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COMPARATIVE NOTE ON THE APPLICABLE STANDARDS AND REGULATION OF RECUSALS AND SELF-RECUSALS OF JUDGES

UKRAINE

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EXECUTIVE SUMMARY

This Comparative Note addresses the topic of recusals and self-recusals of judges and highlights a number of scenarios, which may raise issues as to the impartiality of judges, including those specifically mentioned in the letter of request of the Constitutional Court of Ukraine.

Recusal is the withdrawal of a judge from a case on the grounds that they are not the appropriate person to handle that case because of a possible conflict of interest or lack of impartiality, or appearance thereof. Indeed, judges should not only recuse themselves when the possible conflict or lack of impartiality actually exists, but also when it could appear to a reasonable person that a conflict does exist or that a judge is unable to decide the matter impartially. Recusal can be obligatory or voluntarily depending on the situation.

There is heightened sensitivity around recusals in constitutional courts due to the nature of the cases, their role as last-instance authorities, and the constitutional and political implications of their decisions. The smaller number of judges serving in constitutional courts and the impact of recusals on the quorum and decision-making within constitutional courts must also be considered, as must the fact that the identity of constitutional judges is generally well known. Therefore, assessments of impartiality must take into account the special place and role of constitutional courts and its judges within the judicial system.

National rules regulating the withdrawal or recusal of judges are essential for ensuring the impartiality of the judiciary and for removing any doubts in this regard, whether concerning a particular judge or a court in general. They aim to eliminate potential causes of concern. A study carried out by the European Court of Human Rights (ECtHR) has found that in the civil legal systems of all the reviewed states there are three common grounds for recusal, namely: (1) where the judge is a party or has a particular interest in the outcome of the case; (2) where the judge is related to one of the parties to the proceedings; and (3) where the judge has previously participated in the same proceedings in another procedural capacity.

To determine whether a body, including a constitutional court, can be considered to be impartial according to Article 6 (1) of the European Convention on Human Rights (ECHR), the ECtHR applies both (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge (i.e., whether the judge displayed any personal prejudice or bias in a given case); and (ii) an objective test – i.e., by ascertaining whether the tribunal itself (and, among other aspects, its composition) offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality determining whether, apart from the judge's conduct, there are ascertainable facts, such as hierarchical or other links between the judge and other protagonists in the proceedings, which may raise doubts as to his or her impartiality.

In its case law the ECtHR has examined numerous situations involving the assessment of impartiality, finding, inter alia, a lack of impartiality in cases of

confusion of roles between complainant, witness, prosecutor, and judge; where a judge has acted in different capacities in the same case; and where personal conduct during proceedings, combined with expedited procedure, justified the applicant's misgivings. It has also found that prior exclusion for bias in related proceedings may give rise to objectively justified doubts. At the same time, it has held that a judge's political convictions cannot, in themselves, justify withdrawal; that participation in an earlier decision of the same proceedings does not automatically raise doubts; that prior involvement in other proceedings concerning the same parties is not necessarily capable of generating legitimate doubts; that deciding on a challenge directed against oneself does not per se raise concerns; that general or abstract allegations may be deemed abusive; and that there must be a link between the proceedings at hand and the judge's conduct or prior involvement.

Any specific and relevant grounds must be considered by the competent body and the procedure for determining bias must itself comply with impartiality. Further, competent judges or courts must convincingly explain why challenges are rejected and the "doctrine of necessity" may only be invoked after assessing impartiality. In addition, there must be effective procedures to rectify defects before a higher authority. In cases involving final-instance courts, the principle of subsidiarity imposes a stronger obligation on applicants to exercise special diligence, provided they knew or could reasonably have known the composition of the panel. From a procedural perspective, because constitutional court judges are few and easily identifiable, applicants will often be expected to have known or anticipated the bench composition and to raise concerns pre-emptively.

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

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I. INTRODUCTION

1. On 1 August 2025, the Constitutional Court of Ukraine sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for a comparative legal review on the topic of recusals and self-recusals of judges, including Constitutional Court judges.
2. This request was made in the context of the reform of the Constitutional Court's Rules of Procedure and identified as an urgent matter that is of critical importance to the functioning of the Constitutional Court.
3. On 19 August 2025, ODIHR responded to this request, confirming the Office's readiness to prepare a Comparative Note on the Applicable Standards and Regulation of Recusals and Self-Recusals of Judges from the perspective of international human rights standards and OSCE human dimension commitments.
4. This Note was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[1]

II. SCOPE OF THE OPINION

5. The scope of this Note covers only the topic of recusals and self-recusals of judges, especially of constitutional court judges. In particular, the Note will address a number of scenarios, which may raise issues as to the impartiality of judges, including those specifically mentioned in the letter of request.[2] Thus limited, the Note does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the Constitutional Court's internal processes and rules of procedure.
6. The Note raises key issues and provides indications of areas of concern. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Note also highlights, as appropriate, legal solutions and practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and

1 See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]".*

2 The letter of request of 1 August 2025 specifically mentions the following scenarios: (1) a judge, prior to appointment, served as a Member of Parliament and voted for or against a law that is now subject to constitutional review; (2) a judge, while serving as a Member of Parliament, took part in the parliamentary committee deliberations on a bill that is now under constitutional scrutiny; (3) a judge, before appointment, served as Government Agent before the Court and participated in multiple cases that remained pending at the time of taking office; (4) a judge, prior to appointment, acted as Government Agent and made formal procedural motions before the Court in pending cases, but did not submit legal positions on the merits; (5) a judge, prior to appointment, was invited by a judge-rapporteur to submit an amicus curiae in a pending case, and is now adjudicating the same case; (6) a judge, before appointment, contributed in an expert capacity to an amicus curiae submission prepared by an international organisation as part of an expert group; and (7) a judge, on his or her own initiative, submitted an amicus curiae prior to appointment, and now sits on the bench in that case.

has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[3] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[4] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

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

III. LEGAL ANALYSIS AND RECOMMENDATIONS

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

9. The key role of constitutional courts or comparable institutions[5] empowered with constitutional judicial review in ensuring that the principles of the rule of law, democracy and human rights are observed in all state institutions has been emphasized in the *OSCE Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008).[6] While acknowledging the particular nature and specificities of constitutional adjudication, key principles pertaining to judicial independence and impartiality have to be respected also when reforming legislation regulating constitutional courts.

10. The independence and impartiality of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.[7] The principle of judicial independence is also crucial to respecting the principle of the separation of powers and upholding international human rights standards.[8] Specifically, this independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being subject to internal or external pressure when adjudicating or influenced or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external sources. Judicial independence is also essential to engendering public trust and credibility in the justice system in general, in that everyone is treated equally before the law and seen as being treated equally, and that no one is above the law. Public

3 UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

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

5 It is noted that under Section XII of the Constitution of Ukraine, the Constitutional Court of Ukraine is considered separately from courts governed by Section VIII, although it is considered a court within the meaning of Article 6 of the ECHR and Article 14 of the ICCPR, and other international documents, to the extent individuals may lodge constitutional complaints when considering that the law of Ukraine applied in the final court judgment in his/her case contradicts the Constitution of Ukraine and the outcome of the proceedings before the Constitutional Court is decisive for the determination of an individual's civil rights and obligations; see as a comparison, European Court of Human Rights (ECtHR), *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 187-210.

6 See particular OSCE Ministerial Council Decision No. 7/08 "Further Strengthening the Rule of Law in the OSCE Area", 8 December 2008, para. 4.

7 See *Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers*, United Nations, Human Rights Council, A/HRC/29/L.11, 30 June 2015. As stated in the OSCE Copenhagen Document 1990, para. 2, "*the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*".

8 See OSCE Ministerial Council Decision No. 12/05 on "Upholding Human Rights and the Rule of Law in Criminal Justice Systems", 6 December 2005.

confidence in the courts, especially constitutional courts, and the public perception that courts are independent from political influence is vital in a democratic society that respects the rule of law.

11. The independence of constitutional courts should be guaranteed by law and in practice and, as ultimate guarantors of the interpretation and observance of the constitution of a state, constitutional courts should protect the separation of powers and democracy and prevent undue restrictions of human rights. The constitutional review process is essential to guarantee the conformity of legislation and other governmental action, including legislation, with the constitution, but also to ensure that constitutions, once adopted, remain relevant to people's daily life.

12. International instruments also require a tribunal to be impartial. The requirement of impartiality has two features: first, that judges do not allow their decisions to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them (or subjective impartiality); and, second, that the tribunal must also appear to the reasonable observer to be impartial (or objective impartiality).[9] Rules governing judicial recusals and self-recusals exist precisely to safeguard the impartiality of the judiciary, preventing actual bias or conflict of interest, or appearance thereof.

1.1. Right to an Independent and Impartial Tribunal Established by Law

13. While acknowledging the political nature and specificities of constitutional adjudication, key principles pertaining to the independence and impartiality of the judiciary guaranteed by Article 14 of the *International Covenant on Civil and Political Rights*[10] (hereinafter "the ICCPR") have to be respected. The institutional relationships and mechanisms required for establishing and maintaining an independent and impartial judiciary are outlined in the *UN Basic Principles on the Independence of the Judiciary*,[11] and have been further elaborated upon in the *Bangalore Principles of Judicial Conduct*.[12] An international understanding of the practical requirements of judicial independence and impartiality continues to be shaped by the work of international bodies, including the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers.[13] In *General Comment No. 32 on Article 14 of the ICCPR*, the UN Human Rights Committee underlines that the requirement of impartiality has two aspects: *"[f]irst, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other; [and] [s]econd, the tribunal must also appear to a reasonable observer to be impartial."*[14]

9 See ODIHR, *Legal Digest of International Fair Trial Rights* (2012), Section 3.3.2.

10 International Covenant on Civil and Political Rights, United Nations, General Assembly, resolution 2200A (XXI), adopted on 16 December 1966. Ukraine ratified the ICCPR in 1973.

11 Basic Principles on the Independence of the Judiciary, United Nations, General Assembly, resolution 40/32, adopted on 29 November 1985, and resolution 40/146, adopted on 13 December 1985, see especially, para. 2: "*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*".

12 *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006. See also the *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), and the *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity to assist with the practical implementation of the Bangalore Principles.

13 See e.g., in particular, *2024 Report of the Special Rapporteur on the independence of judges and lawyers, Justice is not for sale: the improper influence of economic actors on the judiciary*, 20 September 2024, A/79/362.

14 General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial, United Nations, Human Rights Committee, 23 August 2007, para. 21.

14. As a member of the Council of Europe (CoE), Ukraine is also bound by the ECHR,[15] particularly its Article 6, which provides that everyone is entitled to a fair and public hearing "*by an independent and impartial tribunal established by law*". In accordance with the case-law of the ECtHR, proceedings before a constitutional court can come within the scope of Article 6 (1) of the ECHR when the outcome is decisive for the determination of an applicant's civil rights and obligations, even if they deal with questions being referred for a preliminary ruling or following a constitutional appeal with respect to the protection of constitutional rights and freedoms, being lodged against judicial decisions, or when it concerns an appeal lodged against a law affecting a person's rights as specified in the national legal system.[16]

15. To determine whether a body, including a constitutional court, can be considered to be impartial according to Article 6 (1) of the ECHR, the ECtHR applies both (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge (i.e., whether the judge held any personal prejudice or bias in a given case); and (ii) an objective test – i.e., by ascertaining whether the tribunal itself (and, among other aspects, its composition) offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality determining whether, quite apart from the judge's conduct, there are ascertainable facts, such as hierarchical or other links between the judge and other protagonists in the proceedings, which may raise doubts as to his or her impartiality.[17] At the same time, the concepts of independence and impartiality are closely linked and, depending on the circumstances, may require joint examination.[18]

16. With respect to the independence of a tribunal, the ECtHR considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure, whether appointees are free from influence or pressure when carrying out their adjudicatory role, and even the *appearance of independence* may be of a certain importance.[19] Other useful reference documents of a non-binding nature issued by CoE bodies are also of relevance,[20] in particular the

15 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), Council of Europe, signed on 4 November 1950, entered into force on 3 September 1953. Ukraine ratified the ECHR on 17 July 1997.

16 See European Court of Human Rights (ECtHR), *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 188-191, and ECtHR case-law referred therein.

17 See e.g., ECtHR, *Micallef v. Malta* [GC], 15 October 2009, para. 93, where the Court observed that "*… the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality*"; and *Morice v. France*, no. 29369/10, 23 April 2015, paras. 73-78.

18 See e.g., *Ramos Nunes de Carvalho E SÁ v. Portugal*, ECtHR, nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, paras. 150-152.

19 See e.g., *Xero Flor w Polsce sp. z o.o. v. Poland*, ECtHR, no. 4907/18, 7 May 2021, paras. 268-269; *Campbell and Fell v. the United Kingdom*, ECtHR, nos. 7819/77, 7878/77, 28 June 1984, para. 78. See also *Olujić v. Croatia*, ECtHR, no. 22330/05, 5 May 2009, para. 38; *Oleksandr Volkov v. Ukraine*, ECtHR, no. 21722/11, 25 May 2013, para. 103; *Morice v. France*, ECtHR, no. 29369/10, 23 April 2015, para. 78; on the relation of the judiciary with other branches of power, see e.g., *Baka v. Hungary*, ECtHR, no. 20261/12, 23 June 2016, para. 165; *Ramos Nunes de Carvalho E SÁ v. Portugal*, ECtHR, nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 144; *Guðmundur Andri Ástráðsson v. Iceland* [GC], ECtHR, no. 26374/18, 1 December 2020, paras. 243-252. See also *Incal v. Turkey [GC], no. 22678/93*, 9 June 1998, para. 71, where the ECtHR held that *"[e]ven appearances may be of a certain importance [since] [w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (…)*".

20 See e.g., Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, 17 November 2010, paras. 46 and 49, which among others expressly states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers" and that "[s]ecurity of tenure and irremovability are key elements of the independence of judges". See also the opinions of the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, particularly CCJE, Opinion no. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, 19 November 2002; see also CCJE, Opinion no. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, 23 November 2001; Magna Carta of Judges, 17 November 2010, par 13; and Opinion no. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy, 16 October 2015.

reports and opinions pertaining to the judiciary and constitutional justice of the European Commission for Democracy through Law (Venice Commission).[21]

Given the EU candidate status of Ukraine and the opening of 'Cluster 1: Fundamentals' of the EU accession negotiations, which focuses *inter alia* on the functioning of democratic institutions, rule-of-law and public administration reform, the need to ensure the independence and impartiality of the judiciary is paramount. Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial.[22] In its caselaw, the Court of Justice of the European Union has underlined that "*guarantees of access to an independent and impartial tribunal previously established by law, […] represent the cornerstone of the right to a fair trial*", noting two aspects to the requirement of impartiality i.e., *"[f]irst, the members of the court or tribunal must themselves be subjectively impartial, that is, none of its members may show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. Secondly, the court or tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect".*[23] In *Chronopost and La Poste v. UFEX* the CJEU noted that it "*…must be observed, first of all, that the fact that the same Judge in the two successive formations was entrusted with the duties of Judge-Rapporteur is, by itself, irrelevant to the assessment of compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the Court. […] Second, there are two aspects to the requirement of impartiality: (i) the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary; and (ii) the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect... ".*[24] It has held that the right to an independent and impartial court means that every court is obliged to check whether, in its composition, it constitutes such an independent and impartial tribunal, where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. That check is necessary for the confidence which the courts must. It has expressed the view that objections related to irregularity in the composition of the Court is a matter of public policy that requires the review of the Court on its own motion.[25]

17. OSCE participating States have also committed to ensure "*the independence of judges and the impartial operation of the public judicial service*" as one of the elements of justice, "*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*" (1990 Copenhagen Document).[26] In the 1991 Moscow Document,[27] participating States further committed to "*respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service*" (para. 19.1) and to "*ensure that the independence of the*

21 See legal opinions on constitutional justice, Venice Commission, as well as the Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, Venice Commission, CDL-PI(2020)004. See also Report on Judicial Appointments, Venice Commission, CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges*, Venice Commission, CDL-AD(2010)004, 16 March 2010; and Rule of Law Checklist, Venice Commission, CDL-AD(2016)007, 18 March 2016.

22 Charter of Fundamental Rights of the European Union (EU), OJ C 326, 26 October 2012.

23 See e.g., Court of Justice of the EU (CJEU), *Lukáš Wagenknecht v European Commission*, C-130/21 P, 24 March 2022, paras. 15-16 and caselaw referenced therein.

24 See e.g. CJEU, Chronopost SA and La Poste v Union française de l'express (UFEX) and Others [GC], C-341/06 P and C-342/06 P, 1 July 2008.

25 See e.g. CJEU, Chronopost SA and La Poste v Union française de l'express (UFEX) and Others [GC], C-341/06 P and C-342/06 P, 1 July 2008, paras 53-54..

26 OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 5 June-29 July 1990, paras. 5 and 5.12.

27 OSCE Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 10 September-4 October 1991.

judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice" (para. 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the OSCE Ministerial Council also called upon OSCE participating States "*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*", as a key element of strengthening the rule of law in the OSCE area.[28] More detailed guidance is also provided by the *ODIHR Warsaw Recommendations on Judicial Independence and Accountability*[29] and the *ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*.[30]

18. Other relevant soft law international documents include: the Consultative Council of European Judges (CCJE) Opinion No. 24 (2021) on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems,[31] which builds upon Opinion No. 10 (2007) to provide further guidance on essential aspects covering judicial councils as key bodies called upon to safeguard judicial independence and impartiality; the European Network of Councils of the Judiciary (ENCJ) Compendium on Councils for the Judiciary (2021); and the Bangalore Principles of Judicial Conduct and their Commentary (2006).[32]

1.2. Specific International Standards and Recommendations on Recusals or Withdrawals of Judges to Ensure Impartiality

19. The topic of recusals or self-recusals (also known as voluntary withdrawal) by judges touches upon the conduct and management of judicial proceedings. Failing to recuse on grounds provided for mandatory recusal by law and/or applicable regulations, may lead to disciplinary action against the judge concerned on the one hand and on the other hand to the undermining of the impartiality of the proceedings in which the judge took part.

20. The Bangalore Principle 2.5 provides that a: "…*judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially*."[33]

21. The Commentary of the Bangalore Principles of Judicial Conduct, in its relevant parts, further provides that:

> *"The generally accepted criterion for disqualification is the reasonable apprehension of bias.*
>
> *Different formulae have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from 'a high probability' of bias to 'a real likelihood', 'a substantial possibility', and 'a reasonable suspicion' of bias. The apprehension of bias must be a reasonable one, held by*

28 OSCE Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Helsinki, 4-5 December 2008.

29 Warsaw Recommendations on Judicial Independence and Accountability, ODIHR, 2023.

30 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, ODIHR, 2010.

31 See Council of Europe, Consultative Council of European Judges (CCJE), Opinion no. 24 (2021) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, CCJE(2021)11.

32 *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006. See also the *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), and the *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity to assist with the practical implementation of the Bangalore Principles.

33 *Bangalore Principles of Judicial Conduct* (2006).

reasonable, fair minded and informed persons, applying themselves to the question and obtaining thereon the required information.

The test is 'what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly'. The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by other judges of the capacity or performance of a colleague…

Depending on the circumstances, a reasonable apprehension of bias might be thought to arise

(a) if there is personal friendship or animosity between the judge and any member of the public involved in the case;

(b) if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case;

(c) if, in a case where the judge has to determine an individual's credibility, he had rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on the judge's ability to approach that person's evidence with an open mind on a later occasion;

(d) if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind; or

(e) if, for any other reason, there might be a real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and the judge's ability to bring an objective judgment to bear on the issues. Other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made ..."

22. The Commentary also emphasizes that in general, the following elements may not usually serve as a sound basis for an objection to a particular judge adjudicating a specific case, although this may depend on the circumstances of the particular case and on the case before the judge:

- a judge's personal characteristic, such as religion or belief, ethnic or national origin, gender, age, class, means or sexual orientation;
- the judge's social, educational, service or employment background;
- a judge's membership of social, sporting or charitable bodies;
- previous judicial decisions; or
- extracurricular utterances.[34]

23. As further underlined in the Commentary, extraordinary circumstances may require departure from these principles and states that "*[t]he doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is*

34 See Commentary on the Bangalore Principles of Judicial Conduct, United Nations, Office on Drugs and Crime, 2007, para. 89.

not similarly disqualified, or where an adjournment or mistrial will work extremely severe hardship, or where if the judge in question does not sit a court cannot be constituted to hear and determine the matter in issue. Such cases will, of course, be rare and special. However, they may arise from time to time in final courts of small numbers charged with important constitutional and appellate functions that cannot be delegated to other judges."[35]

24. The CoE Committee of Ministers Recommendation CM/Rec(2010/12) provides that judges should be independent and impartial in their decision-making and that "*…authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality…*".[36] It further provides that *"…[j]udges should adjudicate on cases which are referred to them. They should withdraw from a case or decline to act where there are valid reasons defined by law, and not otherwise…*"[37] and that "*[d]isciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate*."[38]

25. Regarding recusal specifically, the ECtHR generally considers that there are three common grounds for the recusal of judges: (i) the judge is a party or has a particular interest in the outcome of the case; (ii) the judge is related to one of the parties to the proceedings; and (iii) the judge has previously participated in the same proceedings in another procedural capacity.[39]

26. In the case of *Micallef v. Malta*, the ECtHR further elaborated the elements to be considered in order to assess the impartiality of a tribunal and of individual judges, noting the ECtHR's primary focus on the objective test in cases raising impartiality issues and potential prejudice or bias, also noting that the two above-mentioned subjective and objective tests are not necessarily mutually exclusive.[40] The Court also emphasized that "*any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw".*[41]

27. With respect to the subjective test to assess the personal impartiality of an individual judge, the ECtHR underlined in particular the following:

- that the personal impartiality of a judge is presumed, until there is clear and convincing proof to the contrary;
- the burden of proof lies on the party alleging bias or prejudice;
- as regards the type of proof required, the elements to consider are whether a judge has displayed personal prejudice, hostility, or ill will, or has a personal conviction or interest in the particular case.[42]

35 See Commentary on the Bangalore Principles of Judicial Conduct, United Nations, Office on Drugs and Crime, 2007, para. 100.

36 Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe: Judges: independence, efficiency and responsibilities, 17 November 2010, para 32.

37 Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe: Judges: independence, efficiency and responsibilities, 17 November 2010, para 61.

38 Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe: Judges: independence, efficiency and responsibilities, 17 November 2010, para 69.

39 See e.g., ECtHR, *Iulian Cătălin Gogan v. Romania*, no. 41059/11, 1 October 2019, para. 14.

40 See e.g., ECtHR, *Micallef v. Malta* [GC], 15 October 2009, para. 93.

41 See e.g., ECtHR, *Micallef v. Malta* [GC], 15 October 2009, para. 98.

42 See e.g., ECtHR, *Micallef v. Malta* [GC], 15 October 2009, paras. 94-95.

28. As to the objective test, the following elements are of relevance:

> - whether, apart from the judge's actual conduct, there exist ascertainable facts that could raise legitimate doubts about impartiality, that are objectively justified from the point of an external observer;
>
> - taking into consideration the perception of the litigant as a relevant, but not decisive factor;
>
> - considering the hierarchical or other links between the judge and other participants in the proceedings and assessing whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality;
>
> - acknowledging that even the appearance of bias may suffice to compromise impartiality; and
>
> - assessing whether internal organization of the judiciary and national rules and procedures on judicial withdrawal or recusal exist (and are effective), in order to remove all reasonable doubts as to the impartiality of the judge or court and any appearance of partiality.[43]

29. As the ECtHR noted, what is ultimately at stake is the confidence which the courts in a democratic society must inspire in the public.[44] This consideration is also relevant with respect to the functioning of the judiciary at the highest level when the determination of civil rights or obligations is involved, which requires that the guarantees of Article 6 should be complied with in such proceedings.

2. RECUSAL: GROUNDS, PROCESSES AND OTHER FACTORS

2.1. General Comments and Definitions

30. There are several terms used to describe when a judge does not take part in a case due to a potential conflict of interest, bias, or appearance thereof, or other reason, such as recusal, withdrawal, or disqualification. While they all refer to a similar idea (the judge stepping aside), they have different connotations depending on who initiates the action and why it occurs. These are procedural instruments designed to protect the right to be judged by an impartial court by removing or excluding the judge who is suspected of potential conflict of interest or bias.

31. Domestic law or regulations of judicial bodies may regulate instances in which parties to a proceeding may challenge a judge and request for a judge in that proceeding to withdraw or recuse themselves, or situations in which a judge should (voluntarily) withdraw from a case that is assigned to them or from a procedure in which they are involved (self-recusal). Disqualification generally refers to the formal or procedural removal of a judge from a case due to a legal or ethical infraction.

32. Recusal is the withdrawal of a judge from a case on the grounds that they are not the appropriate judicial officer to handle that case because of a possible conflict of interest or lack of impartiality, or appearance thereof. Indeed, judges should not only recuse themselves when the possible conflict or lack of impartiality actually exists, but also when it could appear to a reasonable person that a conflict does exist or that a judge is unable to decide the matter impartially. Examples of conflicts of interest include: personal

43 ECtHR, *Micallef v. Malta* [GC], 15 October 2009, paras. 96-99.

44 ECtHR, *Micallef v. Malta* [GC], 15 October 2009, paras. 98-99.

connection to one of the parties to the case, personal knowledge of the facts of the case, familial relationship to one of the attorneys and financial interest in the result of the case.

33. As underlined above, the national rules regulating the withdrawal or recusal of judges are an important factor for ensuring impartiality of the judiciary and to remove any doubts in this regard whether it concerns a particular judge or a court in general. These rules attempt to remove potential causes of concern. As noted by the ECtHR in *Meznaric v. Croatia, "[i]n addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. Accordingly, a failure to abide by these rules means that the case has been heard by a tribunal whose impartiality was recognised by national law to be open to doubt.*"[45] In this case the ECtHR confirmed that these rules are relevant for its assessment if a judge or a court was impartial.

2.2. Grounds

34. In a 2019 case, the ECtHR conducted a comparative overview of 28 member States[46] of the Council of Europe plus Canada and the United States of America, all of which are also OSCE participating States, with respect to their regulations on recusals. It found that in seventeen States, the relevant civil codes include a general clause which requires a judge to recuse him or herself in all circumstances which may cast doubt on his or her impartiality.[47]

35. In the Canadian common-law system at federal level, in accordance with the "Ethical Principles for Judges" issued by the Canadian Judicial Council,[48] judges should disqualify themselves: (i) from any case in which they believe they will be unable to judge impartially, and (ii) from any case in which they believe that a reasonable, fair-minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty. At federal level, there is no explicit regulation regarding the authority to examine applications for the withdrawal of judges. However, the practice is that judges can withdraw without having their decisions examined by another judge or State organ, including their fellow panel members.

36. In the United States of America at federal level, a judge must disqualify him or herself in any proceedings in which his or her impartiality might reasonably be questioned (28 U.S. Code § 455 (a)).[49] Furthermore, he or she must also disqualify him or herself in the following circumstances (28 U.S. Code § 455 (b)):[50]

> (i) where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (ii) where in private practice he or she has acted as a lawyer in the matter in contention, or a lawyer with whom he previously practised law has acted, during

45 ECtHR, *Meznaric v. Croatia*, no. 71615/01, 15 July 2005, para 27.

46 Namely in Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, the Republic of North Macedonia, Norway, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom (England and Wales)) and of two States which are not members of the Council of Europe (Canada and the United States of America). See ECtHR, *Iulian Cătălin Gogan v. Romania*, no. 41059/11, 1 October 2019, para. 14.

47 Austria, Bosnia and Herzegovina, Bulgaria, Croatia, France, Germany, Hungary, Iceland, Italy, Lithuania, the Republic of North Macedonia, Poland, the Russian Federation, Serbia, Slovenia, Turkey and Ukraine

48 See Canada, <Ethical Principles for Judges>.

49 See <28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge | U.S. Code | US Law |>.

50 See <28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge | U.S. Code | US Law |>.

> their association, as a lawyer in the matter, or the judge or such lawyer has been a material witness for that matter;
>
> (iii) where he or she has been in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in contention;
>
> (iv) where he or she knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in dispute or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceedings;
>
> (v) where he or she or his or her spouse, or a person having up to a third-degree relationship with either of them, or the spouse of such a person is a party to the proceedings, or an officer, director, or trustee of such a party; is acting as a lawyer in the proceedings; is known by the judge to have an interest that could be substantially affected by the outcome of the proceedings; or is to the judge's knowledge likely to be a material witness in the proceedings.

In the majority of the federal States, State Supreme Court justices decide recusal applications, with no opportunity for review by the U.S. Supreme Court. There is no legal obligation at the federal level to give reasons for the dismissal of an application for recusal.

37. Based on this comparative overview, the ECtHR found that in the civil legal systems of all reviewed states there are three common grounds for the recusal of judges. These are where:

> (1) the judge is a party or has a particular interest in the outcome of the case;
>
> (2) the judge is related to one of the parties to the proceedings; and
>
> (3) the judge has previously participated in the same proceedings in another procedural capacity.[51]

38. The ECtHR caselaw has reviewed several situations where the assessment of the impartiality, or lack thereof, of a judge and/or a bench/court was at stake and finding:

- a lack of impartiality when there is a confusion of roles between complainant, witness, prosecutor and judge (objective test);[52]
- a lack of impartiality when a judge has acted in different capacities in the same case (e.g., previous prosecution of the same case,[53] overlapping of proceedings with the function of judge in one case and that of legal representative of the party opposing

51 ECtHR, *Iulian Cătălin Gogan v. Romania*, no. 41059/11, 1 October 2019, para. 14.

52 ECtHR, *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, paras. 123-128, which concerned an applicant who was held in contempt of court and sentenced to five days' imprisonment, where the judges who had been the direct object of his criticisms as to the manner in which they had been conducting the proceedings, were the same judges who had taken the decision to prosecute him, had tried the issues arising from his conduct, had determined his guilt and had imposed the sanction (a term of imprisonment) on him. The Court concluded as part of the objective test that "*In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench*."

53 See ECtHR, *Piersack v. Belgium*, 1 October 1982, paras. 30-31, where the Court concluded that the fact that a judge had presided over a criminal trial after having been the head of the public prosecutor's office in charge of the prosecution in the case was capable of making the tribunal's impartiality open to doubt, in breach of Article 6 § 1 of the Convention.

the applicant in the other)[54] taking into account the time-frame when assessing the significance of a judge's previous relationship to the opposing party;[55]

- a lack of impartiality where the different elements of judges' personal conduct during the proceedings combined with the expedited procedure justified the misgivings of the applicant about the impartiality of the tribunal (subjective test);[56]
- that prior exclusion of some of the judges for bias in related or similar proceedings gives rise to objectively justified doubts as to their impartiality;[57]
- that the fact that a judge had political convictions different from those of the accused cannot, *in itself*, give rise to a conflict of interest such as to justify the withdrawal of the judge in question;[58]
- that the participation of one or more judges in an earlier decision does not prevent those judges from sitting at a later stage of the same proceedings, when deciding without being in any way bound by their first decision, does not *in itself* raises doubts as to their impartiality;[59]
- that the mere fact that a judge has been involved in other proceedings concerning the same parties is not *in itself* reasonably capable of giving rise to legitimate doubts as to his or her impartiality;[60]

54 See ECtHR, Wettstein v. Switzerland, *no. 33958/96, 21 December 2000, para. 47, where the Court concluded that* as a result of an overlapping in time of two sets of proceedings where a judge exercised the function of judge in one case, and that of legal representative of the party opposing the applicant in the other, the applicant had reason for concern that the said judge would continue to see him as the opposing party, and therefore that this situation could have raised legitimate fears in the applicant that Judge R. was not approaching the case with the requisite impartiality.

55 See ECtHR, *Walston v. Norway* (dec.), no. 37372/97, 11 December 2001.

56 ECtHR, *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, paras. 129-133, where the ECtHR concluded that taking into account the different elements of the judges' personal conduct (including indications that the judges had been personally offended by the applicant's words and conduct, emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements, judges' expressed opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence) taken together, the judges did not succeed in detaching themselves sufficiently from the situation, also considering the speed with which the proceedings had been carried out and the brevity of the exchanges between the judges and the applicant, leading to a conclusion that the bench lacked impartiality also according to the subjective test.

57 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136, where the ECtHR was called to review the situation in which the applicant was faced with disciplinary proceedings before the Constitutional Court (under Slovak law, the Constitutional Court is vested with exclusive jurisdiction to conduct disciplinary proceedings against the President of the Supreme Court, acting in plenary session as the sole instance; pursuant to applicable legislation, decisions in plenary session require a majority of all judges; absent such a majority, the matter is dismissed). In the case under consideration, seven of the thirteen judges were challenged for bias; of the four judges challenged by the applicant, two had previously been excluded for bias in related proceedings. Nevertheless, the Constitutional Court declined to exclude any judges, reasoning that the plenary's exclusive jurisdiction and the need to avoid excessive formalism outweighed the past exclusions; the decision was taken by secret vote, and no separate opinions were joined. The ECtHR found that the Constitutional Court failed to adequately address the arguments raised in support of the judges' exclusion, thereby not fulfilling the requirements of Article 6 ECHR and held that the prior exclusion of two judges for bias in related proceedings gave rise to objectively justified doubts as to their impartiality. The Constitutional Court also did not convincingly explain why these challenges were rejected in the present case for the other challenged judges, and that it failed to assess whether the grounds invoked justified their exclusion. Only after such an assessment could the invocation of the "doctrine of necessity" be considered, which was not shown to apply here. The Constitutional Court's justification—preserving its ability to determine the case—could not override the applicant's right to an impartial tribunal. The ECtHR concluded that the applicant's right under Article 6 (1) ECHR was violated due to the Constitutional Court's failure to ensure impartiality in the disciplinary proceedings

58 ECtHR, *Previti v. Italy*, no. 45291/06, 8 December 2009, where the issue was, amongst others, the political convictions of a judge. The ECtHR held that the fact that a judge had political convictions different from those of the accused cannot, in itself, give rise to a conflict of interest such as to justify the withdrawal of the judge in question. This is especially the case where there is no objective reason to suspect that the judge in question did not regard the oath he took when he took office as a priority over any other social or political commitment (see para. 258). In particular, the ECtHR held that fears of lack of impartiality based on the political opinions of the judges are manifestly unfounded in circumstances where there was no link between the subject-matter of the national proceedings (which, in the present case, concerned tax offences and therefore did not call into question the political ideas of the accused) and the words or political commitment of the judges concerned. While in this case the Court noted it would have been preferable if the judges involved in the applicant's case had shown greater discretion in their public comments, it held that the judges had neither shown any bias against the applicant nor publicly used expressions implying a negative assessment of his case; therefore, the applicant's fears as to a lack of impartiality on the part of those two judges were not regarded as objectively justified.

59 See e.g., ECtHR, Thomann v. Switzerland, 10 June 1996, paras. 35-37.

60 ECtHR, *Šorgić v. Serbia*, no. 34973/06, 3 November 2011, para 67.

- that a judge's decision on a challenge directed against themselves does not, *per se*, raise concerns as to impartiality;[61]
- that a challenge relying solely on general or abstract allegations, unsupported by specific or material facts capable of raising legitimate doubts, may be deemed abusive;[62]
- that there is a need for a link between the proceedings at hand and the conduct of the judge or the judge's prior involvement in the proceedings.

2.3. Procedural Aspects

39. It is important that claims made against a judge are sufficiently substantiated to avoid frivolous insinuations towards the judge, which can impact the trust in the judiciary. Applicable regulations should allow a party to the proceedings to understand the manner in which a request for recusals should be submitted, and the necessary procedures to follow.

40. In the study carried out for a 2019 case of the ECtHR, mentioned in paragraph 34 above, it was found that a recusal application lodged by a judge is, in most States, examined by the president of the court or by another judge or judicial formation and is not determined by the judge her or himself. In eight States,[63] there is an explicit legal obligation to give reasons for the dismissal of an application for recusal. In fourteen States,[64] such an obligation is not explicitly provided but can be inferred from the relevant legal framework. In the other six States, there is no legal obligation, either explicit or inferred, to give reasons for the dismissal of an application for recusal.[65]

41. It is important that a person requesting a judge's recusal also comply with certain requirements. The right to a fair hearing is not violated where a judge rules on a challenge in the absence of arguments that are relevant to determining impartiality as noted above. However, where a party to a proceeding invokes specific and relevant grounds which can raise legitimate concerns regarding impartiality and could not be dismissed as abusive or irrelevant, it warrants objective consideration.[66] On the basis of the ECtHR caselaw, the following key procedural requirements may be identified with respect to the procedure for seeking recusal of a judge:

- general or abstract allegations, unsupported by specific or material facts capable of raising legitimate doubts as to the impartiality of a judge or bench, are insufficient;[67]
- where an applicant is aware, or should reasonably have known, and genuinely believes there are arguable concerns as to the impartiality of a judge or bench, s/he is expected to invoke such remedies in accordance with domestic procedural rules at the earliest opportunity to allow the domestic courts a fair opportunity to examine and, if necessary, remedy the alleged violation;[68]

61 ECtHR, *Mikhail Mironov v. Russia*, no. 58138/09, 6 October 2020.

62 ECtHR, *Mikhail Mironov v. Russia*, no. 58138/09, 6 October 2020.

63 Azerbaijan, Croatia, Estonia, Finland, Norway, Slovenia, Sweden and Bulgaria.

64 Austria, Bosnia and Herzegovina, Czech Republic, Germany, Greece, Hungary, Iceland, North Macedonia, Portugal, Russian Federation, Serbia, Spain, Turkey and the United Kingdom (England and Wales).

65 See ECtHR, *Iulian Cătălin Gogan v. Romania*, no. 41059/11, 1 October 2019, para. 14.

66 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136.

67 ECtHR, *Mikhail Mironov v. Russia*, no. 58138/09, 6 October 2020.

68 See in this respect, ECtHR, *Croatian Golf Federation v. Croatia*, no. 66994/14, 17 December 2020, para. 110; and ECtHR, *Iulian Cătălin Gogan v. Romania*, no. 41059/11, 1 October 2019, paras 34-39.

- where a party to a proceeding invokes specific and relevant grounds which can raise legitimate concerns regarding impartiality, they must be considered by the competent body;[69]
- the procedure employed to determine the applicant's challenge for bias shall itself comply with the requirement of impartiality;[70]
- the competent judge or court assessing the impartiality of a judge/bench should convincingly explain why challenges as to the impartiality may be rejected;[71]
- a potential invocation of the "doctrine of necessity" (whereby in extraordinary circumstances may enable a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice), as applicable and relevant, may only occur after an assessment of the impartiality has been considered;[72]
- in case procedural defects are identified, there should be an effective procedure to rectify such defects before a higher judicial authority.[73]

42. In cases involving the alleged impartiality of a final-instance judicial authority, the principle of subsidiarity imposes a heightened obligation on the applicant to exercise special diligence in exhausting domestic remedies, particularly where no further ordinary remedies exist. These requirements are only applicable where the applicant knew or could reasonably have known the composition of the adjudicating panel. [74]

43. Where disciplinary proceedings against a judge are initiated in circumstances where s/he has failed to withdraw from a case, where there was such an obligation, it is important to note that transparent procedures and proper reasoning of decisions are vital to guarantee accountability and increasing trust in the judiciary. The deciding body should be independent and impartial, and be able to decide on the matter expeditiously and the proceedings should present all the guarantees of a fair trial. The judge should ultimately have the right to challenge the decision and the disciplinary sanctions, which should be proportionate.[75]

2.4. Recusals in Constitutional Courts: Specific Challenges

44. There is a heightened sensitivity around the topic of recusals of constitutional court judges due to the nature of cases, the fact that they generally are last-instance judicial authority of the domestic legal system and the constitutional and political implications

69 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136.

70 ECtHR, *Mikhail Mironov v. Russia*, no. 58138/09, 6 October 2020, paras. 34-40, where despite the existence of potentially disqualifying circumstances, the judge proceeded to decide on the challenge against himself. Furthermore, his reasoning failed to adequately address the applicant's concerns.

71 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136.

72 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136.

73 ECtHR, *Mikhail Mironov v. Russia*, no. 58138/09, 6 October 2020, paras. 34-40, where Court considered whether any procedural defects could be rectified by a higher judicial authority. The only available avenue constituted an extraordinary remedy deemed uncertain and ineffective. Therefore, the Court concluded that the procedure employed to determine the applicant's challenge for bias failed to comply with the requirement of impartiality.

74 ECtHR, *Katsikeros v. Greece*, no. 2303/19, 21 July 2022, paras. 86-94, where the Court noted that under the Code of Civil Procedure, a party may request the recusal of a judge either five days prior to the hearing or during the hearing if the relevant grounds only became known later. The applicant was or should have been aware of the composition of the Court of Cassation and the identity of the judges who had voted against his promotion, which stemmed from a personal dispute. Furthermore, publicly available sources, including the Government Gazette, disclosed the judges assigned to the section dealing with the applicant's case. Of the six judges, five had participated in the decision on the applicant's promotion, with two voting against him. The eventual hearing was conducted by two judges who had previously voted in favour of the applicant, two who had voted against him, and one additional judge not originally assigned to the section. Given this context, the Court found that there was a strong likelihood that the applicant's appeal would be adjudicated by judges previously involved in his promotion decision. The applicant, who had knowledge of these facts from a particular date onward, failed to request the recusal of those judges. Accordingly, the Court held that the applicant was under an obligation to seek the withdrawal of the concerned judges, irrespective of the judges' own duty to withdraw in the presence of objectively justified doubts as to their impartiality

75 CoE, Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe: Judges: independence, efficiency and responsibilities, 17 November 2010, para 69.

that could result from the outcome of such proceedings. It is especially important to maintain a proper balance between judicial independence and public confidence in the highest courts of legal systems (where these courts exist). An important factor to consider is also the fact that constitutional courts by their very nature and scope of work have a smaller number of judges compared to other courts. Therefore, handling recusals when the number of judges is limited will be a factor to take into account when assessing the impartiality of the respective bench. Related to this is also the impact recusals can have on the required quorum and decision-making processes. Moreover, the fact that the identity of constitutional court judges is often well known to the public and even more so to the legal community would also generally be a relevant factor from a procedural point of view when raising the issue of impartiality. Thus, an assessment of the impartiality of a judge or bench of the constitutional court should take into account its special place and role in the judicial system.

45. Based on the caselaw of the ECtHR, there are a number of considerations applicable in the context of constitutional adjudication that should be taken into account to determine whether impartiality may have been compromised:

- the fact that the outcome of the constitutional complaint may be directly decisive to the situation of a close relative of one of the judges sitting in the Constitutional Court bench, which may compromise impartiality;[76]
- the dual role as previous legal counsel to a party and subsequently adjudicating on the constitutionality of the applicant's complaint, combined with potential bias stemming from familial relations, may raise legitimate doubts as to the judge's impartiality;[77]
- the fact that a constitutional court judge had expressed a view on the core issue complained of in the constitutional proceedings in previous proceedings capable of raising legitimate doubts as to the judge's impartiality (objective test);[78]
- that participation in the passage of legislation, or of executive rules – especially when there are elements showing a more direct and active involvement, is likely to be

76 See e.g., ECtHR, *Croatian Golf Federation v. Croatia*, no. 66994/14, 17 December 2020: the case concerned the dissolution of the applicant association by the authorities, and the subsequent court proceedings, it had appeared that the husband of a Constitutional Court judge in a three-judge panel deciding the applicant association's complaint, was the president of a golf club, against which the applicant association had initiated enforcement proceedings. Whilst the latter proceedings were not directly related to the administrative proceedings for dissolution of the applicant association, the ECtHR observed that it cannot be overlooked that the dissolution of the applicant association was directly decisive for the existence of the judge's husband's golf club's debt owed to the applicant association, it being understood that a debt is extinguished if the creditor no longer exists. Also, with the Constitutional Court's decision, the administrative authorities' decision on dissolution became irreversible and the debt of the golf club whose president was the relevant judge's husband was definitely extinguished. The Court therefore concluded that against this background and having regard to the importance of appearances, the fact that the judge concerned was a member of the Constitutional Court's panel which decided the applicant association's constitutional complaint was capable of raising legitimate doubts as to the judge's impartiality. Accordingly, the Court held that the judge should have withdrawn from sitting and the failure to do so justified the applicant association's fears as regards her impartiality.

77 See e.g., ECtHR, *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005, paras. 34-37, where the applicant was the defendant party in civil proceedings brought against him by two plaintiffs which sought damages for breach of contract. The domestic courts, at two instances, gave judgment for the plaintiffs. The applicant appealed to the Supreme Court and subsequently submitted a constitutional complaint. Both complaints were dismissed. One of the judges sitting on the Constitutional Court's panel which delivered its decision had shortly acted as legal counsel of the plaintiffs in the early stages of the proceedings. The same judge's daughter later replaced him as the plaintiff's counsel. While the Court noted there was no subjective bias, and noted that the impugned judge's previous involvement in the case had been minor and remote, it did give weight to the fact that this judge had carried out a dual role in the case: first, as counsel to the plaintiffs in the principal proceedings, and, subsequently, adjudicating on the constitutionality of the applicant's complaint. This dual role in a single set of proceedings, reinforced by his daughter's involvement also as counsel to the plaintiff's, created a situation which was capable of raising legitimate doubts as the judge's impartiality.

78 ECtHR, *HIT D.D. Nova Gorica v. Slovenia*, application no. 50996/08, 5 June 2014, paras. 39-42, which concerned a constitutional review, the applicant company complained that the same judge who had first participated in the adjudication of its case in two separate hearings before the Higher Labour and Social Court later participated in the Constitutional Court panel that dismissed its constitutional appeal. Under the subjective test, the Court noted that the time that had lapsed since the judge was involved in the proceedings before the Higher Labour and Social Court, and the mere participation of judge in the administrative panel of the Constitutional Court deciding its case cannot be considered, in itself, to constitute sufficient proof of her personal bias. It further noted that the applicant had not raised this matter in the domestic proceedings. As to the objective test, the Court took into consideration that while the Constitutional Court panel including the relevant judge did not formally review the decisions of the Higher Labour and Social Court in which the judge took part, it was in fact called upon to ascertain on matters that the judge had expressed a view on in the former proceedings. It found that the composition of the Constitutional Court panel lacked impartiality.

sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue;[79]

- that the mere fact that certain persons successively performed advisory and judicial functions in respect of the same decisions is capable of casting doubt on the institution's structural impartiality as the applicant may have legitimate grounds for fearing that the members of the judicial body will feel bound by the opinion previously given, which is sufficient to vitiate the impartiality of the tribunal in question;[80]
- a constitutional court judge's previous involvement in the case when such involvement has been minor and remote, *in itself*, would in general not be enough to question the impartiality of the said judge (subjective test);[81]
- the mere fact that a judge has been involved in other proceedings concerning the same parties is not *in itself* reasonably capable of giving rise to legitimate doubts as to his or her impartiality (subjective test).[82]

46. From a procedural perspective, given the smaller number of judges and the fact that their identity is well-known, it is generally more likely that an applicant may know or have reasonably known of, or could have anticipated, the composition of the Constitutional Court bench and potential lack of impartiality of one of its judges, which may therefore be expected to be raised pre-emptively when submitting the constitutional complaint.[83]

47. Where it concerns a situation in which a judge had previously adjudicated in proceedings involving the same parties, the ECtHR has noted, in applying the objective test, that the "*…mere fact that a judge has been involved in other proceedings concerning the same parties is not in itself reasonably capable of giving rise to legitimate doubts as to his or her impartiality*."[84] Some factors that are considered in this respect are whether the judge or bench gave reasons for their rulings, and evidenced no bias in favour or against any of the parties to the proceedings.[85]

79 See ECtHR, *McGonnell v. the United Kingdom*, no. 28488/95, 8 February 2000, para. 55. By contrast, ECtHR, *Pabla Ky v. Finland*, no. 47221/99, 22 June 2004, para. 34, where it was noted that in the position as Member of Parliament, the said judge had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Court of Appeal for decision in the applicant company's appeal, concluding that the judicial proceedings therefore could not be regarded as involving "the same case" or "the same decision" in the sense that was found to infringe Article 6 § 1 in the two judgments cited above, and underlining that the mere fact that the judge in question was a member of the legislature at the time he sat on the applicant company's appeal was not sufficient to raise doubts as to the independence and impartiality of the Court of Appeal.

80 ECtHR, *Procola v. Luxemburg*, no. 14570/89, 28 September 1995, para. 45.

81 See e.g., ECtHR, *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005, paras. 60-65; by contrast: ECtHR, *Croatian Golf Federation v. Croatia*, no. 66994/14, 17 December 2020, para. 115-120, where the Court considered that it could not be said that the likelihood of the applicant's constitutional complaint being decided by a panel of the Constitutional Court including a specific judge that may raise reasonable doubts as to impartiality was of such a degree that the applicant should have anticipated that possibility and thus could have been expected to react pre-emptively

82 ECtHR, *HIT D.D. Nova Gorica v. Slovenia*, application no. 50996/08, 5 June 2014, paras. 34-42.

83 See e.g., ECtHR, *Juričić v. Croatia*, no. 58222/09, 26 July 2011, paras. 60-65; by contrast: ECtHR, *Croatian Golf Federation v. Croatia*, no. 66994/14, 17 December 2020, para. 115-120, where the Court considered that it could not be said that the likelihood of the applicant's constitutional complaint being decided by a panel of the Constitutional Court including a specific judge that may raise reasonable doubts as to impartiality was of such a degree that the applicant should have anticipated that possibility and thus could have been expected to react pre-emptively

84 ECtHR, Šorgić v. Serbia, no. 34973/06, 3 November 2011, para. 67.

85 ECtHR, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012, para. 136, where the applicant, who was subjected to disciplinary proceedings, had challenged several Constitutional Court judges including those who had earlier been excluded from other sets of proceedings in which he had been involved, on the grounds that his past dealings with certain of the judges in question meant that there was a risk of bias, was met with a rejection of the request for recusals. It was concluded by the Court that the objective doubts had not been convincingly dismissed by the Constitutional Court when rejecting the request for recusals.

3. COMPARATIVE OVERVIEW OF RULES GOVERNING RECUSALS OF CONSTITUTIONAL COURT JUDGES

48. In the OSCE region various practices exist in arrangements on recusals of judges, including Constitutional Court judges. The following provides an overview of selected countries.

49. In **Austria**, procedural laws differentiate between exclusion from deciding a case - *die Ausschließung* and recusal - *die Ablehnung*. The exclusion is the *ex lege* exclusion in cases provided by the law, while the recusal is possible upon the request and is subjected to judicial review. The Austrian Constitutional Court Act[86] only regulates the institute of exclusion. According to Article 12 (1), the recusal of a Constitutional Court judge is not permitted. Reasons for exclusion of a judge are provided by the Article 12 (2-5). Members and substitute members of the Constitutional Court are excluded from exercising their office in cases in which a judge would be *excluded* in accordance with the Article 20 of the Court Jurisdiction Act[87] or in accordance with the procedural laws referred to in the Constitutional Court Act, if they have been involved in a judicial or administrative proceeding prior the proceeding before the Constitutional Court and if there are other important reasons that are likely to cast doubt on their full impartiality. Furthermore, those members who have participated in taking a decision of an election authority are excluded from any hearing and decision regarding a decision of such authority. The only provision related to the *procedure on exclusion* is provided by Article 12 (6) of the Constitutional Court Act by which the Constitutional Court itself decides in chambers on the existence of any reason for exclusion.

50. Article 27 (6) of the Act on the Constitutional Court of **Croatia**[88] provides that a judge cannot abstain from voting, except in the case when s/he has participated in passing the law, or some other regulation or decision which are the matter of the decision-making process. The setup of the norm implies that the final decision whether or not to abstain from voting lies with the judge.

51. In **France**, the recusal of judges is governed primarily by the Code of Judicial Organizations (*Code de l'organisation judiciair*e), Civil Procedure Code (*Code de procédure civile* (CPC)), and Penal Procedure Code (*Code de procédure pénale* (CPP)), with specific application depending on the nature of the case (civil or criminal).[89] In French administrative law, the recusal (*récusation*) of a member of the Conseil d'État or another administrative court is governed by Articles L721-1 to R721-9 of the Code de justice administrative (CJA).[90] The rules on recusals of members of the Constitutional

86 Bundes-Verfassungsgesetz (B-VG);
https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138

87See Article 20 of the Court Jurisdiction Act
https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001697

88 Ustavni zakon o Ustavnom sudu RH (Nar. nov. 49/02 – pročišćeni tekst) https://www.sabor.hr/en/information-access/important-legislation/constitutional-act-constitutional-court-republic-croatia

89 The grounds for recusal are listed in Article L. 111-6 of the *Code de l'organisation judiciaire*, which applies to all courts, including the *Cour de Cassation*. These include conflicts of interest, familial ties to parties, prior involvement in the case, public enmity or friendship, and situations of dependency or interest. Judges may also abstain voluntarily under Article L. 111-7 of the *Code de l'organisation judiciaire* if they believe a cause for recusal exists or feel unable to judge impartially. The court can order a renvoi (transfer) to another jurisdiction when suspicion of partiality affects several judges or for reasons of public order. Procedurally, in civil cases, Articles 341–344 CPC establish how and when recusal requests must be filed. The request must be submitted as soon as the party becomes aware of the grounds, and never after the close of arguments. While Article 343 CPC outlines who may file the request and in what form, it specifically excludes application to the Cour de cassation, which has its own internal protocols for handling recusals. In criminal matters, Articles 668–674 CPP regulate recusal procedures, with Article 668 CPP listing the causes (similar to those in civil law), and Article 669 CPP detailing the process: the recusal request must name the specific judge(s), be addressed to the Premier président de la cour d'appel, and be adequately justified. When the judge is a member of the *Cour de cassation*, special internal handling applies: a different chamber than the one assigned to hear the main case will review the recusal request, usually designated by the Premier président. In criminal matters at the cassation level, Article 674 CPP provides for decisions on recusal of judges in the Chambre criminelle to be rendered within a set time.

90 A party may request the recusal of a member if there is a "serious reason to doubt their impartiality" (Article L721-1 CJA). In addition to

Council of France are laid down in the Rules of procedure on the procedure followed before the Constitutional Council for declarations of conformity with the Constitution[91] and in the Rules of procedure on the procedure followed before the Constitutional Council for priority questions of constitutionality.[92] The provisions do not refer to specific grounds for recusals but underline that "*[t]he mere fact that a member of the Constitutional Council participated in the drafting of the legislative provision which is the subject of the question of constitutionality does not in itself constitute a ground for recusal."*[93] The Rules of Procedure require the party to submit "*a specially reasoned written document accompanied by documents to justify it*" which is then communicated to the member of the Constitutional Council who is the subject of the request, who may agree or otherwise the request shall be examined by the Constitutional Council without the participation of the member whose recusal is requested.

52. In **Germany**, requests for recusal in civil and criminal court proceedings are regulated in the Code of Civil Procedure[94] and in the Criminal Procedure Code,[95] respectively. The Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*) provides in Section 18 (1) the requirement of impartiality, and that justices shall be barred from exercising their judicial duties if they are a party to the case, or are or were married to a party, or are or were in a civil partnership with a party, are related by blood or marriage in the direct line up to the third degree or by marriage up to the second degree in the collateral line or have already been involved in the same case due to their office or profession. Justices who have an interest in the outcome of the proceedings on the grounds of their marital status, profession, descent, membership of a political party or because of a similarly general consideration shall not be regarded as parties to the case. It clarifies that involvement shall not include participating in the legislative process and expressing a scholarly opinion on a point of law which may be relevant to the case. Section 19 sets out the procedure for recusal or challenge. If a justice is challenged on the grounds of possible bias, the Court shall decide in that Justice's absence; in the event of a tied vote, the presiding Justice shall have a casting vote. The reasons for the challenge shall be stated. The challenged Justice shall comment on the challenge. The challenge

formal recusals, members of the Conseil d'État have a legal and ethical obligation to act with impartiality, independence, and integrity, and to prevent any legitimate doubt as to these qualities, as required by Article L131-2 CJA. This includes an obligation to refrain from behaviour that may give rise to a conflict of interest or create an appearance of bias. Procedurally, if a member considers that a cause of recusal exists in their own case, or if they feel, in conscience, unable to sit, they must abstain, and be replaced by another judge, designated by the president of the section. A party who wishes to initiate recusal must do so as soon as they become aware of the cause, and in any event before the end of the hearing. The request must be made either directly by the party or by their representative with a special power of attorney, submitted in writing to the court registry or recorded in minutes, and must state the reasons for the recusal in detail, with supporting evidence. Once the request is filed, the judge concerned is notified and must abstain from participating in the case while the request is examined. If the judge agrees with the grounds, they are replaced and the case proceeds. If not, the court — without the challenged judge participating — issues a decision on the admissibility and merits of the request (Articles R721 7 to R721 9 CJA). The decision is not subject to appeal.

91 Article 15 (Rules of Procedure on the Procedure Followed Before the Constitutional Council for Declarations of Conformity with the Constitution | Constitutional Council).

92 Article 4 (Rules of procedure of the QPC procedure before the Constitutional Council | QPC360).

93 Article 4 (Rules of procedure of the QPC procedure before the Constitutional Council | QPC360).

94 The motion to recuse a judge is to be filed with the court of which the judge concerned is a member. The grounds for such recusal are to be demonstrated to the satisfaction of the court; if a judge is recused for fear of bias before whom a party has made an appearance at a hearing, or with whom a party has filed petitions, it is to be demonstrated to the satisfaction of the court that the grounds for filing a motion for recusal arose only at a later date, or became known to the party at a later date. In relation to self-recusal, Section 48 of the Code of Civil Procedure provides that the court competent for conclusively dealing with the motion to recuse a judge is to decide on the matter also in those cases in which such a motion is not appropriate, but in which the judge notifies the court that a relationship exists that might justify his recusal, or in which other reasons give rise to concerns that the judge might be disqualified by law.

95 See <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html>. The relevant provisions of the Criminal Procedure Code provide that judges are to be barred by law from exercising their judicial office if: (1) they themselves were aggrieved by the offence; (2) they are or were the spouse, the life partner, the guardian or the carer of the accused or of the aggrieved person; (3) f they are or were lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused or to the aggrieved person; (4) they have acted in the case as an official of the public prosecution office, as a police officer, as a lawyer (*Rechtsanwalt*) representing the aggrieved person or as defence counsel; or (5) they have been heard in the case as a witness or expert.

shall not be considered if it is made after the oral hearing has commenced. If a Justice who has not been challenged recuses himself or herself, the same procedure applies.

53. In **Lithuania**, a judge of the Constitutional Court[96] according to Article 48 of the Law on the Constitutional Court of Lithuania, a judge of the Constitutional Court may disqualify himself or herself or be disqualified from the consideration of a case if: 1) the judge is a relative of one of the persons participating in the case and if inquiries of a personal nature are considered; 2) the judge has publicly declared how the case under consideration should be decided by the Court; or 3) there are other circumstances that raise reasonable doubts as to the impartiality of the judge. If any of these conditions are met, it is upon the judge to announce in writing before the commencement of the consideration of the case and request the Constitutional Court to decide the issue concerning *disqualification*. On the same grounds and according to the same procedure, the persons participating in the case may also put forward a reasoned motion for disqualification. The Court shall decide issues concerning self-disqualification or disqualification in the deliberation room.

54. The Constitutional Court Act of **Montenegro**[97] provides that a judge and/or President of the Court will recuse him or herself from hearing and deciding the case if the judge was a participant in the procedure, legal representative or attorney of the participant in the procedure; if the participant in the proceedings or the legal representative or attorney of the participant in the proceedings is related to a judge by blood in the direct line to any degree, and in the collateral line up to the third degree, or if is his/her married or common-law spouse or relative by in-laws up to the second degree, regardless of whether marriage ended and if participated in decision-making in the case in judicial or administrative proceedings (Article 43). A request for recusal of a judge due to reasons for disqualification may be submitted by the President of the Court, a judge or participant in the proceedings (Article 44 (1)). If the recusal reasons concern the President of the Constitutional Court, the Vice-President will convene the session of the Constitutional Court upon the reasoned motion made by three judges. (Article 43 (2)). The judge whose disqualification is requested may not participate in the decision-making process, but has to express the opinion on the request for disqualification. The Constitutional Court decides on the merits of the request for recusal of a judge. If the decision on exclusion is made, the judge concerned cannot participate neither in hearing nor in deciding the case.

55. In **Norway**, there is no special Constitutional Court, and the ordinary courts of law, with the Supreme Court pronouncing judgments in the final instance, have power to review the constitutionality of legislation and administrative decisions. There is an obligation for judges to withdraw from a case if they believe that their impartiality is in question or compromised or that there is a reasonable perception of bias. This is set out in the Act relating to the Courts of Justice of 13 August 1915 No. 5 (sections 108 and 113). The latter provides that judges finding themselves in a position whereby the parties are entitled to require their recusal, and the situation is not presumed to be common knowledge, they shall ensure that the parties are notified of this as soon as possible. If there are several members of court, they shall notify the presiding judge who will decide on the action to be taken. Section 117 applies to the procedure regarding the Supreme Court. It specifies that where issues regarding recusal arise prior to the court hearing in the Supreme Court where the case is to be heard, a court may sit to decide the issue. Other courts may also decide on issues related to recusal prior to the court hearing for the case. In this event, the chief judge may her/himself make a decision where there are multiple members of court, but there may be an ordinary hearing to decide on the issue in advance,

96 See <https://lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193>.

97 Zakon o Ustavnom sudu Crne Gore (Sl. list CG", br. 11/2015, 55/2019 - Odluka US CG. Vidi: Odluku US CG - 47/2022.) https://www.gov.me/dokumenta/d9d3992f-f6a0-4193-877d-abb22fea9d3e

when this can be done without incurring significant inconvenience or expense. Where the issue centres around the recusal of a sole judge, or the presiding judge, or two permanent members of the court, the sole judge or the presiding judge may decide to bring the issue before the closest higher court or before the Appeals Selection Committee of the Supreme Court, if the case is to be heard before the court of appeal. If a judge does not comply with the obligation to recuse themselves, they can be subjected to a written warning by the judiciary (section 236 of the Act relating to the Courts of Justice).

56. In **England and Wales**, there is an obligation of the judge to withdraw from a case if they believe that their impartiality is in question or compromised or that there is a reasonable perception of bias. This is set out in the Guide to Judicial Conduct (Guide).[98] In the first place, it sets out that judges should "*avoid extra-judicial activities that are likely to cause them to have to refrain from sitting because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity*".[99] The Guide further states that *"[j]udicial office holders must recuse themselves from any case where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that they would be biased*."[100] This includes not only extra-judicial activities, but also involvement in public debates.[101] While there is no sanction where a judge fails to recuse themselves and the Judicial Conduct Investigations Office (JCIO) could not consider a complaint about recusal as it relates to a judicial decision, the JCIO could become involved if an appeal court's criticism of a judicial office holder for failure to declare a potential conflict of interest was so serious as to raise a question of judicial misconduct, which could lead to a sanction, which can include a formal advice, a formal warning, a reprimand or removal.[102]

57. In **Serbia**, if conditions for withdrawal or exemption have been met, the judge of the Court shall be obliged to inform in writing President of the Court of these circumstances. Withdrawal or exemption of judges of the Court may be required by the initiator of the constitutional complaint or complaint. The Court shall decide whether the conditions for withdrawal or exemption of a judge have been met, in accordance with Art of the Law, without participation of the judge whose withdrawal or exemption has been required.[103]

58. In **Slovenia**, the Constitutional Court may recuse the judge by applying the grounds for exclusion in judicial proceedings[104] (Article 31 (1) Constitutional Court Act[105]). As soon as a constitutional court judge learns of any reason for disqualification, the judge must cease working on the case and notify the President of the Constitutional Court thereof (Article 32). Article 31 (2) provides two grounds based on which a Constitutional Court judge may not be recused, namely due to participation in legislative procedures or in the adoption of other challenged regulations or general acts issued for the exercise of public authority prior to being elected a Constitutional Court judge; and in the case of the expression of an expert opinion on a legal issue which might be significant for the proceedings. The Constitutional Court Act allows submission of the request for exclusion

98 Court and Tribunals Judiciary: Guide to Judicial Conduct, July 2003

99 Court and Tribunals Judiciary: Guide to Judicial Conduct, July 2003, p. 9.

100 Court and Tribunals Judiciary: Guide to Judicial Conduct, July 2003, p.9.

101 Court and Tribunals Judiciary: Guide to Judicial Conduct, July 2003, p.17.

102 Judicial Conduct Investigations Office, Judicial Discipline: Misconduct and recommending Sanctions, July 2024 p3; see also the Judicial Conduct in (Judicial) Rules 2014 and The Judicial Discipline (Prescribed Procedures) Regulations 2014

103 Rules of Procedure of the Constitutional Court of the Republic of Serbia (Official Gazette RS, No. 103/13) https://ustavni.sud.rs/eng/constitution-and-regulations-on-the-court/rules-of-procedure?lang_type=eng

104 See for example Article 39 of the Slovenian Criminal Procedure Act https://pisrs.si/pregledPredpisa?id=ZAKO362 and Article 70-75 of the Civil Procedure Act https://pisrs.si/pregledPredpisa?id=ZAKO1212

105 Constitutional Court Act of the Republic of Slovenia (The Official Gazette, No. 64/07 – official consolidated text, 109/12, 23/20, 92/21, 22/25 and 57/25 – ZF)

by participants in the proceedings. The request must be reasoned (Article 33 (1)). If the Court has announced the public hearing of the case, the request for exclusion must be filed no later than the beginning of a public hearing, otherwise, it should be filed by the beginning of a closed session at which the matter is decided (Article 33 (1)). The judge has a right to express an opinion on the allegations in the request, but is barred from participating in the decision-making process on the recusal, which is made in closed session. In case of an equal number of votes, the presiding judge will have the casting vote (Article 33 (2)).

59. In **Spain**, Article 80 of the Organic Law 2/1979 of the Constitutional Court (as amended)[106] provides that the recusal and abstention of constitutional court judges are regulated by the provisions of the Civil Procedure Law and the Organic Law on the Judiciary. Article 218 of the Organic Law on the Judiciary establishes the duty of abstention: judges must abstain from hearing a case when any of the grounds for recusation apply, and must formally state the reason. Their abstention will be reviewed and decided by the relevant body – in the case of the Constitutional Court, by the Plenum of the Constitutional Court (Article 10.1(k) of the Organic Law on the Constitutional Court). Article 219 of the Organic Law on the Judiciary lists the grounds for recusation, including: direct interest in the case or its outcome; having served as lawyer, prosecutor, or judge in earlier stages; family relationships up to the fourth degree; public expressions of opinion on the matter; having a close friendship or enmity with a party; other circumstances that might objectively cast doubt on impartiality. A recusal must be proposed by a party to the proceeding as soon as the grounds on which it is based become known, otherwise it will not be admissible. The recusal must be proposed in writing, which must specifically and clearly state the legal grounds and the reasons on which it is based, accompanied by preliminary evidence. Article 221 lays out the procedure following a recusal request. There is no appeal against the decision on recusal.[107]

4. Relevant Considerations For The Various Scenarios As Submitted

60. In view of the above, the following considerations could apply to the scenarios outlined within the request for this Comparative Note.

4.1. Prior Mandate as Member of Parliament Voting on a Specific Bill under Constitutional Review

61. The first situation is one where a judge, prior to appointment, served as a Member of Parliament and voted for or against a law that is now subject to constitutional review; or where a judge, while serving as a Member of Parliament, took part in the parliamentary committee deliberations on a bill that is now under constitutional scrutiny.

62. As it could be seen from the comparative analysis, there is no uniform legal solution or regulation of the matter, and domestic resolutions range from mandatory exclusion, exclusion of the possibility to recuse oneself on such a ground, case-by-case assessment to a judge's own decision to self-recuse her/himself.[108]

106 Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, availble at: https://www.boe.es/eli/es/lo/1979/10/03/2/con ; accessed 22 September 2025

107 See Chapter V, Abstention and Recusation (Articles 217-228) of Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666

108 For instance, previous membership in the legislative and/or executive power requires mandatory exclusion from the examination of the case before the Constitutional Court in Austria under certain conditions. In contrast, the Slovenian legislation explicitly excludes the possibility of judge's recusal in such a case, while in France, it is specified that ""*[t]he mere fact that a member of the Constitutional Council participated in the drafting of the legislative provision which is the subject of the question of constitutionality does not in itself*

63. These legal solutions all have their legitimate aim: one is to remove all possible doubts in advance by mandatory exclusion of a judge, another is to remove in advance the appearance of a possible doubt by mandatory rejection of exclusion, and a third is to evaluate circumstances for doubt as to the impartiality while the other solution counts on the judge's ethical standards. Moreover, all of the solutions aim to comply with the ECtHR's test on objective impartiality, which is to preserve the confidence the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.

64. In *McGonnell v. the United Kingdom*, the ECtHR found a violation of Article 6 (1) ECHR on account of the direct involvement of a judge in the adoption of the development plan at issue in the proceedings, underlining that *"[a]ny direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.*"[109] In *Procola v. Luxemburg*, the Court concluded that, when four members of the Conseil d'État carried out both advisory and judicial functions in the same case, "*the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality*"; the Court noted that in the specific case, the applicant had legitimate grounds for fearing that the members of the judicial body had felt bound by the opinion previously given, and that "*[t]hat doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question*".[110]

65. In contrast, in *Pabla Ky v. Finland*, which concerned civil proceedings of a member of the Court of Appeal (an expert member) who was also a member of parliament, the ECtHR noted that the member had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Court of Appeal and had no connection or link with any of the parties or the substance of the case. The Court concluded that "*the mere fact that the member of the Court of Appeal was also a member of the legislature at the time he sat on the applicant company's appeal was not sufficient to raise doubts as to the independence and impartiality of the Court of Appeal"* underlining that while the theory of separation of powers is relevant, this principle is not decisive in the abstract.[111]

66. In a German case[112] concerning a review of compatibility of marriages concluded abroad involving minors with the German legislation on combating child marriages, the possible impartiality of the Vice-President of the Federal Constitutional Court was addressed due to prior involvement as legislator in the preparation and adoption of the Act to Combat Child Marriages. The said judge requested the German Federal Constitutional Court to assess if there was potential bias on his part that should prevent him from taking part in the panel. In its decision, referring to the relevant legislation, the German Federal Constitutional Court first concluded that the Vice-President was not precluded from participating in the specific judicial review procedure by virtue of law and given a reasonable assessment of all circumstances, it found no sufficient reason to doubt his

constitute a ground for recusal". The Croatian legislation allows judicial discretion in such case, i.e., it leaves to a judge the final decision whether to abstain from voting or not if participated before in the legislative procedure.

109 ECtHR, *McGonnell v. the United Kingdom*, no. 28488/95, 8 February 2000, para 55, where the Court concluded that *"… the Bailiff's non-judicial constitutional functions cannot be accepted as being merely ceremonial. With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue".*

110 ECtHR, *Procola v. Luxemburg*, no. 14570/89, 28 September 1995, para. 45.

111 ECtHR, *Pabla Ky v. Finland*, no. 47221/99, 22 June 2004, para. 34.

112 See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/12/ls20191205_1bvl000718.html

impartiality. The Court referred to the legal provision which bars the exercise of judicial office *if a judge has served in the same case officially or professionally* and emphasized that the term "in the same case" must always be understood in a concrete, strictly procedural sense, for which reason only activity in the constitutional court proceedings itself or in the proceedings immediately preceding it and related to it in terms of content can generally lead to exclusion. Further on, the Court emphasized that in terms of the Federal Constitutional Court Act, participation in the legislative process is expressly not considered an activity "in the same case". The Court then approached the scope of work of the member of the parliament providing that, among others, "*deliberations and votes as well as work in committees…is part of the exercise of one's mandate and thus falls within the scope of Section 18.3."* (i.e., that participating in legislative process does not mean involvement in the same case due to their office or profession).

67. The German Federal Constitutional Court emphasized that concern about the bias of a judge *requires a reason capable of justifying doubts about his/her impartiality*. The decisive factor is solely whether, upon a reasonable assessment of all circumstances, there is reason to doubt the judge's impartiality. Additionally, doubts about the necessary objectivity and impartiality of a judge of the Federal Constitutional Court may be justified if it becomes *obvious that there is an inherent connection between a political conviction – expressed with commitment – and the legal opinion of the judge concerned* or if previous demands of the current judge for a change in the law have a concrete connection to a case pending before the Federal Constitutional Court during his or her term of office. However, even in these situations, the decisive factor is whether the judge's conduct allows the conclusion that he or she no longer freely and impartially views a legal opinion that conflicts with his/her own, but has already made up his/her mind.

68. Finally, the Federal Constitutional Court held that for a concern about bias, there must always be something additional that goes beyond the mere fact of participating in the legislative process or expressing a scientific opinion on a legal issue relevant to the current proceedings in order for a concern about bias to be considered well-founded according to the applicable standard. These additional circumstances must create a particularly close relationship between the judge and the law under constitutional review in the public eye.

69. In light of the foregoing, **in case where there are no specific regulations on exclusion of judges due to their previous involvement in the legislative procedure as Members of Parliament leading to the adoption of the law under consideration, it must be determined whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to the judge's impartiality.** In this respect, even appearances may be of importance. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.[113]

70. **The following considerations would be of particular relevance to determine whether there may be reasonable doubts as to a Constitutional Court judge's impartiality:**

- **the mere prior status as a Member of Parliament at a time when the legislation was adopted is in itself insufficient if the said judge had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Constitutional Court;**

113 ECtHR, *Castillo Algar v. Spain*, no. 28194/95, 28 October 1998, para. 45.

- **as a voting Member of Parliament, who was directly involved in voting on legislation that then becomes the subject of constitutional review, the following factors should be taken into account to determine a more direct and active involvement which may raise reasonable doubts as to the impartiality of the judge, including whether a judge passively voted according to their party's line, or was one of the initiators or a strong critic of the legislation; or**
- **whether s/he specifically expressed views on the said legislation; and/or there are other legitimate grounds for fearing that said Constitutional Court judge will feel bound by the opinion previously given, for instance in an advisory function**.[114]

4.2. Prior Role as Government Agent Before the Constitutional Court

71. The situations in which a judge, before appointment, served as Government agent before the (Constitutional) Court and participated in multiple cases that remained pending at the time of taking office or a judge, prior to appointment, acted as Government Agent and made formal procedural motions before the (Constitutional) Court in pending cases, but did not submit legal positions on the merits, require nuanced considerations.

72. As noted above, ECtHR has established case-law with regard to the objective test of impartiality in terms of hierarchical and other links between the judge and actors in the proceedings (such as dual role of a judge in the case *Mežnarić v. Croatia* or *Wettstein v. Switzerland*, where the lawyer representing applicant's opponents judges the applicant, etc.) as well as involvement in deciding on "the same decision" (*Procola v. Luxemburg*), which are relevant for this issue.

73. In *Svilengaćanin and Others v. Serbia*,[115] the ECtHR was called to review the situation in which there was a meeting between representatives of various levels of courts and the Supreme Court with a representative of the Ministry of Defence, which had later become a party to the proceedings. The question was if this meeting had been capable of casting doubt on the Supreme Court's impartiality and to compromise the impartiality of the chamber that had determined the appeals on points of law lodged in the applicants' cases at a later stage. The Court had to determine whether the Supreme Court itself and its chambers had offered sufficient guarantees to exclude any legitimate doubt in respect of their partiality. While the standpoint of the applicants was important, the decisive factor was whether there were ascertainable facts which might raise doubts as to the court's impartiality from the point of view of the external observer. Meetings with any interested party, even more so with a State body, on issues which are the subject of pending or foreseeable litigation, should be held in a way which does not undermine the decision-making process and the public confidence that the courts must inspire. In concluding there was no lack of impartiality, the Court took into account specific circumstances of the case, namely that "*the meeting had not been a private communication on a pending case, but a public meeting which had occurred outside the framework of any proceedings before the Supreme Court itself. Had the cases been pending before the Supreme Court, the holding of the meeting with only one party to discuss matters, in these particular circumstances, could have possible raised an issue. However, at the time, neither the applicants' cases nor the other cases of the same kind had been pending before the Supreme Court; most of the applicants' claims had not even been lodged with a first-instance court.*

74. The ECtHR continued to observe that "*…the complaints concerned the court of last resort in ordinary judicial proceedings in Serbia, which was composed exclusively of professional judges with guaranteed tenure. There was no real reason to doubt the ability*

114 ECtHR, *Procola v. Luxemburg*, no. 14570/89, 28 September 1995, para. 45.

115 ECtHR, *Svilengaćanin and Others v. Serbia*, nos. 50104/10, 50673/10, 50714/10 et al., 12 January 2021, paras. 65-75.

of the judges to ignore extraneous considerations, if any, in the present case. They were in principle expected and trusted to abide by the law until there were ascertainable facts which might raise doubts as to their impartiality from the point of view of an external observer... There was also no indication that the Supreme Court had changed its interpretation of the law as a result of the meeting. Moreover, the Constitutional Court had subsequently upheld their legal interpretation. Consequently, while emphasising the importance of 'appearances' in this context, in light of all the circumstances of the case and the foregoing considerations, the holding of the meeting had not been such as to cast doubt on the objective impartiality of the Supreme Court in ruling on the applicants' appeals on points of law against the lower courts' decisions. There remained the issue that the applicants might not have seen the Supreme Court as having been totally free from bias after the meeting. However, the existence of such sentiments and fears on their part was not sufficient to establish that they had been objectively justified within the meaning of the Court's case-law."[116]

75. Other factors relevant to this scenario could also be drawn from cases where the judge member acted in another capacity in the same proceedings, for instance as counsel for one of the parties, which could lead to a finding by the ECtHR of a violation of Article 6 (1) ECHR.[117] These scenarios where judges worked in the legislature or executive could demonstrate functional hierarchy between the judges and their former employers.[118]

76. From the comparative analysis a notable example is the solution of Austrian legislator who expressively excludes from examining the lawfulness of regulations or promulgations regarding a statute (or a treaty) by those members or substitute members who at the time of issue of such regulation or promulgation were members of the Federal Government or the respective Provincial Government. The examination of the constitutionality of statutes by members of the Court who were at the time of the statute being adopted, part of the respective legislative authority are excluded.

77. In light of the foregoing, if – **the following factors may be taken into consideration for the purpose of determining whether there may be reasonable doubts as to the impartiality of a judge who held a prior role as Government Agent before the Constitutional Court**:

- the previous role as Government Agent actively involved in the substance of a case is likely to raise legitimate doubts as to the judge's impartiality both from a subjective test perspective (professional, potentially hierarchical, relationships with successor as Government Agent) but also from an objective test perspective, as the judge may be perceived as being bound by previous legal positions on the matter when acting as Government Agent;
- if the Government Agent was merely submitting procedural motions before the Constitutional Court, the risk of actual bias may be reduced although the perception by external observers may remain the same.

4.3. Prior Submission or Contribution to an Amicus Curiae Brief in a Pending Case

78. In the situations where a judge, prior to appointment, was invited by a judge-rapporteur to submit an amicus curiae in a pending case, and is now adjudicating the same case; or where a judge, before appointment, contributed in an expert capacity to an amicus curiae

116 ECtHR, Svilengaćanin and Others v. Serbia, application nos. 50104/10, 50673/10, 50714/10 et al., 12 January 2021, paras. 71-75.

117 ECtHR, Mežnarić v. Croatia, application no. , para 36.

118 ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), last updated February 2025, para. 345.

submission prepared by an international organisation as part of an expert group; or where a judge, on his or her own initiative, submitted an amicus curiae prior to appointment, and now sits on the bench in that case, a number of factors should be considered.

79. On amicus curiae in general, a 2022 Concept Note for Constitutional Court of Ukraine – Amicus Curiae Concept in Modern Justice[119] provides an analysis of the origin and key functions of amicus curiae. The Note defines amicus curiae or "friend-of-the-court" briefs as briefs that are filed by someone with a strong interest in the subject matter of a lawsuit, but who is not a party to nor directly involved with the litigation.[120] Generally speaking, amicus curiae are filed by person or organization who are not the party to a particular case with a purpose to advise the court on issues that affect the case pending before the court. The Note provides that in constitutional justice, amicus curiae are used for the following purposes: 1) addressing additional legal and factual claims not raised by the formal parties to the litigation; 2) providing certain types of information (e .g ., economic, environmental, historical, etc .) which the formal parties do not possess or are not willing to present to the court, as it might adversely impact their interests; 3) presenting the claims or arguments made by one of the formal parties in an alternative way, showing their support for such arguments and trying to persuade the court to concur with the arguments raised by the formal party which the Amicus supports.

80. In these scenarios too, the considerations in *Procola v. Luxembourg* are of relevance. The consecutive exercise of advisory and judicial functions within one body may, in certain circumstances, raised an issue under Article 6 (1) of the ECHR as regards the impartiality of the body seen from the objective viewpoint. The issue is whether there has been an exercise of judicial and advisory functions concerning "the same case", "the same decision" or "analogous issues"[121] and whether an applicant may have legitimate grounds for fearing that the judge in question will feel bound by the opinion previously given, which is sufficient to vitiate the impartiality of the tribunal in question.[122]

81. **Therefore, *amicus curiae* have to be observed in terms of its purpose – that is to provide legal opinion related to the pending case.** The legal interest taken in submitting an amicus curiae could vary, simply as an independent expert or to lobby for a certain matter. This expression of viewpoints, and later partaking in proceedings on this very matter in a composition of a court, especially a highest court, could prove a challenge in terms of impartiality of the court.

[END OF TEXT]

119 Amicus Curiae Concept in Modern Justice; by Alexander Tanase and George Papuashvili https://www.osce.org/files/f/documents/2/6/523437.pdf

120 *Ibid.*

121 ECtHR, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), last updated February 2025, paras. 346-347.

122 ECtHR, *Procola v. Luxemburg*, no. 14570/89, 28 September 1995, para. 45.