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JUDICIAL COUNCIL OF MONTENEGRO OPERATION ANALYSIS 2008-2013

VESELIN RADULOVIĆ
TEA GORJANC PRELEVIĆ

IN COOPERATION WITH ANA ŠOĆ

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Human Rights Action
Moskovska bb, 20 000 Podgorica, Montenegro
Tel/fax: +382 20 510 040/1
hra@t-com.me
www.hraction.org

Authors
Veselin Radulović
Tea Gorjanc Prelević
In cooperation with Ana Šoć

Editor
Tea Gorjanc Prelević

Layout
Ivanka Haverić

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INTRODUCTION

The Judicial Council is the body responsible for ensuring independence and accountability of the judiciary. Under the 2007 Constitution, the Judicial Council for the first time became directly responsible for the appointment and promotion, disciplinary sanctions and dismissal of judges.[1]

However, the 2007 Constitution did not provide for the composition of the Judicial Council to be independent of the political coalition in power and was unable to ensure the independence of the judiciary in Montenegro. The political method of electing the President of the Supreme Court and President of the Judicial Council was immediately criticized by the Venice Commission and evaluated it asonly an interim solution.[2] Along with four representatives of judges, the Council members include the Minister of Justice, two members of the Parliament and two lawyers elected by the President of the Republic, in the context of the political situation in Montenegro, which does not ensure the perception of the Council as an expert body devoid of political influence.[3]

In November 2010, the European Commission stressed Montenegro's priority to "strengthen the rule of law, in particular through de-politicised and merit-based appointment of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors"[4] in order to achieve progress towards membership in the European Union.

In the Analytical Report accompanying the Opinion of the European Commission, which provides reasoning for the above priority in respect of

1 Art. 125, para 1, 126 and 128 of the Constitution of Montenegro (*Official Gazette of Montenegro* 1/2007).

2 Opinion of the Venice Commission on the Constitution of Montenegro, November 2007, item 90, translation published in the book "International Human Rights Standards and Constitutional Guarantees in Montenegro", Human Rights Action, Podgorica, 2008.

3 One dominant political party, the Democratic Party of Socialists (DPS), has been in power in Montenegro for over 20 years. In 1990 it emerged from the League of Communists of Montenegro, the party in power since 1945 in the previous monopolistic one-party system. Cohabitation has never existed in Montenegro, the president and prime minister have always been DPS members. The current president of the state, who appointed two lawyers for members of the Judicial Council, is DPS vice president, while the Minister of Justice, member of the Judicial Council, comes from the same party. Wife of the President of the Republic was also a member of the Judicial Council, elected by the Conference of Judges.

4 Commission Opinion on Montenegro's application for membership of the European Union, SEC(2010) 1334, Brussels, 9 October 2010.

the judiciary, it is noted that the appointmentof the majority of members of the Judicial Council leaves room for political influence and calls into question the principle of separation of powers in relation to the judiciary.[5] The Report stressed the need for the establishment of the career advancement system for judges based solely on merit, in order to strengthen the independence, professionalism and transparency in the judiciary. This conclusion is based on the assessment that "the criteria for selection of new entrants to the judicial system leave room for discretion by the Judicial Council and thus undermine transparency in the selection process."[6] The Report also noted that there is no legal definition of the manner of weighing individual criteria, resulting in the lack of a unified selection procedure.[7]

In 2011 Progress Report on Montenegro, the European Commission assessed that the new criteria for selecting entrants to the judicial system reduced the room for discretion by the Judicial Council and thereby improved transparency in the selection process. However, it was noted that some of the criteria lack clarity, while the weighing of individual criteria is not fully satisfactory. It was concluded that the merit-based elements of the career system need to be further strengthened.[8] The Commission expressed its expectations for the constitutional amendments to significantly reduce the legal possibilities for disproportionate political influence over appointment of judges, thus reinforcing independence of the judiciary.

The following year, in 2012 Progress Report of Montenegro, the European Commission reiterated: "the promotion criteria for judges and prosecutors lack clarity and objectivity due to the lack of periodical professional assessment of judges"[9] and concluded that it was necessary to provide the system

5 The European Commission, the Analytical Report accompanying the Opinion of the Commission on Montenegro's membership in the European Union, Brussels, 9 November 2010, p. 18.

6 *Ibid*.

7 *Ibid*.

8 The European Commission, Montenegro 2011 Progress Report, Brussels, 12 October 2011, p. 10, SEC(2011) 1204.

9 "Future work needs to focus on setting up a single, country-wide recruitment system for judges and prosecutors, based on transparent and objective criteria. *The promotion criteria for judges and prosecutors lack clarity and objectivity due to the lack of periodical professional assessment of judges and prosecutors' performance.* The work of the Judicial and Prosecutorial Councils is hampered by insufficient administrative capacity and budget allocations. The ongoing constitutional revision, aimed atpolitical influence in the judiciary, needs to be completed in accordance with European standards." European Commission, *Montenegro progress report*, 10/10/2012, p. 49: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf

of appointment and promotion of judges on the basis of merit.[10] It was emphasized that it is necessary to reform the Constitution, adopt a single system at the state level for the appointment of judges and prosecutors and improve administrative capacity and funding of the Judicial Council.[11]

Through this report, which is the result of the analysis of the Judicial Council operation during the first five years of its existence, since its establishment in April 2008 through April 2013, Human Rights Action (HRA) since 2007[12]continuously seeks to contribute to judicial reform in Montenegro, emphasizing the need to provide specific necessary conditions for depoliticised and objective operation of the Judicial Council.

In December 2008, HRA published the conclusions of the "Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008",[13] criticizing the constitutional arrangement regarding the Judicial Council and highlighting the need to establish an objective and transparent system for appointment and regular assessmentof judges, which would make their progress, as well as accountability for incompetent and irresponsible performance of the judicial function, certain and objective.[14] As such system, representing the foundation of judicial independence, does not yet exist in Montenegro, HRA continues to advocate for its establishment believing that theAnalysis and recommendations will finally contribute to achieving that aim.

Despite the reform implemented thus far, system of the appointment of judges in Montenegro, including their promotion, still does not inspire trust, especially bearing in mind the Judicial Council decisions from the previous period that do not clarify reasons for appointing certain candidates as judges and not appointing others. The Council could have reduced consequences of the lack of legal framework by adopting by-laws defining standards for

10 "Further efforts are needed to ensure merit based appointments and career development, as well as to strengthen accountability and integrity safeguards within the judiciary". *Ibid*, p. 10-11.

11 *Ibid.*

12 See "Reform Proposal of the Appointment of Judges in Montenegro", Human Rights Action, Podgorica, 2007; „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", Human Rights Action, Podgorica, 2009.

13 Available at: http: //www.hraction.org/wp-content/uploads/hra_reform_proposal_eng.pdf. NGO Human Rights Action working group that worked on the development of the Analysis includes: Emilija Durutović, Tea Gorjanc Prelević, Darka Kisjelica, Radomir Prelević and Ana Vuković.

14 The above Analysis of almost four years ago offers 109 recommendations for amendments to the legal framework of appointment, promotion and accountability of judges. Of these, 32 recommendations were adopted (29%), 25 were partially adopted (23%), and 52 recommendations were not adopted (48%).

weighing of criteria - which would objectify the assessmentof judges and candidates for judges, or at least by providing substantial explanation for its decisions.

What the Judicial Council certainly could not have improved is its composition, which is in anticipation of changes to the Constitution and raises doubts that the political influence on the appointment of judges, even after the first five years of the Council's existence, prevail over the objective assessmentof a candidate's ability to perform judicial function in Montenegro.

2. CONSTITUTIONAL FRAMEWORK AND CONSTITUTION AMENDING PROCEDURE

2.1. Judicial Council under the 2007 Constitution

2.1.1. Composition of the Judicial Council

According to Article 127 of the Constitution of Montenegro of October 2007, the Judicial Council has a president, who is a President of the Supreme Court, and the remaining nine members are:

1) four judges appointed and dismissed by the Conference of Judges;
2) twoMPs appointed and dismissed by the Parliament from among the members of the parliamentary majority and the opposition;
3) two distinguished legal experts appointed and dismissed by the President of Montenegro; and
4) Minister of Justice.

Such composition of the Judicial Council enables dominant political influence. Of a total of nine members, five of them - the majority - are elected by the will of the parliamentary majority, i.e. the executive power. The President of the Supreme Court and the Judicial Council and MP from among the members of theparliamentary majority are elected by the parliamentary majority, two distinguished legal expertsare elected by the President of Montenegro, who belongs to the parliamentary majority (Vice President of the ruling party DPS), while the Minister of Justice belongs to the executive branch and also to the parliamentary majority.

So, more than half of the members of the Judicial Council have become its members owing to the will of the parliamentary majority, which significantly compromised the Council during the previous period, since the Council should leave an impression of a professional, impartial and independent body. The impression of political interference has been further intensified by the fact that the Council member from among the judges used to be the wife of the State President.

Political impact of the Council is especially evident in the membership of the Minister of Justice, who directly represents the executive power. This fact is somewhat relieved by the decision that the Minister, as a member of the Council, has limited powers, because he does not participate in the pro-

cedures of determining disciplinary responsibility of judges.[15] However, this principle is not applied consistently because the Minister can take part in the procedures of dismissal and appointment of judges.

Similar to the solution regarding the limitations of the Minister of Justice, there is no basis for MPs who are members of the Judicial Council, and political officials, to vote in procedures on appointment of judges, on disciplinary responsibility of judges and their dismissal.

2.1.2. Appointmentof the President of the Supreme Court

Election of the President of the Supreme Court, i.e. the President of the Judicial Council, is no longer under the competence of the Judicial Council, in accordance with Art. 124 of the Constitution under which the Supreme Court President shall beelected by the Parliament on joint proposal of the President of Montenegro, President of the Parliament and Prime Minister. The Venice Commission considers this solution problematic because the judiciary is excluded from the procedure of selecting the President of the Supreme Court and of the Judicial Council.[16]The Commission indicated that the existing solution "gives the impression that the entire judiciary is under the control of the majority in the Parliament and that the President of Montenegro, President of the Parliament and Prime Minister take part in political control of judges" and recommended that the President of the Supreme Court be elected by the Judicial Council by a two thirds majority.[17]

The 2011 amendments to the Law on the Judicial Council stipulate that the President of the Supreme Court is elected on the basis of public vacancy announcement and opinion of the extended session of the Supreme Court, based onwhichthe Judicial Council proposes three candidates to the presidents of the Government, Parliament and State, who decide which candidate to nominate before the Parliament.[18]

2.1.3. Appointmentof the President of the Judicial Council

The solution pursuant to which the President of the Supreme Court is*ex officio* the President of the Judicial Council as wellcreates a

15 Art. 128, para 3 of the Constitution of Montenegro.
16 Opinion of the Venice Commission on the Constitution of Montenegro, no. 392/2006, CDL-AD (2007)047 of 20 December 2006. Available at: http://www.hraction.org/wp-content/uploads/knjiga-eng.pdf, p. 170–202.
17 *Ibid*, p. 88, p. 209.
18 Art. 28a of the Law on the Judicial Council,*Sl. list CG*,39/2011, 4 August 2011.

strong impression that the judiciary is autocratically managed by a person elected in the Parliament by the sole will of the ruling majority. Moreover, under the provisions of Art. 125, para 3 of the Constitution,a president of whichever court cannot be a member of the Judicial Council, soit is illogical for the President of the Supreme Court to be not only a member of the Council, but also its president. The Judicial Council should supervise the work of courts and the courts are managed by their presidents who are most responsible for the situation in a court whose work they manage. Therefore, logical legal solution should stipulate that the court presidents are not the members of the Judicial Council, which supervises their work, and it should also apply to the Supreme Court President, who is,according to the logic of things and position he/she holds, most responsible for work and situation in courts. Also, the authority that the Supreme Court President logically has among other judgesinfluences other judges,who are the Judicial Council members and whose superior is the President of the Supreme Court, to accept his position uncritically.

The Venice Commission considers that "it would have been preferable, instead of entrusting *ex officio* the President of the Supreme Court with the chairmanship of the Judicial Council, to provide that the President be elected by the Judicial Council among the lay members, in order to ensure the necessary links between the judiciary and the society, and to avoid the risk of "autocratic management" of the judiciary".[19]

2.1.4. Appointment of the Council members from the ranks of judges

Composition of the Judicial Council includes four judges who are appointed and dismissed by the Conference of Judges.[20]

Amendments to the Law on the Judicial Council[21] from 2011 provide that the members of the Judicial Council from among the judges are three judges elected from the Supreme Court of Montenegro, Appellate Court of Montenegro, Administrative Court of Montenegro, high courts and commercial courts, while one member is elected from among thebasic courts judges.

This solution represents an improvement over the prior solution, according to which only the judges from the higher instance courts could have become the Judicial Council members, meaning that the Judicial Council did

19 Opinion of the Venice Commission on the Constitution of Montenegro, as above, § 96.
20 Art. 127 of the Constitution of Montenegro.
21 *Sl. list CG*,39/2011.

not include judges of the courts that make up the majority of the judges. However, even now the law does not ensure that all levels of courts are equally represented, since, except for basic courts,it does not stipulate from which courts other three members shall be elected.[22]

Even after the latest amendments, the Law on the Judicial Council does not contain any provisions on the prevention of conflict of interest with respect to all members of the Council, which makes the political influence more plausible. This is particularly important given that the wife of theState President is a judge and used to be a member of the Judicial Council and the Disciplinary Commission President, and that it is not rare that judges are close relatives of officials of the executive and legislative branches.

2.1.5. Appointment of the Council members outside the ranks of judges

Three members of the Judicial Council who are not judges are political officials - two MPs and the Minister of Justice, and as for the two legal experts elected by the President (also the ruling party official), the law does not envisage a restriction ensuring that they are notpolitically engaged andwere not members of political parties. The Constitution of Montenegro does not provide minimum guarantees that half of the members of the Judicial Council are not politically engaged.

The authority of the President - official of the ruling party, to appoint two legal experts in the Judicial Council athis sole discretion is also opposite to the position of the Venice Commission, which proposed that one reputable legal expert be elected by the President, and another by the civil society (NGOs, universities and the Bar Association).[23]

2.1.6. Competences of the Council concerning the courts budget

The Constitution[24] and the Law on Judicial Council[25] stipulateonly that the Judicial Council shall propose to the Government the amount of

22 See the European Charter on the Statute for Judges, p. 1.3 and„Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", HRA, Podgorica, 2009, item 2.1.2.2.1, p.151 (http://www.hraction.org/wp-content/uploads/hra-analiza_reforme_izbora_sudija_u_crnoj_gori-eng.pdf).

23 Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044, Section 3.1.3. item 19.

24 Art. 128, para 1, item 6.

25 Art. 73, para 3.

funds for the work of courts, i.e. courts annual budget. On the other hand, the Venice Commission considers that the Judicial Council should also be responsible for the allocation of funds for the judiciary and for managing those funds.[26]

2.1.7. Judicial Council and appointment of judges of the Constitutional Court

The procedure for electing the President and judges of the Constitutional Court is under the exclusive influence of politics. The judges and the President of the Constitutional Court are elected by a majority vote of all MPs on the proposal of the President of Montenegro.[27]This solution is contrary to the Venice Commission opinionpursuant to which the candidates for the Constitutional Court judges should be selected by the Judicial Council, Parliament and President, the Constitutional Court judges should be elected by qualified majority and the President of the Constitutional Court should be elected by the judges of that Court.[28]

2.2.Constitution amending procedure concerning the composition, election and competences of the Judicial Council

According to the European Commission Opinion on Montenegro's application for EU membership of October 2010, one of the priorities for Montenegro is to strengthen the rule of law, in particular through de-politicised and merit-based appointments of members of the Judicial Council and through reinforcement of the independence, autonomy, efficiency and accountability of judges. In the Analytical Report accompanying the Commission's Opinion it has been stressed that "the legal framework leaves room for the disproportionate political influence on the selection of judges, because most members of the Judicial Council are elected by the Parliament or the Government...".[29] Thus, after the Venice Commission especially criticized the method of electing the President of the Supreme Court and of the Judicial Council in its opinion on the Constitution of Montenegro,

26 Report on Independence of the Judiciary: Part I, Independence of Judges, CDL-AD (2010) 004, p. 52-55.

27 Art. 91, 95 and 153 of the Constitution of Montenegro.

28 Opinion of the Venice Commission on the Constitution of Montenegro, item 183-186.

29 Working document of the European Commission, Analytical Report accompanying the Commission Opinion on Montenegro's membership in the European Union, Brussels, 9 November 2010, p. 17.

the European Commission too pointed to the need to review constitutional solutions regarding the Judicial Council.

On 24 February 2011 the Government of Montenegro adopted the Analysis of the need to amend the Constitution in order to strengthen the independence of the judiciary, and on 2 June 2011 drafted the Proposal to amend the Constitution which was submitted to Parliament.[30]

Basedon the Government's Proposal, on 28 September 2011 the Parliament of Montenegro definedDraft Amendments to the Constitution of Montenegro. At the same session, the Parliament adopted conclusions pursuant to which a public debate on these Draft Amendments was to end on 31 October 2011. According to these conclusions, the Committee for Constitutional Affairs and Legislation was to define and submit to the Parliament the Proposed Amendments to the Constitution and Proposed Constitutional Law for Implementation of Amendments to the Constitution of Montenegro no later than 20 November 2011, but this happened only six months later, in late May 2012.

In the meantime, there were no visible activities in the process of amending the Constitution, except for the proposal of amendments to the Constitution defined on 19 March 2012 in the absence of opposition. Rationale for the finallydefinedproposed amendments of May 2012[31] does not contain reasons for proposingspecific solutionsor assessment of compliance with the opinion and views of the Venice Commission, but it only briefly states what is proposed by specific amendments. The lack of proper rationale is inappropriate for the proposal of amendments to the highest legal act in a state of law.

2.2.1. Composition of the Judicial Council under May 2012 Proposed Amendments to the Constitution

Proposed amendment IX to Article 127 of the Constitution of Montenegro, which prescribes the composition of the Judicial Council, represents an improvement over the current solution, since it does

30 Proposal available at: http://www.skupstina.me/cms/site_data/DOC24/590/590_1_0.PDF.

31 These proposed amendments were adopted by the Committee on Constitutional Affairs and Legislation of the Parliament of Montenegro, whose members include the members of the opposition party SNP, although they did not vote for the proposed changes because they disagreed with the solution that the Judicial Council appoints the President of the Supreme Court. They submitted their proposal of amendments to the President of the Parliament. ("Still no agreement on key decisions", *Pobjeda*, 25 May 2012).

not envisage MPs as members of the Council but respected legal experts, in accordance with the recommendation of the Venice Commission, which insists that all Council members be legal experts.[32]

However, there is still room for political influence, because the Minister is still envisaged as a member of the Council. Proposal made by HRA and a group of opposition MPs to ensure that members of the Judicial Council outside the ranks of judgesare not politically engaged and are selected from the list of candidates proposed by civil associations (NGOs), universities and the Bar Association on the basis of the criteria and procedure prescribed by law - has not been adopted.[33]These shortcomings could be overcome by appropriate amendments to the Law on the Judicial Council.[34]

President of the Supreme Court remains a member of the Judicial Council *ex officio*, which still leaves a risk that the authority of a person most responsible for the situation and work results in the courts will influence the body that supervises the work of the courts. This particularly in relation to the Judicial Council members from the ranks of judges, whose superior is the President of the Supreme Court.

2.2.2. Election of the President of the Supreme Court under May 2012 Proposed Amendments to the Constitution

Proposed Amendments envisage that the President of the Supreme Court of Montenegro is elected and dismissed by the Judicial Council by a two thirds majority, which represents progress towards the judiciary free from political influence and is in line with the recommendation of the Venice Commission.[35]The opposition has proposed that the President of the Supreme Court be elected by the Parliament by a two thirds majority[36], which would provide that, in addition to the ruling coalition, the opposition too has influence on the election, but would also represent a political impact and involve the risk of blocking the election.

32 Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044, Section 3.1.3, item 17.

33 On 12 July 2011, 28 members of opposition parties submitted a proposal to amend the Constitution of Montenegro, see the proposal of amendments to Art. 127 of the Constitution. For HRA proposal see 2.4. below.

34 For all draft amendments to the Law on the Judicial Council see 2.5.below.

35 *Ibid*, para 88, p. 209.

36 A proposal to amend the Constitution of Montenegro filed by 28 MPs, 12 July 2011, Art. 91, para 3, no. 00-11/11-2.

2.2.3. Election of the President of the Judicial Council under May 2012 Proposed Amendments to the Constitution

Progress has been made in relation to the method of electing the President of the Council, proposing that he/she be elected by the Judicial Council from among its members who are not holders of judicial office, by two-thirds majority vote of the Council members. This solution is a positive step in ensuring the necessary connection between the judiciary and society and in avoiding the risk of autocratic control of the judiciary, in accordance with the opinion of the Venice Commission.[37]

The amendments also propose that the Minister of Justice cannot be elected the President of the Judicial Council, which is a logical and reasonable solution.

Since according to the proposed amendments, the Judicial Council members from among the judges and the Minister of Justice can not be elected as the President of the Judicial Council, the Judicial Council President could only be one of the legal experts appointed by the President or elected by the Parliament. The Venice Commission has proposed that one prominent legal expert be selected by the President, and other by the civil society (NGOs, universities and the Bar Association)[38], while the proposed amendments suggest that the President appoints two legal expertsof his choice, which does not guarantee political impartiality of these persons. Since there are no restrictions for legal experts appointed by the President or elected by the Parliament to be politically engaged, or even members of political parties, it appears highly probable that the President of the Judicial Council, who has a casting vote, will be a person under political influence, politically engaged, or even a member of a political party.

Therefore, the proposed amendments do not represent sufficient progress in the sense that the Judicial Council is chaired by a person who is not politically influenced, or that the Council members are prominent experts and do not hold political office. This deficiency must be overcome by urgent legislative amendments.

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37 *Ibid*, para 96.

38 Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL (2011) 044 Section 3.1.3., item 19.

2.2.4. Appointment of the Council members from the ranks of judges under May 2012 Proposed Amendments to the Constitution

Draft Amendments to the composition of the Judicial Council from September 2011 stipulated that the four judges in the Judicial Council elected by the Conference of Judges cannot be from among the court presidents. Such solution in relation to presidents of courts was in line with the Proposal for amending the Constitution of Montenegro of a group of opposition MPsof 7 December 2011 and HRA.[39]However, this formulation was omitted in the Proposed Amendments of May 2012, probably because the Constitution already prescribes that the president of the court can not be a member of the Judicial Council.[40]Nevertheless, considering that the Judicial Council supervises the work of the courts, and therefore the work of their presidents, analogous to this solution neither the President of the Supreme Court should be a member of a body responsible for the supervision of the Supreme Court and its president.

2.2.5. Appointment of the Council members outside the ranks of judges under May 2012 Proposed Amendments to the Constitution

Of members who are not judges, pursuant to the proposed amendments the Parliamentshould elected two prominent legal experts at the proposal of the parliamentary majority and opposition, while two distinguished legal experts are to be appointed and dismissed by the President of Montenegro.

Improvement over the current solution in the Constitution has been achievedsince it is now proposed that prominent legal experts,not MPs, be elected members of the Council, which is in line with the recommendation of the Venice Commission and proposals of both HRA and a group of opposition MPs. However, as noted above, no restrictions have been provided to ensure that those persons are not politically engaged, nor thepossibility to select them from a list of candidates proposed by civil associations (NGOs) and universities, based on the criteria and procedure prescribed by law, so the proposed solution only partially contributes to avoiding politicization of the Judicial Council.

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39 A group of 28 opposition deputies proposed that the Parliament decides by a two-third majority on the proposals of the members of the Judicial Council Conference of Judges (A proposal to amend the Constitution of Montenegro, filed by 28 MPs, 12 July 2011, no. 00-11/11-2).

40 Art. 125, para 3.

In addition, the Law on the Judicial Council stipulates that the President shall make a list of at least four candidates, based on previous consultations with the Bar Association, Association of Judges, Law Schools and the Academy of Sciences, and submit that list for the opinion of the Supreme Court extended session.[41]

However, these consultations and opinion are absolutely non-binding on the President and as such do not provide any guarantee for selection of a candidate who is not politically engaged, regardless of potential suggestions and proposals in consultations and opinions. One such example ofdisregard for opinions occurred at the election of the President of the Supreme Court and of the Judicial Council in 2007, when proponents failed to acknowledge the position of the Supreme Court General Session that the Supreme Court President should be someone from the ranks of judges.[42]This shortcoming could be overcome by introducing appropriate amendments to the Law on the Judicial Council, which would ensure that the President selects candidates proposed to him by NGOs, universities and the Bar Association.

2.2.6. Competence of the Council concerning the courts budget

Procedure for amending the Constitution contained no proposals as to the competence of the Judicial Council regarding the funding of the judiciary, thus neglecting the opinion of the Venice Commission that the Judicial Council should be responsible for the allocation of funds for the judiciary and for managing those funds.[43]

2.2.7. Judicial Council and appointment of judges of the Constitutional Court

Pursuant to the proposed amendments to the Constitution, the Parliament no longer elects the President of the Constitutional Court,

41 Art. 13a, Law on the Judicial Council.

42 "On 14 November 2007 the presidents of the state, Parliament and Government – FilipVujanović, RankoKrivokapić and ŽeljkoŠturanović, met with judges of the Supreme Court of Montenegro regarding the agreement on the proposal for electing a new president of this Court. The Acting President of the Supreme Court RadojeOrović and all the judges unanimously recommended that the president be elected from the judiciary, particularly from among the judges of the Supreme Court." The courts of the Republic of Montenegro, http://www.sudovi.cg.yu/home.php?PID=137&LANG=mn. However, VesnaMedenica was nominated and elected as the President of the Supreme Court, previously holding the office of the Supreme State Prosecutor.

43 Report on Independence of the Judiciary: Part I, Independence of Judges, CDL-AD (2010) 004, p.52-55.

but the judges of the Court from among its members. However, the procedure for election of judges of the Constitutional Court remains under the exclusive influence of politics. All judges of the Constitutional Court will still be elected by theParliament by majority vote of all MPs at the proposal of the President of Montenegro. This solution does not respect the opinion of the Venice Commission that the candidates for Constitutional Court judges should be nominated by the Judicial Council, Parliament and President, and that the Constitutional Court judges should be elected by qualified majority.[44]

2.2.8. General assessmentof the proposal of constitutional changes

Proposed amendments to the Constitution represent animproved solution, especially with regard to the election of the President of the Supreme Court and election of the President of the Judicial Council. However, as regards the composition of the Judicial Council, the proposed amendments do not guarantee that half of its members shall not be politically engaged, because no such restriction has been envisaged for the four members who are not judges (and they areelected by politicians), while the Minister of Justice and Human Rights is apolitical official. In addition, the amendments do not envisage that the President of the Judicial Council is not politically connected person, since it is stipulated that the President will be one of the four members. Therefore, the assessment of the success of the constitutional reform will depend on amendments to the Law on the Judicial Council, which must put a stop to political influence by envisaging (1) prohibition of political engagement of legal experts who are the Council members outside the ranks of judges, (2) their selection from the list of candidates proposed by civil associations and universities, (3) prevention of conflict of Interest in relation to all Council members.

2.2.9. Opinion of the Venice Commission of 17 December 2012[45]

As stated above, although based on the conclusions of the Parliament of Montenegro of 28 September 2011 theCommittee for Constitutional Affairs and Legislature should have drafted and submitted Proposal of Amendments to the Constitution to the Parliament by 20 November 2011,

44 Opinion of the Venice Commission on the Constitution of Montenegro, item 183-186.

45 Venice Commission Opinion on two sets of Draft Amendments to the Constitutional provisions relating to the judiciary of Montenegro, no. 677/2012 of 17 December 2012 (CDL-AD(2012)024).

this took place only six months later. Following that, on 13 June 2012, the President of the Montenegrin Parliament sought Venice Commission's opinion regarding this Proposal, as well asregardingthe alternative draft amendments to the Constitution proposed by the opposition Socialist People's Party.

At the session of 14-15 December 2012, the Venice Commission adopted an Opinion[46] reiterating its earlier views presented in view ofthe improvement of the guarantee of judicial independence, avoidance of politicization and autocracy, constitutional regulation of the appointment and dismissal of public prosecutors and changes in the composition of the Constitutional Court.

a) Appointment and dismissal of judges

In the opinion of the Venice Commission, it is appropriate to maintain the constitutional provision that judges should stay in their permanent posts until retirement; also, the basic conditions for the dismissal of judges should be kept at the constitutional level, although the legislation should develop a detailed regulation in this respect.

b) Appointment and dismissal of the Supreme Court President

The Commission reiterated its positive attitude towards the decision that the President of the Supreme Court be appointed and dismissed by the Judicial Council by a two-thirds majority for a term of 5 years, as also recommended by HRA.

c) Composition of the Judicial Council

The Commission welcomed the Judicial Council composition under the Proposed Amendment, stating that it ensures parity between judicial and lay members. However, the Opinion indicates that the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority. In case of keeping the solution according to which the Minister would be a member of the Judicial Council, HRA supports the proposal of the Venice Commission to provide parity of the members in disciplinary proceedings too, but reiterates that the Minister should be excluded from decision-making procedures in dismissing and appointing of judges, in order to consistently implement the principle of non-interference of the executive power in appointing and dismissingjudges. Also, it would

46 No.677/2012.

be necessary to ensure a parity of members in these procedures too, which further supports the argument that the Minister should not be a member of the Judicial Council.

d) Constitutional Court

The Commission repeated its earlier statement that constitutional courts in Europe are often entirely elected by a qualified majority in parliament (e.g. Germany),or various bodies and institutions have the power to appoint part of the judges of the Constitutional Court, for instance in Italy where one third of the members are appointed by the President of the Republic, one third by the judges of the higher ordinary and administrative Courts, and the last third by the Parliament with a qualified majority.[47]

The Commission also reiterated that a system in which all judges of the Court are elected by Parliament on the proposal of the President "does not secure abalanced composition of the Court" and that, if the President is coming fromone of the majority parties, there is a danger that all judges of the Constitutional Court will be favourable to the majority.

Therefore, the Venice Commission reiterated that the appointment of judges of the Constitutional Court requires at least a qualified majority, stressing also that the lack of the prohibition of re-election may undermine the independence of a judge.

Furthermore, it has been noted that a legal solution according to whichthe Constitutional Court judges are elected without a two-thirds majority is not in line with European standards and that it seriously jeopardizesindependence of the Constitutional Court.

Venice Commission welcomed legalsolution pursuant to which the President of the Constitutional Court is appointed and dismissed by the Constitutional Court, and not the Parliament.

All recommendations of the Venice Commission on the Constitutional Court are in accordance with the recommendations of HRA.

2.3. Current situation in practice

Term of the members of the first Judicial Council, established in April 2008 under the 2007 Constitution of Montenegro, expired on 19

47 CDL-AD(2012)009, p. 8.

April 2012. According to the web page of the Judicial Council, four new members of the Judicial Council from among the judges were elected at its session held on 16 March 2012.[48] Also, as reported by the media, the President of Montenegro appointed two members of the Judicial Council in accordance with his constitutional authority.[49]

Along with the President of the Supreme Court of Montenegro and the Minister of Justice, who are members of the Judicial Council *ex officio*, there are two members whose terms expired on 19 April 2012. Up until June 2012, the Parliament did not elect new members of the Judicial Council from among MPs. The method of proposing candidates shows the neglect for professional references that members should have for proper performance of duties of the Council member. Contrary to the proposed amendments to the Constitution of 28 May 2012, providing that the Parliamentelects and dismisses*two prominent legal experts* in the Judicial Council, the Administrative Committee of the Parliamentrecommended an economics expert from the ruling coalition for a member of the Judicial Council.[50]Half a year later, this Council member was elected the Minister of Internal Affairs in the Government of Montenegro. As the Minister of Internal Affairs cannot be a member of the Judicial Council, in its third session of the second regular sitting on 28 December 2012 the Parliament of Montenegro proposed a new Council member from the same political party.

Although a new member who has been nominated is a lawyer by profession, the method of nomination and appointment does not inspireconfidence that professional references are at all considered in the nomination and appointment of members of the Judicial Council. On 28 December 2012 the Administrative Committee of the Parliament of Montenegro adopted draft decision[51] on the appointment of two Judicial Council members. Draft decision rationale published on the website of the Parliament[52]specifies name of thenominated candidate, party he is a member of and the number of votes

48 Together with the Supreme Court President VesnaMedenica, new members of the Judicial Council from among the judges were: GavriloČabarkapa and NatalijaFilipović, judges of the Supreme Court of Montenegro, MiroslavBašović, judge of the High Court in Podgorica and MiodragPešić, judge of the Basic Court in Podgorica. GavriloČabarkapa was appointed Deputy President of the Judicial Council (http://sudovi.me/sscg/saopstenja-za-javnost/konstituisan-novi-sudski-savjet-858).

49 The Judicial Council members from among eminent legal experts are VeselinRacković and Radovan Krivokapić("The Judicial Council elections", *Pobjeda*, 29 March 2012).

50 "Economist in the Council, Konjević and Gošović proposed as members of the Judicial Council, DPS dissatisfied", *Vijesti*, 29 May 2012.

51 No. 00-63-14/12-37/4.

52 www.skupstina.me.

received. However, there is no data for any of the candidates regarding academic qualification or any other professional references. It is therefore obvious that the appointment of these members of the Judicial Council depends solely on political reasons, and that the professional references are not considered whatsoever.

Such practice of the Parliament does not inspire confidence that professional references will be considered in the appointment of members of the Judicial Council in future, even if the proposed constitutional amendments are adopted.

In any case, it is certain that the current composition of the Judicial Council, which was constituted on 15 June 2012, is temporary, and that it will expire after the adoption of a constitutional reform providing for different composition of the Council and new method for appointing its members.

2.4. Human Rights Action proposal

2.4.1. Composition of the Judicial Council

HRA proposal[53] implies that the Supreme Court President, Minister of Justice and MPs should not bethe Judicial Council members, because such solution unnecessarily politicizes the Council; instead, the Council members shouldincludeon an equal basis judges and representatives of civil society, i.e. universities, the Bar Association and NGOs. Civil society representatives would be elected by the Parliament(one member by the parliamentary majority, one by opposition), President or the Bar Association, and nominated by universities and civil associations according to the procedure and criteria set forth by law. It has been proposed that the President of the Judicial Council be elected by the Council from among its members who are not judges by two-thirds majority vote of the Judicial Council members, and that the President of the Council shall not be a member of the Bar Association.

As in the case of MPs, the Minister too should not be a member of the Council, since it unnecessarily politicizes the Council. HRA believes that the Minister of Justice directly represents executive authority and compromises the Council as an impartial and independent body. On the other hand, as a

53 HRA proposal was submitted to the Committee for Constitutional Affairs and Legislation of the Parliament of Montenegro on 31 October 2011within the public debate on the draft amendments, available at: http://www.hraction.org/wp-content/uploads/HRA_Predlog-28102011.pdf.

member of the Council the Minister has extremely limited authority: he does not participate in the procedures of determining disciplinary responsibility of judges, and,in line with the same principle, he should not even participate in the procedure of dismissal and appointment of judges, which would help consistently implement the principle of non-interference of executive authorities in appointment or dismissal of judicial authorities.

If insisting on the membership of the Minister, it is necessary to provide that the Minister does not vote in procedures of dismissal and appointment of judges, in accordance with the same principle pursuant to which the minister does not vote in disciplinary proceedings. In the case of membership of the Minister, the State President should then elect only one prominent legal expert upon law schools proposal, because, as a rule, both the President and Minister of Justice of Montenegro come from the party that exercises executive authority.

2.4.2. Election of the President of the Supreme Court

President of the Supreme Court of Montenegro should be elected and dismissed by the reformed Judicial Council by two-thirds majority,in the interest of freeingthe judiciary of political influence.

2.4.3. Election of the President of the Judicial Council

The solutionto elect the Judicial Council President fromamong the members who are not judges reduces the risk of autocratic ruleover the judiciary and takes into account the recommendation of the Venice Commission to thereby provide the necessary link between the judiciary and society.

2.4.4. Appointment of the Council members from the ranks of judges

Since the court presidents can not be members of the Council for justified reasons, the President of the Supreme Court should not automatically be entitled to this right, since the Council should also supervise his/her work. The amendments to the Judicial Council Law should ensure that half of the judges who are members of the Judicial Council are elected by the judges of basic and commercial courts, who make up a majority in relation to the judges of other courts. Thus, the Judicial Council would provide the widest

possible representation of the judiciary, in accordance with international recommendations.[54]

2.4.5. Appointment of the Council members outside the ranks of judges

For the Council's independence, it is crucial to establish who will be its members outside the ranks of judges. It is necessary to ensure that those be independent experts who are not politically engaged. HRA proposed a way to achieve the election of such members, based on a system of nomination, which should be specified by the Law on the Judicial Council, which should provide expertise and reputation of candidates and ensure they are not politically engaged.

The system of electing the members of government bodies under the system of nomination by the NGOs is not new in Montenegrin legal system, it is used for selection of NGO representatives in the RTCG (Radio Television of Montenegro) Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police.[55]

The President would nominate two distinguished legal experts from a list of candidates proposed by law schools, and one member of the Council would be elected by the Parliamentof the Bar Association among its members.

The Venice Commission also proposed that the majority and the opposition each elect one "renowned member of the legal profession", who are not necessarily MPs. The MPs should elect these two Council members, one by the majority and one by the opposition for efficiency, or by overall 2/3 majority. In their Proposal of constitutional amendments, the opposition MPs have also insisted that MPs be members of the Judicial Council.[56]

HRA proposal complies with the recommendation of the Venice Commission that there is parity between the Council members from among the judges and those who come from other segments of society.[57] This principle also helps avoid politicization and autocracy.

54 European Charter on the Statute for Judges, p. 1.3.
55 The Law on Public Broadcasting Services of Montenegro (*Sl. list*, 79/2008, Art. 28,29,30,37), Decision on the establishment of the Council for Cooperation between the Government of Montenegro and NGOs (*Sl. list,* 28 of 14May 2010, Art. 7-12).
56 A proposal to amend the Constitution of Montenegro of 12 July 2011, no. 00-11/11-2.
57 Opinion of the Venice Commission on the draft amendments to the Constitution of Montenegro, and the draft amendments to the Law on Courts, the Law on State Prosecution and the Law on the Judicial Council of Montenegro, no. 626/2011, 14 June 2011, CDL(2011)044 Section 3.1.2.,item 14.

2.4.6. Competences of the Council concerning the courts budget

HRA reiterates its previous proposal[58] that the Law on the Judicial Council must envisage competences of the Council regarding the judicial budget drafting, monitoring of its execution and decision making on allocation of budget resources among the courts during the fiscal year, and that the President of the Judicial Council,in case of disagreement with the Government, should be provided an opportunity to present the judicial budget proposal to the Parliament.

2.4.7. Competences of the Judicial Council regarding the appointment of judges of the Constitutional Court

HRA proposes the adoption of a solution functioning well in Croatia and Germany, that the Constitutional Court judges beelected by 2/3 majority in the Parliament, and that the candidates be nominated by different proponents. The Judicial Council would propose to the Parliamentthree judges of the Constitutional Court, while the state President andcompetent Parliamentary Committee would nominate three judges of the Constitutional Court each. The Judicial Council would, as a rule, nominate judges with appropriate experience, the President prominentlegal experts who are not judges, and the Parliamentcould nominate other candidates on the basis of an open competition. In this case it would be advisable to prescribe a qualified majority on the board which, on the basis of the competition,proposes to the Parliamentcandidates for election. The prescription of a qualified majority for the election of judges of the Constitutional Court is a necessary step in preventing political interference in the Constitutional Court, which is composed, by both current and proposed legal solution, in accordance with the will of the ruling political majority.

2.4.8. Other competences of the Judicial Council

The Constitution should generally emphasize only the basic functions of the Judicial Councilit is recognized for, such as the decision-making regarding the election and responsibilities of judges or termination of their office, while all others should beprescribed by the law.[59]

58 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“,Human Rights Action 2009, p. 98, 99.

59 For more detail see „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008“,p. 90.

2.5. Recommendations for amendments to the Law on the Judicial Council in accordance with constitutional changes

Since the Constitution reform will most likely not provide for full guarantees against political interference in the judiciary, it is necessary to amend the Law on the Judicial Council together with the adoption of amendments to the Constitution, in order to provide such legal guarantees.

In this regard we suggest the following:

1. Prescribe the method of selecting members of the Judicial Council outside the ranks of judges which would ensure they are not politically engaged persons. To this end, legal experts elected by MPs should be selected from the list of candidates proposed by civil associations (NGOs), based on the criteria and procedure prescribed by law (modelled on the procedures for selection of NGO representatives in the RTCG Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police).[60] The other two lawyers, elected by the President of Montenegro, should be selected from the list of candidates proposed by civil associations dealing with the rule of law, the Bar Association and law schools.

2. Prescribe conditions for the election of the Judicial Council members outside of ranks of judges, so as to ensure that they are:

a) persons truly independent from political power, who are not in any way politically engaged (e.g. were not members of any political party or actively engaged in a party, directly elected in elections and did not hold government office at least 10 years prior to the election);

b) persons who do not have any conflict of interest that could affect their work and decision making in the Judicial Council (this provision should be defined following the example of the provision on preventing conflict of interest from Art. 26 of the Law on Public Broadcasting Services in Montenegro (*Sl. list CG*, 79/08 of 23 December 2008);[61]

60 The Law on Public Broadcasting Services of Montenegro (*Sl. list*, 79/2008, Art. 28,29,30,37), Decision on the establishment of the Council for Cooperation between the Government of Montenegro and NGOs (*Sl. list*, 28 of 14 May 2010, Art. 7-12).

61 Conflict of interest (Article 26)
Members of the Council shall not be:
1) MPs and members of the Parliamentary committees;
2) person elected, appointed or nominated by the Parliament, the President of Montenegro and the Government;

c) persons with appropriate legal knowledge and experience (bearing in mind that one of them will be the President of the Council).

3) RTCG employees;
4) political party officials (presidents of parties, members of the presidency, their deputies, members of the executive and main boards, and other party officials);
5) persons who, as shareholders, members of management, members of the supervisory authorities, employees and the like, have an interest in legal entities involved in the production of radio and television programs, so that the membership of such person in the Council could lead to conflicts of interest;
6) persons who have been convicted of criminal offenses against official duty, the offense of corruption, fraud, theft or other criminal offense which renders him/her unfit for public office, regardless of the sentence imposed, or persons who have been convicted of another crime and sentenced to imprisonment for a term exceeding six months, during the period of the consequences of conviction;
7) persons who are spouses of persons mentioned in this article or their immediate family members.

3. TRANSPARENCY OF THE JUDICIAL COUNCIL OPERATION

"Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions"

> Recommendation of the Committee of Ministers of the Council of Europe Rec (2010) 12 to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, p. 28

3.1. Principle of the public

Law on the Judicial Council (Art. 5) stipulates that the Council's work is public and that the public can be excluded only under this Law. The Law provides for mandatory exclusion of the public in two cases: session at which the Council decides on the selection of candidates for judges (Art. 35,para 3) and session at whichthe Council decides on dismissal ofjudges(Art. 66,para 3). In disciplinary proceedings before the Disciplinary Commission, the debate is as a rule public and the public may be excluded only at the request of a judge against whom the disciplinary proceedings have been initiated.[62]*Such legal solution should also be prescribed by law in case when deciding on dismissal of a judge.*

The Judicial Council Rules of Procedure, in force until 18 November 2011, provided that the Council may decide to exclude the public from other sessions as well (Art. 4,para 2)[63], thereby seriously violating the principle of the public stipulated by law. Although the new Rules of Procedure contain no such provision, theyenvisage that "the minutes of the session are generally not available to the public", andneither areaudiovisual recordings of the sessions (Art. 25,para 6 and 7), which points to the commitment of the Council to close their session to the public, as the Council have had in practice.

3.2. Sessions of the Judicial Council

Rules of Procedure of the Judicial Council envisage that every December the Council adoptsits annual plan of regular sessions for the coming year (Art. 19, para 2), thatsessions are held in "open atmos-

62 Rules of Procedure of the Judicial Council, *Sl. list CG*, 57/2011 of 18 November 2011, Art. 58, para 6.
63 *Sl. list CG*, 35/2008, 38/2008 and 6/2009, Art. 21, para 6.

phere" (Art. 18, para 1) and that sessions agenda proposal is published on the Council's website (Art. 21, para 4).[64]

> Judicial Council did not comply with the annual plan of the sessions for 2012 and 2013, did not allow HRA representative to attend any of its session and did not publish agenda proposal prior to its sessions on the website.

As part of this project, HRA intended to have one of its representatives attend sessions of the Judicial Council, in order to gain immediate insight into its work and assess the degree of transparency. In this sense, on 14 November 2011 the project assistant requested information from the Secretariat of the Judicial Council on the session date; the Secretariat responded that the date will be posted on the website and that the sessions are held once a month.

However, the very next day, on 15 November 2011, the Judicial Council held a session, and only a day later, on 16 November 2011, information on holding the session was published on its website.Alreadyon 17 November 2011 HRA submitted a letter to the Presidents of the Judicial Council, expressing interest in attending the sessions, explaining that HRA representative could not attend the previous session due to the untimely publishing of information on the session, and kindly asking for the notice of the next session date, in case information is not published on the website.

On 19 November 2011 a new notice was published on the website of the Council - that the session took place the previous day, on 18 November 2011.

It is interesting that HRA representative was in the premises of the Judicial Council to submit certain requests the very day of the session, but when asking about the session date, she received an answer that the session has not yet been scheduled.

The Council continued its practice of concealing session dates and each month HRA requested in writing a notice of session dates, seeking for its representative to attend them. By June 2012, HRA submitted a total of five requests for attending the sessions of the Judicial Council; the Judicial Council responded to none. After the publication of the preliminary report of the Council in July 2012, with the recommendation that sessions be normally

64 Rules of Procedure in effect until the adoption of new Rules on 18 November 2011 also stipulated that the proposed agenda shall be published on the website of the Judicial Council before the session (Art. 17, para 4).

open to the public, from 1 September 2012 to 31 March 2013 HRA submitted another seven requests for attendance[65]. The Judicial Council has not responded to any of these requests.

After previously receiving a notice that they had not been adopted, annual sessions plans that the Council should adopt in December each year pursuant to the Rules of Procedure were later provided upon HRA request. Sessions plan for 2012 was adopted in December 2011 and the plan for 2013was adopted in April, specifying that sessions, as a rule, are held on the last Friday of the month. However, even a partial overview of sessions held indicates that sessions were not typically held on Fridays.[66]

Continuing practice of the Council to hold all its sessions in private, not to publish in advance the dates of sessions and not to respond to requests for attendance, although the law stipulates that its work is in principle open to the public, shows that there is still no willingness to open the Council the public to the greatest extent possible, and thus boost confidence in itsoperation.

- Practice of "telephone sessions"

From September until the end of 2012, the Judicial Council held five sessions, three of which were held over the phone, in the mannernot previously employed by the Council. The sessions were held in the following order:

- Second session - 24 September 2012,
- Third Session - 2 October 2012, held via telephone,
- Fourth Session - 13 November 2012, held via telephone,
- Fifth Session - 12 December 2012,
- Sixth Session - 31 December 2012, held via telephone,
- Seventh session - 29 March 2013.

By holding half the sessions during theobserved period via telephone, the Judicial Council has made its work even morenon-transparent, further restricting the principle of transparency of its operations and the right of interested parties to monitor the Council's work. Also, the Law on the Judicial Council and the Judicial Council Rules do not envisage this kind of sessions.

65 On 10 September 2012, 9 October 2012, 5 November 2012, 12 December 2012, 4 January 2013, 13 February 2013 and 18 March 2013.
66 10 September 2012: Monday; 9 October 2012: Tuesday; 5 November 2012: Monday; 12 December 2012: Wednesday; 4 January 2013: Monday; 13 February 2013: Wednesday; 18 March 2013: Monday.

3.3. Publication of decisions of the Judicial Council

The Judicial Council Law provides that the Council shall publish its decisions on the appointment of judges only in the Official Gazette of Montenegro (*Sl. list CG*).[67]It is not stipulated that any decision of the Judicial Council shall be published on its website.[68]

Despite the absence of legal obligation, the Judicial Council publishes its decisions on the website, although not always on time and not every decision, or not every decision with a rationale. The Council has published many of its decisions on the website after their submission had been requested, and the Council, as a rule, rejected these requests on the grounds that the decisions have already been published.[69]

However, sincethe appointment of judges at the Judicial Council session held on 11 April 2012, the Judicial Council regularly publishes its decisions on the appointment of judges on the website, together with rationales,[70] which encourages the hope that the work of the Judicial Council will becomemore transparent and that this body will continue to operate openly without requests of interested public.

Such good practice should be ensured by an adequate legal obligation. Law on the Judicial Council should stipulate the obligation of the Council to publish on its website decisions on judges' appointment, disciplinary responsibility, dismissal, termination of judicial office, as well as on temporary suspension, with a rationale, immediately upon their adoption.

Publication of decisions following a request filed by HRA

On 19 October 2012, HRA filed a request to the Judicial Council to submit the decision on termination of office of BijeloPoljeHigh Court judgeD.K., decision on the appointmentof PodgoricaHigh Court judge V.P., decision on the appointment ofKotor Basic Court judges J.S. and E.D., as these decision had not been posted on the website of the Council on the day of filing of the request.

67 Law on the Judicial Council,*Sl. list CG*, 13/2008 and 39/2011, Art. 37, para 2.
68 www.sudskisavjet.gov.me/http://sudovi.me/sscg.
69 More detail about the Judicial Council decisions and their disclosure under Section 3.3. and 3.4.
70 In contrast to the previous practice when the Judicial Council separately published rationales and decisions on the termination of officeon its website(not all), after the presentation of HRA report indicating that such publication was confusing, the Judicial Council published three decisions on the termination of office, all three with rationale.

On the same day all the requested decisions were published on the website and HRA received a notice that the decisions have been published.[71]

Also, on 17 December 2012, HRA filed a request to the Judicial Council to submit the decision on the appointment of PodgoricaBasic Court judge D.V., decision on the appointment of KotorBasic Court judge D.V., decision on the appointment of Rožaje Basic Court judge M.R. and decision quashing the decision of the Judicial Council Su.R.br. 436/08 of 22 October 2008 on temporary suspension from office of Bar Basic Court judge Z. L., because these decision too had not been posted on the Council's website on the day of filing of the request.

On the same day all the requested decisions were published on the website and HRA received a notice[72] that the decisions have been published.

Unlike the previous Rules of Procedure of the Judicial Council (Art. 61), the new Rules do not contain a provision under which the imposed disciplinary measuresare, as a rule, published on the notice board and website of the Council, unless the Council would decide otherwise. Currently, neither the Law nor the Rules prescribe that this type of decision is to be published, even though, as mentioned above, the disciplinary procedure is generally open to the public, i.e. for the public that manages to obtain information on disciplinary procedure, because session dates are not announced in advance. The Council does not publish its decisions on determining disciplinary responsibility on the websiteand these decisions have not been published even following HRA recommendation to publish them. *HRA notes that itsrecommendation to publish decisions on establishing disciplinary responsibility of judges, following the practice of the Supreme Judicial and Prosecutorial Council of Bosnia-Herzegovina, in order to follow the practice of the Council in this area - has not been accepted.*[73]

3.4. Decisions rationale

In terms of transparency of Judicial Council operations, earlier recommendation ofHRA, which isin line with the above-cited recommendation of the Committee of Ministers of the Council of Europe[74], to provide

71 Su.R.br.665-1/12.
72 Su.R.br.859-1/12.
73 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", Podgorica 2009, p. 7.3.2.2. and 7.3.2.3.
74 "Councils for the judiciary should demonstrate the highest degree of transparency towards

appropriate detailed and precise rationales for decisions concerning the appointment of judges, especially in cases where the appointed candidate has had lower average grade that a candidate which has not been appointed – has not been acceptedduntil July 2012.[75]

After the presentation of HRA report which emphasized that decisionson the appointment do not include valid rationale, the Judicial Council has partially amended rationales for the decisionsonappointment. However, they are still vague, insufficiently informative and persuasive, sincethey still do not contain information on how and based on what criteria candidates had been evaluated.

For more detail on this issue see "Practice of the Judicial Council in the appointment of judges" below.[76]

3.5. Publication of other information on the Council's web page

3.5.1 General remarks

Website of the Judicial Council contributes significantly to the transparency of its work. However, it is not prescribed what should be posted on the website of the Council, as well as what the Council had already published. It is prescribed that the Council shall post test questions, annual reports of the Council,[77]vacancy announcementsfor the appointment of judges and court presidents, application forms and draft agendas for the-Council sessions.[78]

3.5.2 Sessions agenda

Despite the prescribed requirement to publish session draft agenda on the website prior toholding a session, the Council does not pub-

judges and society by developing pre-established procedures and reasoned decisions", Recommendation of the Committee of Ministers of the Council of Europe Rec (2010) 12 to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, p. 28.

75 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 7.3.2.3, p. 131.

76 More detail on rationales of the decisions on the appointment of judges in the Report under Section 5.

77 Law on the Judicial Council (*Sl. list CG*, 3/2008 and 39/2011), Art. 34, para 3 and Art.26, para 4.

78 Art. 29, para3, Art. 32 and 21, para 4 of the Rules of the Judicial Council of 18 November 2011.

lish information about the session date, or publishes information about the session after it has been held. This prevents the public from attending sessions and following the work of the Council, as already noted.

3.5.3 Judicial vacancy announcements, forms and applications of candidates

HRA has previously proposed that judicial vacancy announcements and application forms be published on the website of the Council, as well asthe applications of candidates, or at least the names of candidates, to enable the public to call attention to the false representation of data in an application or other sort of unworthiness of a candidate for judicial function.[79]

Rules of Procedure of the Judicial Council (Art. 29, para 3) now provide that vacancies for judges and court presidents are posted on the courts website www.sudovi.me. According to data from thiswebsite on 1 June 2012, of a total of six judicial vacancies announced in 2011, four vacancy announcements werepublished,[80] while in 2012 two were announced and both were published. The website also publishes application forms.

However, data on persons who have applied for the position had not been published until this year. The decisions now list the names of all candidates, andearlier only the initials of the candidates who had applied were published. Such practice did not contribute to the transparency of theprocess of appointment of judges.[81]

In 2012 the Judicial Council practice in that area has improved and all vacancy announcements for judges were published, decisions on appointment include information on all the candidates, contributing thus to transparent work of the Judicial Council. However, HRA still finds it very important to

79 Such practice of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina has been pointed out in the publication„Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", Podgorica 2009, item 7.3.1.1, p. 129.

80 There was no vacancy announcement for the appointment of a judge of the High Court in BijeloPolje, a judge of the Basic Court in Kotor and a judge of the Basic Court in Cetinje, published in the *Sl. list CG*, 11/2011, or for the appointment of the President of the Appellate Court of Montenegro, a judge of the Administrative Court, two judges of the High Court in Podgorica and two judges of the High Court in Bijelo Polje, published in *Sl. list CG*, 64/2011.

81 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 7.3.1.3, p. 130, available at:http://www.hraction.org/wp-content/uploads/hra-analiza_reforme_izbora_sudija_u_crnoj_gori-eng.pdf.

publish information about candidates before the publication of the decision on appointment and for that reason to expressly prescribe this obligation.

HRA repeats the recommendation to prescribe the disclosure of information about applicants for judicial office before deciding on their appointment.

3.5.4 Reports on the Judicial Council operation

Annual reports on the work of the Judicial Council are published on its website. However, content-wise, these reports represent reports about the work of the courts. As the authority that oversees the work of the courts,pursuant to its constitutional authority, the Judicial Council should critically review and evaluate reports on the work of all courts, instead of only listing statistics on the courts activities and overview of their work.[82] Also, much of the report on the Judicial Council work contains information about the activities of the President of the Supreme Court and the Judicial Council, noting her visits to other countries and visits of representatives of other countries to the Supreme Court of Montenegro, which does not encourage the impression that this is a document describing the work of the Judicial Council.

Also, the last Report on the work of the Judicial Council for 2012, adopted at the session held on 29 March 2013, has been drafted in identical form as the previous ones and contains a number of details irrelevant to the assessment of operations of the Judicial Council.

3.5.5 Regulations relevant to the operationof the Judicial Council

The website of the Council contains regulations relevant to its work. Meanwhile, as of July 2012, the Law on the Judicial Council has been published in anupdatedversion, and the Guide for Access to Information has been published in Montenegrin language too, in addition to version in English.[83] In addition to the Rules of the Secretariat of the Judicial Council, which has been published, the website should also include all other internal documents of the Council that the Council is entitled to adopt under the Rules for the purpose of "efficient and effective work" (Art. 28, para 1).

82 According to Art.128, para 1, item 4 of the Constitution, the Judicial Council "considers the report on the work of the court, appeals and complaints against the court and takes a position on them."

83 Latest review of the sitehttp://sudovi.me/sscg/sudski-savjet/propisi/on 30 June 2012, Law on the Judicial Council was published in a version from 2008, although it was amended in 2011.

3.6 Minutes from the Judicial Council sessions

Rules of Procedure of the Judicial Council state that the minutes of the Council sessions are generally not available to the public, and that the Council may decide whether to publish the minutes or a portion thereof. Previously applicable Rules of the Judicial Council contained the identical solution. Such a solution declares an act of the Judicial Council secret and empowers the Council to decide whether to ever publish that act, or at least its portion. In addition, no provision of the Rules of the Judicial Council, or of any other regulation, specifies the criteria based on which the Council could make the minutes of its session public. Such broad authority that the Council has given itself under the Rules is not in accordance with the principle of the public prescribed by the Judicial Council Law.[84]

On 24 January 2012, project coordinator submitted the Initiative to Montenegrin Constitutional Court to review the constitutionality and legality of the Rules of Procedure of the Judicial Council, which suggests that this act of the Judicial Council is contrary to the Constitution, Law on the Judicial Council and Law on Free Access to Information, as well as the provision[85] which provides that the Rules shall enter into force on the day of publication. One year and two months after its filing, the Initiative has not yet been put on the agenda of the Constitutional Court of Montenegro.

However, it is interesting that the Secretariat of the Judicial Council on 21 March 2013 submitted a Proposal[86] to the Council to amendprecisely these two articles of the Rules of Procedure of the Judicial Council. The Proposal suggests deletion of part of the provisionstipulating that minutes of the Council's sessionsare generally not available to the public. However, deletion of this sentence has been suggested not because it is contrary to the principle of transparency laid down by law, but because the Secretariat in its Proposal rationale found that this sentence was redundant, sincefurther on the Rules prescribe that the Judicial Council may decide that sessionminutes can be made public. Thus, the Council still has the authority todecide if the minutes could be made available to the public, which is contrary to the principle of transparency under the Law on the Judicial Council.

84 On 24 January 2012 the project coordinator filed an initiative before the Constitutional Court of Montenegro for assessment of the constitutionality and legality of the Rules of the Judicial Council which indicates that this act of the Judicial Council is contrary to the Constitution, the Law on the Judicial Council and the Law on Free Access to Information.
85 Art. 77.
86 Su.R. 243/13 of 21 March 2013.

Additionally, the proposed amendments to the Rules proposechanges toan unconstitutional provision providing that the Rules shall enter into force on the date of publication, rather than on the eighth day after its publication.[87]

By failing to timely publishsession dates on its website and prescribing secrecy of the minutes from the Judicial Council sessions, the Council has made a significant part of its operations non-transparent. In a situation where this institution has yet to prove itselfas an authority that operates without political or other influence, transparency is a must, while the current level of secrecy is inappropriate. It is necessary to changethe Council's practice and Rules of Procedure to increase itstransparency, although not in the manner proposed by the Secretariat of the Judicial Council on 21 March 2013, but so as to ensure transparency and respect for the principles of transparency required by the law.

3.7. Handling of requests for access to information

3.7.1. Failure to comply with the Administrative Court judgment

On 13 January 2011 HRA submitted a request for access to information asking the Judicial Council to provide information in the form of answers to the following questions:

- Whetherthe responsible person of the Basic Court in Podgoricahas beenidentified regarding the absolute time-bar inthe case of prosecution of businessman DraganBrkovićfor the criminal offense of insult under Art. 195, para 2 in relation to item 1, and in relation to Art. 49 of the Criminal Code, under a private action of 8 July 2005, initiated on 26 April 2009; which judge of the Basic Court was in charge of that case and who at the time was the president of that court;

- whether the responsibility of any person from the Basic Court in Podgorica has been initiated and established, concerning the reasons for dismissal of a former judge of that Court, ŽarkoSavković;

- what are the results of control over the PodgoricaBasic Court operations in the past year: whether the control included non-compliance

87 The provision of Article 146 of the Constitution stipulates that the law and other regulations are published prior to the effective date, and shall enter into force on the eighth day from the date of publication.

with deadlines for scheduling trials, undue delays, unprepared discussions/debates, who keeps statistical records on punitive policy of courts, who assesses the appropriateness of punitive policy and what are the assessments in 2009 and 2010.

Deciding on the above request, the Judicial Council adopted a decision Su.R.br. 20/2011 of 26 January 2011, refusing the request, so HRA filed a complaint with the Administrative Court of Montenegro for the annulment of the decision concerned.

In its ruling U br. 428/11 of 21 October 2011 the Administrative Court adopted the complaint, annulled the decision of the Judicial Council and ordered the adoption of a new, legitimate decision.

The Judicial Council failed to act on the said judgment of the Administrative Court and on 8 December 2011 HRA submitted a request to the President of the Judicial Council to comply with the Administrative Court ruling[88] and adopt a new, legally-based decision. However, even after filing the repeated request, the Judicial Council has failed to act on the judgment of the Administrative Courtuntil the day of publication of this report, almost year and a half after the adoption of the ruling.

By failing to comply with the judgment of the Administrative Court of Montenegro, the Judicial Council appears not only as anon-transparent body that hides facts relevant to its operations from the public, but also as a state authority which does not comply with court judgments defying so the rule of law.

3.7.2. Subsequent publication of decisions

Due to the observed selective disclosure of information on the website of the Judicial Council, in accordance with the Law on Free Access to Information, HRA addressed the Judicial Council with several requests for submission ofdocuments relevant to the monitoring of Council's operations and objective assessment of its work. There was a practice of the Council to refuse requests for access to its decisions explaining that all decisions are published on the website, although at the time of submission or rejection of requests that was not the case.[89]However, after filing the complaint with

88 At the presentation of the report, on 14 June 2013, Ms. Vesna Medenica, President of the Judicial Council, submitted a copy of the decision Su.R.br.1101-1/11 from 8 December 2011. We had not previously received this decision. Given that the decision is negative again, HRA will initiate an administrative action.

89 On 13 March 2012 HRA submitted a request to the Judicial Council for decisions on the

the Administrative Court of Montenegro against the decision of the Judicial Council rejectingrequests for submission of its decisions, the Judicial Council did publishthe decisions that were missing on its website, although not all.[90]

On 11 April 2012 three requests were submitted to the Judicial Council, asking for:

a) decisions adopted by the Council since 2009, related to the appointment of judges, termination of judicial office, dismissal, disciplinary responsibility and suspension, bearing in mind that the website of the Judicial Council did not contain all of these decisions;

b) decisions on establishing disciplinary responsibility from 2009, 2010, 2011 and 2012, because no such decision has been posted on the website; and

c) information on the number of decisions adopted by years starting from 2008, related to the appointment of judges, termination of judicial office, dismissal, disciplinary responsibility and suspension.

Requests for decisions on the appointment of judges, termination of judicial office, dismissal and suspension of judges (a) were refused bythe Judicial Council on the grounds that those decisions have already been published. A portion of such decisions was published on the website subsequently. Also, as regards decisions on suspension, they were published without rationales and only those from 2008 and 2009. The Judicial Council has subsequently published one decision on suspension from 11 April 2012 and it is the only published decision on suspension with rationale.

The Council has submitted all requested decisions of the Disciplinary Commission (b) to HRA, as well as information on the number of decisions regarding the appointment of judges, dismissal, termination of judicial office, disciplinary responsibility and suspension (c).However, as noted above, deci-

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appointment of judges, termination of judicial office, dismissal and suspension for the period since 2009 and onwards. On 14 March 2012 the Secretariat of the Judicial Council submitted a notice that all decisions can be found on the website of the Judicial Council, ending with decisions on the appointment of 21 February 2012. However, contrary to allegations in the notice, the Council's website did not contain decisions, which, according to media reports, were adopted in the previous period. For example, based on articles in the media, it is known that at its session held on 21 October 2011 the Judicial Council established termination of judicial office of judges of the High Court in Podgorica Slavka Vukčević and ČedomirJanjević, and a judge of the High Court in BijeloPoljeMiloradSmolović. At its session held on 18 November 2011, the Council decided on termination of office of the President and Judge of the Appellate Court of Montenegro DragutinČolaković. None of these decisions were published on the website of the Judicial Council at the moment when HRA requested their submission and when the Judicial Council submitted a notice that all decisions have been published.

90 Decisions on suspension from 2010 are missing.

sions of the Disciplinary Commission were not published on the website of the Council (see 3.3. above).

3.7.3 Individual examples

(1) On 26 March 2012 HRA submitted a request to the Judicial Council for decisions on termination of office of judgesŽeljkoVuković, Radovan Mandić, Lazar Aković and SlavkaVukčević, whose work was followed by controversy, and decisions on suspension of ŽeljkoVuković, Radovan Mandić and Lazar Aković. The Judicial Council rejected this request stating that decisions on termination of judicial office are posted on its website, and that the requested decisions on suspension have not yet been adopted, meaning that the Council does not have them.[91]

However, decisions on termination of judicial office have not been published on the website (except for certain decisions without rationale), and only one decision without rationale was published - the decision for which the Judicial Council claimed it did not exist, based on which the judge of the High Court in Podgorica Lazar Akovićhas been suspended from office.[92]

Nevertheless, following these requests and HRA preliminary report the Judicial Council published the requested decisions.

(2) On 26 March 2012 HRA submitted a request for decisions on initiation of dismissal proceedings and decisions on termination of judicial office at the personal request of a judge whose dismissal has been sought. The Council refused this request, specifying that decisions on termination of judicial office rendered at the personal request of a judge whose dismissal is being sought are published on itswebsite, and that decisions initiating dismissal proceedings have not been adopted whatsoever, so the Judicial Council does not hold them.[93]

HRA initiated administrative action against this decision of the Judicial Council and on 17 October 2012 the Administrative Court of Montenegro issued a decision[94]adopting HRA claim, annulling the decision of the Judicial Council and ordering the Council to issue a new decision based on law.

91 Su.R.br.244/12 of 28 March 2012.
92 Su.R.br.1105/09 of 3 October 2009.
93 Su.R.br.213/12 of 28 March 2012.
94 U.br.796/12 of 17 October 2012.

However, the Council failed to comply with this decision of the Administrative Court and on 14 January 2013 HRA submitted a follow-up request to the Judicial Council requiring actions in accordance with the Administrative Court ruling. Following this request the Judicial Council issued a decision[95] again rejecting a request for free access to information with much the same explanation as the one in its previous decision quashed by the Administrative Court as illegal. Therefore, on 14 February 2013 HRA submitted a new action to the Montenegrin Administrative Court for annulment of this decisionof the Council too. The procedure is pending.

We believe that this practice does not contribute to the impression that the work of the Judicial Council is sufficiently transparent. This in particular due to the fact that it is not uncommon for judges against whom dismissal proceedings have been taken to soon after request termination of office themselves. Making decisions on termination of judicial office in such cases leaves unresolved doubts and undetermined accountability of judges against whom dismissal proceedings have been initiated. Concealment of those decisions, i.e. refusal of the Judicial Council to submit these decisions, makes the Council's worknon-transparent and doubts that followed the work of these judges gain weight, as well as doubts that in this way judges are pressured to leave the office themselves.

We repeat the recommendation that the Law on the Judicial Council should stipulate that judgescannot be dismissed at personal request when the procedure for their dismissal has already been initiated, but only after adopting a decision on the motion for dismissal.

As noted above, decisions on termination of judicial office have been published on Council's website selectively and partially (without rationale). In addition, decisions on dismissal note that the Judicial Council initiateddismissal proceedings upon the proposal for dismissal, which indicates that the Council does hold the decisions that hadinitiated these proceedings,although the decision to reject HRA request stated otherwise.

(3) In addition to the above mentioned refusals of HRA requests, the Judicial Council[96] refused to submit the report of the President of the High Court and the conclusion of the Judicial Council[97] he had acted upon, regarding actions of the President of the Basic Court in Podgorica in one case (for more details on this case see 8.1.2). Previously in this case the President of

95 Su.R.br. 16-1/13 of 17 January 2013.
96 Decision Su.R.br. 177/12 of 28 March 2012.
97 Su.R.br.772/11 of 19 September 2011.

the High Court adopted the request forexemption of the President of the Basic Court in Podgoricabecause he had failed to comply with the principle of random assignment of cases, which by law constitutes negligent and incompetent performance of one's function. Therefore, the Judicial Council adopted a conclusion seeking a report on this occasion from the President of the High Court in Podgorica. Explaining its decision to reject to submit its conclusion and the report of the President of the High Court to HRA, the Judicial Council noted that the conclusion represents "an integral part of the minutes", referring to the disputed provision of Art. 25 of theRules of Procedure of the Judicial Council (whose constitutionality and legality need to be examined by the Constitutional Court at the initiative of January 2012), which prescribes the confidentiality of the minutes of the Judicial Council session.

Also, as in the example given above, the Council states that the Report of the President of the High Court in Podgorica in this case has been published on the website of the High Court in Podgorica, although the website did not contain that report even on the date of finalizing the preliminary report in June 2012.For this reason HRA filed a complaint with the Administrative Court of Montenegro, which issued a ruling on 27 June 2012 and annulled the decision of the Judicial Council.[98] Acting upon this decision of the Administrative Court, the Judicial Council allowed HRA access to the requested information and submitted these documents.[99]

(4) The Judicial Council also refused to submit the decision establishing that there are no grounds to initiate disciplinary proceedings against the President of the Basic Court in Podgorica for violating the principle of random assignment of cases, accepting the opinion from the reportof the President of the High Court in Podgorica, who had previously found in his decision on exemption of the President of the Basic Court in Podgorica a violation of the above principle set out by law. Regarding this HRA request, the Judicial Council did not even adopt a decision, but it onlysent a notice without any explanation.[100] For more detail on this case see section 8.1.3.

(5) On 10 September 2012, request was submitted to the Judicial Council for access to the most recent report on the implementation of Action Plan for Judicial Council (2009-2013). On 12 September 2012, the Council submitted the decision[101] to HRA granting access to the requested information by delivering a copy of the most recent report on the implementation of Action Plan for Judicial Council (2009-2013) of 1 July 2011 via e-mail.

98 U. br. 795/12.
99 Su. R. br. 177-1/12 of 9 July 2012.
100 Su. R. br. 136-1/2012 of 27 February 2012.
101 Su. R.br. 206-1/12 of 11 September 2012.

(6) On 1 October 2012, HRA submitted a request to the Judicial Councilseekingdelivery ofthe Initiative to change the decision on the method and criteria for addressing the housing needs of officials, in the part related to solving of housing needs of judges and prosecutors, adopted at the Judicial Council session held on 11 April 2012. On the occasion of the above request, Judicial Council issued a decision[102] granting access to the requested information and submitted the Initiative.

(7) On 20 March 2013, HRA submitted a request to the Commission for the Code of Judicial Ethics seeking delivery of decisions taken in the proceedings to determine potential violations of the Code of Judicial Ethics starting from the establishment of the Commission, with the exception of a decision taken on the complaint filed by an employee of Podgorica High Court againstconductof judge ValentinaPavličić anddecision taken on the complaint filed by Dr Milutin Vukić against conduct of judge Vojislavka Vuković, considering that said decisions havealready been submitted. On the occasion of the above request, on 21 March 2013 the Judicial Council submitted anotice[103] to HRAstating that no other decisions were taken in the procedures for determining breaches of the Code of Judicial Ethics, except in cases where decisions have already been submitted.

As of July 2012, Judicial Council hasbeen promptly responding to requests for access to information, in no longer than a few days. Decisions to initiate the procedure for dismissal of judges have not been submitted to date, or the decision not to initiate the procedure for establishing disciplinary responsibility of the President of Podgorica Basic Court for violation of the principle of random allocation of cases and the minutes of the Judicial Council session in this respect.

3.8 Denying access to records of other candidates

Pending the entry into force of the Law on Amendments to the Law on the Judicial Council in July 2011(*Sl. list CG,* 39/2011), Art. 38 of the then in force Law on the Judicial Council(*Sl. list CG,* 13/2008) stipulated the following:

"a candidate has the right to have insight intoown record and records of other candidates who have applied for judicial vacancy announcement, into results of written tests, assessment of candidates and opinions on candidates,

102 Su. R. br. 612-1/12 of 3 October 2012.
103 Su. R. br.226-1/13.

and to submit a written statement on that to the Judicial Council no later than three days after the insight".

This right is considerably limited by the Law on Amendments to the Law on the Judicial Council, as the candidates are now unable to access records of other candidates, but only the final assessment of other candidates.

This solution does not help strengthentrust in transparent and fair operation of the Council, candidates are unable to verify assessment procedure and are forced to file complaintsbeforea court to be able to gain access to all documents. There are novalid reasons for such a solution, so it is certainly necessary to amend it.[104]

Law on the Judicial Council should prescribe that each candidate has the right to have insight into their own and records of other candidates who have applied for the judicial vacancy announcement (into the results of written tests, assessment of candidates and opinions on candidates). It is also necessary to specify by the law or Rules of Procedure the procedure of gaining insight into documents and the rights of candidates, by clearly prescribing the manner and place of gaining insight into electiondocuments, deadline within which the Secretariat shall provide access to election documents upon request, the right to copy documents, the right to gain an insight through a legal counsel and the right to object to the Judicial Council in the event of denial of this right.

3.9. Action Plan of the Judicial Council

In accordance with Art. 22 of the Law on the Judicial Council from 2008[105] and in order to improve the efficiency and effectiveness of the Council and the courts' work, at its meeting held on 25 November 2009 the Judicial Council adopted the Action Plan for the five-year period from 2009 to 2013. The Action Plan has identified 12 strategic goals that should have been achieved during this period to ensure independence, accountability, efficiency and effectiveness of the judiciary.

Pursuant to Amendments to the Law on the Judicial Council of 2011[106] Art. 22 of the Law has been deleted,and since then the Judicial Council

104 When presenting the Analyses on 12 July 2012, RaduleKojović, judge of the Supreme Court of Montenegro and member and deputy president of the Judicial Council in the previous term, noted that these legal changes are not satisfactory and that, despite of them, all candidates shall have the opportunity to access the full documentation.

105 *Sl. list CG*, 13/2008 of 26 February 2008.

106 *Sl. list CG*, 39/2011 of 4 August 2011.

does not have an obligation to adopt Action Plan, submit the Plan to the Government, courts and Parliament, while the Secretariat of the Judicial Council is no longer obliged to produce a reasoned report every three months on the implementation of Action Plan and submit it to the Judicial Council.

Intervention of the legislator does not contribute to transparency of the Council's work and progress in achieving socially beneficial goals that the original Action Plan predicted. This especially when taken into account that the implementation of majority of tasks under the Action Plan had been significantly delayed at the time of these legal changes, which gives an impression that deletion of the reporting obligations on the implementation of Action Plan was to conceal the delay.

Prior to amendments to the Law in August 2011, of the planned 61 tasks for the fulfilment of 12 prescribed strategicobjectives of the Action Plan,as many as 38 (62.5%) were not completed within the prescribed period, while 23 (37.7%)werecompleted. By that time (August 2011), none of the 12 strategic objectives were achieved.

Report on the work of the Judicial Council for 2012, which was adopted at the session held on 29 March 2013, states that 4 of the 12 strategicgoals of the Action Plan have not been implemented:

"The Judicial Council had its five-year Action Plan for the period 2009-2013, identifying 12 strategic objectives, of which the following have not been fulfilled: Ensuring financial independence of the Judicial Council and courts, Strengthening public confidence in the Judicial Council and courts, Improvement of mechanisms for the evaluation of judges and associates andRationalization of the judicialnetwork."

Delay in the implementation ofthe 4 goals listed in 2012 Report on the work of the Judicial Council is a fact, however, it is still unclear based on which data did the Judicial Council conclude that the remaining 8 goals have been completed,whose implementation wassignificantly delayed in August 2011, because as ofthat timethe Secretariatno longer had the obligation to informthe Council about implementation progress. This especially when taken into account that onlythe above sentence, of 193 pages of the Report on the Council's work,has been dedicated to the Action Plan of the Judicial Council.

Instead of improving conditions through statutory changes for achieving undisputed goals to ensure independence, autonomy, accountability and professionalism of the courts and judges, it could be said that the abolition of

the obligation to adopt action plans and monitor their implementation contributed to further delay in achieving these goals (for more detail about delay in the implementation of strategic goals under the Action Plan see Section 9.3. International recommendations and regulations for their implementation).

Deletion oflegal obligation for the Judicial Council to adopt Action Plan and for the Secretariat to draft reports on its fulfilment would be justified and make sense only if all of the strategic objectives were fully implemented, which, according to the Action Plan, would ensure the fulfilment of the principle of independence, accountability, efficiency and effectiveness of the judiciary. Since there is still a significant delay in the fulfilment of most of the above tasks and goals, omission of these obligations only helps to cover-up thedelay in the implementation of these principles.

3.10. Conclusions and recommendations

3.10.1. Conclusion

Compared to the situation before July 2012, the Judicial Council accepted HRA recommendation to publish its decisions on the website with rationales, and not to publish certain decisions separately, to post judicial vacancy announcements on the website and include data on all candidates in decisions on appointment (not just initials - as it was before) and to publish the latest version of the Law on the Judicial Council and Guide for Access to Information in Montenegrin language on the website.

The Judicial Council did not accept the recommendation to normally open their sessions to the public,to amend the Rules of Procedure of the Judicial Council in accordance with the principle of the public so as not to allowthe Council to arbitrarily assess when the minutes of sessions can become confidential (Art. 25, para 6 of the Rules),to change the form and content of Annual Report on the Judicial Council's workin order to include the assessment of the work of courts by the Judicial Council, not just statistics on the work of courts, and toleave outpromotional information from Annual Report on the Council's workabout visits of the Supreme Court President to other countries and instead state the purpose and results of such activities, and particularly financial resources from the budget spent for these purposes. Also, the Law on the Judicial Council has not been amended so as to ensure the right of candidates for the appointment to access documents of other candidates.

3.10.2. Recommendations:

1. As a rule, make the Judicial Council sessions open to the public.

2. Amend the Lawon the Judicial Counciltoprescribethe exclusion of the public fromsessions at which the Council decides on dismissal anddisciplinary responsibility ofjudgesonlyat the request ofa judgewhoseresponsibilityisbeing established.

3. Specify by law all informationto be publishedon the Council's website, and particularlyensuretimely upload of:

a)decisions on the appointment, disciplinaryresponsibility,dismissal andsuspensionof judges, with a rationale;

b) applications ofcandidatesfor the judicial post;

c) allregulations relevant to thework ofthe Judicial Council;

d) noticesof session dates, with the proposed agenda.

4. Amend and alignthe Rulesof Procedure of the Judicial Councilwith the statutoryprinciple ofthe public,byabolishing the Council's right toarbitrarilydecide onwhen to keep the minutesof the sessionsecret(Art. 25, para 6 of the Rules).

5. Changethe form andcontents of the annualreporton the work ofthe Judicial Councilsothatthe report includes the Council's assessment of the work of courts, and notonlystatistics on the workof courts. Also, the annual report on theJudicial Council operations should notcontainpromotional informationaboutthe Supreme CourtPresident's visits to otherstates, but information on the purpose and resultsof suchactivities andfunds expended from thebudgetforthese purposes.

6. Ensurethat the Judicial Councilrespects court rulingsbindingon the Council.

7. Amend the Law on theJudicial Counciltoensure access to one's personal records, as well asrecords of other candidatesfor election;specify theprocedure of accessing therecords and the right to appealin case ofdenialof this right.

4. CRITERIA FOR THE APPOINTMENT OF JUDGES AND PRESIDENTS OF COURTS AND THEIR ASSESSMENT

4.1. General remarks

Law on Courts (*Sl. list RCG*,5/2002 and 49/2004 and *Sl. list CG*,22/2008 and 39/2011) prescribes framework conditions, criteria for selection of judges, President of the Supreme Court and presidents of other courts:

Requirements for election of judges

General requirements
Article 31

A person may be elected as a judge if he/she:

1) *is a national of Montenegro;*

2) *is medically fit and possesses capacity to exercise rights;*

3) *has a university degree in the field of law;*

4) *has passed bar examination;*

Special requirements
Article 32

In addition to the general requirements, a person may be elected as a judge if he/she possesses work experience of the following duration in the field of law:

- for a judge of the basic court – five years,

- for a judge of the commercial court – six years,

- for a judge of the high court – eight years,

- for a judge of the Appellate Court and the Administrative Court – ten years,

- for a judge of the Supreme Court – fifteen years.

Requirements for election and mandate of the President of the Supreme Court

Article 32a

A person may be elected as the President of the Supreme Court if he/she meets general and special requirements for a judge of the Supreme Court and possesses professional impartiality, high professional and moral qualities.

President of the Supreme Court shall be elected for a term of five years.

Requirements for election of a president of court

Article 33

A president of court is a judge.

The person elected as a president of court is at the same time elected as a judge of that court.

The president of court shall continue to serve as judge of the court after: the expiry of his/her term of office, removal from the office of the president of court and submission of request for termination of office of the president of court.

Law on the Judicial Council (*Sl. list CG,*13/2008 and 39/2011) prescribes the precise criteria and sub-criteria for the appointment of judges appointed for the first time, advancing judges and court presidents:

Criteria for the appointment of a judge to be appointed for the first time

Article 32

Criteria for appointment of a judge to be appointed for the first time shall be the following:

1) *Professional knowledge assessed on the basis of the sub-criteria:*

a) average grade and the length of studies;

b) professional trainings (initial training, seminars, workshops);

c) title awarded (Master of Laws, Doctor of the Science of Law);

d) computer literacy and foreign language skills

2) *Ability to perform judicial office assessed on the basis of the sub-criteria:*

a) written examination;

b) work experience (types of assignments a candidate performed so far, the length

of work experience, work performance, promotions etc.);

c) communication skills and personal conduct.

3) *Worthiness for the performance of judicial office assessed on the basis of the sub-criteria:*

a) the fact that he/she has not been convicted for criminal offences which renders him/her unworthy of judicial office, nor sentenced in a misdemeanour procedure;

b) reputation and irreproachable conduct;

c) relationship with colleagues and clients;

Criteria for the appointment of an advancing judge

Article 32a

Criteria for the appointment of an advancing judge shall be the following:

1) *Knowledge assessed on the basis of the sub-criteria:*

a) professional trainings (regular constant trainings and other forms of training);

b) title awarded (Master of Laws, Doctor of the Science of Law);

c) published scientific papers and expertise and other professional activities;

d) computer literacy and foreign languages skills.

2) *Capability of holding a judicial office assessed on the basis of the sub-criteria:*

a) work experience;

b) work performance during the last three years assessed on the basis of: number and type of resolved cases and the manner of resolving the cases; the number of confirmed,

altered, abolished judgements and the judgements resulting in trials conducted upon legal

remedies; percentage of resolved cases in relation to approximate norms; resolving cases in the order of their receipt; acting in a timely manner and the time needed for drafting judgments;

the number of cases which resulted in the statute of limitations; the number of justified review requests;

c) communication skills and personal conduct.

3) *Worthiness for holding a judicial office assessed on the basis of the sub-criteria:*

a) the fact that he/she has not been charged in a disciplinary procedure with the violation of the dignity of a judicial office;

b) relationship with colleagues and clients;

c) reputation and irreproachable conduct.

Criteria for appointment of a court president
Article 32b

A court president, in addition to the criteria under Article 32a of this law, shall be capable of managing and organising the work in a court, which comprises the following:

1) *ability to organize work;*

2) *knowledge of court administration;*

3) *reputation that a candidate enjoys among the judges of the court in which he/she performs judicial office;*

4) *dedication to preserve the independence of courts and judges.*

The new Rules of Procedure of the Judicial Council of 18 November 2011 prescribe a range of points that can be awarded to the assessment of each sub-criterion, for example 0-4, 0-20 (Art. 43-45).

The existing legal provisions and new Rules of Procedure represent an improvement over the previous situation, because the criteria and sub-criteria are now prescribed by the law, and their assessment by the Rules.[107]

The new Rules of Procedure provide that each sub-criterion is assessed separately. It also prescribes the forms for candidates appointed as a judge for the first time and for judges to be appointed to the court of higher instance.

107 Amendments to the Law on the Judicial Council of 4 August 2011 and the new Rules of Procedure of 18 November 2011 include HRA suggestion to legally prescribe all the criteria, „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", HRA, Podgorica 2009, item 1.1.1.1.1, p. 40.

However, the main recommendation of HRA to prescribe the parameters (indicators) for assessing the criteria and sub-criteria in order to ensure uniform treatment and the most objective possible handling of the Council members in evaluating candidates - has not been accepted. (Specifically, this recommendation has beenadopted only in relation to the evaluation of the sub-criterion "average grade and length of study"). This still allows for arbitrary and inconsistent actions of the Council in the appointment of judges, as will hereinafter be explained in more detail.

In addition to the range of points for evaluation of each sub-criterion, the new Rules of Procedure should also prescribe the parameters for awarding these points and thus provide a uniform and objective assessment of candidates.

In its Action Plan for the period 2009-2013, as one of its 12 strategic objectives the Judicial Council has identified the improvement of mechanisms for assessment of judges and expert associates. Normative framework for defining the objective and clear criteria for assessment and promotion of judicial office holders has been provided as a priority in the implementation of this strategic goal, and one of the tasks set by the Judicial Council in this regard is the adoption of "internal documents which will clearly define objective criteria for qualitative and quantitative evaluation of the performance of judges in accordance with international standards". Although the Action Plan stated that the specific tasks are to be performed to achieve the priorities, and the deadline for the fulfilment of this task was October 2010, the Judicial Council has not yet adopted internal documents that would define the qualitative and quantitative evaluation of the performance of judges.

The Judicial Council fails toimplement specific tasks defined in its Action Plan for more than two years and thus maintains the existing situation which allows for arbitrary and biased evaluation of judges.

4.2. Criteria scoring system under the provisions of the Judicial Council Rules of Procedure

The Rules of the Judicial Council envisage scoring as the sole form of assessment (evaluation) of the criteria and sub-criteria. In addition to the basic objection regarding the lack of the scoring parameters, HRA believes it is absurd to score the criterion "Worthiness to perform judicial function" and that it would be better to descriptively assess the sub-criteria

"Work experience" and "Communication skills and personal conduct", as explained below in detail.

4.2.1. Appointment of judges appointed for the first time

4.2.1.1. General remarks

When choosing among the candidates for a judge appointed for the first time, three criteria are assessed: acquired knowledge, ability to perform judicial function and worthiness to perform judicial function, which are evaluated based on the fulfilment of the sub-criteria (see Art. 32 of the Law on the Judicial Council).

4.2.1.2. Criterion "Acquired knowledge"

Acquiredknowledge is assessed on the basis of the sub-criteria:

a) average grade and duration of studies,
b) professional development (completed initial training, seminars, workshops),
c) academic qualification (Master of Laws, Doctor of the Science of Law),
d) computer skills and knowledge of foreign languages.

4.2.1.2.1. Sub-criterion "Average grade and duration of studies"

Of the four sub-criteria listed (and all other sub-criteria), the Rules of Procedure set standards for the evaluation of only one - "Average grade and duration of studies", by prescribing number of points for a range of average grades atthe university, and the degree of reduction of points in case the candidate studied for more than four years.[108] This ensures that each candidate at the same level regarding the average grade and duration of studiesalways earns the same number of points, rather than having the Council members assign grades in each case of the appointment of a judge. In other words, now it iscertain that each candidate for a judge who had studied 4 years and had an average grade of 8 to 9 shall earn 3 points, and that someone with the same average grade, but who had studied twice as long will earn less points. This ensures certainty and objectivity, especially with regard to the uniform conduct of the Council in evaluating each candidate and on every occasion.

108 See Art. 43, para 2 and 3 of the Rules of the Judicial Council of 18 November 2011.

However, for evaluation of all other sub-criteria only the adequate range of points that can be awardedis prescribed, but not the parameters or benchmarks which determine how many points can be awarded in a particular circumstance, which inevitably leads to uneven and subjective evaluation.

Regarding the assessment of all other sub-criteria, only the range of points that can be awarded to candidates has been prescribed, without any indication of what determines that numerical score, i.e. what influences it to be lower or higher. This regulation still leaves plenty room for subjective and arbitrary decision-making in the appointment of judges or their advancement.

Out of 100 possible points a candidate for a judge can achieve, it is only possible to accurately determinehow an average grade and duration of studies that brings a maximum of 5 points has been scored. As regards all other criteria and sub-criteria which make up 95 points, there is ample room for subjective evaluation and selection of candidates. The fact that even 95% of possible points awarded to candidates can be awarded arbitrarily suggests that the new Rules of Procedureachieved little progress in relation to the previous and still leave much room for biased selection of judges.

4.2.1.2.2. Sub-criterion "Professional development"

Sub-criterion (b) *professional development (completed initial training, seminars, workshops*) isassessed on a 0 to 5 point scale, but it is not defined whether the completed initial training in itself implies 5, 4 or 3 points? Does attending a seminar deserve 1, 2 or 3 points? Will seminars that may be of importance for the performance of judicial functions (e.g. seminars on human rights) be awarded more points or not? All this should be laid down,so as not to allow for subjective evaluation that does not provide for uniform conduct of the Council and does not guarantee its objectivity.

4.2.1.2.3. Sub-criterion "Academic qualification"

Sub-criterion (c)*"Academic qualification" (Master of Laws, Doctor of the Science of Law)* is assessed on a 0 to 5 point scale, but it is unclear how many points the Master of Laws or Doctor of the Science of Law will earn, whether the change in the system for awarding academic titles in accordance with the Bologna Declaration will be taken into account, etc.

Also, a small number of points obtainable for academic degree (maximum 5, as opposed to maximum 10 points for "Reputation and irreproachableconduct") shows that this sub-criterion is not adequately evaluated. Thus,academics are not encouraged to become candidates for judges, although it would be ideal that all judges have the highest education possible. It is certainly desirableto increase a range of points that can be awarded to e.g. a candidate who is a doctor of the science of law, to thereby compensate for the lack in case that such a candidate, for example, did not attend seminars or initial training for judges.

Besides the fact that there are no parameters forscoring of academic knowledge, information at which educational institution the academic qualification has been obtained is completely neglected, which leaves room for the same or even better scoring of a diploma acquired in a newly established institution without references and reputation as opposed to a diploma that a candidate acquiredat the institution with long tradition and professors who have undisputed international authority.

4.2.1.2.4. Sub-criterion "Computer skills and knowledge of foreign languages"

Sub-criterion (d) "Computer skills and knowledge of foreign languages " is assessed jointly, on a 0 to 5 point scale, but it has not beenprescribed how to divide the points, what if a candidate speaks and writes a foreign language outstandingly, but cannot use a computer? It should be borne in mind that computer skills can be learned much faster than a foreign language and in view of that appropriate parameters for the separate scoring of each of the two sub-criteria should be prescribed.[109] Level of knowledge of foreign languages is evaluated differently in diplomas, and the parameters for evaluating this knowledge should be prescribed based on this. For absolute objectivity, this knowledge should be verified by appropriate testing.

4.2.1.3. Criterion "Ability to perform judicial function"

Ability to perform judicial function is assessed based on the three sub-criteria:
a) written examination;

109 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 1.1.4.1.1, p. 44.

b) work experience (types of assignments a candidate performed so far, the length of work experience, work performance, promotions etc.);

c) communication skills and personal conduct.

4.2.1.3.1. Sub-criterion "Written examination"

Sub-criterion "Written examination" carries the most points (50) in relation to the points earned by other sub-criteria (typically up to 5). The test scorerepresents 50% of total points.

The Rules of Procedure prescribe a range of points that can be awarded to a candidate for a specific grade s/he received on the test, in the following manner:

- 0 to 39 points, if the candidate received grade 1 and 2 on the test;
- 40 points if the candidate received grade 3 on the test;
- 45 points, if the candidate received grade 4 on the test;
- 50 points, if the candidate received grade 5 on the test.

The Rules prescribe the content of the test, i.e. areascovered bythe written test questions, and that the test must specify how many points each question can earn.[110] However, there is no indication as to how many points a certain area should earn and how the Commission carries out the evaluation. The Rules of Procedure provide that the number of points for each question is determined by majority vote of the Commission members, and that the Commission evaluates the test by majority vote on the basis of the total number of points won, and that the test grades are as follows:

1 (one) if the candidate achieved less than 55% of the total possible points;
2 (two) if the candidate achieved 55-65% of the total possible points;
3 (three) if the candidate achieved 65-75% of the total possible points;
4 (four) if the candidate achieved 75-85% of the total possible points;
5 (five) if the candidate achieved 85-100% of the total possible points.[111]

Such solution does not ensure objective and balanced evaluation of candidates. It is unclear on what basis the Testing Commission determines the number of points for different questions, it is possible that same areas are evaluated differently in different tests, it is not known on what basis higher or lower score is given for certain questions andthe Testing Commission has

110 Art. 36.
111 Art.41.

an authority to arbitrarily decide on a number of points to be awarded for particular questions, which additionally creates space for arbitrary evaluation of candidates. This is especially important since the written examination makes up 50 points, which is half of the total number of points a candidate can obtain. Finally, it is unclear why the Commission evaluates the test by majority vote, since a percentage of points for achieving certain grade has been specifically prescribed?

Prescribed anonymity of testing does not provide objectivity in evaluating the candidates, because it does not preclude the possibility of favouring a particular candidate by a part or the whole Commission. Although the Rules provide that a candidate discloseshis/hercode number only immediately before the interview, and after the test is evaluated (Art. 38, para 4), the fact that the interview is not conducted on the same day as the test, but at least eight days later (Art. 42, para 1) does not ensure that in the meantime the candidate will not be able to inform the Commissioner member about their code.

It would be reasonable to introduce a lower limit of passing scores, because now it possible thata candidate who achieved 65% of possible points gets 39 points, same as a candidate who achieved 1% of possible points. Also, this lower limit would ensure that the judiciary does not employ really incompetent candidates, who might otherwise meet other formal criteria.

4.2.1.3.2. Sub-criterion "Work experience"

Sub-criterion (b) "Work experience (type of work that the candidate has performed, length of work experience, merit, promotion, etc.)" is assessed on a 0 to 5 point scale, but also with no indication of how to evaluate all these elements.

Sub-criterion "Work experience" in general should not be evaluated as a separate sub-criterion, since the years of work experience in the legal profession are prescribed by law as a separate requirement for judges. Also, for example, a longer work experience does not necessarily indicate a preference in terms of expertise.[112] However, if the scoring of this sub-criterion is maintained, it is necessary to prescribe parameters for its evaluation in order to avoid inconsistent and unfair treatment.

112 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 1.1.4.1.2, p. 45-46.

For example, in evaluating "work experience" candidate M.K., with 14 years experience mostly in the court, received 5 points, while the other candidate, who had 6 years of service, out of court, received 4 points.[113] So in this case a candidate with 14 years experience, mainly in the court, received only 1 point more than a candidate who has 6 years of experience outside the court.

The place of service as such is no longer listed under the sub-criterion "work experience", but the "type of work performed by the candidate," which is a more precise solution. However, it would be advisable to stipulate how to evaluate different types of work and give advantage to candidates who have worked in courts, especially as legal advisors.[114]

It is not prescribed what is implied by "promotion". Also,a form for obtainingemployer's opinion on a candidate, which, on this subject, contains the section "work results",is not prescribed in sufficient detail to provide for this type of information.[115] HRA has previously recommended prescribinga specific type of questionnaire to obtain relevant information from the employer, as well as specifying what is implied by "promotion". A particular challenge is the choice of method for evaluatingelements of the sub-criterion "work experience" prescribed in such manner. One solution is to assess this sub-criterion descriptivelywithout scoring, as previously recommended.[116]

4.2.1.3.3 Sub-criterion "Communication skills and personal conduct"

Sub-criterion"Communication skills and personal conduct"is assessed on a 0 to 5 point scale, and the new Rules stipulate thatduring an interview with a candidate for judge or court president, facts and circumstances for evaluating the sub-criterion "communication skills and personal performance" shall be particularly examined (Art. 42, para 2). It remains completely unclear how the assessment of this sub-criterion can be precisely determined numerically based on one conversation, content of which has not been prescribed by guidelines. Due to the fact that it is impossible to

113 Information obtained in an interview with M.K., a candidate who has examined the form containing the grades.
114 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 1.1.4.1.2, p. 45-46, recommending that in the event of equal meeting of other criteria, court advisors have the advantage.
115 This form is an integral part of the Rules of the Judicial Council of 18 November 2011.
116 *Ibid*, 1.1.4.1.3, p. 46.

determine how to assess one's communication skills and personal conduct, as well as an opportunity to check the assessment of this sub-criterion of a candidate, there is still room for subjective and arbitrary evaluation of candidates under this sub-criterionas well. HRA has previously pointed out that "communication skills" should be excluded as a separate criterion, except in respect of candidates for court presidents, where this feature should be assessed descriptively rather than numerically.[117]

4.2.1.4. Criterion "Worthiness to perform judicial function"

4.2.1.4.1. Sub-criterion "Clean criminal record and no conviction for an offence rendering a person unworthy to perform judicial function"

The fact that a candidate has not been convicted of criminal offenses or convicted of an offense rendering him unworthy to perform the judicial function is assessed on a 0 to 4 point scale.

It is unclear why this sub-criterion is not intended as one of the general conditions for appointment of judges, which would ensure elimination of candidates who were convicted of crimes or offenses that make them unworthy of the judicial function, similar to the general requirements for employment in state bodies specified in the Law on Civil Servants.[118] This solution makes it possible to score such an important issue, so the candidate who is on this basis unworthy of judicial office can receive 0 points, which in combination with other points may lead to his/herappointment as a judge. On the other hand, if a candidate was convicted or punished for offenses rendering him unworthy to perform the judicial function, there is still space for extreme arbitrariness in scoring and assessing the severity of the offense or punishment on the scale from 1 to 4.

The logical solution would imply that the clean criminal record and no conviction for violations making a person unworthy to perform judicial functionbe prescribed only as a general condition, noting the act for which the candidate has been convicted, but which does not render him unworthy of the judicial position.

117 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 1.1.3.1, p. 43.

118 Art. 32, para 1, line 5 reads: "The state agency may employ a person who has not been convicted of a crime that renders him unfit to work in a state agency and against whom no criminal proceedings have been initiated for a criminal offense prosecuted *ex officio*".

4.2.1.4.2. Sub-criterion "Reputation and irreproachableconduct"

"Reputation and irreproachableconduct" is assessed on a0 to 10 pointscale, and provides twice as many points than most other sub-criteria, which obviouslygives special importance to such candidate's traits.

However, it is unclear on what basis candidate's reputation and conduct are evaluated, and especially on what basis reputation and conduct receive different numerical value. It is entirely unclear whatrepresents the basis for assessing one's reputation, i.e. how and why the Commission could have assessed differently reputation of a candidate. Further, even if it is clear on what basis this sub-criterion is assessed, it remains unclear in what way the Commission obtains information for assessing "reputation and irreproachable conduct" of candidates.

In this sense, HRA has previously proposed that all candidates' applications be published on the website of the Judicial Council, so that the public can point to the possible inadequacy of applicants, which would then be verified by the Council.[119]Also, HRA stands by its assessment that this sub-criterion should be evaluated descriptively ("satisfactory" - "not satisfactory"), not numerically, especially since there is no way of knowing on what basis the candidates could receive a different number of points.

4.2.1.4.3. Sub-criterion "Relationship with colleagues and clients"

"Relationship with colleagues and clients" is assessed on a 0 to 6 pointscale, while it remains unclear how the Commission determines the quality of candidates' relationship withcolleagues and clients, and based on what criteria this is evaluated numerically. This applies particularly to the evaluation of the relationship "with clients" when the candidateshave not worked with clients. It is unclear whether this will earn him/her fewer points. Also, it remains unknown based on which information the Commission will determine the quality of relationships with colleagues and clients, whether it will receive information directly from clients and colleagues, from which clients and colleagues, etc.

In this regard, previous HRA proposal which has not been adopted suggests that the forms include a section for stating sources of information

119 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", item 1.2.2.3.1, p. 63.

upon which the evaluation has been carried out, as it remains controversial how the Judicial Council obtains information for assessingthe criteria and sub-criteria, especially the last two sub-criteria presented - "Reputation and irreproachableconduct" and "Relationships with colleagues and clients". Regulations only stipulate that information can be provided through obtaining the "opinion of an organ where a candidate had worked", but only regarding the professional and working qualities of candidates (Art. 31 of the Judicial Council Law), while there is no search for other information on other criteria and sub-criteria.

4.2.2. Appointment of an advancing judge

Amendments to the Law on the Judicial Council, which came into force in August 2011, prescribethe criteria for the appointment of advancing judges, as well as the sub-criteria based on which they are evaluated (see above).

As in selecting a judge appointed for the first time, three basic criteria are evaluated: (1) acquired knowledge, (2) work experience and (3) worthiness to perform judicial function, but the sub-criteria in relation to which the fulfilment of these criteria is assessed are somewhat different compared to those evaluated in the first selection of candidates for a judge.

As in the case of the criteria for the selection of judges appointed for the first time, the new Rules of Procedure of 18 November 2011 provide an appropriate range of points for assessment of each sub-criterion, but also completely lack parameters or standards, on the basis of which a certain number of points for any of the sub-criteriacan be assigned. This still enablesinequality in evaluation and bias in deciding on promotion of judges.

HRA believes that specifying the parameters for objective evaluation of judges, as well as their regular assessment, is necessary for objective decision-making on career advancementor accountability for unprofessional work. This system of parameters and assessment has not yet been established.

4.2.2.1. Criterion "Acquired knowledge"

4.2.2.1.1. Sub-criterion "Professional development"

Sub-criterion*professional development (ongoing training and other forms of training)* is assessed ona 0 to 5 pointscale, but contains no

further indications of what exactly it comprises and how it is evaluated, especially in the light of the existence of a separate sub-criterion "academic qualification" where it is indicated that this qualification includes master and doctor of law. HRA assumes that the participation of judges in continuing training programs organized for judges is the subject of evaluation. It is not clear how this sub-criterion is assessed, especially in the light of the fact that the judges in Montenegro are not provided a specified number of days per year for professional development. Also, it is not known whether there are any training programs carried out continuously.

4.2.2.1.2. Sub-criterion "Academic qualification (Master of Laws, Doctor of Science of Law)"

Sub-criterion*academic qualification (Master of Laws, Doctor of the Science of Law)* is also evaluated on a 0 to 5 pointscale. It is unclear how academic degrees listed under this sub-criterion are assessed, as explained above under 4.2.1.2.3.

4.2.2.1.3. Sub-criterion "Published scientific papers and other activities"

Sub-criterion *published scientific papers and other activities in the profession*is also assessed on a0 to 5 pointscale, but still lacks the scoring system. The formulation "other activities in the profession" is general and it is hard to imagine what activities (in addition to published papers) could be evaluated under this criterion. If it implies the membership inworking groups for drafting legislation or the like, it should be prescribed that the basis on whichan applicant became a member of the working group shall be taken into consideration, and that volunteer work and personal initiative will be particularly appreciated.

4.2.2.1.4. Sub-criterion "Computer skills and knowledge of foreign languages"

As in selecting a judge appointed for the first time, there are no parameters for evaluating candidates under the sub-criterion *computer skills and foreign languages*. The same comment applies as above, regarding the first appointment.

4.2.2.2. Criterion "Ability to perform judicial function"

4.2.2.2.1. Sub-criterion "Work experience"

Work experience is awarded with ¼ of the total number of points (0-25), but there are no parameters for its evaluation.

Earlier HRA proposal whichhas been ignored suggests that the candidates from outside the judiciary should be evaluated on an equal grounds and granted fair treatment in relation to advancing judges. Current solution discouragesacademics, lawyers, prosecutors, notaries and all those who have particularly desirable experience and knowledge needed to apply for judicial office.

Assessment of the kind of work experience has also been neglected, and it should be of importance for the appointment of a judge in a particular judicial department. To ensure that judges make a full contribution to improving the quality of trials, it is necessary to ensure that a candidate who has tried and perfected in one area for yearsuses experience and knowledge gained in such manner to advance to the higher court. This especially because Montenegro has not encouraged the specialization of judges, but it was common, for example, for a judge who has tried during most, especially recent yearsof his/her career in a criminal matter to be appointed a judge of the Civil Department of the Supreme Court.

> The lack of parameters ensuring that the same length and same kind of work experience is always equally assessed isa disadvantage that allows arbitrary decision-making and evaluation of the sub-criteria, which can ensureup to ¼ of the total number of points.

4.2.2.2.2. Sub-criterion "Achieved results in the last three years"

Sub-criterion *achieved results of the last three years*also carries ¼ of the total number of points (0-25). However, this sub-criterion tooincludes no parameters (indicators) which would indicate how to carry out the assessment.

Instead of elaborating in the Rules of Procedure the bases explicitly laid down in the Law on the Judicial Council, these legal basis are mentionedneither in Art.44, which states that the working results are assessed jointly ona 0 to 25 pointscale, nor in form No. 4, which also provides for the section for total score only.

Law on the Judicial Council under Art. 32a,para 2, line b, explicitly states that the results of a judge's work in the past three years are assessed based on:

1) the number and type of cases solved and method of solving;

2) the number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;

3) the percentage of solved cases in relation to approximate norms;

4) resolving cases in the order received;

5) timely acting and decisions-making;

6) the number of time barred cases;

7) the number of founded review requests.

It remains completely unclear based on which parameters these elements explicitly listed in the law as the bases for evaluatingthe work of judges shall be assessed. (For example, what "number" and what "type of solved cases" deserve a grade 5 or 4, 3, 2 or 1? What "percentage of solved cases in relation to approximate norms" deserves a grade 5, or 2?) Without standards (parameters, indicators) for evaluation of the elements ofsub-criteria, the criteria are merely a curtainbehind which there is still too much room for arbitrary and inconsistent evaluation of judges and career prospects of those with essentially worse results.

It is necessary to prescribe the parameters for assessment of judges on all the elements mentioned in the Law on the Judicial Council (Art. 32a, para 2, line b) and provide a system of regular evaluation of judges. See Chapter 9 for details.

Specifically, in relation to*thenumber and type of cases solved and method of solving*, there is ample room for arbitrary assessment of resolved cases according to reports, arbitrary assessment of cases resolved based on the merits or otherwise, arbitrary assessment of cases resolved through mediation and settlement.

The practice shows that the courts render most decisions in December each year and this information has been publicly communicated by the President of the Supreme Court and the Judicial Council.[120]These decisions

120 At the Round Table "Human Rights in Montenegro - the challenges of institutional protection" held on 10 December 2010 on the occasion of International Human RightsDay at the Faculty of Law of the University of Montenegro, the President of the Judicial Council and the Supreme Court of Montenegro VesnaMedenica spoke about the statistical data concerning the results of the courts operations and noted that the results will soon be even better "since the courts adopt most decisions in December".

are included in the number of solved cases based on which the work of judges is assessed, but it has notbeen taken into account how many of those decisions are not based on merits, orhow many decisions were later revoked by the second instance court. What particularly conceals the actual (lack of) quality of the work of judges is the fact thatthe cases where the decisions had been revoked were later assigned a new number at the first instance court, in accordance with the Court Rules. This provides a legal basis which enables concealing ofthe substandard work of a judge and at the same time, through the number of solved cases, i.e. the quantity (which increases due to the decisions that are revokedas a result of poor performance of judges), substandard work is assessed with a higher grade.

For example, in the case initiated in October 2008 before the Basic Court in Podgorica, a judge issued a decision[121]in December 2009 to discontinue the proceedings. This decision was quashed, on party's appeal, by the High Court decision[122] in May 2010 and the case was returned to the Basic Court, which scheduled a hearing for 21 October 2010, but with a new case number assigned to it[123], which indicates that this was a new case from 2010. Basic Court judge adopted a decision in this case in January 2011, by the High Court quashed it in November of that year and returned the case tothe same judge of the Basic Court. The case was then assigned a new number (third from the beginning of the proceedings),[124] and the judge adopted a new decision in April 2012.

So, in this case the judge issued a total of three decisions, two on the merits and one procedural decision, which are treated as decisions in three cases, due to changing of the case number. Despite the fact that in this case two decisions abolishing the decisions of this judge were rendered, the lack of evaluation parameters allows this judge to be rated higher than someone who would havesolvedthis caseby rendering a merit-baseddecision. Therefore, the fact that it took three and half years for this case to end due to the poor performance of this judge and that the judge's substandard work caused an increased quantity of the decisions issued by him, may lead to absurdity and serve as a basis for better assessment of this judge.

It is particularly unclear how the work results are assessed in relation to the *number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy*.

121 P. br. 2537/08 of 24 December 2009.
122 Gž. br. 1914/10-08 of 25 May 2010.
123 P. br. 2473/10.
124 P. br. 5043/11.

Evaluation of the quality of a judge's performance under this sub-criterion in the reports on the work of the courts is expressed as a percentage by recording the number of confirmed, modified and overruled decisions out of the total number of decisions on remedies, and then expressing it as a percentage. However, **this sub-criterion completely overlooks the total number of decisions issued and in particular the decisions that have become final and that neither party hasappealed to**. For example, a judge who would have only one decision on the appeal, which was reversed, would have a percentage of 100% reverseddecisions, although in all other cases the parties were satisfied with his decision and did not file an appeal. Under this sub-criterion all these final judgments would not be evaluated, which is unreasonable and unfair.

For more details on shortcomings in the evaluation of the quality of work of judges in Montenegro, see section 9: Assessment of the quality of performance of judges in Montenegro in the light of international recommendations and comparative experience (for the assessment of "achieved results" see especially 9.2.2).

Further, the sub-criterion"achieved results in the last three years" carries 25 points, allowing ample room for arbitrariness and subjectivity in the evaluation because there is no indication as to how many points a certain percentage of confirmed, modified or overruled decisionswill earn.

Law on the Judicial Council states that the work resultswill also be valued on the basis of *resolving cases in the order received*. This basis of assessment has become meaninglessdue to the courts practice to assign new case numbers after the abolition of decisions by the second instance court. Thus, in the above example, the judge's apparently substandard work on this basis could have obtained more points because the cases' numbers indicate he had acted in three, not in one case, hence one could come to an absurd and unfounded conclusion that this judge handled the cases in the order of receiving, and even acted promptly.

Ifthe basis of *time formaking decisions*is to be added to all the above, it appears thaton that basis toothe judge who performs his tasks in such unsatisfactory manner could get more points, because his time for making three decisions would have been assessed with regard to three different case numbers, although his substandard work caused the adoption of three decisions (for now) in the case that could have be ended in one decision!(In relation to the timeliness of the CEPEJ standards, see 9.2.2)

Given that the results of work of the past three years, with work experience, are awarded most points and that these two sub-criteria together carry ½ total points (50), complete absence of parameters for evaluating any of the mentioned bases and awarding a certain number of points for any of them, leaves room for biased and inconsistent evaluation of judges and their promotion.

4.2.2.2.3. Sub-criterion "Communication skills and personal conduct"

For assessing*communication skills and personal conduct*a point scale from0 to 10 has been envisaged, while it is also quite unclear how the score for this sub-criterion can be precisely determined numerically based on one conversation, guidelines for which has not been prescribed. Given that this sub-criterion is the same for boththe judges who are advancingand those appointed for the first time, the same comment previously stated applies.

4.2.2.3. Criterion "Worthiness to perform judicial function"

4.2.2.3.1. Sub-criterion "Violation of the Code of Judicial Ethics"

Violation of the Code of Judicial Ethics is a sub-criterion assessed on a point scale from0 to 8. Bearing in mind the fact that the Judicial Council, since its establishment until now[125], has not yet found a violation of the Code, and that since the establishment of the Commission for the Code of Ethics on 1 October 2011, the Commission provided its opinion only in two cases (both times that the judge did not violate the Code)[126], the question is how this sub-criterion isevaluated and based on what a candidate can obtain more or less points under this sub-criterion.

As with the evaluation of the fact that a candidate "has not been convicted of criminal offenses or punished for offenses",scoring of this sub-criterion too proves absurd.

125 Before the entry into force of the Law on the Judicial Council, establishing any violations of the code of ethics was the responsibility of the Association of Judges, which also adopted the Code.

126 Su.EK.br. 1/11of 29 December 2011 and Su.EK.br. 2/11 of 29 December 2011.

4.2.2.3.2. Sub-criterion "Relationship with colleagues and clients"

Sub-criterion *relationships with colleagues and clients* isawarded 0 to 4 points, unlike inthe case of a judge appointed for the first time, where this sub-criterion is awarded up to 6 points. Unlike in the case of judges appointed for the first time, it is at least certain that there are parties in respect of which the relationship of a judge could be evaluated. However, it is completely unclear how this relationship will beassessed, based on which information, and how that information will be evaluated using points. This particularly applies to the evaluation of relationship with clients because it is not known whether information from the clients will be obtained, from which parties, will the number of complaints filed against judges be assessed, etc.

HRA reiterates the proposal that the forms contain a section for recording sources of information upon which the evaluation is carried out, since it remains debatable in which way the Judicial Council obtains information for evaluating the criteria and sub-criteria, especially "relationship with colleagues and clients" and "reputation and irreproachableconduct".

4.2.2.3.3. Sub-criterion "Reputation and irreproachableconduct"

This sub-criterion is awarded from 0 to 8 points, but, as with the first appointment of a judge, it is again unclear on what basis the reputation and conduct of candidates is assessed, on what basis it is awarded different numerical values. It is unclear what represents the basis for scoring the reputation of judges, and especially how and why the Commission could make different assessments. Behaviour indicating that a certain judge is loyal to vices to the extent that harms his honour and reputation of the judicial profession, should be a problem for holding a judicial office. If there isno such conduct, then it is absurd and unfounded to assess reputation.

4.2.3. Appointment of presidents of courts

Amendments to the Law on the Judicial Council, which came into force in August 2011, provide that, in addition to the criteria for the appointment of an advancing judge, the court president must have the ability to manage and organize work in the courts, which is assessed in relation to (Art. 32, b):

1) ability to organize work;

2) knowledge of operations of the court administration;

3) reputationa candidate enjoys in the court where he/she performs a judicial function;

4) commitment to preserve the independence of the court and judges.

The new Rules of Procedure of the Judicial Council prescribe the range of points a candidate for the president of the court can receive under all sub-criteria for theappointment of an advancing judge and for the court president (Art. 45). However, again none of the criteria include parameters for their evaluation, which leaves room for partiality in appointing the presidents of the courts.

Earlier HRA proposal to prescribe the obligation for obtaining written opinion of the judges of the court whose president is being elected about the candidate for president has been disregarded.

4.3. Recommendations

1. Rules of Procedure of the Judicial Council should be amended to lay down the precise standards (parameters) for assessing each criteria and sub-criteria, so as to ensure a uniform and objective assessment of candidates, as has been started in relation to the criterion "Average grade and duration of studies".

2. It is essential that the Judicial Council, in accordance with its Action Plan, urgently adopts internal documents defining qualitative and quantitative assessment of judges, bearing in mind that according to the Action Plan of the Judicial Council this should have been carried out in 2010.

3. Instead of a numerical score of 1-5, evaluate the criterion of "Worthiness to perform the judicial function" descriptively, in the range "satisfactory - unsatisfactory", primarily to highlight the potential problems in terms of worthiness for the position of a judge.

4. Define "Communication skills" as a separate criterion, except in respect of candidates for presidents of courts, where this property is to be assessed descriptively, rather than numerically.

5. "Work experience" should not be assessed numerically, as currently prescribed - it is enough to verify that a candidate meets special minimum requirements for the position of a judge in terms of years of experience in the field of law, while the place of service should be noted and assessed in light of the fulfilment of other criteria. Stipulate that judicial advisors will have an advantage in case of equal fulfilment of other criteria.

6. Regarding the criterion "Achieved results", specify what is implied under the sub-criterion "Career advancement", how to obtain information with regard to that, and objectify "Opinion of the employer" by providing for a special questionnaire that would provide concrete answers about the type of work activities the candidate has carried out and in which area has he advanced. Evaluate achieved results descriptively with a rationale, rather than numerically, as prescribed.

7. Prescribe appropriate scoring system for the criteria "Published scientific papers and other activities" and "Professional development" for the purpose of their uniform assessment. Particularly consider assessment of the criteria for appointment to higher functions in the judiciary in relation to candidates from universities, bar association, etc., to ensure their uniform assessment.

8. Under the sub-criterion "Academic qualification" prescribe a precise scoring system for degrees Master of Laws, Doctor of the Science of Law, as well as for completion of other relevant forms of education. When defining the scoring system, bear in mind that access requirements for judicial function for scholars should be eased by prescribing that they are not required to attend initial training for judges. In that sense, HRA strongly recommends that the academic qualification be valued significantly higher in order to stimulate judges to acquire specialized knowledge and professional development.

9. Provide that work experience be assessed descriptively, in terms of type of acquired experience relevant to the judicial position the application has been submitted for. As regards the length of the judicial experience, it is sufficient to meet the special condition for appointment of a judge from Art. 32 of the Law on Courts, because the length of experience does not always have to be an advantage (same at the first appointment as a judge). Otherwise, specify parameters to ensure that the same length of experience always earns the same score.

10. Objective assessment of "Achieved results" of judges candidates for judges of higher courts requires urgent prescription of parameters (stand-

ards, indicators) for the scoring, i.e. the assessment of judges' performance in terms of all the sub-criteria: the method of resolving cases, quality of work expressed by the number of confirmed, modified and overruled decisions, and others. The Law on Courts should specify the procedure for regular assessment of judges in accordance with the Methodology for drafting annual reports on the work of individual judges. Prescribe the parameters to assess the assignment of cases in the order they were received and compliance with statutory deadlines, as well as the method for obtaining this type of information regarding the work of judges.

11. Forms should include a section for keeping a record of sources of information based on which the assessment has been carried out, since it remains controversial how the Judicial Council obtains information upon which it assesses the criteria and sub-criteria, especially "the relationship with colleagues and clients and reputation and out of office conduct".

5. PRACTICE OF THE JUDICIAL COUNCIL IN THE APPOINTMENT OF JUDGES

5.1. General remarks and conclusion

In the second half of 2011 there have been changes to the regulations relevant to the appointment of judges. In late July 2011, the Law on Amendments to the Law on the Judicial Council (*Sl. list CG,* 39/2011) was adopted, specifying the criteria and sub-criteria and changing certain other aspects of the process of appointmentof judges. The new Rules of Procedure of the Judicial Council of 18 November 2011 stipulate a range of points assigned to each sub-criterion (*Sl. list CG*, 57/2011).

HRAhas divided the analysed decisionsinto two main groups - decision reached prior to the change of regulations and decisions adopted on the basis of the amended regulations. Also, in accordance with the division of the criteria for the appointment of judges, decisions have beendividedinto those concerning the first appointment of candidates for a judge and those on promotion of judges.

In relation to all these decisions, the same pattern is discernible, especially in terms of rationales. Rationales are not sufficiently substantial and convincing, especially in those cases where no explanation whatsoever has been provided as to why the Judicial Council opted to appoint those candidates who have had fewer total points than opponents who were not selected. There were a total of eight such decisions (fiveprior to 2011 amendments to the regulations and three after the amendments until the end of June 2012), based on which 23 judges have been appointed. Only on the occasion of one of these decisions the administrative proceedings were initiated, as described below.

5.2. Commission for the Appointment of Judges / Testing Commission

According to Article 10 of the previous Rules of the Judicial Council, in force until 18 November 2011[127],the Commission for the Appointment of Judgeshad a president and two members. Commission President was the President of the Judicial Council and President of the Supreme Court, the majority of the members of the Commission consisted

127 *Sl. list CG*, 35/2008,38/2008 and 6/2009.

of judges and the Commission was appointed for a term of one year. The Commission had theresponsibility to: a) verifytimely submission of applications and completeness of submitted documentation; b) conduct interviews with candidates c) prepare the test, conduct testing of candidates and evaluate test results when the Judicial Council decides to conduct written examination,and d) make a ranking list of candidates. Members of the Commission were the only ones rating the candidates by filling forms for evaluation after the interview with the candidates.[128]

As of 28 January 2009 it was prescribed that a member of the Judicial Council who is not a member of the Commission for the Appointment may access the written tests of candidates and participate in the interview with the applicants.[129]

Composition of the Appointment Commission contributed to the impression that the judiciary is administered autocratically, which has also been pointed out by the Venice Commission.[130] Control over the appointment of judges has been established by the Supreme Court President, elected solely by the political will of the ruling majority. The Supreme Court President, who is also the President of the Judicial Council *ex officio*, is *ex officio* the President of the Commission for the Appointmentof Judges. It is logical to assume that a person with such strong political support and the concentration of power[131] has a crucial role in the AppointmentCommission where he/she constitutes majority with one more judge.

The Council's documentation available to the public does not reveal whether the Council members who were not part of the Appointment Commission used their right of access to the written tests of candidates and participated in interviews with candidates. On 18 April 2012 HRA requestedthe Judicial Council to provide information whether any member of the Judicial Council has ever used this right and reviewed the tests of candidates and participated in interviews; on this occasion the Council submitted a notification stating *"that some members of the Judicial Council attended and participated in interviews with the applicants conducted by the Commission for the Appointment and had an insight into the completed and evaluated tests of*

128 *Ibid*, Art. 36 of the Rules.
129 Decision on amendments to Art. 10 of the Judicial Council Rules of Procedure published in*Sl. list CG*, 6/2009.
130 The Venice Commission on the Constitution of Montenegro, 2007, items 88-92 and 96.
131 See „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", p. 75.

candidates", without further details.[132] Moreover, even if the Judicial Council members have used this opportunity regularly in every case, it still was not of obvious importance, since not one decision of the Council on the appointment of judges notes such actions.

Instead of the Commission for the Appointment of Judges, the new Rules of Procedure of the Judicial Council (Art. 13) of 18 November 2011 envisage the Testing Commission which shall:

- verify timely submission of applications and completeness of submitted documentation;
- prepare the test, conduct testing of candidates and evaluate test results;
- determine the average number of points based on the assessment of each member of the Judicial Council;
- make a list of candidates for the appointment.

The Commission still has a president and two members, who also have their deputies appointed, and it is appointed for a period of one year (Art. 11 and 12). The new Rules omit the provision under which the President of the Judicial Council is the President of the Commission, while other provisions indicate that this possibility is not excluded.

However, the description of the competences of the Commission indicates that now all members of the Judicial Council participate in interviews with candidates and evaluate candidates, which significantly enhances the impression of the fairness of the appointment process.

5.3. Practice of the Judicial Council prior to 2011 regulations changes

5.3.1. Appointment of judges appointed for the first time

Prior to amending the regulations in the second half of 2011, the Judicial Council:

• in 2008 issued 8 decisions on the appointment of judges appointed for the first time, based on which 18 judges of the basic courts came into office;

• in 2009 issued 8 decisions on the appointment of judges appointed for the first time, based on which 8 judges of the basic courts came into office;

132 Which does not contain a reference number and the date of adoption.

• in 2010 issued 16 decisions on the appointment of judges appointed for the first time, based on which 19 judges of the basic courts came into office;

• in 2011 issued 7 decisions on the appointment of judges appointedfor the first time, based on which 7 judges of the basic courts and 1 judge of the Administrative Court of Montenegro came into office.[133]

The analysis of these decisions indicates that they were made using the same patternand do not contain indications of how candidates have been evaluated, on what basis and criteria, but they usually accept the decision of the Commission for the Appointment, chaired by the President of the Supreme Court. In two cases of the appointment where the Commission evaluated a candidate not better than others,it is statedthat this was a majority decision, without any further explanation. The fact that the content of each decision is practically the same, without more substantial reasoning, casts doubt on the method of the appointment of judges and indicates the possibility that judges are not chosen objectively.

Decision rationales note that the Appointment Committee compiled a list of candidates who have been tested, a brief overview of assessment results after conducted interviews and that this was submitted to the Judicial Council, which found that the Commission considered the results of the test, results after the interview, expert knowledge, experience, working results, published scientific papers and other activities, training of candidates, submitted opinions of the professional and working qualities, and then a gradethe candidate received.

It is not clear how the Judicial Council established all aforementioned from the list of candidates with a brief overview of assessment results. Such rationales are not sufficiently convincing and allow doubt that the Judicial Council has not exercised access to the documents of candidates, that not all its members wereinterested to learn about the characteristics of candidates, and that they were in advance ready to leave the decision on the selection to the Appointment Commission, which, in turn, had an obligation to explain how it had evaluated the candidates.

Although the provision of then in force Art. 33, para 4 of the Judicial Council Law provided that the Appointment Commission decides on candidates' grades by majority vote, each of the analyzed 39 decision state that each candidate had beenunanimously assessed by the Commission.

133 Based on information from the Judicial Council website (http://sudovi.me/sscg).

At the end of almost every decision's rationale there is the same formulation that the candidate has beenselected only because he "has higher overall score than other applicants". Thus, the identical rationales indicate that the Judicial Council only stated that the Appointment Commission evaluated the selected candidate with the highest grade. The decisions do not include a closer explanation of the methods for evaluation of candidates, which is particularly contentious given that neither then nor later the parameters for evaluating (scoring) the criteria were prescribed, allowing disproportionate space for inconsistent and subjective evaluation.

In addition to the majority of decisionson selection of candidates assessed by the Commission with the highest number of points, there are those on the selection of candidates who did not receive the highest score in relation to other candidates. In such cases it is stated that the candidate has been chosen by the Judicial Council by "majority vote",withoutstating the reasons that influenced the majority not to support the candidate best assessed by the Commission.[134]

These shortcomings in the decisions of the Judicial Council are best illustrated inthe following two examples. The first is the decision of May 2011, on appointment of a judge of the Administrative Court of Montenegro.[135]

Pursuant to the Law on Courts (Art. 32, line 4)[136]appointment of Administrative Court judge requires work experience in the legal profession for at least 10 years. According to this provision, only the Supreme Court judge needs longer experience (15 years), a judge of the Appellate Court needs the same experience as a judge of the Administrative Court, while judges of the high, commercial and basic courts need significantly less experience (8 years, 6 years and 5 years). This provision implies that ajudge of the high, commercial or basic court, who would be appointed a judge of the Administrative Court, would in fact be promoted.

On 9 May 2011 the Judicial Council issued a decision that an advisor of the Administrative Court be appointed a judge of that court,which means that this candidate has been appointed a judge for the first time. However, the said decision notes thatthree candidates have applied for this vacancy announcement, and that, in addition to the adviser in this court, the other two candidates were judgesof the Commercial and of the Basic Court in Podgorica. It is assumed that the appointed candidate was evaluated by the criteria ap-

134 See decisions: Su.R.br.1212/2010 and Su.R.br.272/2011.
135 Su.R.br.406/2011.
136 *Sl. list RCG*, 5/2002 and 49/2004 and *Sl. list CG*, 22/2008 and 39/2011.

plied at the first election for a judge, while the other two candidates were evaluated according to the criteria applied in relation to advancing judges. However, as these criteria are not congruent, and it is not stipulated how to assess them in the case of parallel application, the Judicial Council should have noted something with regard to that in the rationale of its decision.

TheJudicial Council Rules of Procedure in force at the time of the adoption of this decision provided that the criterion Work experience, with regard to advancing judges, shall be determined on the basis of the length of judicial service (Art. 35). On the other hand, for candidates appointed as judges for the first time,the length of service and the place of service are evaluated (Art. 33).

By unanimous decision of the Appointment Commission the candidate who was an adviser in the Administrative Court was rated highest, but the decision on the appointment of the Judicial Council does not include an explanation as to how did the Commission reach this assessment, what were the grades of the candidates already working as judges and how many points were they awarded based on the length of judicial experience, and how is it possible that a candidate, who could not get points based on the length of judicial service, israted better than the candidates who were judges.

It is possible for a candidate who was an adviser toultimatelybe assessed better than the candidates who are judges, but such a case requires detailed explanation as to how such assessment had been reached. Otherwise, with this method of deciding not accompanied by any explanation, the appointment of this judge raises doubt, as well as the qualities of previously appointed judges who had been performing a judicial function for years, but have obtainedfewer points than an advisor in the court.

Rationale for this decision, as well as for all others in the past, comes to the conclusion that the selected candidate "is awarded higher overall score compared to other candidates applying for the post of the Administrative Court judge".

The decision on the appointment of a judge of the Basic Court in Berane of 8 February 2010[137], after listing the grades the Appointment Commission awarded each candidate, states the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment

137 Su.R.br.169/2010.

Commission, the Judicial Council has decided to appoint A.Ć. as a judge of the Basic Court in Berane. This due to the reason that the above candidate, which also follows from the aforesaid, has been awarded higher overall grade compared to other candidates applying for the post of a judge of the Basic Court in Berane.

Therefore, in this case, as in most other cases,[138] the Judicial Council has essentially confirmedthe choice of the Commission, without any indication of how the evaluation of each candidate was conducted, what is they reference, and what did the Commission establish by examining their reference.

Contrary to this view, pursuant to the decision on the appointment of two judges of the Basic Court in Nikšić from 16 February 2011[139],the selected candidate D.B.was awarded lower overall grade (4)by the Appointment Committee thancandidate M.B. who was not selected (4.14), so after listing the grades the Committee awarded each candidate, the following was stated:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, the Judicial Council has decided by majority vote to appoint candidates N.T. and D.B. as judges of the Basic Court in Nikšić.

Similarly, on 31 March 2011the Judicial Council appointed a judge of the Basic Court in Kotor[140], although the selected candidate had lower overall score than another candidate who was not selected (3:57 compared to 4), which has been justified only by stating that the appointment was decided "by majority vote":

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, the Judicial Council has decided by majority vote to appoint candidate D.Ć.asa judge of the Basic Court in Kotor.

These decisions indicate that a candidate has been selected by majority vote in the Judicial Council, regardless of the total number of points or other reference based on which he deserves to be appointed. This decision contains no reason as to why the majority of the members of the Judicial Council voted for the candidate who has a lower score than another candidate.

138 Su.R.br.167/2010, Su.R.br. 541/2010, Su.R.br. 371/2010, Su.R.br. 786/2010, Su.R.br. 372/2010, Su.R.br. 787/2010, Su.R.br. 373/2010, Su.R.br. 540/2010.
139 Su.R.br. 1212/2010.
140 Su.R.br. 272/2011.

Due to the lack of a rationale, it remains unclear whether the judges were appointed on the basis of their grades or majority vote in the Judicial Council, and on what basis the Judicial Council members have generally voted. This practice does not secure public confidence in the objective work of the Judicial Council.

5.3.2. Appointment of an advancing judge

Prior to2011 amendments to the Judicial Council Law and the Rules of Procedure of the Judicial Council, the Judicial Council:

- in 2008 issued 5 decisions on promotion of judges, on the basis of which 11 judges of high courts came into office;
- in 2009 issued 7 decisions on promotion of judges, on the basis of which 8 judges of high courts, 2 judges of the Appellate Court of Montenegro and 1 judge of the Supreme Court of Montenegro came into office;
- in 2010 issued 8 decisions on promotion of judges, on the basis of which 8 judges of high courts, 2 judges of the Appellate Court of Montenegro and 3 judges of the Supreme Court of Montenegro came into office.

As in the case of decisions on the first appointmentas a judge, analysis of these decisions too shows that the decisions were made using the same pattern, that no decision has meaningful explanation which might suggest why a particular candidate has been promoted, especially when the selected candidate has had lower score than others. No decision on the appointment contains indicationof how candidates were evaluated in relation to certain criteria and based on which parameters. It is not certain that the Council as a whole conducted a review of the records of all candidates. These shortcomings as regards proper rationales cast doubt on the promotion of judges during this period.

All decisions on the appointment of advancing judges from this period are identical in content. Rationales state that the Appointment Commissioncompiled a list of candidates[141] and a brief overview of assessment results after the interviews, and that the list was submitted to the Judicial Council, which found that the Commission considered the results

141 Only the words “that have been tested” have been left out of the rationales of decisions on the appointment of judges elected for the first time, and in all other aspects explanations are the same as in those decisions.

of the interview,[142] the expertise, experience, work results, published scientific papers and other activities, training of candidates, submitted opinion on their professional and working qualities, and thenstate which grade a candidate received.

Rationales of these decisions have the same shortcomings as rationales of decisions on the first appointment as a judge. They indicate that the Judicial Council relied on the list of candidates with an overview of assessment results, without reviewing the documentation of candidates, and that the decision on the appointment was essentially left to the Appointment Commission. Although the decisions stated that the Appointment Commissionconsidered the results of candidates from previous years, rationales of these decisions show that the Judicial Council as a whole has not been directly informed about these results.

Template rationales of decisions on the appointment of advancing judges have been partially amended by the Judicial Council in 2009 by adding that the Judicial Council made the decision "after examining the reference of applicants, as well as theirachieved results in 2007, 2008 and 2009". However, even these decisions contain no explanation as to what the Judicial Council has found by examining the references and achieved results of candidates, or how they were assessed. Bearing in mind that the parameters for evaluation of the criteria and sub-criteria such as achieved results are not prescribed[143], the lack of explanation gains in importance.

However, in decisions on the appointment of advancing judges adopted in 2010 the Judicial Council uses both new and old rationale patterns. Four decisions on the basis of which four judges advanced to a High Court still provide rationale indicating that the Judicial Council did not examine the reference and working results of the judges and that the decision was made solely on the basis of the list andassessment results of the Appointment Commission. In other four decisions from 2010 the Judicial Council noted that it had examinedthe reference and working results, but there is no indication of what the Council identified thereby and how it evaluated the reference and working results.

Such practice indicates that the Judicial Council makes decisions on different criteria and appoints certain candidatesas judges after examining

142 Here too the only part left out notes that the Commission took into account the results obtained in the written test, and in all other aspects explanations are the same as in decisions on the appointment.

143 For a more detailed explanation see sections 4.2.2.2.2. and 9.

their references and results, while other judges are appointed without such examination, i.e. that in all cases thedecisions offer template rationales, and that the Council only formally states the selection previously conducted by the Appointment Commission.

As the decisions on the first appointment of judges, thedecisions on the promotion of judges too note that each candidate has been assessed unanimously by the members of the Appointment Commission.

At the end of the reasoning of the majority of decision there are identical statements that a candidate has been elected because ''he obtained higher overall grade as compared to other applicants".

Thus, the decision on the appointment of three judges of the Supreme Court of Montenegro of 8 February 2010[144],after listing the gradesawarded to each candidate by the Appointment Commission, notes the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, after having examined the references of applicants and working results of 2007, 2008 and 2009, the Judicial Council decided to appoint candidates B.F., D.M. and R.K. as judges of the Supreme Court of Montenegro in Podgorica. This due to the reason that the above candidates, which also follows from the aforesaid, have been awarded higher overall grades compared to other candidates applying for the post of a judge of the Supreme Court of Montenegro in Podgorica.

So, the Judicial Council has essentially confirmed the choice of the Commission, without any indication of how the assessment of eachcandidate was carried out, what are their references and what the Judicial Council found by examining the reference. Ultimately, the question is whythe Judicial Council examined the references of candidates if the decision implies that the candidates were selected because they had beenassessed better than others by the Commission.

Other decisions of the Judicial Council too contain identical explanations.[145]

Contrary to this view, the decision on the selection of two judges of the High Court in Podgorica of 16 November 2010[146]appoints a candidate with

144 Su.R.br.163/2010.
145 Su.R.br. 227/08, Su.R.br. 356/08, Su.R.br. 445/08, Su.R.br.369/2010, Su.R.br.164/2010, Su.R.br.537/2010, Su.R.br.539/2010, Su.R.br. 310/2010, Su.R.br. 165/2010.
146 Su.R.br. 1212/2010.

lower overall score compared to four other candidates, so after listing the grades awarded to each candidate by the Appointment Commission, the decision notes the following:

Considering the list of candidates, the results of the assessment of all criteria and established overall grades of the candidates by the Appointment Commission, after having examined the references of applicants and working results of 2007, 2008, 2009 and the first half of 2010, the Judicial Council decided by majority vote to appoint candidates K.Dj. and P.T. as judges of the High Court in Podgorica. This due to the reason that, in accordance with Article 128, para 2 of the Constitution of Montenegro (Sl.list CG, 1/07), the Judicial Council decides by majority vote of all members.

So, this decision implies that a candidate who received a majority vote of the Judicial Council shall be selected, regardless of his grade, his reference andachieved work results. This decision includes no reason that would explain why the majority of the Judicial Council members voted for the candidate who has a lower score than the other four candidates.

In the same way the Judicial Council appointed judges of the High Court in Podgorica in its decision of 1 October 2008[147], wherethe candidates' scores werealso neglected, so out of six judges, four judges with lower scores than other candidates were selected. The decision does not state why exactly those candidates have been appointed judges, but only that it has been done "unanimously".

Therefore, it remains completely incomprehensible whetherjudgesprogress based on their score or majority vote of the Judicial Council, i.e.on what basis the Judicial Council members vote.

5.3.3. Appointment of presidents of courts

Prior to the amendments of regulationsin July and November 2011, according to information from the website, the Judicial Council:

- in 2009 issued 14 decisions on the appointment of the court president, based on which 11 presidents of basic courts, 2 presidents of high courts and 1 president of the Administrative Court of Montenegro came into office;
- in 2010 issued 6 decisions on the appointment of the court president, based on which 5 presidents of basic courts and 1 president of the Appellate Court of Montenegro came into office.

147 Su.R.br. 357/08.

Analysis of these decisions shows that the decisions were made using the same pattern, that no decision has meaningful explanation which might suggest why a particular candidate was appointed, while other was not, no decision contains indications of how candidates were evaluated in relation to certain criteria and based on which parameters, nor do they mention or evaluate ideas or programs of the courts presidents to improve the work in courts. Therefore, incomprehensible content of these decisions justifies the suspicion that the presidents of courts are not elected fairly, based on merit.

Every decision on the election of the court president has identical content andtemplate rationalestipulating that the Appointment Commission evaluated candidates after the interview and submitted a brief overview of assessment results to the Judicial Council, which found that the Commission considered the results of the interview[148], the expertise, working experience, working results, published scientific papers and other activities, training of candidates, submitted opinions of the professional and working qualities, performance of candidates and then noting the grade a candidate obtained.

These decisions too do not indicate how the Judicial Council managed to determine all of the above after brief overview of assessment results, which leaves the impression that the choice is actually left to the Appointment Commission. Although these decisions as well note that the Appointment Commission considered the results of candidates from previous years, the decisions rationales also show that the Judicial Council was not directly informed about these results.

Template rationales of decisions on the appointment of courts presidents, where the judges who have applied or have been appointed, already held a post of the court president they had applied for, were partially amended by the Judicial Council by adding that the Council found that the Appointment Commission also had an insight into *"candidate's achievements in the previous term, expressed through the overall timeliness of that court and the application of the Law on the protection of the right to trial within a reasonable time, as well as the consistent application of the Law on Courts and the Law on the Judicial Council"*. However, this decision does not indicate that the entire Judicial Council reviewed the results of the candidate who is the court president, or timeliness of the court whose president is elected, or the application of these laws.

148 Here too the only part left out notes that the Commission took into account the results obtained in the written test, and in all other aspects explanations are the same as in decisions on the appointment.

Also, the decisions do not specify how the Appointment Commission obtainedinformation on the results of thecourt operations, timeliness and consistent application of laws, or state the method of evaluating all of the above.

Two decisions on the appointment of the higher court presidents[149], one decision on the appointment of the President of the Appellate Court of Montenegro[150] and two decisions on the appointment of the basic courts presidents[151] note that the Appointment Commission had an insight into candidate's *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"* in accordance with Article 32, para 4 of the then applicable Rules of Procedure of the Judicial Council,[152] which provided that thesetopicstoo be considered during an interview with a candidate. However, the reasoning of these decisions does not contain any indication of how these candidates presented their "*view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"*, or how the Appointment Commission evaluated the abovesaid.

Besides being concerned about the fact that the Judicial Council appointedcourtpresidents without directly reviewing and considering the candidates' opinion in respect of the court operations, it is unclear on what grounds other decisions on the appointment of court presidents donot mention whether the Appointment Commission examined such views of the candidates. This especially because Art. 32,para 4 of the then applicable Rules of the Judicial Council[153] expressly stipulated that during an interview with a candidate for president of the court, theAppointment Commission shallparticularly examine his views regarding problems in the functioning of the court, manner of solving these problems and ideas for improving the work of the court.

This raises the suspicion that in all other interviews the Appointment Commission completely ignored its obligation to examine the above criterion, and that the applicants did not at all express their *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"*. In this way, the presidents of courts were selected on unequal terms.

149 Su.R.br. 612/09 of 9 June 2009 and Su.R.br. 454/09 of 16 April 2009.
150 Su.R.br. 162/2010 of 8 February 2010.
151 Su.R.br. 368/2010 of 18 March 2010 and Su.R.br. 1085/2010 of 11 October 2010.
152 *Sl. list CG*, 35/2008, 38/2008and 6/2009
153 *Sl. list CG*,35/2008, 38/2008and6/2009

This practice indicates eitherthat the Judicial Council makes decisions on different criteria and appoints certain candidates for the court president after an insight into their *"view of the problems in the functioning of the court, method of solving these problems and ideas for improving the work of the court"* and other candidates without applying this obligation, or that in each case the appointment of the court president is explained by a template rationale and that the Council only formally confirms the choice of the Commission.

As in all previously analyzed decisions, these too state that the Appointment Commission adopted their decisions unanimously.

In any case, decisions on the selection of court presidents do not indicate why a particular candidate was appointed, while some others were not. Rationales that come toa conclusion that a certain judge was elected a president because he received better grade then other candidates, without any indication of how all the applicants were assessed, or because that was done by evaluating the results of the assessment (where only one candidate applied), are not convincing. This especially considering that the decisions imply that the Judicial Council too had no access to anything that would suggest how the assessment in making the decision has been carried out.

5.4. Practice of the Judicial Council following 2011 regulations changes

According to data from the website of the Judicial Council, following the amendments to the Judicial Council Law on 22 July 2011 and adoption of the new Rules of Procedure on 18 November 2011, eight decisions on the appointment of judges were issued as follows:

- two decisions on the appointment of four judges of higher courts;
- one decision on the appointment of a judge of the Administrative Court of Montenegro;
- four decisions on the appointment of six judges of basic courts, and
- one decision on the appointment of a judge of the Appellate Court.

Analysis of these decisions shows that the changes to regulations have not influenced the Judicial Council to change its practice and provide better rationalesfor its decision. Amendments to the regulations specified the criteria, introduced the scoring system, but also direct participation of all members of the Council in interviews with candidates and their evaluation. However, despite this, once again the adopted decisions contain no explanation about the appointment of candidates who did not have the highest score or were not evaluated better than the rest of candidates.

If the Rules do not explicitly prescribe the cases allowing derogation in favour of a candidate with fewer points, such decisions could be reversed by the Administrative Court as illegal. Besides this, there is a problem of the crucial lack of explanation of such a decision, which is another reason for its invalidity.

Following amendments to the Judicial Council Law regarding the criteria and sub-criteria for the appointment of judges and adoption of new Rules of the Judicial Council, which stipulates a range of points for the assessment of sub-criteria, the website of the Judicial Council has published a decision on the appointment of a judge first time appointed.[154]

Rationale for this decision is different from previous explanations of decisions, because it is consistent with the legal solutions from the amendments and the new Rules. This decision was adopted on the basis of the vacancy announcementstwo candidates have applied for, one of which withdrew the application.

Unlike the decisions from the previous period, the rationale states that the evaluated test has been submitted to all members of the Judicial Council. This is certainly an improvement over the prior decisions,which do not indicate that the Judicial Council actually reviewedany part of the documentation that was the basis for the assessment and when the Judicial Council had access only to the list of candidates.

The rationale for this decision implies that the members of the Judicial Council, in accordance with the new solutions from the law and the Rules, interviewed the applicants, obtaineddocumentation and opinion on working and professional qualities of a candidate and evaluated him/her using the prescribed criteria and sub-criteria in the prescribed form.

However, it remains unclear how the scoring of candidates was carried out and how each member of the Judicial Council scored thefulfilment of the criteria and sub-criteria based on which the Commission established the average number of points which was the basis for the evaluation of a candidate.

Following the publication of this decision, the website of the Judicial Council also published: the decision on the appointment of two judges of the

154 Su.R.br. 61/12 of 21 February 2012.

Basic Court in BijeloPolje[155], decision on the appointment of two judges of the Basic Court in Podgorica[156] and decisionon the appointment of a judge of the Basic Court inKotor.[157]

In the decision on the appointment of two judges of the Basic Court in BijeloPolje, two judges were chosen among eight candidates. This decision implies that the selected candidate was previously employed by the Police Administration and had fewer points than the candidate who is an adviser in the court and who was not elected, although ranked higher on the list of candidates. The decision states that it was adopted unanimously, but there is no explanation as to how the number of points was established and why the appointedcandidate had fewer points in relation to a candidate who was not elected!

Candidate M.K.,who applied for the judicial post in the Basic Court in BijeloPolje as an adviser at the Basic Court in Berane, announced the initiation of an administrative dispute before the Administrative Court of Montenegro, for annulment of the decision on the appointment of a candidate rated worse than her. Her experience confirms the conclusion that judges are selected arbitrarily, without proper explanation and reasons justifying the choice.

After an insight into the candidates'awarded score, M.K. found that the "work experience" of 14 years of service in the court secured her 5 points, while other candidate who had 6 years of service out of court (and judiciary) received 4 points. This is a practical example of awarding points arbitrarily-under a certain sub-criterion since there are no parametersfor evaluation. Thus, in this case a candidate with 14 years of experience in the court received only 1 extrapoint as compared to a candidate with not even half the work experience outside the judiciary.

In relation to training, the above candidate had a certificate of completion of initial training[158] with the grade "stands out", and on this basis obtained 5 points. Although the initial training is provided precisely in order to prepare candidates for the exercise of judicial functions, in that respect she received

155 Su.R.br.124/12 of 11 April 2012.
156 Su.R.br. 123/12 of 11 April 2012.
157 Su.R.br. 125/12 of 11 April 2012.
158 Art. 7, para 2 of the Law on Initial Training (*Sl. list CG*, 27/2006) provides that the initial training is organized for associates in the judiciary (courts and prosecutors' offices), as well as for law graduates who meet the general requirements for employment in public administration and have passed the bar examination, with the aim to prepare them for the performance of judicial function.

only two points more than a candidate from the Police Administration who was appointed a judge, and who did not complete this training.

Further, according to M.K., the candidates completed a written test on 5 April, and on 10 April an interview with the candidates was conducted, making the required confidentiality in testing pointless. The anonymity of testing itself does not protect from favouringcertain candidates, because the members of the Commission who wish to favour a candidate are certainly able to find out which test belongs to that candidate, i.e. which number has been assigned to it, prior to interviewing him/her. *Therefore, written testing, test assessment and interviews with candidates should all be organized on the same day, immediately one after another.*

Finally, what is of particular concern is a way the interviews with candidates are conducted. In the experience of the candidate M.K., candidates are questionedexclusively by the President of the Supreme Court andthe Judicial Council, while the issues raised with regard to family status and number of children should be banned as a possible source of discrimination in the selection (e.g. women who are expected to use the maternity leave, or have small children so it is assumed that they could be absent from work, etc.), as prescribed in the case of employment with any employer.[159] This situation further justifiesthe earlier HRA recommendation to prescribe guidelines for interviewing candidates, which should also prescribe, as it turns out, the issues that candidates are not allowed to be questioned about.

In a similar way as in the selection of judges appointed for the first time, the decision on the appointment of two judges of the High Court in Podgorica notes that 12 candidates had applied for a judicial vacancy announcement.[160] Unlike in the previous period, the decisions now state that the Judicial Council members evaluated the candidates andsubmitted the completed assessment forms to the Commission to compile a list of candidates for election. However, based on the list of candidates with the average number of points, of 11 evaluated candidates for the judge of the High Court, the Judicial Council chose a candidate who had the most points, but also the candidate whosenumber of points secured him fourth place.

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159 The Labour Law (*Sl. list CG*, 49/2008 and 26/2009) provides that an employer can not require data on family or marital status and family planning from the person with whom he intends to enter into a contract of employment, or the submission of documents and other evidence not directly relevant for the performance of duties the employment contract is based on (Art. 18, para 2). The fine for violation of this provision is from ten to three hundred times the minimum wage in Montenegro (Art. 172).

160 Su.R.br. 69/12 of 23 February 2012.

The decision contains no explanation for the reasons for such choice and for not selecting the two candidates who had more points and as such held the second and third position on the list, but merely states that the Judicial Council selected the fourth candidate on the list by majority vote.

Also, in the decision adopted by the Judicial Council two days later[161] on the appointment of two judges to the High Court in BijeloPolje, there was a choice between five candidates and the candidate who had the most points was selected, but, again, also the candidate who was only fourth in terms of the score.

This decision too provides no explanation or reason whyother candidates who had more points than an appointed judge were not chosen, or on what basis the Judicial Council decided to select a candidate who hadfewer points, but also repeats the statement that the Judicial Council chose the candidates by majority vote.

In contrast, the decision on the appointment of a judge of the Administrative Court of Montenegro[162] appointed a judge who had the highest number of points out of eight candidates, but that decision as well lacks reasoning upon which such selection was made. This explanation too proves to be incomprehensible, especially since other decisions indicate that the number of points is not decisive for the selection of a candidate and that a candidate with fewer points may be selected.

> Such method of the appointment of judges encourages doubt that judges are not selected fairly, do not advance fairly and that there arereasons unknown to the public based on which some judges are appointed or promoted, while others are not, or at least not at the same pace.

5.5. Practice of the Judicial Council following the presentation of HRA report and recommendations in July 2012

After the presentation of the preliminary report of HRA in July 2012, which points to deficiencies in the Judicial Council practice in the appointment of judges and offers recommendations to overcome them, in the period from July 2012 to April 2013 the Council issued four decisions on the basis of which five new judges of the basic courts were appointed and one decision appointing a judge of the High Court in Podgorica.

161 Su.R.br. 60/12 of 21February 2012.
162 Su.R.br. 59/12 of 21 February 2012.

5.5.1. Appointment of judges appointed for the first time

5.5.1.1. Decisions rationale

In new decisions too there is anapparent rationale pattern, partially amended in relation toCouncil's previous decisions. However, reasoning behind the decisions is still not sufficiently extensive and convincing, leaving the impression that the Council members have not yet been willing to make additional effort to properly reason their decisions and thus contribute to public confidence in the appointment of judges.

> Unlike in the previous period, new decisions include no cases of appointment of a candidate with fewer points than his/her opponent, but it is still unclear how the scoring was carried out.

In its previous decisions the Judicial Council stated that the selected candidate had the highest grade, and when that was not the case, decisions were made by majority vote of the Council. Such rationale isincomprehensible and insufficient, because it is unknown whether the appointed candidate has the highest score orthe majority of the Council members agreed upon the choice. Mentioned rationales did not cite any reasons for opting for the candidate with the lowest score, so the reason for his/her appointment remained incomprehensible.

Since July 2012, in its new decisions the Judicial Council no longer states whether the selected candidate had the highest grade or the decision was made by majority vote. Instead, the Council states that the average number of points was taken into account and then lists the criteria and sub-criteria that particularly singled out and recommended anappointed candidate. However, decisions still do not include information on the manner ofestablishing and evaluating data on the fulfilment ofdecisive criteria and sub-criteria, particularly in relation to those candidates who were not appointed.

HRA preliminary report states that it is unknown whether all the Council members review written tests of candidates. The Council responded to HRA in writing *"that certain Judicial Council members attended and participated in the interviews with candidates conducted by the Appointment Committee and reviewedcandidates' completed and evaluated tests"*, but without specifying to which extentthe Council members used these rights or ofhow much importancethe performed review was. Reasoning to decisions of the Judicial Council does not specify that any member of the Council ever reviewed writ-

ten tests of candidates. Even if the Council members did review the tests, it is unclear why none of the decisions on the appointment states so.

In contrast, new decisions of the Judicial Council on the appointment of judges appointed for the first time now state that theTesting Commission *"submitted a copy of evaluated tests to all members of the Judicial Council"*. This can be considered as a step forward compared to earlier practice when one could not have concluded whether the members of the Judicial Council reviewed written tests of candidates. However, it is still not clear how importantthe evaluation of these tests was in the appointment process, sincethis informationhas been omitted from the decisionsrationale.

Specifically, all new decisions specify the grade that each candidate receivedon the test and the number of points won, andstate that the Judicial Council members (on the basis of interviews, received documentation and opinions on candidates) evaluated candidates using criteria and sub-criteria identified by law and the Rules. Such rationales remainvague, because the manner of evaluation of the criteria and sub-criteria in each candidate is unclear.

5.5.1.2. Written examination

According to everynew decisionon the appointment of judges, a candidate who was appointedhad received the highest scorefrom the Testing Commission, which suggests that the score achieved by the candidate in the written test was decisive.

However, two decisions of the Judicial Council on the appointment of judges of December 2012[163] indicate that applications for a judicial posthad also been submitted by candidates who were appointed not for the first time, and who therefore should not have taken the written test.[164]Decisions on the appointmentcontain no information as to how these candidates were evaluated with respect to those candidates who took the written test.

Decision to appoint a judge of the Basic Court in Podgorica[165], whohas been chosen among 11 candidates, states that the prescribed criteria and

163 Su.R.br.271/2012 of 12 December 2012 and Su.R.br.273/2012 of 12 December 2012.
164 Art. 34 of the Law on the Judicial Council stipulates that the Judicial Council, prior to the interview, conducts written testing of the candidate appointed as a judge for the first time. These particular cases involved a basic court judge who applied for the post at another basic court, and in the second case, it was a judge who previously relieved of duty.
165 Su.R.br.271/2012 of 12 December 2012.

sub-criteria*"distinguishing the said candidate and recommending him to be appointed, inter alia, are:*

- high score on the written test,

- highgrade point average in Law School,

- high grade point average in Master of Laws program, and the fact that the candidate worked as a judge in the Basic Court in Obrenovac in the period between 1 June 1996 and 31 May 1998,

- pursuant to the decision of the Minister of Justice no. 03-4517/09 of 9 July 2009 he was appointed an agent, and pursuant to the decision of the Agency for peaceful resolution of disputes no. 1-1996-6 of 28 July 2010 he was appointed an arbitrator and mediator in labour disputes,

- number of seminars and trainings attended at home and abroad,

- knowledge of foreign languages, computer skills, communication skills and personal conduct."

However, the decision contains no information about the manner of assessing each of these criteria and sub-criteria, except for the conclusion that the selected candidate received the highest score on the written test. Although the criteria listed above were selected as crucial recommendations for the appointment, the decision does not include information oncandidate's average gradein Law School and comparison with the grades of other candidates. The decision does not have any data on candidate's average grade in Master of Laws program or whether any of other candidates completed the saidprogram. The decision has no data on seminars and trainingsattended by the selected candidate in the country and abroad or whether other candidates attended seminars and trainings. Moreover, the decision does not include any data on foreign language that the chosen candidate speaks and how the Council established that, or how it established and evaluated computer skills, communication skills and personal conduct, and in particular there is no indication on the evaluation of these criteria with other candidates.

In another decision adopted by the Judicial Council on the same day and at the same session[166], judge of the Basic Court of Rožaje was selected among the four candidates. This decision states that the criteria and sub-criteria *"distinguishing the said candidate and recommending him to be appointed are, inter alia:*

- high score on the written test,

- computer skills and foreign language skills, communication skills and personal conduct."

166 Su.R.br.273/2012 of 12 December 2012.

Thus, in the latter case the number of criteria and sub-criteria which were decisive in the appointment has been significantly reduced. Also, there is no information about how the Judicial Council established all thator whether any other candidate met some of the criteria and sub-criteria and how they were evaluated, if at all.

The same candidate who was appointed a judge in the Basic Court of Rožaje had applied for apost in the Basic Court in Kotor; the Judicial Council adopted a decision on this application on the same day and at the same session.[167] However, another candidate was selected for the said post, said to have had a higher grade on the written test, while that the criteria and sub-criteria *"distinguishing the said candidate and recommending him to be appointed are, inter alia:*

- high score on the written test,
- computer skills, communication skills and personal conduct."

This decision too lacks information about how the Judicial Council determined all that and whether any other candidate met some of the criteria and sub-criteria and how they were evaluated, if at all. However, the previous decision indicates that one candidate, same as the appointed candidate, had computer skills, communication skills and personal conduct recommending him for the appointment, as well as the knowledge of foreign languages that the selected candidate lacked. It therefore appears that the written test score is decisive, but the appointment decisions do not indicate how the scorehas beenattained or especially how othercandidates, not required to pass a written test, have been evaluated.

5.5.1.3. Assessment of initial training

Decision on the appointment of two judges of the Basic Court in Kotor[168] also indicates that criteria and sub-criteria are evaluated arbitrarily in the appointment of judges. This decision too states that the criteria and sub-criteria*"distinguishing the said candidates and recommending them to be appointed are, inter alia:*

- high scores on the written test,
- completed initial training program organized by the Centre for Judicial Education and successfully completed final exam,

167 Su.R.br.272/2012 of 12 December 2012.
168 Su.R.br. 216/2012 of 24 September 2012.

- attended seminars,

- computer skills and foreign languages, communication skills and personal conduct."

In addition to lacking information about how the Judicial Council established all that and whether any other candidate met some of the criteria and sub-criteria and how they were evaluated (if at all), this decision specifies that one of the decisive recommendations has been*completed initial training program organized by the Centre for Judicial Education and successfully completed final exam*.

However, earlier we pointed to the decision of the Council to appoint a judge of the Basic Court in BijeloPolje[169]taken only five months earlier, wherea candidate with a certificate of completed initial training with the grade *standsout* was awarded only two extra points on this basis in relation to a candidate from the Police Administration, who has been appointed a judge, who did not complete this training and had lower total score than the candidate with completed initial training.

Thus, the Judicial Council passed two decisions in less than six months, one of which practically devalued the certificate of completion of initial training with the grade*stands out*, while the second decision evaluated the attendance of this training as a *crucial recommendation*, but again with no indication of the manner of appraisal and evaluation.

Decisions on the appointment still have template character. The Judicial Council in its decisions merely lists the criteria and sub-criteria, without any indication of how they were established or assessed, whether they wereestablished or assessed in other candidates too, and in which manner. The practice already shows evidentlydifferent appraisal of the completion of initial judicial training with different candidates. The fact that the Council has not yet prescribed the parameters for evaluatingcriteria and sub-criteria allows for this lack of an explanation behind the decision on the appointment of judges, but does not justify it. The Council could have tried to convincingly explain the reasons distinguishing a particular candidate in relation to the competition, provided that such convincing reasons really existed.

169 Su.R.br. 124/2012 of 11 April 2012.

5.5.2. Decisions on promotion

Between July 2012 and April 2013 the Judicial Council issued only one decision of this kind which, among eight candidates, appointed a judge of the High Court in Podgorica.

Previous decisions on the appointment of judges to a higher instance court indicate that the Judicial Council used to appoint candidates with the highest grade, and when this was not the case, rationale would state that the Council decided on the selection of a particular candidate by majority vote. Suchrationalesdid not suggest whether judges got promoted based on the best grade or majority vote. Decisions lacked reasons as to why judges who had lower score than other candidates advanced, as well as the explanation based on which criteria judges advanced.

In this latest decision on the appointment of a judge of the Podgorica High Court, Judicial Council stated that the candidate's average number of points was taken into account, and that the choice was also decided by the fact "that he is alongtime judge, with more than 23 years of service, with goodperformance results of the last three years, which is a special sub-criterion for promotion of judges, which further speaks of the quality of this candidates as a judge."

Thus, for the first time in its decision the Judicial Council stated that a judge progressedbased on the achieved results of the last three years, which is a sub-criterion for the promotion of judges prescribed by law. However, this decision contains no information upon which the Council established the results this judge has achievedduring the last three years, there is no explanation of how the Council came to the assessment that these results were good, that is, there is no explanation of what is considered as *good performance results*that are the basis for promotion, or what were the results of other candidates in relation to those of the candidate appointed a judge of the High Court.

Also, this and other decisions do not mention other criteria and sub-criteria, or how they were evaluated in all the candidates, so this decision is as equally incomprehensible as the previous ones.

Thus, decisions based on which judge progress remain obscure,as they are insufficiently reasoned. They still do not include information on identification and appraisal of decisive criteria and sub-criteria, both in terms of the promoted judges and in relation to other candidates.

Poorly reasoned decisions on the appointment of judges encourage suspicion that judges progress not on the basis of an objective assessment of the results of work and that there are reasons unknown to the public why some judges receive promotion.

5.6. Fairness of the procedure and legal remedies

Law on the Judicial Council[170] provides that the Judicial Council shall announcea vacancy for the post of a judge orpresident in the Official Gazette of Montenegro ("Sl. list CG") and in one of the print media. Moreover, in practice such announcements are usually published on the website of the Judicial Council as well, which further helps inform a greater number of people, especially younger generation, on the vacancy announcement. However, HRA remains at an earlier recommendation to expressly prescribethis obligation by law.

Fairness and efficiency of the appointment process of judges would also be significantly improved by publishing all candidates' applications on the website of the Judicial Council. Since these applications are not published, the public can not point to possible inadequacy of the candidates.

Regarding the applying process of candidates,it is prescribed that the Judicial Council rejects untimely or incomplete applications, but also decides on the complaint against such decisions.[171] This solution makes pointless the filing of the complaint as a legal remedy against the decision to reject untimely or incomplete application, because the same body that made the decision decides on it. In this sense, HRA has previously suggested that the Appointment Commission be authorized to reject untimely or incomplete applications, whilethe Judicial Council would decide on the complaints to such decisions.

The Judicial Council has not laid down guidelines for interviewing candidates, and current practice shows that it is possible thatonly the President of the Supreme Court asks questions, even those that should be prohibited (see previous section 5.4.). Also, the law implies that the interview is alsoconducted with advancing judges, which is illogical and unnecessary.

170 Art. 28, para 3.
171 Art. 29 of the Law on the Judicial Council.

According to the Rules of the Judicial Council[172], the number of points scored on the test is determined by a majority vote of the Commission. This solution does not contribute to the impression of procedural fairness, because it is absurd to vote on something that is numerically measurable.

Also, the prescribed forms are incomplete and do not contain a column forstating a source of information based on which the assessment is carried out; they are not adapted for the assessment of a candidate appointed a judge of the higher instance court for the first time, who does not come from the judiciary. The lack of instructions for filling out forms and parameters for the evaluation of criteria and sub-criteria leaves room for arbitrariness and inequality in the evaluation.

Although the decisions on the appointment include instruction on legal remedy, HRAbelieves that this not being explicitly prescribed by law is a serious shortcoming,since the law only provides that the decision must include a written rationale.[173] On the other hand, decisions analysis indicates that their rationales are unclear and cast doubt on an objective and correct appointment.

Although the law prescribes the right ofa candidate to accessown documentation and written test[174], as well as final evaluation grade of other candidates, there are still doubts as regards objective assessment because the candidates are denied the right to access documents and tests of others. Also, the regulations do not prescribe the method and place to get an insight intoelectoral documents, deadline for theSecretariatto provide aninsight into electoral documentsupon request, the right to copy documents, the right to access documents through an attorney, or theright to file a complaintto the Judicial Councilin the event ofdenialof this right.

Law on the Judicial Council does not prescribe the consequences of the annulment of the decision on the appointment of a judge who did not meet the general requirements for selection. The acts and actions taken by that judge would also have to be annulled. In this sense, another shortcoming of the law is that it does not expressly prescribeurgent nature of an administrative action against a decision on the appointment of a judge.

Since the Constitution prescribes the reasons for dismissals of a judge, appeals against such decisions should be considered by the Constitutional,not the Administrative Court. In addition, the Administrative Court therefore also decides on the decisions on the appointment of judges of that court, which calls into question the objectivity and impartiality in such procedures.

172 Art. 41, para 1.
173 Art. 35, para 4 of the Law on the Judicial Council.
174 Art. 38 of the Law on the Judicial Council.

5.7. Recommendations

1. It is necessary tostopthe practice of templateandincomprehensible-decision rationales. Instead, define rationales which provide clear answer as to whya certain candidateis appointed a judge, and the other candidateis not, or why a certain judgeis promoted, while the otheris not.

2. Publishapplications ofcandidatesfor the judicial post on the Judicial Council website, so that the publiccan point topossibleinadequacyof applicants. Allowcandidatesto learn about possibleobjectionstotheir candidacy, as well as to respond to them.

3. Obtain the opinionof thehigher courtjudges on promotionbased ona questionnaire thatwould includethecategories of good knowledge of procedural and substantive legal regulations, practiceof the European Court ofHumanRights, practiceof Montenegrin courtsetc.

4. Prescribe the right ofjudges of the courtwhosepresidentis being electedto submit their opinion on candidatesfor the president to the Judicial Council.

5. Amend Art. 38 of the Law on the Judicial Councilin a mannerthat will grant allcandidatesfor the judicial post theright to access recordsof other candidates (above recommendation no.7) andprescribe:method and place to get an insight intoelectoral documents, deadline for theSecretariatto provide aninsight into electoral documentsupon request, the right to copy documents, the right to access documents through attorney, theright to file a complaintto the Judicial Councilin the event of denial of this right and deadline in which the Judicial Council is to decide on the complaint.

6. Prescribethe competenceof the Commissionfor Appointment of Judgest or eject untimelyor incomplete applications, given that the Councildecides on the complaint against the decision to reject an application.

7. Obtain opinionson various aspectsof work and behaviour of candidates based on a questionnaire, whose contentshould bedeterminedby the Judicial Council, to avoid obtaining stereotyped phrases instead of substantive evaluation. Courts should hold data on achieved work results of expertassociates, on which the opinion of their performance should be based.

8. The Judicial Council should prescribe guidelines for conducting interviews with candidates, including the questions a candidate must not be

asked. Stipulate that the interview is not required in the promotion of judges.

9. In the "Annulment of the decision on the appointment" (Art. 49, para 2 of the Law on the Judicial Council), for the purpose of appropriateness, HRA once again proposes the introduction of an obligation topostponethe startdate ofperforming judicial function in order to verify the information from paragraph 1 of the same article, considering the implications of Art. 71 entailed by the annulment of the decision on appointment.

10. HRA reiterates its objection that thejudicial protectionagainst decisionsof the Judicial Council must not be providedin administrative proceedings, but with the ConstitutionalCourt.

6. ASSIGNMENT OF JUDGES TO HIGHER INSTANCE COURTS TO PROVIDE ASSISTANCE

Art. 42, para 3 of the Law on the Judicial Council stipulates the following:

The Judicial Council may temporarily transfer a judge for a period of up to one year, with his/her consent, to a higher instance court in the event the workload of that court has been temporarily increased or in the event of a large accumulation of unsolved cases, which cannot be efficiently handled by the existing number of judges in that court. The judge that is being reassigned must fulfil all of the criteria specified for the position in the court to which he/she is being transferred.

Art. 43 of the Law on the Judicial Council:

(1) The Judicial Council shall adopt a decision on the temporary transfer of a judge to another court upon the request of the president of the court the judge is to be transferred to.

(2) Before taking a decision on the temporary transfer of a judge to another court, the Judicial Council shall first consult with the president of the court who filed therequest, the judge who is being considered for the temporary reassignment and the president of the court in which the judge ordinarily performs his/her judicial duties.

Law prescribes a controversial possibility for a judge who is not formally appointed a judge of the higher instance court to hold that position based on an individual decision of the Judicial Council on the temporary transfer to that position. This solution is also controversial from the aspect of the legal basis for court action, which is the element of the human right to a fair trial.[175]

HRA particularly points to shortcomings in making these decisions, which allow unequal treatment of judges. It should be noted that a decision on the temporary transfer of a judge to a court of higher instance inevitably favours that judge for further progress, in addition to enabling the transferred judge to receive higher wage.

175 Art. 6, para 1 of the European Convention on Human Rights reads: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

Decisions taken by the Judicial Council on the temporary transfer were not published on its website, so HRA requested access to this type of decisions referred to in the Report on the work of the Judicial Council, in order to analyze them.[176]The Judicial Council submitted four decisions, based on which judges of the lower instance courts had been transferred to the High Court. In addition to these four, Annual Reports on the work of the Judicial Council indicate that there were a total of 29 decisions since the Council was constituted.

It was found that these decisionsdo not offer valid rationales anddo not indicate thatthe Judicial Councilhas determined whether a judge meets the requirements for a judge of a court he is reassigned to. Also, the decisions do not indicate the method of deciding about which judge,of all judges who can qualify, shall be referred to a higher instance court.

All reviewed decisions only cite the provisions of Art. 42 and 43 of the Judicial Council Law, but none contains specific reasons for the decision, especially the reasons why and how a certain judge was selected to be reassigned to a higher instance court.

Given the right to fairness of the proceedings in relation to the legal composition of the court, judges who were not appointed as higher court judges should generally not be referred to that court. This prohibition does not apply to judges of equal rank, so they should be used for the purpose of increasing timeliness. If it is necessary to increase the number of judges of the high court, then they should be selected in accordance with law.

Recommendation:

Abolish the authority of the Judicial Council to temporarily assign judgesto work in the court of higher instance.

176 Decisions were sought and obtained.

7. DISCIPLINARY RESPONSIBILITY OF JUDGES AND PRESIDENTS OF COURTS

7.1 Disciplinary violations

7.1.1 General remarks

Law on the Judicial Council[177] prescribes disciplinary responsibility if a judge neglectfullyperforms his judicial function or harms the reputation of the judicial function in cases prescribed by law, and if a court president neglectfully performs his function or harms the reputation of the office of a court president.

The Constitution of Montenegro[178] stipulates that a judge shall be dismissed in the following cases: conviction for an offense that makes him unsuitable to hold judicial office, incompetent or negligent performance of a judicial function, or permanent loss of capacity for performing judicial function. This constitutional solution seems illogical in relation to the reason when a judge *'permanently loses his capacity to perform judicial function"*. This reason should be a basis for the termination of judicial office, not for dismissal, because the dismissal procedure involves determination of responsibility and culpability of a judge for certain actions or omissions, while the loss of ability can not be considered the responsibility of a judge.

Amendments to the Law on Courts[179] specify what constitutes undueperformance of the judicial function and harm to the reputation of judicial function by judges and court presidents, negligentand unprofessional execution of office of judges and court presidents:

Undue performance of judicial duties
Article 33a

A judge shall be deemed to perform the judicial duty unduly if the duty is not performed in a usual manner and particularly if for a longer time or in a greater number of cases and without a reasonable justification such judge:

177 Art. 50.
178 Art. 121.
179 *Sl. list CG*, 39/2011.

1) does not act upon the cases in the order they have been received;

2) does not summon sittings or hearings for cases assigned to him/her to act upon them or if, in any other manner, delays the proceedings;

3) fails to ask for his/her challenge in cases where there is a reason for such challenge;

4) does not come or comes later to summoned hearings of arguments or hearings or panel of judges sessions;

5) does not process his/her rulings timely;

6) does not follow the schedule for deciding on pending cases or does not act upon a decision based on a review request;

7) prevents the performance of supervision as prescribed by the law;

8) does not attend mandatory training program."

Harming the reputation of judicial office

Article 33b

A judge shall be deemed to harm the reputation of judicial office, in particular if:

1) duringthe performance of the judicial duty or at any public place brings himself/herself in the situation or behaves in the manner that is inappropriate to the performance of the judicial duty;

2) behaves inappropriately towards the participants in any court proceedings and the court staff;

3) does not abstain from inappropriate relations with the attorneys and parties upon whose cases he/she acts or discloses information he/she has found out during acting upon such cases;

4) uses his/her judicial position for gaining his/her private interests and the interests of his/her family or close persons;

5) receives gifts or does not present the data of his/her property or income as required by the regulations governing the conflict of interests.

Undue performance of the judicial function

by the president of the court

Article 33v

A president of the court shall be deemed as in undue performance of duty if such president of the court, without reasonable grounds:

1) contrary to the law, changes the annual schedule of the court businesses;

2) does not act upon complaints and review requests;

3) does not institute disciplinary proceedings against a judge when he/she knows or must have known the grounds for such proceedings;

4) prevents the supervision to be carried out according to the law;

5) does not ensure education for judges, advisers and other staff in a court as it should be according to the regulations;

6) does not present or presents incomplete and inaccurate performance reports and other data required under the law.

Harming the reputation of the office of the president of a court

Article 33g

A president of a court shall be deemed to harm the reputation of the office of the president of a court if:

1) during the performance of the president or at any public place brings himself/herself in the situation or behaves in the manner that is inappropriate to the performance of the court president duty;

2) behaves inappropriately towards the clients and the court staff;

3) uses his/her position of the court president for gaining his/her private interests and the interests of his/her family or close persons;

4) receives gifts or does not present the data of his/her property and income as required by the regulations governing the conflict of interests.

Negligent and unprofessional performance of the duty of the president of a court

Article 33d

A president of a court shall be deemed as in negligent and unprofessional performance of the duty of the president of a court if:

1) during the supervision of the performance of the court management, wrongful acts and irregularities in the performance of the court management that are detrimental to the proper and regular performance of the court duties and functions are found;

2) he/she does not respect the principle of the random assignment of cases;

3) he/she withholds, contrary to the law, already assigned cases;

4) he/she violates the principle of impartiality of a judge;

5) he/she does not make a motion to dismiss a judge from duty in cases prescribed by the law when he/she knows or must have known the reasons for such dismissal.

Unprofessional and negligent performance of the judicial duty

Article 33e

An unprofessional and negligent performance of the judicial duty shall be particularly the one during which a judge, without reasonable grounds:

1) does not achieve, to a large extent, the expected results as regards the quality and quantity of performance for a previous two-year period compared to the average number of solved cases of the same type and complexity at the level of that court;

2) exceeds substantially the legally prescribed deadline for making respective rulings in a larger number of cases;

3) delays proceedings or does not act upon cases, inducing thereby the limitation of the criminal prosecution or the limitation of the criminal sanction execution;

4) performs activities or undertakes actions that are incompatible with the performance of the judicial duty.

7.1.2. Undue performance of judicial function

Decisions of the Disciplinary Commission and the Judicial Council indicate unequal treatment in the assessment of undue performance of judicial function and result inlegal uncertainty among judges. The wording of Article 33a of the Law on Courts, which prescribes the undue performance of the judicial function "for a longer time or in a greater number of cases" is vague and unevenly and arbitrarily interpreted in practice. Also, a question arises concerning the application of warning as a sanction, since the practice shows that undue performance can possibly grow into negligence.

However, amendments to the Law on Courts define undue and negligent performance of judicial duties and contempt ofjudicial function in a better manner than earlier. Amendments omit the earlier formulation that the judge performs judicial function in an undue manner "in other cases where the law provides that certain acts or omissions of a judge constitute undue performance of judicial function", which provided room for arbitrary and inconsistent sanctioning of judges, because the cases of undue performance of a judicial function were not accurately and fully defined. Neither this nor any other law specifically prescribed actsoromissions which constitute undue exercise of judicial function, i.e. disciplinary offense.

However, the wording that *"a judge shall be deemed to perform the judicial duty unduly if the duty is not performed in a usual manner and particularly if for a longer time or in a greater number of cases and without a reasonable justification"* still allows for arbitrary and inconsistent treatment and sanctioning of judges.

How long is "a longer term", how many cases does "a greater number of cases" imply, and what is "reasonable justification" –cannot be concluded based on the regulations. Therefore, persons authorized toinitiate disciplinary proceedings (court presidents) might arbitrarily assess the implication of "a longer term", "greater number of cases", or the lack of "reasonable justification". This allows for both arbitrariness and inequality in treatment, i.e. the possibility that in some cases a certainperiod of time is considered longer, a certain number of cases larger, or especially the reasons may be regarded as justified, while in some other cases, in the same or similar situation all this would not be treated equally.

Examples from practice, referred to below, indicate that the judges are treated unequally and that these general standards are applied selectively and unequally in relation to judges. All this reinforces the impression that

the judges are governed autocratically and kept in suspense and under constant pressure that proceedings may be initiated against them based on an arbitrary assessment of court presidents, who are authorized to initiate such proceedings.

The phrase "without a reasonable justification" in some cases allows for arbitrary tolerance for the violation of deadlines set by the procedural law. Deadlines for the publication and making of judicial decisions are regulated by special laws, as well as the obligation of judges, in case of passing the deadline, to notify the court president, who shall undertake measures in this regard.

Amendments to the Law on Courts stipulate that a judge may violate statutory deadlines for a specified time period in several cases and that the court president arbitrarily decides whether this is carried out for a "longer term", in a "greater number of cases", or whether there is "reasonable justification" for violating these deadlines. Such regulation should immediately be amended, because it regulates in a different manner the issues already regulated under procedural laws relating to the rules of procedure, which should certainly not be the subject of the Law on Courts. A particular problem is the uniformity of practice -"longer", "greater" or "reasonable" may be perceived differently by different court presidents. Since the Disciplinary Commission does not publish its decisions, this further prevents the establishment of a uniform practice regarding the initiation of disciplinary proceedings and establishment of disciplinary responsibility.

7.1.3. Negligent and unprofessional performance of judicial function

The same wording "if without reasonable justification" shouldbe omitted in the case of unprofessional and negligent performance of judicial function (Art. 33e). In any case, a judge is the one who should defend himselfwith the existence of possible valid reasons which in themselves may exclude the existence of responsibility and prove their existence; it is not acceptable for initiators of the proceedings to arbitrarily do so.

Therefore, the law defines both unprofessional and negligent performance of judicial function only provided that those actions are conducted *"without reasonable justification"*. Here too there is space for unexplained

arbitrariness in allowing a certain judge to go unpunished, for example, for exceeding statutory deadlines for making decisions in a greater number of cases, delaying proceedings and not acting upon cases, causing the limitation of the criminal prosecution or of the criminal sanction execution and for performing activities that are incompatible with the judicial function. It is entirely unclear what could be the "reasonable grounds" for such actions of a judge.

It follows that the law amendments allow the evasion of responsibility for individual judges and court presidents, which would depend on the arbitrary assessment of their superiors. Allowing this practice is extremely dangerous and detrimental to the independence of judges, since there is always a question of reasons as to why some judges are allowed to avoid responsibility for actions that other judges are sanction for, but also the possibility of seeking or expecting favours in the form of a specific action in some cases, which is detrimental to the rule of law.

7.1.4. Undue performance of a court president function

In the same manner the law prescribesundue performance of the function of the court president, provided it is carried out it *"without reasonable justification"*. It remains unclear what represents reasonable justification for the court president to amend the annual schedule of work in the court, not to act on complaints and review requests, not to initiate disciplinary responsibility of a judgewith regard to whom he knows or should know that there are grounds for responsibility, to preclude the exercise of supervision and training for judges and court staff and not to submit or submit incomplete or inaccurate reports on operations and other information.

Such a broad formulation of the basis for exclusion of responsibility gives the authority to presidents of directly higher courts and the Supreme Court President to arbitrarily assess reasonable justification for violation of laws and failure to perform official duties by a court president. In addition to not prescribing "reasonable justification" anywhere, it is unfounded and even absurd to think that in general a court president may have good reason, for example, fornot dealing with complaints and review requests, not initiating disciplinary responsibility of a judge for whom he knows that there are reasons to do so, or submitting incomplete or inaccurate reports about the work.

For example, the provisions of Art. 6 and 20 of the Law on the protection of the right to trial within a reasonable time[180] prescribe that the failure of the president of a court to act upon a review request within 60 days constitutes grounds for initiating the proceedings to establish his responsibility. These reasonable grounds forthe responsibilityof the court president have been made completelysenselessby prescribing the authority of the president of the directly higher court and the President of the Supreme Court to assess the "reasonable justification" for failure of the court president and to arbitrarily decide not to initiate the disciplinary proceedings.

7.1.5. Contempt of judicial function

The Law on Courts does not provide that the violation of the Code of Judicial Ethics constitutes undue or negligent performance of the judicial function, i.e. the basis for determining disciplinary responsibility of judges. Also, the law does not prescribe that the violation of the Code constitutes contempt of the judicial function. Therefore, a violation of the Code is still not punishable, although the Code itself provides that its violation constitutes grounds for disciplinary action and procedure for removal of judges under the Constitution and the law (Art. 14, para 6). HRA has previously stressed the need to lay downin the Law on CourtstheCode violationsthat constitute undue or negligent performance of judicial office, or contempt of judicial function.[181]

7.2 Disciplinary proceedings

7.2.1 Authority to initiate disciplinary proceedings against judges and court presidents

In addition to the Law on the Judicial Council, the new Rules of Procedure of the Judicial Council prescribe the contents of the proposal to initiate disciplinary proceedings (Art. 54) and specify the disciplinary proceedings (Art. 55 - 69).

180 *Sl. list CG*, 11/2007.

181 See „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", p. 107.

Members of the Judicial Council are still not among the persons authorized to determine the disciplinary responsibility of judges and court presidents, which is certainly not conducive to promoting responsible and professional work of the courts. Also, since only the court president, the president of the directly higher court and the President of the Supreme Court are authorized todetermine disciplinary responsibility, it appears that it is still not possible to initiate disciplinary proceedings against the President of the Supreme Court, as no person is authorized to do so.

HRA has previously indicated that it is inappropriate for the President of the Supreme Court to be fully protected from the disciplinary responsibility and to be only politically responsible, which is contrary to the principle of judicial independence. It is illogical and incomprehensible that the Judicial Council, as a body that supervises all courts and judges (including the President of the Supreme Court), has no authority to initiate disciplinary proceedings against any judge, including the Supreme Court President. It should be noted that back in 1991 the Law on Regular Courts prescribed the authority of the Judicial Council to initiate the disciplinary procedure against the Supreme Court President.[182]

7.2.2. Disciplinary Commission

The procedure of determining disciplinary responsibility of judges is conducted by a Disciplinary Commission appointed by the Judicial Council for a period of two years.[183] The amendments to the Judicial Council Law[184] stipulate that the Disciplinary Commission has a president and two members, that the president is appointed from among the members of the Judicial Council who are not judges, and two members from among the judges who are not members of the Judicial Council and have at least 15 years of experience. Thus, recommendation of the Venice Commission to ensure parity between judicial and lay members in the Disciplinary Commission has not been implemented.[185]

182 Art. 46, para 3: "President of the court shall submit a request to the Judicial Council to initiate disciplinary proceedings against a judge, which shall include the facts of a violation of standards of judicial conduct prescribed by law or the rules of the court. Request in relation to the president of the court shall be submitted by the president of the directly higher court, and in relation to the Supreme Court President, by the Judicial Council."(Law on Regular Courts,*Sl. list RCG*, 48/91 and 18/92).

183 Art. 51 of the Law on the Judicial Council.

184 *Sl. list CG*, 39/2011.

185 Opinion of the Venice Commission on the draft amendments of the Constitution, the Law

Also, neither the law nor the Rules of Procedure of the Judicial Council specify the procedure of appointment of the Disciplinary Commission members, which is important especially for the appointment of two members outside the Judicial Council.[186]

Montenegro Progress Report for 2012 of the European Commission states that the disciplinary system needs to be further strengthened and differentiated in line with the principle of proportionality, and the Disciplinary Commission's dual role ininvestigating and deciding on disciplinary proceedings reviewed.[187]

In this sense, *HRA suggests that the Law on the Judicial Council be amended so as to provide for a disciplinary prosecutor to carry out investigation and initiate the proceedings, while the disciplinary commission adopts decisions*.[188]Such legal solution exists in Bosnia and Herzegovina, where the High Judicial and Prosecutorial Council has a disciplinary prosecutor who may initiate investigation at own initiative or upon a complaint, which may be filed by any person or organization. The complaint must be lodged in writing or in person at the Office of Disciplinary Prosecutor, with the evidence supporting the complaint.[189] The Office is responsible for the assessment of the legal validity of complaints, investigation into allegations of misconduct against judges and prosecutors and filing of a complaint, i.e. initiation of disciplinary proceedings and presenting cases of disciplinary violations before the disciplinary committees of the Council.[190]

7.3 Practice of the Judicial Council and the Disciplinary Commission in evaluatingundue, negligent and unprofessional work of judges

The practice of the Disciplinary Commission started on 1 August 2008.

on Courts, the Law on State Prosecution and the Law on the Judicial Council, no. 626/2011 of 14 June 2011.

186 HRA noted the same in 2009, see „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", Human Rights Action, Podgorica, 2009, p. 122, item 6.2.4.5.

187 http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf.

188 See „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", p. 122, footnote referring to an identical proposal set out in the document "Judicial Reform in Montenegro - the experience of Bosnia and Herzegovina", B. Perić, S. Marius Urkeand L. Sheehan, T. Nelson, September 2007, p. 41.

189 Art. 41, para 1 of the Rules of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

190 See Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Sl. glasnik*, no. 48/07), Art. 64, Rules of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Art. 41-45.

Although its composition should guarantee a high degree of legitimacy, this is not always the case. The fact that its decisions were not published on the website represents quite a shortcoming, because courtpresidents who initiate the proceedings could be guided by those decisions, and unequal treatment in equal situations could be eliminated or reduced to a minimum.

According to the Annual Reports on the work of the courts from 2008until 2012, 14 proposals to institute disciplinary proceedings against judges have been submitted to the Disciplinary Commission. Of these, four proposals were rejected as unfounded, six proposals were adopted and judges imposed four disciplinary measures - the salary reduction of 20% for three months or for one month and three warnings. In four proposals, after the Disciplinary Commission found that there are grounds for dismissal of a judge, the proceedings were interrupted and the case submitted to the Judicial Council.

Pursuant to Art. 63, para 2 of the Judicial Council Law, after having established that there are grounds for initiating the proceedings for dismissal, the Judicial Council submitted 10 received proposals to the Disciplinary Commission to examine the reasons for dismissal. After collecting data and evidence, the Disciplinary Commission in due course submitted a report to the Judicial Council, which, in deciding on the proposal, made decisions on the dismissal of four judges, two proposals have been rejected as unfounded, while in two proposals the dismissalproceedingswere suspended, and during the proceedings four judges submitted a request for termination of office.

Since the Disciplinary Commission decisions are not published on the website of the Council, HRA addressed the Council with the request for free access to information, and 11 decisions adopted fromApril2008, when the Council began its operation, until 31 January 2012 were submitted.From January 2012until the beginning of April 2013 no new decisions were issued by the Disciplinary Commission.

The analysis of these decisions and their comparison with the facts in other cases available to members of the team that worked on this project, also lead to the conclusion that judges are treated unequally and that not the same conditions for establishing disciplinary responsibility apply to all judges, that the criteria by which judges are held responsible are interpreteddifferently and that the presidents of courts typically initiate disciplinary proceedings only after the control carried out in that court by the Supreme Court representatives.

In its decision[191] of 1 September 2008 the Disciplinary Commission rejected as unfounded the proposal for establishing disciplinary responsibility of a judge of the Basic Court in Kolašin, who had been charged with undue performance of the judicial function between July 2006 and end of 2007 due toexceeding statutory deadlines for making judgments in criminal matters in 16 cases and the violation of statutory deadlines for scheduling of the main trial in 3 cases, between September 2006 and May 2008, which led to the limitation of criminal prosecution in one case.

The decision states that the judge in his statement pointed out that the President of the High Court, by order of the Supreme Court President, pressured him and offered him a settlement in order to resign and that the limitation deadline for the prosecution in the mentioned time-barred case is 6 years and that the investigating judge previously spent five years in investigation.

Disciplinary Commission then took the position that exceeding the statutory deadline for writing a decision is not prescribed as a disciplinary offense[192]. However, only a few months later, in its decision[193] on the dismissal of a judge the Judicial Council stated:

"failure to act upon cases in accordance with the rules of procedure constitutes undue performance of the judicial function and provides the reason for dismissal under Art. 121, para 3 of the Constitution of Montenegro."

Judicial Council and its Disciplinary Commission interpret differently violations of the rules of procedure - the Commission as an act that is not a disciplinary offense and for which one cannot be held responsible, and the Council as an act that can be qualified as unprofessional performance, and for which a judge can be dismissed. Different interpretations have led to unequal treatment of judges in practice. This example further supports our recommendation that disciplinary offenses should be specified better.

Moreover, the Disciplinary Commission in the said decision indicated that it had taken into account whether the shortcomings in the performance have elements for dismissal, but that it was concluded that these grounds do not exist because statutory deadlines had been exceeded in 16 cases, which,

191 Dp.br.1/08.
192 This action is prescribed as a negligent exercise of judicial function in the amendments to the Law on Courts, which came into force in August 2011.
193 Su.R.br.636/08 of 26 December 2008.

by the assessment of the Disciplinary Commission,does notrepresent "greater number of cases" for dismissal of the judge. In the decision on dismissal mentioned earlier, performance of a judge contrary to the rules of procedure qualified asunprofessionalperformance was also established in 16 cases.

In addition to the above, in this procedure the Disciplinary Commission has determined that the party requesting the establishment of the disciplinary responsibilityis the very investigating judge in the case where the statute of limitation in the criminal prosecutionoccurred and that it was him who conducted a five-year investigation during which he questioned the suspects and one witness.

In this decision neither the Disciplinary Commission, nor the Judicial Council later, dealt with the allegations that the judge was pressured by top judicial authorities to resign. One year later,the Judicial Council issued a decision[194]pursuant to which this judge ceased to hold office due to an unconditional one-year prison sentence for criminal offenses of abuse of office and negligent performance of duty, performed in connection with the exercise of the judicial function.

Also, the Disciplinary Committee andthe Judicial Council never addressed the issue of competence and timeliness of thework of the court president, who tried to attribute to another judge shortcomings in his own work and a five-year investigation during which he had only questioned the suspects and one witness, even though all of the facts were basically established in the previously conducted procedure.

In other decisions from 2008[195] the Disciplinary Commission found responsible the judges of the Basic Court in Bar for not scheduling the hearings in 104, and in 54 criminal cases in 2007. Both procedures were initiated after the control of the said basic court by the Supreme Court of Montenegro.

Less than five months later, the Disciplinary Commission adopted a decision[196]on the negligent performance of judicial office for the reason that a judge in one case failed to schedule a hearing during the period from 22 March to 12 December 2008. In the same decision the Disciplinary Commission adjourned the proceedings because the judge in one case did not schedule hearings in the period from 3 November 2006 until 28 November 2008, and

194 Su.R.br.1571/09 of 11 November 2009.
195 Dp.br.2/08 of10 September 2008, Dp.br. 4/08 of 10 September 2008.
196 Dp.br.1/09 of 2 February 2009.

because in another case she made the decision to stay the proceedings due tothe party's death, and the case file contained no evidence of death of the party, which was assessed by the Commission as a reason for dismissal and the case was submitted to the Judicial Council.

In this decision the Disciplinary Commission established the "standards" it failed to apply in other proceedings, because the rationale states:

"Disciplinary Commission believes that judges litigants may schedule hearings in more than 5 cases a day, which certainly increases the number of cases in which she could have scheduled hearings within one month".

In addition to being unclear based on what grounds the Commission came to a conclusion on the number of hearings that may be scheduled daily, it is particularly unclear why the same standard has not been applied in relation to other judges. It is also unclear why in other cases the judges who do not schedule hearings for a period of nine months or more are not sanctioned. This further justifies HRA recommendationthat the Judicial Council should be granted the authority to initiate proceedings for establishing disciplinary responsibility.Also, the Judicial Council receives information about such shortcomings through the complaints of citizens.

Nine months later, the Disciplinary Commission adopted a decision[197]to impose a disciplinary measure of reduction of a monthly salary by 20% in relation to a judge of the Basic Court in Podgoricaas a result of undueperformance of the judicial function becauseas of 27 October 2008 until 14 September 2009 she failed to schedule a hearing in the case where the suitwas filed in December 1984, assigned to that judgeon 27 October 2008. This decision implies that the same judge was assigned an even older case, in which the suit was filed back in 1983. Also, in its decision the Disciplinary Commission found that the same case, in which the judge failed to schedule hearings for almost 11 months, wasin the High Court for deciding on appeal for a total of 2 years and 10 months.

So, in the case which lasted for 25 years and was in the High Court the last time on appeal for 2 years and 10 months, only a judgethis case was assigned to at the time when it was already 24 years old has been sanctioned, because she failed to schedule a hearing for almost 11 months after it was assigned to her.

197 Dp.br.3/09 of 9 October 2009.

Contrary to the views of the above decisions, in the case before the Basic Court in Podgorica[198],mentioned earlier in this report, the judge of that court scheduled a preliminary hearing more than a year after the suit had been filed. Also, in the case before the same court[199] ajudge scheduled a preliminary hearing after more than nine months and only after filing of the request to accelerate the procedure, which was adopted by the High Court, while in another case[200] atrial was scheduled after more than 11 months and later in the same case the statute of limitation on criminal prosecution occurred.

None of the judges who acted in these cases have ever been held accountable for not scheduling hearings in the period which is longer than the period for which the judge of the Basic Court in Podgorica in the above case was sanctioned.

In relation to actions ofa judge assessed by the Disciplinary Commission in its first decision in 2009[201] as a reason for dismissal, the decision of the Commission stated that the judge:

"exhibited negligence, especially since it is a procedure of an urgent nature, and there is no excuse whatsoever to keep case file in a desk drawer for two years."

During the same time period, in the case before the Basic Court in Podgorica[202] which was a labour dispute and therefore urgent, a judge of that court "kept the case in a drawer" and issued a judgment one year and seven and a half months after the conclusion of the hearing, although the statutory deadline is 30 days. This judge was never held accountable for negligent performance, or "keeping the case in a desk drawer", even though the President of the High Court[203] and President of the Supreme Court of Montenegro[204], who is also the President of the Judicial Council, had been informed about all the above.

Therefore, this decision of the Disciplinary Commission too demonstrates unequal treatment of judges, but also a suspicion that judges are pressuredwith their mistakes from the past.

198 P.br.5043/2011.
199 P.br.164/2011.
200 K.br.1236/05.
201 Dp.br.1/09 of 2 February 2009.
202 P. br. 19954/01.
203 In the request to expedite the proceedings of 13 October 2008.
204 In the complaint of6 April 2009.

In early September 2009 the Judicial Council issued a decision on dismissal[205] of a judge. Only 7 months earlier that judge was sanctioned with a 20% salary reduction for not scheduling a hearingin one case for almost 8 months. However, the decision on dismissal points to the new shortcomings of that judge assessed as unprofessional and negligent work. Thus, in addition to acting in two cases where the Disciplinary Commissionfoundthe grounds for dismissal, the decision on dismissal points to judge's incompetent performance in another 30 cases from 2008 in which decisions were modified oroverruledand in 20 cases from the first 4 months of 2009, while the negligent work was established in another 17 cases.

Majority of cases (47) for which this judge had been dismissed date from the previous period, so it is unclear why the dismissal procedure was not initiated earlier. Also, disciplinary action and sanctioning of a judge for not scheduling a hearing in only one case prove probable that the judge has been pressured to seek termination of judicial office herself. In any case, it is inexplicable and unacceptable that the data on a negligent and unprofessional work were concealed or unnoticed for a long time.

In the decision[206] from the following year the Disciplinary Commissionfound no disciplinary offense in a case where a judge failed to rule on the motion for a temporary measure for three years, although the statutory deadline for deciding on such a motion is 5 days. The rationale states that failure of a judge to decide on a party's motion in due time constitutes negligent performance of a judicial function only on the condition that it is not an isolated case.

That same year the Disciplinary Commission adopted a decision[207]on a negligent performance of judicial function where a judge in one case failed to schedule a hearing, did not respect the principle of urgency and adopted a decision nearly four months after the submitted motion. This decision indisputably shows that the former President of the Basic Court and the Supreme Court President (and the President of the Judicial Council) were familiar with the reasons for initiating the disciplinary proceedings almost a year earlier, since May 2009. The judge's salary was reduced by 20% for a period of three months, but the disciplinary measure was not carried out, because pursuant to the decision[208] of the Judicial Council, this judge ceased to hold office at his own request on 27 May 2010.

205 Su. R. br. 983/09 of 4 September 2009.
206 Dp. br. 1/10 of 25 October 2010.
207 Dp.br.2/10 of 8 April 2010.
208 Su.R.br.653/2010.

Decisions of the Disciplinary Commission and the Judicial Council prove unequal treatment of judges and further strengthen doubts that the data about negligence and illegal activities in the work of judges is being covered up and used as a pressure on judges to seek the termination of judicial office themselves (see section 8.2. below). This especially regarding the fact that the President of the Supreme Court and the Judicial Council, who has the competence to propose initiation of a disciplinary procedure against judges, has not initiated proceedings for almost a year even though she was familiar with the reasons for which a judge was later sanctioned.

7.4. Recommendations

1. Amend the Law on the Judicial Council to grant the Judicial Council members as well the authority to submit a proposal for establishing disciplinary responsibility of judges and court presidents, including the Supreme Court President.

2. The Law on Courts should be amended so as to omit the possibility of determining the "reasonable grounds" in case of a judge's undue performance of judicial function, or incompetent and negligent performance of judicial function, as it allows for arbitrary and inconsistent interpretation and actions of courts presidents.

3. The Law on Courts should expressly prescribe that the violation of the Judicial Code of Ethics represents the basis for determining disciplinary responsibility of a judge, i.e. undue or negligent performance of judicial function, or the contempt of judicial function.[209]

4. Amend the Law on Courts so as to prescribe the existence of a violation of judicial discipline, in addition to mentioned cases, when a judge:

- fails to fulfil mentoring duties and obligations for professional development of trainee judges;
- in case of unexcused absence from work;
- fails to wear official attire in accordance with regulations;
- behaves rudely or impolitely towards the parties and other participants in the proceedings and fails to prevent such behaviour of others under his/her authority in the proceedings led by him/her;
- fails to refrain from any action which is improper or leads to such impression, as well as from any action which causes distrust, incites suspicion, weakens confidence or in any other way damages the reputation of the court and its impartiality;
- fails to resist threats, blackmails and other assaults on his/her persona and integrity;
- is not able to resist political influence, public opinion, bias (particularly in relation to prohibited grounds of discrimination), temptations, vices, passions, private and family interests and other internal and external influences;
- visits places of improper reputation (repeated recommendations from 2008).[210]

209 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", op.cit. item 5.1.2. p. 107.

210 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", op.cit. items 5.1.3 – 5.4.2. p. 107-111;

5. "Disciplinary Commission" (Art. 51 of the Law on the Judicial Council) does not prescribe the procedure and criteria based on which the Judicial Council elects members of the Disciplinary Commission who are not the Judicial Council members.Prescribe the composition of the Commission so as to be arranged on a parity basis.

6.To avoid Disciplinary Commission's dual role in investigating disciplinary offenses and deciding on disciplinary proceedings, it is necessary to amend the Law on the Judicial Council to establish a disciplinary prosecutor to conduct investigation and initiate the proceedings, while the disciplinary commission adopts decisions.

7. Publish decisions of the Disciplinary Commission to ensure uniformity of practices of court presidents as only they have an authority to initiate disciplinary proceedings, and to insure that the public and all judges are familiar with the practice of this Commission.

8. DISMISSAL OF JUDGES

8.1. Practice of the Judicial Council

8.1.1. Assessmentof negligent performance of judicial function in practice

As presented in the previous chapter, the decisions of the Disciplinary Commission illustrate how the Commission perceives undue, unprofessional and negligent performance of a judicial duty.

Also, unequal treatment of judges in assessing negligent and unprofessional performance is best reflected in the previous three decisions of the Judicial Council on dismissal of judges. On the basis of these decisions, it can be concluded that the work of judges is arbitrarily and unequally qualified as negligent and incompetent performance of a judicial function, and that negligent and unprofessional work are tolerated unreasonably long.

In the decision on dismissal of a judge of the Basic Court in Podgorica[211] it is said that his negligence in performing the judicial function is due to:

"failure to act in many cases, contrary to Art. 4 of the Law on Courts (Sl. list RCG, 5/02, 49/04 and 22/08), which, due to the failure to act in some cases for several years, threatened the right of the parties to a fair and public trial before an independent and impartial court within a reasonable time, protected by Art. 6 of the European Convention on Human Rights and Fundamental Freedoms and Art.16, para 1 and 2 of the Criminal Procedure Code, as well as the right of the parties to an effective legal remedy, protected by Art.13 of the European Convention on Human Rights and Fundamental Freedoms".

It is further stated that the judge failed to take any investigative actionin 10 cases which, based on the numbers assigned to them, date from: 1999 - one case, 2004 - 3 cases, 2005 - 4 cases, and2006 - 2 cases.

It is also indicated that the judge failed to take any investigative actionin 111 cases from 2007, failed to act in 39 more cases in the period since 1997 (which can also be concluded based on the case numbers), and that his failure to act in another 17 cases resulted in the statute of limitation of criminal prosecution.

211 Su.R.br. 367/08 of 1 October 2008.

It follows that,in order to establish negligent work and sanction negligent performance of a judicial function,it was necessary fora judge to fail to take any action in 121 cases, fail to act in 56 cases, 17 of which resulted in the statute of limitation of criminal prosecution, and all thisover a time period of 11 years. It is concerning that the reaction to such a performance of a judge did not occur much earlier. In this sense, the logical conclusion is that there were serious shortcomings in supervising the work of this judge and the Basic Court in Podgorica, where he held the office.

In the decision on dismissal of a judge of the Basic Court in Pljevlja[212], issued less than three months after the previous one, it is also stated that the judge performed his judicial function unprofessionally. The decision's rationale lists 11 cases in which actions were not undertaken and 8 cases in which the judge applied the law incorrectly, and all thisstarting 29 December 2004 when the judge began to perform his judicial function.

Although as in the previous case this decision indicates failure to act, or failure to take action in certain cases, it does not include qualification of negligent performance of a judicial function. Also, there is a significant difference in the number of cases based on which the work of these judges has been assessed as incompetent or negligent, as well as in the time period during which the judges acted in that manner. In the first case the judge failed to undertake any action in 121 cases during the period of 11 years, and in the second case - in 11 cases for a period of 4 years. Therefore, it is completely incomprehensible when and on what basis the actions against judges who do not act in their cases are taken.

More than two years later, the decision on dismissal of a judge of the Basic Court in Cetinje[213] states that this judge performed his judicial function negligently because *"the judge failed to make written copies of decisions in cases assigned to himin due time, namely: in 70 decisions up to 4 months, in 36 decisions up to 5 months, 33 decisions up to 6 months, 15 decisions up to 7 months, and in 7 decision up to 8 months".*

This decision implies that such conduct was at first the reason for the President of the Court in Cetinje to submit a proposal for establishing disciplinary responsibility of thisjudge. As the Disciplinary Committee found

212 Su.R.br. 636/08 of 26 December 2008.
213 Su.R.br. 104/11 of 8 February 2011.

that in this case there are grounds for dismissal of the judge, that procedure-was terminated. President of the Court then accepted the assessment of the Disciplinary Commission that there are grounds for dismissal, and, according to law, the proposal to establish disciplinary responsibility was considered the proposal for dismissal.

> This decision effectively shows that the reasons for disciplinary responsibility are not clearly prescribed and leave ample room for arbitrariness in the decision of the court president, as the person authorized to submit proposals for establishing disciplinary responsibility of judges. In this case, the president of the court held that there are reasons for disciplinary responsibility of a judge, while the Disciplinary Commission assessed that these are the groundsfor dismissal.

This decision also demonstrates the arbitrariness in the evaluation of whether a judge had "reasonable justification" for actions he had been charged with. The Judicial Council has found that the judge's allegations had no impact on a different decision in this legal matter and with regard to that provided only one reason - *"the published judgement must be made in writing and sent off within the period prescribed by Art.378 of the Criminal Procedure Code".*

Therefore, this decision implies that the decision in each case must be made in writing and sent offwithin the statutory deadline, without exception. Otherwise, the Judicial Council would be obliged to indicate in the decision's rationale that the judge allegations represent "reasonable grounds" for violating the deadlines prescribed by law and provide clear reasons for such a position.

Contrary to the position of this decision, in its decision[214] described above in section 7.2., the Disciplinary Commission took the standpoint that exceeding legal deadline for making a written decision is not prescribed by law as a disciplinary offense, and refused the proposal to establish disciplinary responsibility. Three years later, that action was prescribed by law as undue performance of a judicial function.[215]

Therefore, this decision on dismissal too shows that the judges are not treated equally and that for some judges there may be room for "reasonable

214 Dp.br.1/08.

215 In the amendments to the Law on Courts, which came into force in August 2011.

justification" for breach of statutory deadlines, while others are made aware that "*the issued judgment must be prepared in writing and sent off within the deadline prescribed by law",* or otherwise they shall be dismissed at the time when their superiors arbitrarily and for reasons known to only them decide to initiate the proceedings. Moreover, in this case the judge was dismissed for the action thathad not even been treated as a disciplinary offense couple of years earlier.

The stipulation that the violation of statutory deadlines is acceptable if there are "reasonable grounds" imposes an obligation on the Judicial Council to particularly take into consideration the reasons indicated by the judge whose dismissal has been requested. Rationales of all decisions on dismissal do not include the assessment of allegations and reasons that the judges have given, but only routinely note that the Judicial Council "assessed the statement of the said judge as unfounded and lacking legal arguments that would call into question the allegations contained in the Proposal for dismissal and Report of the Disciplinary Commission".

The possibility of unequal treatment of judges is further enabled-by non-transparent operation of the Judicial Council, which prevents judges themselves, as well as the general public, to have access to all decisions and be aware of the kind ofjudges' behaviour that is sanctioned. Besides, the regulations and practice that enable some judges to violate statutory deadlines without being sanctioned and be able to find a "reasonable justification" discourages the parties in court proceedings to report such cases.

In fact, even in cases wherea judge hasconsiderably exceeded the statutory deadline in a particular case, thisdoes not provide a reason for questioning his responsibility unless the Judicial Council finds thatthe judge has exceeded deadlines in several cases, for a longer time period and without reasonable justification. Since the parties do not have access to judge's behaviour as regards other cases, their complaints can be arbitrarily rejected even if the judge clearly negligently performs his duties.

Contrary to these examples, which point to the arbitrariness in the evaluation of unprofessional and negligent performance of a judicial function depending on the number of cases and time period during whicha judge has acted in such manner, as well as possible existence of "reasonable grounds", the practice of the Judicial Council indicates that some judges are sanctioned when their work is assessed as unprofessional and negligent only in one case.

Acting on the initiative of 9 September 2009 of the President of the High Court in Podgorica, on 3 October 2009 the Judicial Council adopted a decision on suspension of Lazar Aković, a judge of that Court. In this decision the Judicial Council has confirmed the allegations of the proposal for dismissal that in one case the judge performed his judicial function negligently due to"lengthyprocedure", "exceeding the legal deadline for communication of the judgment" and "making errors in the judgment submitted to the parties".

None of the acts passed by the Judicial Council against judge Aković were published on theCouncil's website. The Council refused to submit the decision in this case falsely stating that "all decisions are published on the website", but has published the decision on termination of office of this judgelater.

Therefore, in analyzingthis case HRA also used the information published in the media, which, in addition to the evident lack of transparency, support the conclusion that it is completely unclear on what basis judgesare sanctioned and their work evaluated.

In the case in whichit has been concluded that judge Aković conducted "lengthy procedure", the first hearing was held on 26 March 2006, and the judgment was rendered on 7 August 2009. This case is one of the most complex cases conducted before the Montenegrin courts, it contained the records of over 1000 pages, and the first instance verdict comprises over 300 pages.

There was no official note of the reasons why the Judicial Council in the case of judge Aković concluded that he had led "lengthy procedure", or whether, and if so, how the Council evaluated the fact of the complexity of the case and the volume of the case file. The two and a half years after the termination of judge Aković'soffice, this case is still pending before the first instance court - the High Court in Podgorica. The first instance verdict has since been abolished twice by the second instance court and the case was assigned to a third judge in the court of first instance. So far, the Judicial Council has found that only judge Aković, who ceased to hold office two and a half years ago, acted negligently in this case.

It is also unclear whether the Judicial Council assessed the facts of the case complexity and the scope of case documentation in relation to exceeding the legal deadline for adopting a decision. In the practice of courtsit is not uncommon for judges to violate deadlines for making judgments without being sanctioned in some much simpler and less extensive cases.[216]

216 For example, in a labour dispute that is legally urgent, a judge of the Basic Court in

Nearly two years after the dismissal of judgeAković, in the same case a judge of the High Court in Podgorica,SlavkaVukčević, made a mistake in writing the judgmentand corrected it in a decision, the same way judge Aković previously did. On this occasion the Minister of Justice and President of the Supreme Court of Montenegro demanded of the President of the High Court to examine the work of judgeVukčević in that case. The same President of the High Court whotwo years earlier filedthe initiative for the dismissal of judge Akovićdue to negligent performance of the judicial function in the same case, subsequently refused to act on this request and in a letter to the Judicial Council[217] stated that the second instance court, the Appellate Court of Montenegro, will make its decision on shortcomings regarding the judgment and decision issued by judge Vukčević.

Thus, it appears that this case too is the evidence of unequal treatment of judges,this time by the same Court President, who, in case of one judge,submits a proposal for dismissal due to, among other things, mistakes in making the judgment, while in case of another judge refuses to comment on errors in making the judgment in the same case, explaining that the second instance court willdecide on that.

This proves probable the public statement of the former judge LazarAković that the President of the High Court, before submission of the proposal for dismissal, said to him that he is "pressured to do so", or otherwise the dismissal procedure will be initiated against him as well, advising Aković to "meet with the President of the Supreme Court" (who is also the President of the Judicial Council), or "resign".[218]

Finally, it remains completely unclear why the President of the High Court initiated the procedure for dismissal of a judge in the case where the first instance judgment was made, without an explanation whether the duration of the procedure, assessed as lengthy, had been caused by (non) actions of the judge and whether the errors in the judgment should have been left to the second instance court for review. This especially since the same Court President in thesame case later took the view that the second instance court should decide on errors in the judgment.

Podgorica reached a verdict P.br. 19954/01 after 7 months and 15 days after the conclusion of the hearing. The Judicial Council was notified on this case, but has failed to take any action to determine the liability of the judge.

217 V-Su.br. 215/11 of 21 September 2011.

218 *Pobjeda*, 24 October 2009.

What is common to both the judgments, in which the judges corrected their mistakes by decisions, is that they were both later abolished by the second instance court - the Appellate Court of Montenegro. However, lack of transparency and denial of the right of the public to learn about the reasons for initiating dismissal procedure of a judge during the proceedings in the most complex case, encourages further doubts about the independence of judges and autocratic administration of the judiciary.

After the dismissal of judge Aković, a judge whose daughter was appointed a judge of the Basic Court in Nikšićjust months earlier by the Judicial Council decision[219], was appointed a judge-rapporteur in the second instance procedure. Also, the judge appointed as a judge-rapporteur in the second instance procedure was elected the President of the Appellate Court of Montenegro bythe decision of the Judicial Council during the process of deciding on the first instance judgment.[220] These decisions of the Judicial Council do not indicate for what reasonsthe President of the Appellate Court has been appointed, or previously his daughter as a judge of the Basic Court in Nikšić. This especially because the decision on appointment of a judge of the Basic Court indicates that on a written test one candidate had more points than the judge who was elected, but received a lower grade. Nonetheless, the decision offers no explanation or reasons for such evaluation.

Such actions and decisions of the Judicial Council, which are not accompanied by clear explanation, point to serious doubts about the independence of judges and possible influence on the decision of the second instance court. If errors in the judgments that the judges corrected by decisions were such as to affect the legality of the judgment, then only the second instance court could have decided on that matter, while the viewpoints of the Judicial Council, President of the Supreme or any other court, and especially the Minister Justice, as the representative of executive power, put pressure on the court which should decide on the legality of the judgment. On the other hand, if the error was of technical nature, then all of these subjects again had no basis to conclude that the judge acted negligently and unprofessionally. Further, if a judge that has a key role in the second instance procedure,in which the judgment is repealed, afterwards gets promoted by the Judicial Council and if the very Judicial Council previously appoints his daughter a judge and fails to provide proper rationale for these decisions, then the suspicion about the objectivity of the Council and independence of judges is further strengthened.

219 Su.R.br. 792/09 of 17 July 2009.
220 Su.R.br.162/2010 of 8 February 2010.

8.1.2. Random assignment of cases - the case of the President of the Basic Court in Podgorica

Arbitrariness in the actions of the Judicial Council in determining the responsibility of judges is confirmed in practice by the example of treating a case of the President of the Basic Court in Podgorica. On 12 September 2011 the President of the High Court in Podgorica issued a decision[221]to adopt the request forexemption of the President of the Basic Court in Podgorica in case K.br.386/11.

In the explanation of this decision, the President of the High Court noted that the President of the Basic Court:

"took the case without considering the provisions of Art.89, 90 and 91 of the Law on Courts, and Art. 55 of the Court Rules of Procedure(Sl.list RCG, 5/02 and 49/04), i.e. that the principle of random assignment of cases has not been met" and that "he obviously failed to comply with the above rules ...,... which could be a factor that casts doubt on his impartiality".

Art. 50, para 2 of the Law on the Judicial Council (Sl. list CG, 13/2008, 39/2011):
The president of the court shall be liable to disciplinary action in case he/she performs his/her duty improperly or harms the reputation of the office of the court president.
According to the Law on Amendments to the Law on Courts (Sl.list CG, 39/11), in Article 33d, para 1, item 2:
President of the court shall be deemed to exercise his/her office in a negligent and incompetent manner if he/she:
2) fails to comply with the principle of random assignment of cases.
The Constitution of Montenegro (Sl. list CG, 1/2007) in Art. 121, para 3 stipulates:
A judge shall be dismissed if: convicted of an offense that renders him/her unfit to perform the judicial function, in case of incompetent or negligent performance of judicial function, or in case of permanent loss of ability to perform judicial function.
Art. 71a of the Law on Amendments to the Law on the Judicial Council envisages that:
The president of the court shall be dismissed inthe case of negligent and unprofessional performance of the office of the court president.
Art. 61 of the Law on the Judicial Council stipulateswho can submit a proposal for the dismissal of a judge:
(1) A judge may be dismissed in cases stipulated by the Constitution.
(2) A proposal for the dismissal of a judge may be submitted by a president of the court where the judge performs a judicial function, president of the directly higher court, president of the Supreme Court, Minister of Justice and another member of the Judicial Council.

221 VII Su.br.72/11.

Rejection of the proposal

Art. 63 of the Law on the Judicial Council:

(1) The Judicial Council shall refuse or reject the proposal for dismissal if it finds that there are no grounds for the procedure, that the proposal was submitted by an unauthorized person or in an untimely manner.

(2) If the Judicial Council finds that there are grounds for the dismissal procedure, the proposal shall be submitted to the Disciplinary Commission of Art.51 of this Law, which examines the reasons for dismissal.

Determining the just cause for filing the proposal

Art. 64 of the Law on the Judicial Council:

(1) The Disciplinary Commission shall gather the information and evidence necessary to determine whether or not just cause for the filing of the initiative exists.

(2) The judge against whom the initiative was brought is entitled to attend the sessions of the Disciplinary Commission and observe its work.

(3) Upon reviewing the collected information and evidence, the Disciplinary Commission shall submit a report to the Judicial Council within the deadline set by the Judicial Council.

(4) A copy of the report prepared by the Disciplinary Commission shall be delivered to the judge against whom the initiative was brought.

Bearing in mind the cited statutory provisions, there is no doubt that the President of the Basic Court in Podgorica in this case failed to comply with the principle of random assignment of cases and that such conduct constitutes negligent and incompetent performance of the function of the president of the court, which is the legal basis for dismissal of the court president.

However, in its conclusion[222] of 19 September 2011 the Judicial Council asked the President of the High Court in Podgoricafor the report on actions of the President of the Basic Court in Podgorica in this case. Contrary to the above provisions and contrary to his statements from the decision adopting the request for exemption of the President of the Basic Court in Podgorica, the President of the High Court gave his opinion in the report to the Judicial Council that there is no basis to initiate disciplinary action.

This opinion was adopted by the Judicial Council at its session held on 28 December 2011.

In the notice of the Judicial Council, submitted to HRA upon the request for submission of a decision in this case, the following is noted:

222 Su.R.br. 772/11.

"At its XV session the Judicial Council accepted the opinion of the President of the High Court in Podgorica that there are no grounds for disciplinary action against ZoranRadović, President of the Basic Court in Podgorica, with the conclusion that all presidents should be regularly assigned cases according to the percentage of the norm determined for them".[223]

Thus, it appears that the Judicial Council did not at all address the issue of responsibility of the President of the Basic Court and that it has accepted the opinion of the President of the High Court without any explanation. The statement that *"all court presidents should be regularly assigned cases according to the percentage of the norm determined for them"* is not an explanation for tolerating in this case the behaviour prescribed by law as incompetent and negligent performance of the function of the court president.

In addition, it is incomprehensible why the Judicial Council has not shown interest to get a statement from the President of the High Court regarding his opinion that there are no grounds for disciplinary action being contrary to what he had found in the procedure for the exemption of the Basic CourtPresident. Moreover, it is incomprehensible and worrying that the Judicial Council, as a body to supervise the work of the courts, has not shown interest to examine the actions of the President of the Basic Court in Podgorica (as well as of the presidents of other courts), who noted the following in hisstatement[224] regarding the request for exemption:

"given the great interest of the public and the media attention this case has attracted in its investigation phase, I took the case in order to contribute with my experience to the work and credibility of the court, which has been the practice of the presidents of Montenegrin courts in such cases".

In addition tobeing unacceptable that a court president considers that he "contributes to the credibility of the court" when acting in a manner the law defines as unprofessional and negligent performance of a function, his statement that this has been "the practice of the presidents of Montenegrin courts" is especially concerning.

In the opinion of the President of the High Court in Podgorica[225], submitted to HRA by the Judicial Council only in the procedure of execution of the judgment of the Administrative Court, it is stated that there are no grounds

223 The same reasoning the Judicial Council announced in the media, for example: "When for the norm, the law can be avoided", *Vijesti*, 18 February 2012.
224 Decision VII Su.br.72/11 of 12 September 2011.
225 V-Su.br.214/11 of 17 November 2011.

for initiating disciplinary proceedings against the President of the Basic Court in Podgorica. In the explanation the President of the High Court makes incomprehensible reference to the provision of Art. 31, para 1 of the Law on Courts which prescribes general requirements for the selection of judges, provision of Art. 9 of the Rules of approximate norms for determining the number of judges and other court employees, which stipulates the percentage of reduction of norms for presidents of courts and the Court Rules provisions which deal with the method of random allocation of cases. In the opinion of the President of the High Court it is also stated that the court presidents must act in the most extreme cases. Although this obligation is not prescribed by any act, the President of the High Court did not provide any basis on which for determining that the case in question is one of the "most complex cases".

None of the provisions of the legislation that the President of the High Court referred to in the explanation that there are no grounds for determining accountability, gives the right and justification to the court president to violate the legal principle of random allocation of cases. Moreover, the same President of the High Court had previously issued a decision on the exemption of the President of the Basic Court[226] in which he stated that the President of the Basic Court violated the very Law on Courts and the Court Rules –regulations that he now uses as a basis for avoiding responsibility.

Previously cited provisions of the Law on Courts and Law on the Judicial Council stipulate that the president of the court shall be dismissed in the case of non-compliance with the principle of random assignment of cases. Above attitudes of the President of the High Court show that in practice the regulations are often ignored andevadedand the existence of liability in some cases assessed arbitrarily.

As this case concerns the events the Mayor of the Capital actively participated in, where his son, also a public official, was charged with a criminal offense, such conduct of the court president and his statement that this was the "practice" in Montenegro, as well as assertions of the President of the High Court that this is the "most difficult case", indicate serious doubts about the independence of the courts, and that the judicial branch is under the direct influence of politics and that the law is knowingly violated when in the interest of a public official. This even more so given that the Judicial Council, which supervises the work in courts, shares the view that there is no basis for disciplinary procedure and offers no explanation for such a position, and in addition has no interest to examine what are the other cases

226 VII Su.br.72/11 of 12 September 2011.

when the "practice" of not respecting the principle of random assignment of cases was applied.

Therefore, in addition to showing that the responsibility of judges does not depend on whether they have violated the laws but of one's arbitrary assessment, this case also calls into question the independence of the judiciary.

8.1.3. Random assignment of cases - the case of the President of the High Court in Podgorica

In a similar manner as the President of the High Court in Podgorica, the President of the Supreme Court of Montenegro gave her opinionon an initiative to submit the proposal for the dismissal of the President of the High Court and similarly interpreted the "right" of the president to disregard the principle of random allocation of cases. In a letter[227] to the Judicial Council of 26 December 2011, the President of the Montenegrin Supreme Court first notes:

"The then Acting President of the Court IvicaStanković took the case and the documentation available for insight does not indicate with certainty whether the case was allocated using the method of random assignment."

The President of the Supreme Court of Montenegro has thus established that in the High Court in Podgoricait is not possible to determine whether a case was assigned to a judge by the principle of random allocation, i.e.that there is no system that would conclusively show that cases have been assigned legally. It is concerning that the President of the Supreme Court at the same time failed to announce what steps will be undertaken to determine whether in this case the principle of random assignment of cases has been met, and how to ensure that it will be possible to verify this in every case.

In the same letter the President of the Supreme Court of Montenegro further stated that on 16 April 2009 the President of the High Court in Podgorica was elected a judge of the Supreme Court of Montenegro, that the case was assigned to a judge who herself sought the exemption and that the case was then taken over by the newly elected President of the High Court, since it was a complex case previously assigned to the President of the High Court, and, by the logic of taking over the cases, he ordered the Court Registry to assign to him the specified case.

227 Su.IV.br. 331/11.

No provision of any regulation authorizes the president of a court to violate the principle of random assignment of cases and take over a case because it is complex and because it has previously been assigned to a former president, also suspected of having violated the same principle, or to order the Registry to assign any case to him. Furthermore, it remains completely incomprehensible who and on what basis assessed that the case was "complex".

Rather than carrying outexamination that will undoubtedly determine whether the previous and current presidents of the High Court violated the principle of random assignment of cases in the same case, the President of the Supreme Court further finds that:

"the president of the Court is also a judge, which means that he also must try",

and that:

"Court Rules of Procedure do not elaborate a method of random allocation of cases. The method of random allocation of cases will be developed and recognized after the full implementation of the PRIS[228] and cases will be electronically allocated to the presidents of courts as well starting from 1 January 2012."

By taking such position, the President of the Supreme Court of Montenegro has explicitly stated that all the presidents of courts could have violated the legal principle of random allocation of cases without being sanctioned and taken over cases at own discretion up to 1 January 2012, although the principle of random allocation of cases was clearly envisaged by the 2002 Law on Courts, and elaborated in detail in the 2004 Court Rules of Procedure.[229]

In any case, contrary to allegations of the President of the Supreme Court of Montenegro, in late 2010 in the "Information on the implementation of judicial reform", the Ministry of Justice stated:

"Judicial Information System (PRIS) has been implemented at all locations of users of justice information system (Ministry of Justice, courts ...), with a centralized and unified database and centrally installed application solutions available to users 24 hours a day, seven days a week."

It follows that the President of the Supreme Court of Montenegro finds unjustified excuses for breaking the law by judges, since the report of the

228 Judicial Information System.

229 See Court Rules of Procedure, *Sl. list RCG*, 36/2004, Art. 55-64, http://sudovi.me/podaci/vrhs/dokumenta/591.pdf.

Ministry of Justice indicates that the PRIS was implemented back in 2010 at all locations of the judiciary's information system users, in the courts as well.

Although responsible for the supervision of the courts, the Judicial Council also failed to take any action to check why it is not possible to determine whether the High Court in Podgorica respects the principle of random assignment of cases, how it is possible that the court president gives order to the Court Registry Office to assign a specific case to him, or actions to determine liability for violations of this legal principle.

8.1.4. Deciding on suspension from judicial office

Law on the Judicial Council prescribes conditions for the suspension of a judge:

Suspension
Article 69

(1) A judge shall be suspended from duty, should any of the following occur:

1) If he/she is being held in pre-trial confinement.

2) If an investigation is initiated against him/her for the commission of an act that renders him/her unworthy of holding a judicial office.

(2) A judge shall be suspended from duty if the Judicial Council accepts the proposal to initiate the procedure for his/her dismissal.

(3) The decision on the suspension of a judge shall be issued by the Judicial Council.

New Rules of the Judicial Council prescribe:

Suspension from duty

The principle of emergency
Article 70

The procedure for the suspension of a judge from exercising his/her duties is urgent.

Initiation of the procedure for thesuspension from duty

Article 71

The procedure for the suspension can be initiated:

-at the request of the president of the court where a judge performs his duties, the president of the directly higher court and the Supreme Court President (hereinafter the authorized proposer),

- by the Judicial Council ex officio.

Request of the authorized proposer for the suspension shall be submitted to the Judicial Council in writing.

The provisions of the Rules relating to the contents of the proposal to initiate disciplinary proceedings shall be applied to the content of the request for the suspension.

Deciding on Request

Article 72

The Judicial Council shall decide on a temporary suspension from duty for the reasons specified in Art.69,para 1, item 1 of the Law on the Judicial Council on the basis of the decision on detention.

In the process of suspension for the reasons referred to in Art. 69, para 1, item 2 of the Law on the Judicial Council, the judge must be allowed to explain the reasons for the suspension.

The judge may submit his statement within 48 hours of receipt of thedecision on the investigation by the Judicial Council.

Judicial Protection

Article 73

The decision of the Judicial Council on the suspension fromoffice of a judge is final.

Administrative procedure may be initiated against the decision referred to in paragraph 1 of this Article.

The claim for initiating administrative procedure shall not stay the enforcement of the decision on suspension from office of a judge.

The new Rules of Procedure of the Judicial Council do not include the earlier HRA recommendation to provide forthe deadlines for the prescribed principle of urgency of the suspension procedure.

With a pronounced lack of transparency in the work of the Judicial Council, a declarative prescribing of the urgency of the suspension procedure lacks practical significance and allows different treatment of judges. Thus, in a decision by the Judicial Council[230] a judge was suspended from duty on 16 July 2009for being under investigation on suspicion of having committed a serious form of criminal offense of abuse of office due to actions taken by this judge in theproceedingsin which anotherperson gained € 811,000. Two years later, the Judicial Council issued a decision[231]pursuant to which this judge ceased to hold office because he had reached the statutory retirement age. Among the decisions that lifted the suspension from office there is no decision on this judge, **so it follows that the Judicial Council did nothing to establish the responsibility of that judge for the full two years, but waited for the judge to acquire the retirement age, which is why he ceased to hold office.**

Therefore, the principle of urgency in the suspension procedure remains only declarative, because it is not concretized by prescribing precise deadlines. The Judicial Council should, without undue delay, carry out every procedure for determining the responsibility of judges,regardless of whether the criminal procedure against a judge has been initiated for the same cause. Possible absence of criminal liability does not affect the establishment of the existence of disciplinary responsibilityor the reasons to dismiss of a judge.

Since the Law on Judicial Council indicates[232] that a judge shall*always*be suspended from duty in case of detention ordered against him or investigation for an offense that renders him unfit to perform a judicial function, and that a judge *may* be removed from office after the Judicial Council accepts the proposal for removal procedure, this certainly implies the obligation of the Judicial Council to explain the specific reasons for the decision on suspension in cases when such decision may be, but does not have to be issued.

On its website the Judicial Council published 9 decisions on suspension of judges from office in 2008 and 9 decisions on suspension of judges from office in 2009, but without rationales. Decisions submitted by the Judicial Council uponrequest indicate that from 2008 until the end of 2010 a total of 20 decisions on suspension of judges from office were issued. These decisions' rationales do not state the reasons why the judges were suspended

230 Su.R.br.796/09 of 16 July 2009.
231 Su.R.br. 582/2011 of 1 July 2011.
232 Art. 69.

from office in cases when the law provides that suspension is not mandatory. Each such decision contains only the following identical statement:

> *"After accepting the proposal to initiate a dismissal procedure, the Judicial Council found that the grounds referred to in Art. 69,para 2 of the Law on the Judicial Council for the removal of judges have been met."*

This practice suggests that the judges are suspended from office arbitrarily, without proper justification and without clearlystipulated reasons that should be taken into account when adopting such decision.

According to data from the website of the Judicial Council and decisions-submitted by the Judicial Council, it appears that as of 2008, of a total of 20 decisions on suspension of judges from office, 10 decisions were adopted due to initiation of the investigation for a crime which renders the judge unfit to perform a judicial function.

Contrary to these official figures, the President of the Judicial Council and the Supreme Court of Montenegro has publicly said to the diplomatic representatives of countries that have embassies in Montenegro that 20 judges *"had beensuspended from the judicial function for committing a criminal offense"*.[233]

These data indicate that 20 judges committed a crime and are therefore removed from office, which would point to the serious results in combating corruption in the judiciary.

However, these allegations are not true because half of the decisions on suspension of judges from office (10 of them) were issued due to the investigation for a crime that renders a judge unfit to perform the judicial function, while none of these procedures resulted in convictions. Therefore, considerably smaller number of judges has been convicted for an offense that renders them unfit to perform the judicial function than it appears.

By noting that these judges were removed from office *"for committing a criminal offense"*, the President of the Judicial Council and the Supreme Court of Montenegro violated the presumption of innocence for judges against whom criminal proceedings are still pending. Moreover, bearing in mindthe formal and de facto position of thePresident of the Judicial Council and the Supreme Court of Montenegro, her public attitudes can be interpreted as pressure on the courts that adjudicate in these proceedings.

233 "Medenica: There are not enough courtrooms", *Vijesti*, 8 May 2012.

8.2. Termination of judicial office upon judge's personal request

A judge shall cease to hold office at his/her own request after meeting the conditions for obtaining the old age pension and if sentenced to unconditional imprisonment.[234]

According to the annual reports data, the most common reason for termination of judicial office is a personal request of the judge. Thus, in 2008 four decisions on the termination of judicial office were adopted, including two at the personal request of a judge; in 2009 nine decisions on the termination of judicial office were issued, eight of them at own request; in 2010 there were twelve decisions on the termination of judicial office, ten of them at the personal request of judges; in 2011 eleven decisions on the termination of judicial office were adopted,six of which at judges' personal request, while in 2012 seven decisions on the termination of judicial office were adopted and all seven at the personal request.

Thus, in most cases, judges ceased to hold office at their own request. Since judges are not obliged to state their personal reasons, it is not possible to draw conclusions about the reasons why such significant number of judges leavesjudicial office.

However, in some cases a decision of a judge to personally request the termination of office came shortly after the initiation or announcement of initiation of the procedure for determining his/her responsibility. In addition, the suspicion that judges seek termination of office at their own initiative also arises from the previous explicit announcement of such decisions by the President of the Judicial Council and the Supreme Court of Montenegro. As reported by the media,[235] on24 June 2008 at the extended session of the Supreme Court held in Cetinje, the President of the Judicial Council and of the Supreme Court of Montenegro said:

> *"All those who are not aware of their obligations, the weight of judicial office and its responsibilities must make a radical decision to leave the judicial function, before the "court" ofpublic,as well as before oneself. Incompetence and ignorance, malicious intent and avoidance of justice will find no understanding of the Judicial Council in future."*

234 The Constitution of Montenegro, Art.121, para 2.
235 Among others: "Supplementary education for judges",*Pobjeda*, 25 June 2008.

At the same session, the President of the Judicial Council reminded that "all the presidents of basic courts were obliged to submit proposals for the dismissal of judges where there were grounds for such decision until 1 July".

These allegations indicate that up until 1 July there were grounds for dismissal of certain judges, but that the presidents of courts failed to submit a proposal for dismissal. The presidents of basic courts have had and still have a legal obligation to file a proposal for dismissal of judges, always when there are reasons to do so, and not only by 1 July 2008, but at all times. Such statements from the top of the judiciary can be interpreted as a message to judges against whom it would be possible to initiate the dismissal procedure to leave judicial office themselves. Additionally, this certainly applies to those against whom such proceedings have been initiated.

Every decision on the termination of judicial office "at the personal request" following this announcement from the top of the judiciary is burdened by the suspicion that it was issued under pressure on the judge and that it is possible that in such cases there were reasons for establishing the responsibility of judges, but were hidden this way.

In any case, the allegations of thePresident of the Judicial Council indisputably confirm that there are those judges whom she considers "incompetent and who avoid justice out of malicious intent", which calls into question the reasons and motives that the Judicial Council has so far had "understanding" for with regard to such judges, and particularly why noprocess for determining liability has been initiated the against such judges, instead of encouraging them to leave office at their own request.

These public attitudes render pointless the work of the Judicial Council as the organ responsible for supervision of the courts, and point to the responsibility of the Judicial Council in concealing the cases of illegal work and keeping of data on illegal work in order to rule the judgesautocratically and be able to pressure them.

Due to the above practice which allowed avoiding the responsibility, HRA finds it *necessary to prescribe that a judge can not cease to hold office at his/her own request following a request for initiation of the dismissal procedure, until the completion of that procedure*. This particularly because the dismissal, as a sanction, should also have a preventive effect, whether a judge is dismisseddue to incompetence or deliberate evasion of justice. Each such case would have to be fully elucidated.

After the announcement of the position of thePresident of the Judicial Council,first decision on the termination of judicial office at the personal request of a judge was issued by the Judicial Council on 4 July 2008[236]. Dismissal procedure was not initiated against this judge, but the President of the Judicial Council has previously requested access to the case file this judge has acted in, which is why the trial in that case was delayed.[237]

On 6 August 2008 the Judicial Council issued a decision[238] on suspension from office of a judge of the Basic Court inBar, whichdoes not indicate the reasons for the suspension. The decision states that the Judicial Council accepted the proposal of the President of the Basic Court in Bar to initiate proceedings for the dismissal of that judge, but there is no indication about the reasons for the dismissal in the case. A month later the judge in question acted upon the "advice" of the President of the Judicial Council directed to judges and requested the termination of judicial office, and less than two months after the suspension from office, the Judicial Council decided[239] on the termination of judicial function of that judge for personal reasons. The reasons for suspension from duty of this judge have remained unknown and unresolved, but also whether in this particular case there were any reasons for dismissal whatsoever.

On 3 October 2009 the Judicial Council issued a decision[240] on suspension from office of a judge of the High Court in Podgorica Lazar Aković. This decision too contains no explanation as regards the reasons based on which the Judicial Council could have concluded to remove a judge from office in this case. In the decision the Judicial Council states that it has considered the dismissal proposal and the statement submitted by the judge, but it fails to mention how the documents were assessed and the reasons for adopting such decision.

According to public statements of this judge[241], the President of the High Court told him, before submitting the proposal for dismissal, that he must seek his removal as he is "under pressure" and advised him to meet and talk with the President of the Supreme Court of Montenegro, or to submit resignation.

236 Su.R.br. 92/08.
237 "The case at Medenica's office", *Pobjeda*, 17 June 2008.
238 Su.R.br.215/08.
239 Su.R.br. 349/08 of 1 October 2008.
240 The decision was not posted on the website, and the Judicial Council replied to HRA request that it cannot deliver the decision, on the grounds that "it has not been adopted". Acting on the new request, the Judicial Council did submit the decision on temporary suspension from office of this judge.
241 "Leaves without regrets",*Pobjeda*, 24 October 2009.

The session at which this judge was suspended from duty was scheduled for a day of weekend (Saturday, 3 October 2009), when the proposal for dismissal of judge Akovićwas accepted and when he was suspended from office. On the same day and only a few hours after this session, the police protection that judge Aković was entitled tobased on assessment of the safety risk, for trying in the most complex cases of organized crime,was withdrawn. The abolition of the police protection of this judge was performed without carrying out a new assessment of the safety risk, or determining termination of the risk to his safety.[242]

Such actions additionally indicate the pressure on judges not only by the top judiciary, but also in cooperation with the executive authorities, i.e. the police. Moreover, it follows that this case involved undertaking of coordinated measures againstthe judge by the Judicial Council and the police. Otherwise, there is a question as regards the reasons forsuspending a judge and immediately afterwards withdrawing the police protection on the same day, on the weekend. At that moment judge Akovićstill held the judicial office and was protected based on assessment of the safety risk, not on the basis of the function. Therefore, it is impossible that such a risk to judge's safety stops upon his suspension and withdrawal of security proves to be a measure of pressure taken against this judge.

On 24 October 2009 judge Akovićrequired the Judicial Council to terminate his office and on 11 November 2009 the Council issued a decision[243] based on which judgeAković ceased to hold office at his own request. In this case too there are doubts about the existence of the grounds for dismissal, but also about the possible extortion of the request for termination of office.

On 27 May 2010 the Judicial Council ruled on the termination of judicial office at the personal request of a judge of the Basic Court in Danilovgrad.[244] Previously, the President of the Basic Court in Danilovgrad submitted to the Judicial Council a proposal to start disciplinary proceedings against this judge.[245]This information and the text of the proposal to initiate disciplinary proceedings were obtained directly from the party who filed a complaint against that judge. At the request of HRA, the Judicial Council submitted the decisions of the Disciplinary Commission of the Judicial Council, including the decision[246] establishing the responsibility of this judge and imposing a dis-

242 "Judge in the open", *Monitor*, 30 October 2009.
243 Su.R.br. 1569/09.
244 Su.R.br. 653/2010.
245 Su.br. 33/2010 of 10 February 2010.
246 Dp.br.2/10 of 8 April 2012.

ciplinary measure of a 20% salary reduction for the period of three months for negligent performance of judicial function in one case, while in relation to actions of the same judge in another case the disciplinary proceedings were stayed due to the existence of the reasons for dismissal and the documents were submitted to the Judicial Council for further action.

In relation to the case where the Disciplinary Commission held that the judge had performed his judicial function in a negligent and incompetent mannerwhich constituted the grounds for his dismissal, the Disciplinary Commission noted that *"the statement 'subsequently hire an expert in civil engineering' has been entered into the minutes from the hearing"* before the party signed it. The Commission has also found that this statement is *"skewed to the right side, so that it touches the text of the previous paragraph and the party's signature, creating an impression that it was added after the signing of the party, as it seems to be 'pushed'in between the signature and the previous paragraph of the decision".*

Also, the Disciplinary Commission found that in the case file:

"there is no decision of the court that the expert civil engineer referred to",

and that the case file:

"includes an order to the Accounting Department given by judge V. on 2 February 2009 to pay € 130.00 to expert B.B. from the temporary deposit on which the party B.M. had paid € 180.00... from the funds paid by the party B.M. on the basis of the court's visit tothe site and remuneration and costs of an expert of other profession suggested by the party".

These actions raise suspicion that the judge in this case committed the act of counterfeiting official documents and abuse of office. However, both the Disciplinary Committee andthe Judicial Council failed to further address the issue of possible counterfeiting of the hearing minutes and illegal hiring of an expert and payment of his remuneration from the funds paid on a different basis and for other purposes.

At the meeting held on 27 May 2010, the Judicial Council issued a decision[247] on the termination ofoffice of this judge at his own request. In this case too there is suspicion that the "personal reasons" include those concerning the establishment of the responsibility (perhaps criminal), but also the am-

247 Su.R.br. 653/2010.

biguity as regards the reasons due to which the Judicial Council failed to deal with issues that raise suspicion about the commission of criminal offenses in exercisingthe judicial function.

On 21 October 2011 the Judicial Council adopted a decision[248]on the termination of office of a judge of the High Court in PodgoricaSlavka Vukčević, again at the judge's own request. As noted above, this judge has previously found herself in a similar position as judge Aković, except that the dismissal procedure against her has not been initiated, although on this occasion the Minister of Justice stated that the Judicial Council had found errors in her work and announced undertaking of measures.[249]

8.3. Violation of the Code of Judicial Ethics

Prior to the entry into force of the Law on Amendments to the Law on the Judicial Council[250] and establishment of the Commission for the Code of Judicial Ethics, the body responsible for monitoring the implementation of the Code of Judicial Ethics with the Judicial Council,[251]the Judicial Council had been the body responsible for determining whether there has been any breach of the Code.

> Since the adoption of the Code of Judicial Ethics on 26 July 2008, until the appointment of the Commission for the Code of Judicial Ethics on 1 October 2011, the Judicial Council has never determined whether a judge has violated the Code. Therefore, over a period of three years the Judicial Council found no cases of potential violation of the Code of Judicial Ethics.

8.3.1 Practice of the Commission for the Code of Judicial Ethics

Since the appointment of the Commission for the Code of Judicial Ethics on 1 October 2011 up to 1 April 2013, thisCommission gave its opinion on the breach of the Code in two cases only. In both cases the Commission held that the judges did not violate the Code, but the Commission's rationales arevague and lack the explanation on what basis the Commission concluded that the Code has not been violated.

248 Su.R.br.903/2011.
249 Among others: "Failures are obvious", *Dan*, 22 September 2011; "Shortcomings in writing of the judgment", *TV Vijesti, News at 6:30 PM*, 21 September 2011.
250 *Sl. list CG*, 39/2011 of 4 August 2011.
251 Art. 8, para 4 of the Law on the Judicial Council

In one case, the Commission acted on a complaint[252] of employees in the High Court in Podgorica, who argued that the judge of that court ValentinaPavličićaddressed a series of insults to the President of the Trade UnionBiserkaIvanović and other court staff and threw Ivanović out of her office. According to the allegations ofstaff[253], the judge thus violated Art. 13 of the Code of Judicial Ethics, which prescribes the relationship with colleagues and court staff.[254]

On 29 December 2011 the Commission for the Code of Judicial Ethics gave its opinion[255] that a judge did not violate the provision of Art. 13 of the Code, which regulates the relationship with fellow judges and court staff. In the rationale the Commission states that the judge acted in accordance with the provision of Art. 318 of the Criminal Procedure Code, which specifies the conduction of the main hearing by the presiding judge, as well as his/her duty to ensure thorough hearing in the case, establishment of the truth and elimination of everything that delays the proceedings and does not contribute to solving of the case.

Further, the Commission found that the judge in this case acted in accordance with this provision of the Criminal Procedure Code, did not behave improperly in communication with the President of the staff strike committee and did not hurt the reputation of the judicial function.

Suchrationale of the Commission is incomprehensible, because it does not indicate whether the Commission determined in which manner the judge communicated with the court staff and how the Commission assessed the manner of communication. Also, it is not mentioned whether the Commission questioned the complainants,the judge and other witnesses of events to determine the merits of the allegations in the complaint, i.e. on what basis did the Commission establish the facts upon which it based its decision.

Instead, the Commission gave its opinionon the manner the judge conducted the proceedings and ran the main hearing, although the disputed event occurred in the office of the judge, outside the courtroom. Bearing all

252 Su.EK.br 2/2011 of 28 October 2011.

253 "Get out of my office",*Dan*, 6 October 2011.

254 Art. 13 of the Code reads:

"A judge is required to maintain and develop good relationships and cooperation with colleagues. A judge is required to assist judicial associates and interns in their professional training and development. A judge is required to develop a level of conduct in accordance with this Code with judicial associates and interns. A judge is required to properly treat all employees in the court."

255 Su.EK.br. 2/11.

this in mind, it follows that the Commission conducted the procedure formally and failed to determine the merits of the complaint whatsoever.

> The competence of the Commission is not to determine whether a judge respects the provisions of procedural law in any case, so this case implies that the Commission members do not act in accordance with their competence and make decisions only formally, without verifying the allegations of the complaint and determining the facts.

The second opinion[256] that the Commission delivered on the same day, 29 December 2011, contains no explanation that would even suggest what were the allegations in the complaint against a judge, whether the Commission determined in which manner the judge communicated with a party that filed the complaint because of the manner of communication and how the Commission assessed this way of communication.

Instead, as in the already mentioned case, the Commission cited the provisions of the Law on Courts and the Civil Procedure Code, concerning the right to view and copy the court records, then determined that the complainant sought review of records from the court president, not from the judge, based on which the Commission "concludes" that on 5 September 2011 the judge did not violate the Code in communication with the client.

The competence of the Commission is not to determine whether a party in a case sought review of the filesfrom the judge or the court president and whether a judge complied with the provisions of procedural law, so this case implies that the Commission members are not aware of their responsibilities and make decisions only formally, without verifying the allegations of the complaint and determining the facts.

In any case, based on documentation on the work of the Commission one cannot conclude that the Commission verified the allegations in the complaints in both cases and on that basis the Commission determined whether the judges acted contrary to the reputation of the judicial function. Also, the decisions are completely useless from the standpoint of practice which should point to the interpretation of the Code in future, which is unfortunate and makes the work of the Commission seem particularly useless.

256 Su.EK.br. 1/11.

8.4. Recommendations

1. Rationale for decisions on dismissal must be more comprehensive, include the position of a judge whose dismissal is being considered, as well as a reasoned assessment of that position.

2. Amend the Rules of Procedure of the Judicial Council to specify the legal principle of emergency in cases of temporary suspension from judicial office by laying down deadlines for action.

3. Amend Art. 69, para 2 of the Law on the Judicial Council by specifying the reasons the Council shall consider when deciding on temporary suspension of a judge. The Law should prescribe that the Council's decision on suspension has to be substantiated, and that the judge on maternity leave cannot be suspended, nor can disciplinary proceedings or dismissal procedure be initiated against her.[257]

4. Rationale for decisions on temporary suspension must include clear reasons as to why a judge has been suspended.

5. Amend the Law on the Judicial Council to stipulate that a judge cannot cease to hold office at his/her own request following initiation of dismissal procedure, before the completion of the procedure.

6. In "Appropriate application of disciplinary proceedings", Art. 70 of the Law on the Judicial Council, delete words "judicial protection" and add paragraph 2 that reads: "The decision on dismissal of a judge includes an instruction on the right to protection in administrative proceedings." This in case the proposal for the protection against decisions of the Judicial Council before the Constitutional Court is not accepted.

7. Rationale for opinions of the Code of Ethics Commission should be considerably improved, so as to represent a useful contribution to the interpretation of the Code.

257 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", op.cit. item 5.5.2. p. 112.

9. ASSESSMENTOF THE QUALITY OF WORKOF JUDGES IN MONTENEGRO - IN THE LIGHT OF INTERNATIONAL RECOMMENDATIONS AND COMPARATIVE EXPERIENCE

We have previously established that decisions of the Judicial Council on the appointment of judges to the higher instance courts indicate that the system for assessment of the quality of performance of judges in Montenegro is ambiguous. The lack of norms (parameters, indicators) for assessment of the criteria results in unequal evaluation of the sub-criterion "Achieved results", based on which it should be possible to determine which judges deserve promotion and which judges need to be held accountable. Judges themselves cannot be certain as to how their work is evaluated and which acts or omissions constitute the grounds for a promotion or sanctioning. This type of uncertainty enables autocratic governance of the judiciary and threatens the independence of judges.

9.1. Assessment of the quality of performance of judges according to the reports on the work of courts

9.1.1. The term "quality of operation" in the reports on the operationof courts

Reports on the work of courts published on the website www.sudovi.me provide information about the quality of work in all the courts individually.[258] Each year, the Judicial Council also publishes the Annual Report, which is a report on the work of all ordinary courts in Montenegro.[259] In these reports, the term "quality of work" is expressed as a percentage, and implies – exclusively - the number of confirmed, modified and overruled decision by

258 Most courts do not publish their reports on the work, and those that publish them do it in different forms. Of all the basic courts, only five of them published reports for specific years (Basic Court in Rožaje for 2010 and 2012, Basic Court of Cetinje for 2008, 2009, 2010 and 2012, Basic Court in Bijelo Polje for 2009 and 2010, Basic Court in Podgorica for 2011, Basic Court in Danilovgrad for 2009 and 2010). Podgorica High Court and the Appellate Court of Montenegro published their reports that assess the quality of work only at the level of the court (not by individual judges), and the Administrative Court of Montenegro published the reports from 2007 to 2011 which, in relation to individual judge, state only the number of cases resolved.

259 The document entitled "Annual Report 2012" is available at: http://sudovi.me/podaci/vrhs/dokumenta/947.pdf.

an appellate court, in relation to the total number of challenged decision by a judge or court as a whole.

However, the prescribed sub-criterion "Achieved results",[260] based on which the quality of the performance of judges should be assessed, includes seven different indicators, of which "the number of confirmed, modified and overruled decisions of an appellate court" is just one of the many:

- number and type of cases solved, and method of solving;
- number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;
- percentage of solved cases in relation to approximate norms;
- resolving cases in the order received;
- timely acting and decisions-making;
- number of time barred cases;
- number of founded review requests.

"Quality of work" of judges and courts, presented in the reports on the work of courts, is evaluated by assessing only one of the seven indicators of the performance of judges, although it would be logical that the quality of work is evaluated on the basis of all seven of them.

It is particularly confusing and incomprehensible how and whether at all the fulfilment of norms is assessed, i.e. the percentage of completed cases in relation to the approximate norms, which is one of the sub-criteria for the assessment of performance, or the quality of work of a judge. Specifically, this standard appears in the reports on courts' work as the percentage of its fulfilment, but it is not at all specified when evaluating the quality of work. This raises the question of the significance of determining (non)compliance with the norm.

In Annual Reports on the work of courts, the quality of work of all courts is expressed in the same manner, but without the assessment of the quality of performance of individual judges. Also, based on all the published reports on the work of courts that include assessment of the quality of work of individual judges,[261] it appears that the quality of work of judges is assessed solely on the basis of decisions of an appellate court upon legal remedies, as indicated.

260 Art. 32a, para 2b of the Law on the Judicial Council.

261 Among others: Report on the work of the Basic Court in Podgorica for 2011, Report on the work of the Basic Court in Danilovgrad for 2011, 2010 and 2009.

Not a single report, which contains information on the individual work of judges, gives an overall evaluation of work of any judge, but only states data on the fulfilment of the so-called norm[262] and percentage of confirmed, modified and overruled decisions by an appellate court.[263] In these reports too, the two sub-criteria are shown separately, and the quality of work is valued solely by the appellate court decisions.

Based on such presentation of the quality of work, it appears that the outcome of a decision is generally not valued whatsoever, i.e. whether it will subsequently be modified or overruled by an extraordinary remedy, decision of the Constitutional Court on a constitutional appeal or judgment of the European Court of Human Rights. These decisions should be of particular importance to the assessment of the quality of judge's performance, especially if the European Court of Human Rights finds that the court decision violated a basic human right.

> According to the present system of evaluation of the quality of work of judges in Montenegro, it is more important how the directly higher court will evaluate the work of a judge in question, rather than the Supreme Court of Montenegro, the Constitutional Court of Montenegro or even the European Court of Human Rights, as the quality of work of judges is assessed strictly on the basis of decisions of the immediately higher court.

Only some courts in their work reports[264], in the tables showing work of individual judges, include information on *timeliness of decision making*, i.e. the number of cases in which the judge exceeded the statutory deadline for making judgments and the period for which the deadline was exceeded. However, there is no indication as to how these data are assessed, and the practice of the Judicial Council shows that such untimely actions of judges are sometimes tolerated and sometimes not.

In relation to the quality of performance of judges in criminal proceedings, *not one report includes information on the number of cases in which there was a bar to criminal prosecution,*which is also one of the indicators to

262 This norm is determined by reference to the *approximate norms for determining the number of judges and other court employees necessary for the timely and proper performance of judicial functions*, as prescribed by the Rules of approximate norms for determining the necessary number of judges and other court employees (more details below under 9.2).
263 *Ibid*.
264 Basic Courts in Cetinje and Podgorica.

assess the performance of judges. This information, which should be of great importance in assessing the performance of judges in criminal matters, is not shown in the reports, and it appears that it is not determined at all. Moreover, in these cases the court makes a judgment dismissing the charges as a result of the time-bar of criminal prosecution, and such decision increases the quantity of work of a judge, so judge's potential inefficiency contributing to the time-bar of criminal prosecution and impunity may even partially affect a better evaluation of that judge's performance through a review of the number of decisions made, which is absurd!

Also, neither report contains data about the cases in which the decision was suspended on appeal on several occasions and which have thus changed the number assigned to them several times, or data on the total length of proceedings, including the enforcement of a final decision. All these indicators, through the evaluation of timeliness of actions, should be collected and evaluated in relation to the sub-criterion "Achieved results".

In addition, reports on the quality of work of individual judges do not contain any other data for evaluation of the sub-criteria "Achieved results", which are assessed when deciding on judge's promotion. Thus, the reports contain no specific data either about:

- the order of cases heard;
- compliance with procedural deadlines for the scheduling of hearings and making decisions;
- the number of cases resolved by way of their resolution.

HRA pointed to these shortcomings back in 2009, in the analysis which has been distributed to all members of the Judicial Council.[265]

The published reports on the work of courts imply that there are judges with an extremely small percentage of confirmed decisions, in some cases below 50%. However, although these data were published, no procedure has been initiated against these judges to establish responsibility for the obviously poor work results, in relation tothe method of assessment of the quality of work employed by the Judicial Council.

265 See "Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", Human Rights Action, 2009, p.140.

9.1.2. International recommendations on the assessment of the work of judges

9.1.2.1. The European Commission

In its most recent Report on Montenegro's progress towards EU accession for 2012, the European Commission indicates that *"the current criteria for the appointment and promotion of judicial office holders lack clarity and objectivity due to the lack of regular professional assessment of judges' and prosecutors' performance"*.[266]

9.1.2.2. Recommendation of the Committee of Ministers of the Council of Europe

In its Recommendation Rec (2010) 12 to member states on judges: independence, efficiency and responsibilities, of 17 November 2010[267], the Committee of Ministers of the Council of Europe recommended that the decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities; that such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity (p. 44).

As regards systems for the assessment of judges, the Committee stressed that such systems should be based on objective criteria published by the competent judicial authority (p. 58). The procedure of assessment should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court (p. 58).

9.1.2.3. Recommendations of the Consultative Council of European Judges

The Consultative Council of European Judges (CCJE) recommended that the authorities responsible for making and advising on appoint-

266 Montenegro Progress Report, 10 October 2012, p. 45. For more detail see: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf

267 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member stateson judges: independence, efficiency and responsibilities (https://wcd.coe.int/ViewDoc.jsp?id=1707137).

ments of judges introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "*based on merit, having regard to qualifications, integrity, ability and efficiency*" and concluded that once this is done, it will be possible to scrutinize their practical effect.[268]

The CCJE finds inappropriate the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity,since it is considered that the number of appeals and the percentage of their success do not necessarily reflect the actual quality of first instance decision.[269] Evaluation of the quality of judicial decisions through the percentage of decisions modified on appeal may be one of the elements for evaluation of the performance of a judge. CCJE underlines that reversal of decisions must be accepted as a normal outcome of appeal procedures, without any fault on the part of the first judge.

The CCJE also noted that, in the case of candidates subject to an appraisal, they should enjoy legal safeguards that protect them against arbitrariness in the appraisal of their work.[270]

9.1.3. Methodology for producing reports on the operationof courts and competence to adopt the methodology

In 2009, HRA recommended the Judicial Council to adopt the methodology for producing the reports on the work of courts with all indicators of the quality and quantity of work, in accordance with contents of the subcriterion "Achieved results" (Law on the Judicial Council, Art. 32a, item 2, b).[271]

9.1.3.1. Competence to adopt the methodology

In accordance with the statutory powers and its own Action Plan (2008-2013), the Judicial Council should have adopted an improved methodology for producing the reports on the work of courts by the end of March 2010. However, the Council failed to do it, and "Methodology for producing the reports on the work of courts" was adopted at the end of 2012 by the President of the Supreme Court and of the Judicial Council.[272]

268 Opinion of the CCJE no.1, p. 25 (2001).
269 Opinion of the CCJE no.6, p. 36 (2004).
270 Opinion of the CCJE no. 4, p. 41 (2003).
271 For more detail see: "Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", p. 140.
272 Su I 230/12 of 26 December 2012.

This raises the question of the competence of the Supreme Court President to adopt this act herself. Art. 23, para 1, item 9 of the Law on the Judicial Council lays down the competence of the Judicial Council to establish methodology for drafting the reports on the work of courts, as well as Action Plan for implementation of the task of improving the methodology. It appears that the President of the Supreme Court and of the Judicial Council exceeded her powers by adopting this act, and that the Judicial Council failed to perform duties within its competence.

9.1.3.2. Contents of the methodology for producing the reports on the operation of courts

The Methodology for producing the reports on the work of courts, issued by the President of the Supreme Court, stipulates that courts shall act uniformly when drafting the reports.

However, the Methodology does not ensure that the content of the report follows the content of the sub-criterion "Achieved results" (Art. 32a, para 2b of the Law on the Judicial Council), taking into account all seven performance indicators under this sub-criterion, as stated above (9.1.1).

The Methodology offers an instruction as to which cases are included in the general review of the work of a court, which cases are considered resolved by the end of the reporting year, how to calculate duration of the proceedings, what is the deadline for processing and decision making, how to calculate the workload of judges and quality of work, how to present merged cases, criminal sanctions, annual norm and deduction, what is considered a year and a month and how to calculate the achieved norm. Thus, the Methodology has failed to improve the substantiality of the report, as it mainly deals with issues already regulated by law (cases considered to be resolved, calculating duration of the proceedings, deadline for making a decision, etc.).

Methodology of preparing the reports on courts' work is partially laid down by the Court Rules[273], in the part dealing with reports, records and statistics.[274] The only provisions relevant to the contents of the report are: Art. 47, para 5, which states that in preparing the report on work, data on pending cases in which the decision has been reversed shall also include the year in which the proceedings were instituted, and Art. 49, which stipulates: *"Annual*

273 *Sl. list CG*, 26/2011 and 44/2012.
274 Art. 46 do 53.

report on the work of the court, in addition to regular data, should include and analyze the work of the court and state the problems and shortcomings in the work of the court and measures taken and to be taken to achieve the required efficiency, as well as the amount of funds paid in accordance with the law governing free legal aid".

Neither this provision, nor any other, specifies *regular data* to be included in the report. Therefore, apart from this provision, no other provision prescribes the content of the report on the work of courts or the manner and methodology of its drafting, except for the Methodology adopted by the President of the Supreme Court and the Judicial Council on 26 December 2012.

The Judicial Council should adopt the methodology of drafting the reports on the work of courts, which will not deal with issues already regulated by law, but provide guidelines that will ensure that the reports on the work of courts contain all the necessary parameters for the assessment of the sub-criterion "Achieved results" and reporting on the fulfilment of the said criterion by each judge individually (see 9.1.1). Prescribing norms (indicators) for assessing the compliance with this sub-criterion would provide the conditions for regular comprehensive evaluation.

Also, it is necessary to stipulate the obligation of courts to publish their annual work reports on the website, because the lack of this obligation does not contribute to transparency and public scrutiny of the courts, while it contributes to further failure of the Council to establish an improved methodology to be implemented in all Montenegrin courts.

9.1.4. Statistics

Keeping statistics has not been regulated adequately, because the Court Rules provide that the statistics and records are maintained in accordance with the instruction of the Supreme Court President and the administrative body in charge of statistics.[275]

It is not good that statistics are kept in accordance with instructions of the person responsible for the results of the courts' work, whose appraisal is directly dependent on the statistics and results determined by it, or in accordance with instructions of the body that does not belong to the judicial

275 Art. 47, para 1.

system, since it cannot have the knowledge of what relevant data are, important for an objective evaluation of courts. Statistical data that need to be collected should be provided for in the methodology of drafting the reports on the work of courts.

Implementation of the Judicial Information System (PRIS) is also of crucial importance for statistics keeping, but the System has not been normatively regulated particularly well and all the effects of its application are still unknown in practice.

Action Plan of the Judicial Council envisaged "improving of the methodology for producing the reports on the work of courts" as one of the tasks to achieve the goal of "improving the statistics and other reporting systems", that needed to be fulfilled by the end of March 2010, as indicated (more details in 9.3.3. below). Determining which statistics will be collected is logically related to the methodology for producing the reports on the work of courts.

> Collection of statistical data should be specified in detail by the Court Rules, the only one that is published. Contents of the methodology for producing the reports on the work of courts should incorporate these statistical data.

9.2. Problems regarding the assessmentof the quality of judges' workin practice

9.2.1. Lack of an adequate regulation

Given the fact that Montenegrin regulations do not require regular assessment of the performance of all judges, it may be concluded that the assessment is carried out only in relation to those judges who decide to apply for promotion, i.e. for appointment to a higher instance court, or those against whom the court president initiates disciplinary proceedings.

Since the Judicial Council failed to "improve the mechanism for evaluating the performance of judges" in line with the objectives of the Action Plan (see 9.3.1. and 9.3.2. below for more detail), it is not clear how the performance of judges in Montenegro is evaluated and especially on the basis of which acts and what criteria, that is, whether the assessment is made solely on the basis of decisions of the second instance court, as it follows from the reports on the work of courts.

In an attempt to obtain clear indications of how the quality of the performance of judges is assessed, on 27 April 2012 HRA requested the Judicial Council to submit the document based on which judges are assessed, criteria based on which the general assessment of the performance is provided, and information on how to assess a judgment that no one appeals to and which thus becomes final.

In a brief notice[276] of 4 May 2012 the Judicial Council stated that the evaluation of judges and criteria based on which the general assessment of the performance of judges is provided are specified by the Law on Courts and the Rules of approximate norms for determining the required number of judges and other court staff,without reference to the specific provisions of the said acts.

Contrary to the claims of the Council, no provision of the Law on Courts prescribes a method for the evaluation of judges or criteria by which the general assessment of the work of judges is provided. The said Law governs *the establishment, organization and jurisdiction of courts; conditions for the appointment of judges and lay judges; organization of the work of courts; judicial administration; financing of the courts and other issues of importance for the proper and timely functioning of courts*.[277]

Moreover, the Rules of approximate norms for determining the required number of judges and other court staff[278] does not contain provisions specifying the manner of evaluation of judges or the criteria under which the general assessment of the work of judges is provided. This document defines *the approximate norms for determining the required number of judges and other court employees needed for timely and proper performance of judicial functions.*[279]

The Rules set standards for determining the necessary number of judges in the Basic Court[280], High Court[281], Commercial Court[282], Appellate Court[283] and Administrative Court[284]. However, other provisions of the Rules show that these are not only the criteria for determining the number of judges, but also the criteria that practically define the required norm that judges need to

276 Su.R.br. 319-1/12.
277 Art. 1.
278 *Sl. list CG*, 76/2008, 46/2011 and 49/2011.
279 Art. 1.
280 Art. 8.
281 Art. 13.
282 Art. 19.
283 Art. 24.
284 Art. 30.

fulfil. Thus, it has been prescribed how those criteria are reduced for the Basic Court President[285], High Court President[286], Commercial Court President[287], Appellate Court President[288] and President of the Administrative Court. Given that in this case the criteria cannot be considered as those whose sole objective is determining the number of presidents of courts, as there can be only one at the court level, it is clear that the criteria actually represent a norm that judges need to fulfil. For the shortcomings of the norm as an objective indicator of efficiency of judges, see below 9.2.5.

The same conclusion is indicated by the provision relating to the criteria for determining the necessary number of judges in the Supreme Court of Montenegro.[289] Specifically, this provision stipulates that the Supreme Court has at least 13 judges, for the purpose of forming judicial departments. Therefore, this provision does not provide any criteria for the number of judges of that court, but only lists the minimum number of judges that the court must have. Also, unlike for other courts, the Rules do not contain a provision establishing criteria, i.e. the norm, for the President of the Supreme Court. That is why these Rules too confirm that it is not clear how to evaluate the performance of judges and of the Supreme Court President.

We propose that, in accordance with the recommendation of the European Commission, regular evaluation of the performance of judges in Montenegro be introduced, in line with precisely defined criteria (indicators) based on which each judge and the public will understand which actions deserve career advancement, and which call for accountability of a judge. The law should establish a basis for regular evaluation and the right to a remedy, and separate Rules should establish indicators for the assessment and procedure of assessment.

9.2.2. Lack of indicators for the assessmentof "Achieved results" as a criterion for promotion of judges

Law on the Judicial Council prescribes the criteria for promotion of judges (Art. 32a) as follows: 1) Acquired knowledge, 2) Ability to perform judicial function, and 3) Worthiness to perform judicial function.

285 Art. 9.
286 Art. 14.
287 Art. 20.
288 Art. 26.
289 Art. 36.

Each of these criteria is evaluated based on defined sub-criteria:

- *acquired knowledge* based on professional development, academic qualification, published scientific papers and other professional activities and computer skills and knowledge of foreign languages;
- *ability to perform judicial function* based on work experience[290], achieved results of the last three years and communication skills and personal conduct;
- *worthiness to perform judicial functions* on the basis of violations of the Code of Judicial Ethics, relationships with colleagues and clients and reputation and irreproachable conduct.

One of the sub-criteria based on which the ability to perform the judicial function is evaluated is "achieved results of the last three years",[291] which should be decisive for the assessment of quality performance of a judge. As noted above, this sub-criterion is assessed based on seven indicators:

- the number and type of cases solved, and method of solving;
- the number of confirmed, modified and overruled decisions, as well as decisions upon which a hearing was open, or hearing upon a legal remedy;
- the percentage of solved cases in relation to approximate norms;
- resolving cases in the order received[292];
- timely acting and decisions-making;
- the number of time barred cases[293];
- the number of founded review requests.

Cited sub-criteria should represent the basis for the assessment of work of previous three years in relation to a judge whose promotion is being considered, and, pursuant to the Rules of Procedure of the Judicial Council, they are awarded from 0 to 25 points. However, given the lack of prescribed parameters (indicators) for evaluation of judges by specified sub-criteria, objective evaluation of judges who apply for promotion has not been ensured (for more detail see sections 4.2.2.2.2 and 5.3.2, 5.4 and 5.5.2. Uneven and arbitrary treatment in determining disciplinary responsibility and reasons for dismissal is specifically described in sections 7.3 and 8.1.1).

290 Work experience has already been prescribed as a condition of appointment of judges in certain courts, and this sub-criterion is unnecessary.
291 Art. 32a, item 2b.
292 Obligations to resolve urgent cases (detention, juvenile, high-priority cases in accordance with the control request or cases with set deadline for the resolution, etc.), regardless of the order of receipt, has been neglected.
293 Reasons for the time-bar have been neglected here, i.e. whether time-bar was due to actions of the judge being evaluated, and whether these cases were previously assigned to another judge.

As many as four of the seven cited indicators, based on which the results of work of the last three years should be evaluated, are related to the duration of acting in a case, namely: 1) resolving cases in the order received, 2) timely acting and decisions-making, 3) number of time barred cases, and 4) number of founded review requests.

The final Analysis towards rationalization of the judicial network[294] indicates that the European Commission for the Efficiency of Justice (CEPEJ) uses two basic indicators to assess the performance of courts: clearance rate and **disposition time**. The Analysis states that the CEPEJ considers the duration up to 40 days excellent, above 90 days alerting, and over 120 days alarming.

Also, the said Analysis critically indicates that the average disposition time in the Montenegrin courts is 244 days, or as many as 345 days for the basic courts only, and that the situation is particularly alarming in basic courts in Podgorica and Danilovgrad, where the average disposition time in one case is between 1,282 and 1,408 days.

However, none of the four indicators related to the disposition time is taken into account in assessing the quality of performance, although the said Analysis clearly indicates that the average disposition time in Montenegrin courts deviates significantly from the CEPEJ standard.

> The lack of indicators for the assessment of the disposition time, which is one of the key indicators for the assessment of courts' performance according to the CEPEJ, further contributes to the non-objective assessment of the quality of performance.

One of the strategic goals provided for in the Action Plan of the Judicial Council for the period 2009-2013 is the "improvement of the procedure of appointment of judges", which implies the priority of *ensuring proper application of objective and clear criteria in the procedure of appointment of judges, by reviewing and analyzing indicators for the assessment of candidates with a view to their improvement in accordance with identified needs*. However, it is not clear which "indicators" should have been subject to review and analysis, given that no indicators were published, that the Judicial Council failed to point them out even at the request of HRA or to refer to them in its decisions. **Therefore, the norms or "indicators" for assessing the mentioned criteria and sub-criteria still do not exist, although they should have been considered, analyzed and improved back in 2010.**

294 Adopted at the 10 session of the Government held on 14 February 2013.

Objective assessment of "Achieved results" of judges - candidates for judges of higher instance courts requires immediate prescribing of indicators for the assessment of all seven elements of this sub-criterion, as envisaged in the Action Plan of the Judicial Council. The CEPEJ indicators should be used for assessing "timely acting in a case", which were taken into account in the drafting of the Analysis towards rationalization of the judicial network.

It is necessary to prescribe the manner in which to obtain this type of information on the work of judges.

This raises the question of the method of evaluation of the performance of judges who have applied for promotion to date.

9.2.3. Shortcomings of the dominant criterion for evaluatingthe quality of the workof judges in practice - number of decision confirmed, modified and overruled on appeal

As described previously, although the sub-criterion "Achieved results of the last three years" consists of seven different categories, based on the published reports on the work of courts in Montenegro, one may conclude that the dominant criterion in assessing the quality of a judge's performance is the number of decision confirmed, modified and overruled by the appellate court.

Although the Report on the work of the Judicial Council also deals with issues of efficiency and effectiveness[295], the Judicial Council does not at all mention these elements in its decisions on the promotion of judges, so it is unclear whether these elements are generally taken into consideration when assessing the performance of judges and deciding about their promotion.

295 The Report on the work of the Judicial Council for 2011 on p. 89 states: "Decisions were made within the statutory deadline and of all decisions made by the basic courts in criminal matters, only 5.5% of the decisions were adopted after the statutory deadline or in civil matters only 2.54%, which is an indicator of complete efficiency and effectiveness, while respecting the trial within a reasonable time". Identical statements including percentages for 2012 are given on p. 54 of the same Report:"Decisions were made within the statutory time and of all decisions made by the basic courts in criminal matters, only 2.29% of the decisions were adopted after the legal deadline or in civil matters only 1%, which is an indicator of complete efficiency and effectiveness, while respecting the trial within a reasonable time".

Explanation as to how to evaluate the performance of judges of first instance courts has been provided, however, there is no explanation as to how to assess the work of judges in appellate courts, or in departments. Neither report on the work of the High Court in Podgorica presents individually the quality of the performance of judges in the second instance - criminal or civil department. Their work is presented through the number of completed cases and compliance with the norm.

Furthermore, individual performances of judges in the second instance are not considered even at the collegiums on annual reports, although these data are assessable through the decisions on extraordinary legal remedies. This raises the question of the manner of assessing the performance of judges who make decisions in a panel based on the criterion of modified and overruled decisions.

Evaluation of the quality of judges' performance based solely or mainly on a decision of the second instance court represents a one-sided statistical indicator and does not show the real quality of the work of a judge being evaluated, as stated by the Consultative Council of European Judges (see above 9.1.2.3). This applies in particular in the case of Montenegro, as the jurisprudence of the high courts is not always uniform, and the Supreme Court has a small number of binding positions, which leads to a situation where different verdicts are adopted in identical cases in the same court, but also where different second instance panels decide differently on these judgments.

In addition, this method of assessing the quality of judges' performance inevitably creates the need to try and adopt a decision on the assumption that it will be confirmed in the second instance, and the responsibility to make fair and lawful decisions in each case, in accordance with the position of a sitting judge, becomes of secondary importance. Such method of assessment may be a subtle form of pressure on judges and lead to their discipline with the purpose of making the expected decision, which may not be in line with the standards of the European Court of Human Rights.

Objective assessment of the quality of judicial decisions through the percentage of decisions modified and overruled on appeal can be one of the elements for the evaluation of judges, which has been confirmed by international recommendations (for more detail on international recommendations see 9.1.2 and 9.3). The number of appeals and the percentage of their success do not necessarily reflect the quality of the first instance decision, and it is therefore inappropriate to assess the quality of judge's work based on this indicator only, even assuming that the practice of appellate courts is

clear, consistent and constant, and certainly not in a system that lacks strong and long tradition of the rule of law and where the decisions of courts have been under the "control" of an international court regarding the compliance with international human rights standards only for a few years. Thus, for example, this system allows a judge to receive a good grade only because the immediately higher court upheld his/her decision, although the decision is later revoked by the Constitutional Court of Montenegro on a constitutional appeal, or the European Court of Human Rights expresses its adverse opinion with regard to it.

It is necessary to change the method of assessing the quality of the performance of judges in a manner that will allow the monitoring of cases until the final decision is rendered and separately evaluate the Constitutional Court's decisions on constitutional appeals and decisions of the European Court of Human Rights establishing a breach of fundamental human rights. In assessing the quality of work it is also necessary to evaluate the cases that were not appealed or cases in which a settlement was reached, as is the case in other jurisdictions in the region (discussed below).

All the aforesaid points to the necessity of individual evaluation of judges per annum (not only when deciding on promotion or determining disciplinary responsibility), having previously prescribed clear criteria and elaborate sub-criteria, especially in terms of those criteria that cannot be expressed numerically.

9.2.4. Lack of the work assessment of the Supreme Court judges

The fact that the performance of judges in Montenegro is assessed solely based on the results of the appeal procedure can also be concluded from the fact that the annual reports on the work of the Judicial Council do not present the quality of work of the Supreme Court of Montenegro. Specifically, information on the Supreme Court only includes data regarding the efficiency[296], but lacks evaluation of the quality of performance of that Court and its

296 Report on the work of the Judicial Council for 2011 on p. 90 states: "Of total of 2,102 received cases, the Supreme Court acted on 2,204 cases together with those from the previous year, completed 2,188 cases, while only 16 or 0.73% of cases are still pending." Identical statements exist in the Report on the work of the Judicial Council for 2012 on p. 55: "Of total of 1,967 received cases, the Supreme Court acted on 1,983 cases together with those from the previous year, completed 1,950cases, while only 33 or 1.66% of cases are still pending".

judges in the manner in which the quality of other courts and judges is evaluated. Bearing in mind that the Rules of approximate norms for determining the necessary number of judges and other court employees do not provide benchmarks, i.e. the norm for the judges of the Supreme Court, although it is prescribed for all other courts and judges, it appears that the performance quality still predominantly depends on the percentage of modified and reversed decisions and that other criteria and sub-criteria have been ignored.

This specificity of the Supreme Court is justified when it comes to the norm as it cannot be determined in advance, since this Court decides only when the conditions prescribed by law are fulfilled. However, when it comes to efficiency, acting on cases in the order received (or in urgent cases) and compliance with statutory deadlines, these parameters are certainly verifiable and subject to evaluation. Since this is the highest court of appeal, the mentioned parameters cannot be evaluated in terms of career advancement, but in terms of the general evaluation of judges, if such evaluation should be established on an annual basis.

Thus it appears that the quality of work of the Supreme Court, i.e. the judges of this court is not being evaluated. Moreover, decisions of this Court too may be repealed in the procedure on constitutional appeal[297], or may be subject to new proceedings in accordance with the judgment of the European Court of Human Rights, which has often happened in practice.[298]

297 The decision of Montenegrin Constitutional Court Už-III br. 87-09 upholding the constitutional appeal filed by Andrej Nikolaidis and reversing the judgment of Montenegrin Supreme Court Rev.br. 262/08 of 6 June 2009 and returning the case for a new trial.

298 From April 2009 until the end of February 2013, the European Court of Human Rights found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Supreme Court in the following 8 cases:

Garzičić v. Montenegro of 21 September 2010 - The Court finds that there has been a violation of Article 6, para 1 of the Convention, because the Supreme Court had unreasonably refused to consider the request for review. The applicant was awarded 1,500 Euros in damages. For more detail see: http://sudovi.me/podaci/vrhs/dokumenta/233.pdf.

Koprivica v. Montenegro of 22 November 2011 - The Court finds that there has been a violation of the right to freedom of expression and that the amount of damages sought was unrealistic, given that the domestic court obliged the applicant to pay damages for defamation in the amount of 5,000Euros and legal costs, which was 25 times higher than his monthly income. Montenegrin Supreme Court modified the judgment of the High Court reduced the damages awarded and the costs to 2,677.50Euros, however, the ECtHR in this case too finds that the awarded damages and the costs of the proceedings in the present case are disproportionate to the legitimate aim pursued. For more detail see: http://sudovi.me/podaci/vrhs/dokumenta/663.pdf

Lakićević and others v. Montenegro and Serbia of 13 December 2011 -The Court finds that there has been a violation of the right to peaceful enjoyment of possessions (applicants - retired owners of law firms complained because their pension had been suspended between 2004 and 2005 for reopening their law firms and working part-time. Supreme Court in Podgorica refused the requestsfor review of court decisions filed by the second, third and fourth applicant. The

Therefore, quality of the performance of judges of the Supreme Court should also be evaluated, i.e. it is necessary to prescribe the criteria for evaluating the performance of judges of the highest ordinary court in Montenegro.

9.2.5. Shortcomings of the so-called Norm

Rules of approximate norms for determining the number of judges and other court employees[299] establish *the approximate norms for determining the number of judges and other court employees, required for efficient and proper performance of the judicial function*.[300]

Court considers that the applicants' rights to a pension constitute property under Article 1 of Protocol no. 1 of the Convention, and that the suspension of payment of applicants' pensions by the Pension Fund represented a clear interference with the peaceful enjoyment of their property. Therefore, the Court awarded the first and third applicants the amount of 8,000 Euros, the second applicant 6,000 Euros and the fourth applicant 4,000 Euros of pecuniary damages, 4,000 Euros to each applicant for non-pecuniary damage and 679.8 Euros to the first applicant for costs and expenses. For more detail see: http://sudovi.me/podaci/vrhs/dokumenta/664.pdf.

Barać and others v. Montenegro of 13 December 2011 - The Court finds that there has been a violation of the right to a fair trial: the applicants were rejected claims for damages against the employer. The final judgment in this case was based on the law, which was previously found to be inconsistent with the Constitution, and which ceased to have effect before making a final decision, and the Supreme Court in Podgorica rejected the applicants' claim for review. The Court awarded the sum of 202.34 Euros to each of the thirteen applicants for non-pecuniary damage and a total of 4,405 Euros for costs and expenses. For more detail see: http://sudovi.me/podaci/vrhs/dokumenta/662.pdf.

Stakić v. Montenegro of 22 October 2012 - The Court finds that there has been a violation of Article 6 of the ECHR (the right to trial within a reasonable time was violated within the right to a fair trial) and Article 13 of the ECHR (right to an effective remedy). The Court awarded the sum of 5,000 Euros to the applicant for non-pecuniary damage. For more detail see: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113297.

Velimirović v. Montenegro of 2 October 2012 - The Court finds that there has been a violation of Article 6 of the ECHR (the right to trial within a reasonable time was violated within the right to a fair trial). The Court awarded the sum of 4,325 Euros to the applicant for non-pecuniary damage. For more detail see: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113298#{"itemid":["001-113298"]}

Novović v. Montenegro of 23 October 2012-The Court finds that there has been a violation of Article 6 of the ECHR (the right to trial within a reasonable time was violated within the right to a fair trial), indicating that the overall length of the impugned proceedings failed to meet the reasonable period of time. For more detail see: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113978#{"itemid":["001-113978"]}.

Milić v. Montenegro and Serbia of 11 December 2012 - The Court finds that there has been a violation of Article 6 of the ECHR (the right to trial within a reasonable time was violated within the right to a fair trial) and Article 13 of the ECHR (right to an effective remedy) in respect of Montenegro. The applicant was awarded 7,000 Euros for non-pecuniary damage, plus any fees that may be chargeable.

299 *Sl. list CG*, 76/2008, 46/2011 and 49/2011.
300 Art. 1.

In practice, however, these norms are used not solely to determine the number of judges, but also to assess the quality of their performance, as evident in the reports on the performance of judges (see 9.1.1).

One of the seven parameters to be taken into account for the evaluation of the sub-criterion "Achieved results" is the "percentage of completed cases in relation to the approximate norms", which actually indicates the degree of fulfilment of the so-called norm. However, as already pointed out, parameter for the assessment of this indicator has not been prescribed, so it is not certain which percentage of the compliance with the "norm" is considered acceptable and which is not, i.e. how it is evaluated.

The very method for determining the "norm", laid down in the Rules of approximate norms to determine the number of judges and other court employees, allows for abuse and the possibility that individual judges meet or exceed the norm in acting on easier cases and neglect and stall their work in complex cases.

Although the said Rules recognize "complex cases", they are mentioned as such only in terms of more complex non-contentious cases[301] in basic courts, with an explanation of what they are, and complex bankruptcies in commercial courts[302], but with no indication that bankruptcies are considered complex. In relation to criminal matters, cases of organized crime have been singled out as complex. However, the complexity of these types of cases is not evaluated adequately – it is enough if the offense has been committed in an organized manner to evaluate this criterion 5:1 in relation to other criminal cases. It is not uncommon for certain cases, both regular and other cases under the competence of a specialized department for organized crime, to be much more extensive and complex than the procedures for criminal acts committed in an organized manner, and the extensiveness and complexity are generally not taken into account in assessing compliance with the norm or efficient handling, both in terms of trial within a reasonable time and the deadline for making the decision.

The Rules do not contain provisions prescribing the time required to resolve any type of case, therefore, prescribing which cases are considered more complex and determining the number of such cases that judges should resolve annually to "meet the norm" appears to be rather insignificant in

301 Art. 8.
302 Art. 19.

terms of the assessment of compliance with the norm. As a result, it is always possible that a judge with much less working hours exceeds the norm in easier and simpler cases, while other judge, who spent much more time working on complex cases, does not.

It follows that it is very important to determine the time necessary to resolve certain types of cases, so as to prevent the said abuse where judges with the less effective working hours exceed the norm, while others, working more effectively, fail to meet the norm.

In addition, the Rules do not provide for any criteria or norm regarding the judges and president of the Supreme Court, whose work would have to be evaluated same as the work of all other judges.

Data from the work report related to courts' presidents prove that the norm prescribed by the Rules on approximate norms for determining the number of judges and other court employees is easily abused, i.e. that it is possible that the prescribed norm is met and exceeded in the short time period, working in the simplest of cases.

Although it has been prescribed how the approximate norms are reduced in relation to the presidents of courts, which means that the presidents should try too, this is often not the case in practice. Reports on the work clearly indicate that the presidents of courts rarely try, but no one is concerned with the reasons for non-observance of the provision of the law stipulating that they should do so. It is sufficient that the court president's norm is met, however, not through making the prescribed number of judgments, but through making decisions in a panel of judges.[303] This suggests that a president of court has resolved all the cases received in the reporting year and that there is no backlog of cases from previous years.[304] This too is an obvious example of just meeting the statistics requirements – achieving and often considerably exceeding the prescribed "norm".

The quality of work is generally given priority when deciding on promotion, but the quality evaluation method used thus far does not always provide accurate data. In addition to all the aforementioned shortcomings, e.g. even

303 For example, Report of the Basic Court in Podgorica for 2011 indicates that the President of the Court did not at all try and that he made decisions in cases exclusively in a panel of judges (Iks, Kv., Su ...), all of which were completed.

304 Report on the work of the Basic Court in Podgorica for 2011, Work of individual judges, p. 6.

if only 3 or 5 cases were subject to the decision of an appellate court in the reporting period, their positive or negative outcome does not show the real quality of that judge's performance. Notwithstanding the statement in the work report that during the reporting period the court has not yet decided on appeals in a number of cases, such information on the percentage of reversed and confirmed decisions is the only assessment of the quality of that judge's work for the reporting year, which is then considered in the overall assessment of the three-year period. Such an assessment is taken into account in deciding on career advancement, without explaining the said circumstances or addressing them, as evident from the cited decisions of the Council.

The current "norm" in the form of approximate criteria for determining the necessary number of judges should be changed, as the performance of judges might be jeopardized in the "race" for the fulfilment of the norm. Moreover, reports on the work of courts give emphasis to the strengthening of efficiency and point out that in this respect the Judicial Council has established measures, including the awards, for the completion of "double norm".[305] It is thus possible for someone to be awarded for "double norm", without analyzing how such norm was achieved, in which cases the judge acted, how the cases ended and particularly without any further follow-up to the outcome of these cases.

As already mentioned, in the last Analysis towards rationalization of the judicial network in Montenegro it is stated that the CEPEJ uses two basic indicators for the appraisal of courts' performance (clearance rate and disposition time). The Analysis states the workload of courts as an important indicator for Montenegro, or the influx of cases and approximate norms for determining the number of judges.

However, this Analysis too highlights the need to change the rules for determining the necessary number of judges by attaching importance to the number of cases resolved in one year and the number of cases that have not been completed. It has therefore been noted that the approximate norms should be gradually superseded and a system for monitoring case disposition established, as well as a system for tracking and monitoring unresolved cases and undertaking measures to reduce their number. That is why this Analysis too shows shortcomings in establishing of the "norm" and the necessity to change its establishment.

305 Report on the work of the Judicial Council for 2011, Increase in efficiency, p. 36 and the Report on the work of the Judicial Council for 2012, Increase in efficiency, p. 41.

HRA reiterates its recommendation from 2009 that it is necessary that the Judicial Council, in cooperation with the Ministry of Justice establish a new system of time quotas (the so-called weighted system), whose starting point would be the available (effective) annual fund of hours within which it should be expressed how much time is needed for resolving certain types of cases according to their complexity and thus reach the required number of cases that a judge should resolve and the required number of judges. Also, HRA wishes to reiterate that such criteria should be an integral part of the special rules for evaluation of judges.

9.2.6. Shortcomings of other prescribed criteria and sub-criteria for promotion of judges

9.2.6.1. Continuous training

The importance of ongoing training of judges is recognized by all relevant international instruments dealing with the rights of judges.[306]

Under the Law on the Judicial Council, one of the three criteria assessed when deciding on the promotion of judges is "Acquired knowledge", evaluated based on several sub-criteria, of which "Professional development" is in the first place.

It was noted that Montenegro lacks a plan for ongoing professional training of judges. Instead, presidents of courts are informed about planned seminars to which they refer judges at their own discretion, or depending on whether they have a trial scheduled during the time of a seminar. It has also been noted that seminars abroad are often attended by same judges. It is obvious that this criterion of professional training does not depend on the will and interest of judges, so it cannot be assessed in such a manner. In order for this criterion to be properly treated in an individual assessment of this aspect of the work of judges, it is necessary to first make a plan of professional training and provide each judge a number of working days per year for training.

306 UN Basic Principles on the Independence of the Judiciary of 1985, Recommendation of the Committee of Ministers No. R (94) 12 on the independence, efficiency and role of judges, updated in 2010 as Recommendation Rec (2010) 12 to member states on judges: independence, efficiency and accountability; European Charter on the Statute of Judges of 1998; Opinion No. 1 of the CCJE, p. 11.

9.2.6.2. Communication skills and personal conduct

Without prescribed descriptive sub-criteria, individual properties of judges: communication skills, personal conduct, etc., provide the possibility to favour certain candidates based on personal preferences or animosity, with no regard to objective indicators.

9.2.6.3. Violation of the Code of Ethics and the relationship with colleagues and clients

Worthiness to perform the judicial function on the basis of violations of the Code of Ethics is measurable, but not the relationship with colleagues, as such observations (except if determined in a disciplinary procedure) are not recorded anywhere, so the evaluation of judges from this aspect can be abused. As regards the relationship with clients, it is necessary to take into account not only the number of control requests and client complaints filed against a judge, but also their grounds, which can be verified through the decisions taken on these requests, appeals against decisions taken on requests and claims for just satisfaction, or the amount awarded on such claims for the violation of the right to trial within a reasonable time.

9.3. Action Plan strategic aimsrelevant to the assessmentand promotion of judges and their implementation

9.3.1. Assessment of judges

One of the strategic goals of the Judicial Council Action Plan for the period 2009 – 2013 is the **"improvement of mechanisms for the assessment of judges"**. The priority in achieving this goal has been defined as the *provision of normative framework for defining clear and objective criteria for the assessment and promotion of judges and prosecutors*. The Judicial Council has been in charge of the implementation of this strategic goal and the goal should have been implemented through the fulfilment of following tasks:

- *adoption of internal documents which will clearly define the objective criteria for qualitative and quantitative assessment of judges in accordance with international standards,*
- *establishing transparent procedures for the consistent application of objective criteria,*
- *normative regulation and establishment of a central database on the appointment and promotion of judges, and*
- *preparing of reports using a central database and making them available to the public on a periodic basis.*

The Action Plan specified the third quarter of 2010 as deadline for the fulfilment of the first three tasks, while the third task should have been implemented continuously. However, none of the first three tasks have been fulfilled by the end of March 2013.

9.3.2. Appointment and promotion of judges

Another one of the strategic goals of the Judicial Council Action Plan is the **"improvement of the procedure of the appointment of judges"**. The priority in achieving this goal has been identified as *ensuring the proper application of objective and clear criteria in the procedure of the appointment of judges*. Judicial Council is responsible for the implementation of this goal too, which should have been implemented through the fulfilment of following tasks:

- *review and analysis of the criteria for the appointment in order to improve them in line with the identified needs,*
- *review and analysis of indicators for the assessment of candidates with a view to their improvement in line with the identified needs.*

Action Plan specified the second quarter of 2010 as deadline for the fulfilment of the first task, and the third quarter of 2010 for the fulfilment of the second task. However, none of these tasks have been fulfilled by the end of March 2013.

9.3.3. Statistics

Finally, one of the strategic goals of the said Action Plan is the **"promotion of statistical and other reporting systems"**. Priorities in achieving this goal have been defined as *establishing and continuous updating of an internal database, improvement of the methodology for judicial statistics and preparing of reports as provided in the Rules of Procedure.* The Judicial Council and the Secretariat of the Judicial Council are responsible for the implementation of these goals through following tasks:

- *establishment and continuous updating of an internal database on the appointment of each judge,*
- *establishing and maintaining records of judges,*
- *improvement of the methodology for the development of reports on the work of courts, and*
- *preparing of reports on progress in implementing the Action Plan.*

These tasks should have been carried out continuously up to 2013, apart from the improvement of the methodology for the development of reports on the work of courts, which should have been completed by the first quarter of 2010. However, Judicial Council has failed to improve the said methodology, as already noted, although this has been its obligation since the establishment of the Council in 2008.[307]

The last report on the progress made in implementing the Action Plan, submitted to HRA by the Judicial Council at the request of HRA in February 2013, refers to the period up to July 2011.

Art. 22 was deleted[308] from the Law on the Judicial Council in accordance with the Amendments to the Law on the Judicial Council[309] of 2011, and as of August 2011 the Judicial Council is no longer required to adopt the Action Plan, submit it to the courts, the Parliament and the Government, nor is the Secretariat of the Judicial Council required to prepare quarterly reports on its implementation and submit them to the Council. Since the Judicial Council has already been significantly late with the implementation of a number of tasks in the Action Plan at the time of the deletion of these legal obligations, such amendments to the law will certainly not contribute to improving the work of the Council. This especially because now the Council will not receive information about the tasks and measures that have not been implemented.

It is indisputable that there is a constant and significant delay in the implementation of tasks set in order to improve the process of evaluation, appointment and promotion of judges and that the deletion of the legal provision with specified duties of the Judicial Council will certainly not contribute to the improvement of situation in this area. Also, in addition to the Judicial Council, the interested public can no longer obtain precise information on the implementation of the measures and tasks of the Action Plan either.

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307 Under Art. 23, para 1, item 9 of the Law on the Judicial Council (*Sl. list CG*, 13/2008, 39/2011 and 31/2012),obligation of the Council to specify the methodology for the preparation of annual reports on the work of courtsentered into force on 5 March 2008.

308 Art. 22 of the Law on the Judicial Council stipulated:

(1) The Judicial Council adopts the Action Plan which includes goals, measures and holders of certain activities, to strengthen the efficiency and effectiveness of the Judicial Council and the courts.

(2) Action Plan shall be in accordance with relevant judicial strategies and financial capabilities.

(3) Action Plan shall be submitted to all the courts, the Parliament and the Government of Montenegro (hereinafter: the Government).

(4) Secretariat of the Judicial Council (hereinafter: the Secretariat) shall prepare a reasoned report every three months on the implementation of the Action Plan and submit it to the Judicial Council.

309 *Sl. list CG*, 39/2011 of 4 August 2011.

Notwithstanding the deletion of this article of the law, we believe that the goals set forth in the Judicial Council Action Plan for the period 2009 - 2013 are still binding, that the goals and tasks of the Action Plan remain unchanged. Abandonment of the stated goals and tasks would mean abandoning the judicial reform that is needed to strengthen the independence, efficiency and quality in the Montenegrin judiciary, and to join the European Union.

9.4. Comparative experiences in the assessmentof judges

9.4.1. General on various assessmentsystems

HRA has conducted a partial comparative analysis of the assessment of judges in the region, starting from international bases and standards and recommendations in this regard. The results of the research show that in no other system in the comparative law the work of judges is assessed solely based on the decisions of an appellate court, as is the case in Montenegro.

All important international documents dealing with the issue emphasize that the appointment and promotion of judges must be done on merit and based on objective criteria.[310]

According to the Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary of 2005, in some countries[311] the evaluation of judges is carried out mainly to assess the efficiency of the judiciary and efficiency in resolving citizens' requests, thus workload is of great importance for such evaluation, i.e. the number of cases a judge acts on and completes.

Other systems[312], however, take into account the quality of the performance of judges in assessing their work, not only the workload and statistical data. In systems where the process of evaluation of the performance of a judge includes consideration of the decisions issued by that judge[313], the appealed decisions are evaluated together with the reasons for which they have been modified or confirmed[314]. Formal validity of the decision is also assessed, its logic, length of the procedure and legal knowledge of the judge.[315]

310 UN Basic Principles, Recommendation R(94)12.
311 Denmark, Spain, Sweden.
312 Germany, Bulgaria, Finland, Hungary, Italy, Lithuania, Netherlands, Poland and Romania.
313 Bulgaria and Lithuania.
314 Final Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary, presented in Barcelona, 2-3 June 2005.
315 *Ibid*.

Analysis of the reasons for the reversal of judicial decisions is not carried out in Montenegro. If the same repealing reasons are repeated in the decisions of individual judges, especially in a large percentage of overruled decisions, it is necessary to consider the expertise of the judge.

Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary states that, in most cases, the parties involved in the evaluation may include a judge whose work is being reviewed, higher instance judge, other judges or collegial bodies.

Although the opinion of the collegium of the immediately higher court on a judicial candidate is required in accordance with the procedure in Montenegro, in practice this opinion is a mere formality. It is usually a positive opinion, identical even in case of multiple candidates. Cited decisions show that the Judicial Council attaches no importance to the said opinion, although it is also given by colleagues immediately familiar with the work of the judge in question through deciding in the second instance.

Although there is considerable variation in the legal systems in terms of the assessment of the work of judges and although each of these systems is subject to different interpretations and criticism, a method of assessing the quality of judges' work as applied in Montenegro has not been observed in other systems. We believe that the experience of judicial systems, which individually evaluate the performance of judges and decide on their promotion solely on merit, may particularly help improve the situation in this regard in Montenegrin judiciary.[316]

Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary points out that the existence of mechanisms for individual and collective evaluation of judges represents a useful and necessary element of any judicial system[317]. In addition, regular evaluation of judges is not carried out solely for the purpose of appointment or promotion, but also for the purpose of regular monitoring of professional performance, as is the case with any government official.[318]

316 Germany, Bulgaria, Finland, Hungary, Italy, Lithuania, Netherlands.
317 Final Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary, presented in Barcelona, 2-3 June 2005, section F, conclusion.
318 Final Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary, presented in Barcelona, 2-3 June 2005.

In most countries where there is High or Judicial Council, that body has been given the above authority and these bodies prescribe the criteria for the objective evaluation of judges.[319] In most of these countries, individual evaluation of judges and their merit play a decisive role in their careers and advancement.[320]

Given that different systems employ different approaches in assessing the quality of judges' performance, with the aim of individual monitoring and evaluation of judges or with the aim to evaluate the justice system as a whole, CCJE emphasized that the assessment of the quality of the entire system or of a specific court should not be confused with the assessment of professional skills of each judge. Professional evaluation of judges that affect their career and advancement has other goals and should be based on objective criteria.[321]

Regular evaluation of the work of judges upon objective criteria and standards would allow judges to advance solely on the basis of merit, but would also ensure regular monitoring of professional work of each judge, which inevitably leads to the improvement of the quality and efficiency of the judiciary in general.

9.4.2. Experience in the region

Comparative experience in judicial systems in the region shows that the method assessment of the work of judges only through the percentage of appellate court decisions is not common.

9.4.2.1. Kosovo

Law on Courts of the Republic of Kosovo[322] prescribes the qualifications that a candidate for appointment as a judge of any court must have[323], as well as that the Judicial Council may transfer and reassign judges

319 The above report lists Belgium, Bulgaria, Spain, Hungary, Italy, Lithuania, Poland, Portugal and Romania in this context.
320 Final Report of the Working Group on the evaluation of judges of the European Network of Councils for the Judiciary, presented in Barcelona, 2-3 June 2005.
321 Opinion of the CCJE no.6, p. 34 (2004).
322 *Sl. list Republike Kosova/Priština*, 79/24, August 2010.
323 Art. 26 and 27.

taking into account, inter alia, *"the integrity, experience, abilities and management skills that are assessed during the nomination".*[324]

Law on the Judicial Council of Kosovo[325] stipulates that the Judicial Council adopts regulations governing the assessment procedure of judges and that the Council must establish criteria for the assessment and promotion of judges.[326]

Based on these legal powers, on 24 February 2012 the Judicial Council of Kosovo adopted *Rules on the assessment of the performance of judges*. This act provides for the regular assessment of judges, so judges appointed on a permanent basis are evaluated every two years.[327] Evaluation of judges is based on three criteria: 1) personal integrity and overall professional competence, 2) legal and technical skills, and 3) professional involvement. Each of these criteria incorporates a number of sub-criteria.[328]

In contrast to the assessment of judges in Montenegro, the number of overruled decisions can be used as an additional indicator, based on the detailed analysis of cases carried out by the Commission for Evaluation.[329]

The Rules also envisage descriptive evaluation of judges in relation to efficiency and deadlines for the resolution of cases,[330] as well as deadlines for making and delivering decisions.[331] The Judicial Council is responsible for the establishment of the Commission for Evaluation of judges consisting of seven judges + three deputy judges.[332] Court president submits a report on the judge whose performance is assessed to the Commission for Evaluation and randomly selects eight decisions of that judge to review[333]. The judge has the right to object to the report and proposal of the court president within seven days[334], as well as to the Judicial Council's decision on the evaluation.[335]

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324 Art. 38, para 1, item 1.2.
325 *Sl. list Republike Kosova/Priština*, 83/03, November 2010.
326 Art. 19, para 1 and 2.
327 Art. 1, para 3.
328 Art. 2.
329 Art. 6.
330 Art. 7.
331 Art. 8.
332 Art. 11.
333 Art. 15.
334 Art. 19.
335 Art. 21.

Although it is possible to object to these decisions individually, it is good that none of the indicators has a crucial and decisive importance for the assessment of a judge. Regular assessment of judges has been introduced and judges are able to actively participate in the assessment of their work and present their comments during and after the procedure.

9.4.2.2. Croatia

In Croatia, the State Judiciary Council adopted the *Methodologyfor the evaluation of judges* on 6 September 2012, which sets benchmarks for their evaluation and scoring. In contrast to systems that provide for regular evaluation of judges, in Croatia judges are assessed only upon filing an application for the appointment to another court, higher instance court and for the election as a court president.[336]

The Judiciary Council in Croatia evaluates judges based on the following criteria:

1. whether the judge adopted a number of decisions as envisaged by the *Framework criteria for the performance of judges* during the evaluation period, while assessing performance results based on the types of cases, in absolute numbers and percentages, work on difficult cases, and stating justified reasons if the judge has failed to issue a number of decisions set forth by the *Framework criteria for the performance of judges*;

2. whether the judge has met deadlines for making written decisions;

3. if not otherwise provided by the *Methodology*, based on the percentage of decisions reversed on legal remedy to the immediately higher court during the evaluation period;

4. other activities, procedures and circumstances that allow more thorough assessment of the work of judges.

Evaluation of judges on the basis of a higher court's decisions and other activities, procedures and circumstances relevant to the evaluation are described in detail in the *Methodology*[337], explicitly stating what is evaluated in this regard.

In contrast to the evaluation of judges in Montenegro on the basis of a higher court's decisions, in Croatia the total number of decisions that the judge madeduring the assessment period, against which a remedy has been

336 Art. 2, para 2.
337 Art. 6.

prescribed to an immediately higher court, is taken into consideration under this criterion. Also, in contrast to Montenegro, court settlements are taken into account in Croatia.

Furthermore, the number of returned or reversed decisions by an appellate court is taken into account in the assessment procedure, especially decisions that were reversed due to substantial violation of the procedure, or confirmed or modified, although such violation of the procedure had been committed.

The said *Methodology* also prescribes in detail the method of scoring of judges considering the workload[338], compliance with deadlines[339], quality of performance[340] expressed through second instance decisions and other activities, procedures and circumstances identified as important for the evaluation of judges.[341]*The Judiciary Council* makes a decision on the assessment with a detailed explanation.[342]

Although flaws can be found in this system too (it does not provide for regular evaluation of judges, does not allow for active participation and legal protection of judges in the evaluation process, ignores the knowledge and application of the standards of the European Court of Human Rights), it nevertheless represents a serious attempt to ensure objective evaluation of judges. It thereby uses several indicators to base the rating upon, takes into account the workload, types of cases in which the judge acts, deadlines and performance quality.

9.4.2.3. SERBIA

Law on the Organisation of Courts of the Republic of Serbia[343] stipulates that the High Judicial Council shall keep a personal record for every judge which, among other things, contains information about the appraisal of performance, suspension from duty, disciplinary actions, conducted criminal proceedings, termination of office, published professional and scientific papers, knowledge of foreign languages and other information related to the performance and position of a judge.[344]

338 Art. 7.
339 Art. 8.
340 Art. 9.
341 Art. 10.
342 Art. 13.
343 *Sl. glasnik RS*, 116/2008, 104/2009, 101/2010 and 101/2011.
344 Art. 72, para 1 and Art. 73, para 1.

Law on Judges of the Republic of Serbia[345]prescribes regular evaluation of all judges including all aspects of judges' work, which is carried out on the basis of published, objective and uniform criteria and standards, in a single procedure ensuring participation of the judge in question who has the right to object to the assessment of his/her work, with the obligation to provide reasoning of the decision on the assessment, while the judge's evaluation is entered in his/her personal record,[346] which is a general source of data for the evaluation of judges.[347]

Decision on the establishment of criteria and measures for the assessment of expertise, competence and worthiness for the appointment of judges and presidents of courts in the Republic of Serbia[348]prescribes criteria and benchmarks for the promotion of judges[349], with the assessment of judge's work being the basic criterion for the appointment of a judge to the court of higher instance.[350] The same act stipulates that a candidate for a permanent function of the judge failed to show a sufficient level of expertise:

- *if in the past three years the number of reversed decisions has been significantly above the average of the court where the judge performs his/her duties,*[351]i.e. if the judge failed to show a sufficient level of competence;

- *if in the past three years the judge has failed to resolve a required number of cases envisaged by the Standards for the assessment of minimum effectiveness in performing judicial duties and if the time-bar of criminal prosecution can be attributed to the apparent failure of the candidate.*[352]

The same Decision explicitly specifies nine reasons to doubt competence and qualifications of a judge[353], one of which (but certainly not the decisive one) is the number of confirmed, modified and reversed decisions on remedies.

345 *Sl.glasnik RS*, 116/2008, 104/2009 and 101/2010.
346 Art. 32, 33, 34, 35, 36.
347 Art. 15, para 1, item 2 of the Decision on the establishment of criteria and measures for the assessment of expertise, competence and worthiness for the appointment of judges and presidents of courts.
348 *Sl. glasnik RS*, 49/2009.
349 Art. 2.
350 Art. 11, para 2.
351 Art. 13, para 3.
352 Art. 13, para 4.
353 Art. 14, para 1.

Finally, the High Judicial Council of the Republic of Serbia adopted *Rules for the application of the Decision on the establishment of criteria and measures for the assessment of expertise, competence and worthiness and for the procedure of reviewing the decisions of the first composition of the High Judicial Council on the termination of judicial office*[354], specifying the criteria and benchmarks.

Under these *Rules*, the criterion of expertise shall be met by a judge who had a smaller percentage of reversed decisions in 2006, 2007 and 2008 (in relation to the number of considered decisions for the whole evaluation period) compared to the average of the court department in which he carried out his duties and to the minimum effectiveness in performing judicial duties prescribed by *Standardsfor the assessment of minimum effectiveness*.[355]

Also, the criterion of competence is met by a judge who fulfilled the framework standards prescribed in *Standardsfor the assessment of minimum effectiveness* or the average of the court department in 2006, 2007 and 2008, if during the same period he/she had no severe negative deviations/violations in relation to at least one of the following criteria:

- decisions made 30 days following the verdict in relation to the average of the court in which the judge performed his/her duties;
- ratio of unsolved old cases (for which the judge is responsible) in relation to the total number of pending cases, compared with the average of the court and keeping in mind the influx of cases.

Serbian High Judicial Council has access to data on each judge essential to his/her work and promotion, which are the source of information relevant to evaluation. Regular evaluation of all judges has been envisaged, including all aspects of judge's work, a judge can participate in the appraisal process, judge's evaluation is the basic criterion for promotion, the level of expertise and competence is determined in accordance with the prescribed criteria, also, it is possible to determine when a judge does not meet these levels, appellate court decisions is only one of the indicators of which the reasons to doubt judge's expertise and competence depend.

354 *Sl. glasnik RS*, 35/2011 and 90/2011.
355 Art. 5.

9.4.2.4. Slovenia

Slovenian Law on Courts[356] prescribes the obligation of the Judicial Council to adopt criteria for assessing the quality of the performance of judges[357], which were adopted by the Judicial Council on 8 December 2005. According to these Criteria, in evaluating the quality of the performance of judges the following shall be particularly taken into account:

- ability to resolve legal issues and ability of proper application of the law,
- ability to assess the real (factual) issues,
- ability of written and oral expression,
- systematic, complete, accurate, concise and clear reasoning of the decision,
- ability to organize and rationally conduct the proceedings,
- ability to lead and resolve complex issues,
- ability of quality reporting on the Senate meetings.[358]

In assessing the ability of solving legal issues, the achieved degree of regularity and legality of decision making is taken into consideration, which is estimated in the procedures on remedies. In this assessment particular attention is paid to the number and ratio of confirmed, modified and reversed decisions in relation to the total number of issued decisions, number of decisions modified due to incorrect application of substantive law, number of decisions reversed due to an absolute breach of procedure and number of decisions reversed by appeals or by Constitutional Court decisions.[359]

Also, quality of the performance of judges is assessed mainly based on the opinion of the department of immediately higher court, and the data to base the assessment on are obtained from the head of department, court president, judge and other authorities who possess data on the performance of a judge.[360]

356 Ur.l. RS št.19/94, 45/95, 38/99, 28/00, 73/04 and 72/05.
357 Art. 28, para 1, line 5.
358 Art. 3.
359 Art. 4.
360 Art. 5.

This system too attaches great importance to decisions of the second instance courts in assessing the quality of judges' performance. However, in contrast to the assessment of the performance of judges in Montenegro, this appraisal is based not only on simple statistics. In assessing the quality of judges' work through decisions of the immediately higher court, special attention is paid to the number of decisions of this court in relation to the total number of decisions the judge made. Thus, decisions that have not been appealed or procedures that have been resolved, for example, by settlement still affect the work of judges to be assessed better. In addition, particular attention is paid to the reasons for modifying or reversing the decisions, which again affects assessment of the quality of judges' performance.

Although the opinion of the immediately higher court has great significance in the assessment process, method of evaluating and acquiring data, with the participation of judges in question, do provide certain guarantees that this evaluation will be more objective.

9.4.2.5. Bosnia and Herzegovina

The Law on Courts of the Federation of Bosnia and Herzegovina[361] stipulates that the results of the performance of judges are evaluated at least once a year in accordance with the criteria set by the High Judicial and Prosecutorial Council, that the evaluation is carried out by the court president, and that the results of the performance of the court president are assessed by the president of the immediately higher court.[362]

The Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina[363] provides that the High Judicial and Prosecutorial Council shall determine the criteria for evaluating the performance of judges and prosecutors.

Pursuant to this authority, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina adopted early last year[364] the Rules of frame-

361 *Sl. novineFederacijeBiH*, 38/05 and the Law on Amendments to the Law on Courts of the Federation of Bosnia and Herzegovina, *Sl. novineFederacijeBiH*, 22/06.
362 Art. 41.
363 *Sl. glasnikBiH*, 25/04,Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Sl. glasnikBiH*, 93/05) and the Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Sl. glasnikBiH*, 15/08) promulgated by the Decision of the High Representative of 15 June 2007 (*Sl. glasnikBiH,* 48/07).
364 25 January 2012.

work criteria for the work of judges, legal officers and other employees of the courts in Bosnia and Herzegovina. The Rules provide framework guidelines for monitoring and assessing the work and work results of judges[365] in order to ensure equal evaluation of the work and work results for all judges.[366] The Rules impose an obligation on courts presidents to draft regular periodic reports on the work of courts and judges.[367]

However, special value and specificity of this document in relation to Montenegrin Rules of approximate norms for determining the number of judges and other court employees[368] is that the Rules in Bosnia and Herzegovina determine the value of the case not only in terms of criminal or civil matter, but also according to the manner of completion of the case.[369]

Rules give a judge an opportunity, if he believes that the value of a particular case in which he tries does not match its true value, to submit a request to the court president for recognition of greater value.[370] Monitoring and assessment of the performance of judges and their work results is carried out in line with the rules on the fulfilment of the norm in cases valued by the Rules.[371]

Rules prescribe the manner of monthly and annual evaluation of work results. Monthly result of the work of a judge is the ratio of the number of completed cases and cases that the judge should have completed in accordance with the monthly norm determined by the value of cases[372], while the annual report shows the number of cases completed during the year in terms of criminal or civil matter, stages and manner of completion, and the annual result of judge's work is the ratio of the number of completed cases and the number of cases that the judge should have completed in accordance with the annual norm, which is obtained by multiplying the monthly norm with number 11.[373]

Rules[374] set forth the norm that judges should meet on a monthly basis for all cases in terms of criminal and civil matters and manner of completion,

365 Art. 1.
366 Art. 3.
367 Art. 4.
368 *Sl. list CG*, 76/2008, 46/2011 and 49/2011.
369 Art. 7.
370 Art. 9.
371 Art. 16.
372 Art. 17.
373 Art. 18.
374 Art. 19.

which represents the value of each case in relation to criminal or civil matter and the manner of completion of the case.

Although this system of evaluation of judges may be considered unilateral, as it deals solely with the norm and its fulfilment, i.e. the work a judge completes in relation to the established norm, its positive aspect is that the cases are evaluated not only in terms of criminal or civil matter, but also the manner of completion. The system also provides for regular annual evaluation of the work of judges.

9.5. Conclusions and recommendations

9.5.1. Conclusions

The method of evaluationof the performance of judges only or mainly based on the number of decisions confirmed, reversed or overruled by the Appellate Court is inappropriate, as indicated by the CCJE[375]. This method overlookscases in which the decision of the Appellate Court is reversed or modified by the third-instance court, or has become the subject of reconsideration pursuant to the decision of the Constitutional Court or the European Court of Human Rights. In this manner, cases are not tracked down to their final decision and there is hence no reliable data on the quality or quantity of the work of judges.

This single method for the evaluation of the quality of judge's performance in Montenegro has never been amended. Under current criteria, it is possible that a judge is evaluated negatively because of the repealed decision by the Appellate Court, although later it might be determined that the decision of the Appellate Court was illegal and/or in violation of human rights. On the other hand, this kind of evaluation system (based on the decision of the Appellate Court) neglects the efficiency of the work of a judge, i.e. the speed of resolving cases assigned to him/her. We also find that the amount of work that a judge had and completed is important for a full evaluation of the quality of the judge's performance.

Occasional and uneven system of evaluation of the work of judges in Montenegro does not contribute to the improvement of quality of their performance. Also, the method applied does not allow judges to participate in the process of evaluation of their performance.

Shortcomings in the gathering of statistical data and methodology of reports on the work of judges and courts do not enable evaluation of judges with respect to all elements of the criterion "Achieved results", including the number of time-barred cases, thus causing the failure to determine responsibility and impose sanctions for the occurrence of time-bar.

375 Opinion of the CCJE no.6, p. 36 (2004).

9.5.2. Recommendations

1. In accordance with the recommendation of the European Commission, regular evaluations of the performance of judges in Montenegro should be introduced in line with the precisely defined indicators for evaluation of criteria and sub-criteria, based on which every judge and the public will easily understand which actions deserve career advancement, and which call for accountability. The law should establish a basis for regular evaluation and the right to a remedy, and separate Rules should establish indicators for the evaluation and evaluation procedure.

Regular evaluation of the work of judges on the basis ofobjective criteria would allow judges to advance solely on the basis of merit, but would also ensure regular monitoring of professional work of each judge, which inevitably leads to the improvement of the quality and efficiency of the judiciary in general.

Therefore, we repeat HRA's recommendation from 2007 and 2009 to introduce regular evaluation of judges by prescribing in separate Rules standards for the evaluation of criterion "Ability to perform the judicial function", i.e. its sub-criterion "Achieved results of the last three years". For evaluating "timely acting in a case" CEPEJ's indicators should be used, which were taken into account in the drafting of the Analysis towards rationalization of the judicial network. It is necessary to prescribe the manner of obtaining this type of information on the work of judges.

2. The Judicial Council should adopt the methodology of drafting the reports on the operation of courts, which will not deal with issues already regulated by law, but provide guidelines that will ensure that the reports on the operation of courts contain all parameters necessary for the evaluation of the sub-criterion "Achieved results" and reporting on the fulfilment of this criterion by each judge individually (see 9.1.1). Prescribing indicators for evaluating the compliance with this sub-criterion would provide the conditions for regular comprehensive evaluation.

3. Gathering of statistical data should be specified in detail by the Court Rules, which are published. Contents of the methodology for producing the reports on the work of courts should incorporate these statistical data.

4. The Law on Courts should prescribe the obligation of courts to publish their annual operation reports on their websites, because the lack of this obligation does not contribute to transparency and public scrutiny of courts,

while it contributes to further failure of the Judicial Council to establish the improved methodology to be implemented in all Montenegrin courts.

5. It is necessary to change the method of evaluating the quality of the performance of judges in a manner that will allow the monitoring of cases until the final decision is rendered and separately evaluate the Constitutional Court's decisions on constitutional appeals and decisions of the European Court of Human Rights establishing a violation of fundamental human rights. In evaluating the quality of work it is also necessary to evaluate the cases that were not appealed or cases in which a settlement was reached, as is the case in other jurisdictions in the region.

6. Meet the objectives set forth in the Action Plan of the Judicial Council for the period 2009 -2013, whose implementation has been delayed for years, particularly in terms of improving the mechanisms for evaluation of judges.

7. Instead of the approximate criteria for determining the number of judges, the so-called Norm, it is necessary that the Judicial Council, in co-operation with the Ministry of Justice, establishes a new system of time quotas (the so-called weighted system), whose starting point would be the available (effective) annual fund of hours within which it should be stated how much time is needed for resolving certain types of cases according to their complexity and thus reach the required number of cases that a judge should resolve and the required number of judges. Also, HRA wishes to re-iterate that such criteria should be an integral part of the special rules for the evaluation of judges.

8. A plan of professional training of judges should be developed, and every judge should be providedwith a number of working days per year for training. Only under such circumstances it would be possible to fairly assess the criteria of professional training regarding promotion.

10. CONCLUSIONS

Reform of the composition and method of appointment of the Judicial Council

At the time of publication of this analysis, in May 2013, reform of the Constitution was still on the way. Pursuant to the reform proposal by the Government in 2011, the method of appointment of the President of the Supreme Court of Montenegro and of the Judicial Council, i.e. the composition and method of appointment of the Judicial Council members,should be changed with an aim of eliminating political influence from the judiciary.

The adoption of the proposed amendments to the Constitution in May 2012 would imply only partial progress, as this proposal does not provide for guarantees that half of the members of the Judicial Council, who are not judges, shall not be politically engaged, enabling thereby political influence in future. If the proposal is adopted, it would be necessary to amend the Law on the Judicial Council to ensure prevention of conflict of interest, and specify the way in which Council members from outside the ranks of judges are nominated,in order to ensure that the Council inspires confidence as a competent, independent and impartial body.

Transparency of operation

In addition to the fact that the Judicial Council has recently shown positive changes in terms of transparency and has responded positively to requests to provide information, a significant portion of the Council's work still remains non-transparent. Sessions of the Judicial Council have been closed to the public, despite the principle of transparency of the Council's work stipulated by law. The representatives of HRA were not allowed to participate at any session of the Council in spite of their ongoing initiative to that end.

Decisions on the appointment of judges are poorly reasoned and do not present the Council's method of weighing of the criteria or explanation why the Council decided on a certain candidate. It is particularly worrying that in the case of seven decisions on the first appointment and promotion of judges,

no reasoning has been provided for the appointment of eleven candidates whose total point assessment score was lower than of those who were not appointed. At the same time, pursuant to the most recent amendments to the Law on the Judicial Council, candidates have been denied the right of insightinto their opponents' documentation, all of which does not contribute to building public confidence in the objectivity of the Council'swork.

Appointment of judges and assessment of their work

The criteria and sub-criteria for the appointment and promotion of judges have been improved in 2011 compared to previous years, but remain incomplete, since standards for their weighing have not yet been set (such standard exists only for one sub-criteria, amounting to 5% of the total evaluation score of a candidate who is to become judge for the first time). Incomprehensible and incomplete regulations that the Council failed to improve do not provide with minimum conditions for objective and equal assessment of candidates for judges appointed for the first time, as well as for judges who have been promoted.

The Judicial Council failed to adopt internal documents defining the qualitative and quantitative assessment indicators of the performance of judges in accordance with international standards, although the deadline for the completion of this task in the Action Plan of the Council was set for October 2010. The Council thus enabled arbitrary and non-objective assessment of judges and candidates of judges to date. In such a situation, the judges may not predict how their performance is to be evaluated and what action or omission will lead to their sanctioning. This kind of uncertainty allows for autocratic management of the judiciary and endangers judicial independence.

There is no legal document specifying the method of assessment of quality of judges' performance in Montenegro. The existing incidental system of assessment of quality of judges' performance when applying for promotion or on the occasion of initiation of disciplinary proceedings is vague, as there are no precise indicators for assessment of prescribed elements of performance of judges, and the assessment relies on subjective judgment of the Judicial Council members, which does not ensure equality in assessment.

The dominant evaluation method of the quality of judges' performance – the percentage of judges' success in relation to the number of confirmed and reversed decisions by the second instance court is illogical, as it implies

that an appeal against the decision of a judge is filedin each case, although this does not have to be the case (for example, if only one appeal is filed in relation to all decisions adopted by a judge, and the decision on that appeal is reversed, that judge will have a 100% reversal rate). It is unfair not to credit successful performance of a judge visible through decisions to which the parties have not filed an appeal or through procedures, which, for example, ended in settlement.Also, the current system does not take into account the ultimate outcome of the decision, which depends on the Constitutional Court or the European Court of Human Rights. In addition, the Consultative Council of European Judges (CCJE) finds this grading system to be unsuitable, because the number of complaints and the percentage of their success do not always reflect the quality of first instance decisions.

In accordance with the recommendation of the European Commission, regular evaluation of the performance of judges in Montenegro should be introduced in line with the precisely defined indicators for the assessment of the criteria and sub-criteria, based on which every judge and the public will understand which actions deserve career advancement, and which call for accountability. Regular evaluations of judges' performances should lead to the improvement of quality and efficiency.

Establishing accountability of judges for unprofessional and negligent performance

As regards accountability of judges, it has been observed that imprecise legal framework provides for unequal treatment of judges and selective application of regulations, creating space for autocratic power over judges. Presidents of courts and the President of the Supreme Court are allowed to arbitrarily assess the justification of reasons for violating the law and subjectively decide which judge is to be held accountable, while the Judicial Council and its members have no authority to initiate disciplinary proceedings against any judge or court president. The President of the Supreme Court can never be subject to disciplinary proceedings. Practice shows that such system allows certain judges to avoid accountability for actions other judges have been sanctioned for.

The unequal treatment of judges is further enabled by non-transparent work of the Judicial Council. By choosing not to publish decisions on establishment of disciplinary responsibility, the Council prevents judges, presidents of courts and general public from gaining insight into the judges' per-

formance subject to sanctions and from comparing it with the performance they observe in court proceedings.

The practice shows thatsome judges submitted requests for termination of office after a question of their responsibility had been raised, doing so according to suggestions or under pressure from the highest ranks in the judiciary. Termination of office suspended any procedure of determining accountability of judges, leaving many cases of negligent and incompetent performance unresolved, possibly containing elements of criminal responsibility of some judges.

Violation of the Code of Judicial Ethics has not been determined in any of the two cases decided by the Commission for the Code of Ethics. The Commission's decisions are incomprehensible, and do not provide an explanation as to what were the relevant facts to make such decisions and how these facts were obtained.

Temporary assignments of judges to higher instance courts

The practice of appointing judges to work temporarily in the court of higher instance to the end of improving the efficiency of trials is not transparent and allows for unequal treatment of judges. This practice is controversial also with regard to the respect of the right to a fair trial by a legally appointed judge.

Practice of the Judicial Council following the publication of HRA preliminary analysis in 2012

In July 2012 HRA published the preliminary analysis of the Judicial Council in its first four-year term, with a total of 47 recommendations for the establishment of the Council as a professional, objective and independent body. The majority of recommendations relate to amendments to the Constitution, laws and by-laws. The application of some significant recommendations has been conditioned by changes to the Constitution, which did not take place in May 2013.

Meanwhile, only one recommendation has been fully applied, relating to the publication of decisions with a rationale on the website of the Judicial

Council, rather than publishing rationales of certain decisions independently. Two recommendations have been partially implemented, so the announcements for the appointment of judges are now published on the website of the Council, decisions on the appointment of judges include data on all candidates (not just the initials, as it was before), and the website provides access to the last version of the Law on the Judicial Council and the Guide for Access to Information in Montenegrin language (previously it was published only in English). To ensure that these recommendations are fully implemented, it is necessary to prescribe the said obligations of the Judicial Council by law. It is also necessary to improve decision rationales to provide a clear answer to the question of why a certain candidate was appointed as a judge, while the other was not, or why certain judges got promotion and others did not.

Although subsequent to the publication of preliminary analysis of the Judicial Council operations in July 2012, HRA noted the Council's efforts to provide more thorough reasoning for its decisions, they still do not explain how the criteria were evaluated in relation to different candidates, one of whom was then selected. Such attitude is detrimental to acquiring public confidence in the objectivity of the Judicial Council and independence of the judiciary, which should be provided by the very Judicial Council.

It is necessary to carry out the Constitutional reform as soon as possible, as well as the reform of the Law on the Judicial Council, Law on Courts, Court Rules and other by-laws, in order to establish guarantees for fair and balanced, i.e. predictable operation of the Judicial Council. TheCouncil itself should ensure urgent adoption of indicators for weighing of criteria and subcriteria for appointing judges and assessing their work. Only when the rules for the appointment of judges, their promotion in the judiciary and establishment of accountability for unprofessional performance become clear, necessary conditions for the independence of judges will be met and the possibility for autocratic management of the judiciary that the Venice Commission warned about in 2007 will vanish.

11. RECOMMENDATIONS

This section highlights all the recommendations of the analysis, grouped by corresponding chapters.

2. Constitutional framework and Constitution amending procedure

Since the Constitution reform will certainly not provide for full guarantees against political interference in the judiciary, it is necessary to amend the Law on the Judicial Council together with the adoption of amendments to the Constitution, in order to provide such legal guarantees.

1. Prescribe the method of selecting members of the Judicial Council out of ranks of judges to ensure they are not politically engaged. To this end, lawyers elected by the Parliament should be selected from the list of candidates proposed by civil associations (NGOs), based on the criteria and procedure prescribed by law (modelled on the procedures for selection of NGO representatives in the Radio Television of Montenegro - RTCG Council, Council for Cooperation between the Government and NGOs, Council for Protection against Discrimination, Council for Civil Control of the Police). The other two lawyers, elected by the President of Montenegro, should be selected from the list of candidates proposed by civil associations dealing with the rule of law, the Bar Association and law schools.

2. Prescribe conditions for election of the Judicial Council members outside of ranks of judges, so as to ensure that they are:

a) persons truly independent from political power, who are not in any way politically engaged (e.g. were not members of any political party or actively engaged in a party, directly elected in elections and did not hold government office at least 10 years prior to the election);

b) persons who do not have any conflict of interest that could affect their work and decision making in the Judicial Council (this provision should be defined following the example of the provision on preventing conflict of interest from Art. 26 of the Law on Public Broadcasting Services in Montenegro (*Sl. list CG*, 79/08 of 23 December 2008));

c) persons with appropriate legal knowledge and experience (bearing in mind that one of them will be the president of the Council).

3. Transparency of the Judicial Council operations

1. As a rule, make the Judicial Council sessions open to the public.

2. Amend the Law on the Judicial Council to prescribe the exclusion of the public from sessions at which the Council decides on dismissal and disciplinary responsibility of judges only at the request of a judge whose responsibility is being established.

3. Specify by law all information to be published on the Council's website, and particularly ensure timely upload of:

a) decisions on the appointment, disciplinary responsibility, dismissal and suspension of judges, with a rationale;

b) applications of candidates for the judicial post;

c) all regulations relevant to the work of the Judicial Council;

d) notices of session dates, with the proposed agenda.

4. Amend and align the Rules of Procedure of the Judicial Council with the statutory principle of the public, by abolishing the Council's right to arbitrarily decide on when to keep the minutes of the session secret (Art. 25, para 6 of the Rules).

5. Change the form and contents of the annual report on the work of the Judicial Council so that the report includes the Council's assessment of the work of courts, and not only statistics on the work of courts. Also, the annual report on the Judicial Council operations should not contain promotional information about the Supreme Court President's visits to other states, but information on the purpose and results of such activities and funds expended from the budget for these purposes.

6. Ensure that the Judicial Council respects court rulings binding on the Council.

7. Amend the Law on the Judicial Council to ensure access to one's personal records, as well as records of other candidates for election; specify the procedure of accessing the records and the right to appeal in case of denial of this right.

4. Criteria for appointment of judges and court president and 4. their assessment

1. Rules of Procedure of the Judicial Council should be amended to lay down the precise standards (parameters) for assessing each criteria and sub-criteria, so as to ensure a uniform and objective assessment of candidates, as has been started in relation to the criterion "Average grade and duration of studies".

2. It is essential that the Judicial Council urgently adopts internal documents defining qualitative and quantitative assessment of judges, bearing in mind that according to the Action Plan of the Judicial Council this should have been carried out in 2010.

3. Instead of a numerical score of 1-5, evaluate the criterion of "Worthiness to perform the judicial function" descriptively, in the range "satisfactory - unsatisfactory", primarily to highlight the potential problems in terms of worthiness for the position of a judge.

4. Define "Communication skills" as a separate criterion, except in respect of candidates for presidents of courts, where this property is to be assessed descriptively, rather than numerically.

5. "Work experience" should not be assessed numerically, as currently prescribed - it is enough to verify that a candidate meets special minimum requirements for the position of a judge in terms of years of experience in the field of law, while the place of service should be noted and assessed in light of the fulfilment of other criteria. Stipulate that judicial advisors will have an advantage in case of equal fulfilment of other criteria.

6. Regarding the criterion "Achieved results", specify what is implied under the sub-criterion "Career advancement", how to obtain information with regard to that, and objectify "Opinion of the employer" by providing for a special questionnaire that would provide concrete answers about the type of work activities the candidate has carried out and in which area has he advanced. Evaluate achieved results descriptively with a rationale, rather than numerically, as prescribed.

7. Prescribe appropriate scoring system for the criteria "Published scientific papers and other activities" and "Professional development" for the purpose of their uniform assessment. Particularly consider assessment of the criteria for appointment to higher functions in the judiciary in relation

to candidates from universities, bar association, etc., to ensure their uniform assessment.

8. Under the sub-criterion "Academic qualification" prescribe a precise scoring system for degrees Master of Laws, Doctor of the Science of Law, as well as for completion of other relevant forms of education. When defining the scoring system, bear in mind that access requirements for judicial function for scholars should be eased by prescribing that they are not required to attend initial training for judges. In that sense, HRA strongly recommends that the academic qualification be valued significantly higher in order to stimulate judges to acquire specialized knowledge and professional development.

9. Provide that work experience be assessed descriptively, in terms of type of acquired experience relevant to the judicial position the application has been submitted for. As regards the length of the judicial experience, it is sufficient to meet the special condition for appointment of a judge from Art. 32 of the Law on Courts, because the length of experience does not always have to be an advantage (the same at the first appointment as a judge). Otherwise, specify parameters to ensure that the same length of experience always earns the same score.

10. Objective assessment of "Achieved results" of judges candidates for judges of higher courts requires urgent prescription of parameters for the scoring, i.e. the assessment of judges' performance in terms of all the sub-criteria: the method of resolving cases, quality of work expressed by the number of confirmed, modified and overruled decisions, and others. The Law on Courts should specify the procedure for regular assessment of judges in accordance with the Methodology for drafting annual reports on the work of individual judges. Prescribe the parameters to assess the assignment of cases in the order they were received and compliance with statutory deadlines, as well as the method for obtaining this type of information regarding the work of judges.

11. Forms should include a section for keeping a record of sources of information based on which the assessment has been carried out, since it remains controversial how the Judicial Council obtains information upon which it assesses the criteria and sub-criteria, especially "the relationship with colleagues and clients and reputation and out of office conduct".

5. Practice of the Judicial Council in the appointment of judges

1. It is necessary to stop the practice of template and incomprehensible decision rationales. Instead, define rationales which provide clear answer as to why a certain candidate is appointed a judge, and the other candidate is not, or why a certain judge is promoted, while the other is not.

2. Publish applications of candidates for the judicial post on the Judicial Council website, so that the public can point to the possible inadequacy of applicants. Allow candidates to learn about possible objections to their candidacy, as well as to respond to them.

3. Obtain the opinion of the higher court judges on promotion based on a questionnaire that would include the categories of good knowledge of procedural and substantive legal regulations, practice of the European Court of Human Rights, practice of Montenegrin courts etc.

4. Prescribe the right of judges of the court whose president is being elected to submit their opinion on candidates for the president to the Judicial Council.

5. Amend Art. 38 of the Law on the Judicial Council in a manner that will grant all candidates for the judicial post the right to access records of other candidates and prescribe: method and place to get an insight into electoral documents, deadline for the Secretariat to provide an insight into electoral documents upon request, the right to copy documents, the right to access documents through attorney, the right to file a complaint to the Judicial Council in the event of denial of this right and deadline in which the Judicial Council is to decide on the complaint.

6. Prescribe the competence of the Commission for Appointment of Judges to reject untimely or incomplete applications, given that the Council decides on the complaint against the decision to reject an application.

7. Obtain opinions on various aspects of work and behaviour of candidates based on a questionnaire, whose content should be determined by the Judicial Council, to avoid obtaining stereotyped phrases instead of substantive evaluation. Courts should hold data on achieved work results of expert associates, on which the opinion of their performance should be based.

8. The Judicial Council should prescribe guidelines for conducting interviews with candidates. Stipulate that the interview is not required in the promotion of judges.

9. In the "Annulment of the decision on the appointment" (Art. 49, para 2 of the Law on the Judicial Council), for the purpose of appropriateness, HRA once again proposes the introduction of an obligation to postpone the start date of performing judicial function in order to verify the information from paragraph 1 of the same article, considering the implications of Article 71 entailed by the annulment of the decision on appointment.

10. HRA reiterates its objection that the judicial protection against decisions of the Judicial Council must not be provided in administrative proceedings, but with the Constitutional Court.

6. Assignment of judges to the court of higher instance to provide assistance

1. Abolish the authority of the Judicial Council to temporarily assign judges to work in the court of higher instance.

7. Disciplinary responsibility of judges and court presidents

1. Amend the Law on the Judicial Council to grant the Judicial Council members as well the authority to submit a proposal for establishing disciplinary responsibility of judges and court presidents, especially the proposal for establishment of disciplinary responsibility of the President of the Supreme Court.

2. The Law on Courts should be amended so as to omit the possibility of determining the "reasonable grounds" in case of a judge's negligent performance of judicial function, or incompetent and negligent performance of judicial function, as it allows for arbitrary and inconsistent interpretation and actions of courts presidents.

3. The Law on Courts should expressly prescribe that the violation of the Judicial Code of Ethics represents the basis for determining disciplinary responsibility of a judge, i.e. undue or negligent performance of judicial function, or the contempt of judicial function.[376]

376 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", op.cit. item 5.1.2., p. 107.

4. Amend the Law on Courts so as to prescribe the existence of a violation of judicial discipline, in addition to mentioned cases, when a judge:

- fails to fulfil mentoring duties and obligations for professional development of trainee judges;

- in case of unexcused absence from work;

- fails to wear official attire in accordance with regulations;

- behaves rudely or impolitely towards the parties and other participants in the proceedings and fails to prevent such behaviour of others under his/her authority in the proceedings led by him/her;

- fails to refrain from any action which is improper or leads to such impression, as well as from any action which causes distrust, incites suspicion, weakens confidence or in any other way damages the reputation of the court and its impartiality;

- fails to resist threats, blackmails and other assaults on his/her persona and integrity;

- is not able to resist political influence, public opinion, bias (particularly in relation to prohibited grounds of discrimination), temptations, vices, passions, private and family interests and other internal and external influences;

- visits places of improper reputation.

5. "Disciplinary Commission" (Art. 51 of the Law on the Judicial Council) does not prescribe the procedure and criteria based on which the Judicial Council elects members of the Disciplinary Commission who are not the Judicial Council members.Prescribe the composition of the Commission so as to be arranged on a parity basis.

6. To avoid Disciplinary Commission's dual role in investigating disciplinary offenses and deciding on disciplinary proceedings, it is necessary to amend the Law on the Judicial Council to establish a disciplinary prosecutor to conduct investigation and initiate the proceedings, while the disciplinary commission adopts decisions.

7. Publish decisions of the Disciplinary Commission to ensure uniformity of practices of court presidents as only they have an authority to initiate disciplinary proceedings, and to insure that the public and all judges are familiar with the practice of this Commission.

8. Dismissal of judges

1. Rationale for decisions on dismissal must be more comprehensive, include the position of a judge whose dismissal is being considered, as well as a reasoned assessment of that position.

2. Amend the Rules of Procedure of the Judicial Council to specify the legal principle of emergency in cases of temporary suspension from judicial office by laying down deadlines for action.

3. Amend Art. 69, para 2 of the Law on the Judicial Council by specifying the reasons the Council shall consider when deciding on temporary suspension of a judge. The Law should prescribe that the Council's decision on suspension must be substantiated, and that the judge on maternity leave cannot be suspended, nor can disciplinary proceedings or dismissal procedure be initiated against her.[377]

4. Rationale for decisions on temporary suspension must include clear reasons as to why a judge has been suspended.

5. Amend the Law on the Judicial Council to stipulate that a judge cannot cease to hold office at his/her own request following initiation of dismissal procedure, before the completion of the procedure.

6. In "Appropriate application of disciplinary proceedings", Art. 70 of the Law on the Judicial Council, delete words "judicial protection" and add paragraph 2 that reads: "The decision on dismissal of a judge includes an instruction on the right to protection in administrative proceedings." This in case the proposal for the protection against decisions of the Judicial Council before the Constitutional Court is not accepted.

7. Rationale for opinions of the Code of Ethics Commission should be considerably improved, so as to represent a useful contribution to the interpretation of the Code.

377 „Assessment of the Reform of Appointment of Judges in Montenegro 2007-2008", op.cit. item 5.5.2., p. 112;

9. Assessment of the quality of performance of judges in Montenegro - in the light of international recommendations and comparative experience

1. In accordance with the recommendation of the European Commission, regular evaluations of the performance of judges in Montenegro should be introduced in line with the precisely defined indicators for evaluation of criteria and sub-criteria, based on which every judge and the public will easily understand which actions deserve career advancement, and which call for accountability. The law should establish a basis for regular evaluation and the right to a remedy, and separate Rules should establish indicators for the evaluation and evaluation procedure.

Regular evaluation of the work of judges on the basis ofobjective criteria would allow judges to advance solely on the basis of merit, but would also ensure regular monitoring of professional work of each judge, which inevitably leads to the improvement of the quality and efficiency of the judiciary in general.

Therefore, we repeat HRA's recommendation from 2007 and 2009 to introduce regular evaluation of judges by prescribing in separate Rules standards for the evaluation of criterion "Ability to perform the judicial function", i.e. its sub-criterion "Achieved results of the last three years". For evaluating "timely acting in a case" CEPEJ's indicators should be used, which were taken into account in the drafting of the Analysis towards rationalization of the judicial network. It is necessary to prescribe the manner of obtaining this type of information on the work of judges.

2. The Judicial Council should adopt the methodology of drafting the reports on the operation of courts, which will not deal with issues already regulated by law, but provide guidelines that will ensure that the reports on the operation of courts contain all parameters necessary for the evaluation of the sub-criterion "Achieved results" and reporting on the fulfilment of this criterion by each judge individually (see 9.1.1). Prescribing indicators for evaluating the compliance with this sub-criterion would provide the conditions for regular comprehensive evaluation.

3. Gathering of statistical data should be specified in detail by the Court Rules, which are published. Contents of the methodology for producing the reports on the work of courts should incorporate these statistical data.

4. The Law on Courts should prescribe the obligation of courts to publish their annual operation reports on their websites, because the lack of this obligation does not contribute to transparency and public scrutiny of courts, while it contributes to further failure of the Judicial Council to establish the improved methodology to be implemented in all Montenegrin courts.

5. It is necessary to change the method of evaluating the quality of the performance of judges in a manner that will allow the monitoring of cases until the final decision is rendered and separately evaluate the Constitutional Court's decisions on constitutional appeals and decisions of the European Court of Human Rights establishing a violation of fundamental human rights. In evaluating the quality of work it is also necessary to evaluate the cases that were not appealed or cases in which a settlement was reached, as is the case in other jurisdictions in the region.

6. Meet the objectives set forth in the Action Plan of the Judicial Council for the period 2009 -2013, whose implementation has been delayed for years, particularly in terms of improving the mechanisms for evaluation of judges.

7. Instead of the approximate criteria for determining the number of judges, the so-called Norm, it is necessary that the Judicial Council, in cooperation with the Ministry of Justice, establishes a new system of time quotas (the so-called weighted system), whose starting point would be the available (effective) annual fund of hours within which it should be stated how much time is needed for resolving certain types of cases according to their complexity and thus reach the required number of cases that a judge should resolve and the required number of judges. Also, HRA wishes to reiterate that such criteria should be an integral part of the special rules for the evaluation of judges.

8. A plan of professional training of judges should be developed, and every judge should be providedwith a number of working days per year for training. Only under such circumstances it would be possible to fairly assess the criteria of professional training regarding promotion.

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