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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE LAWS ON THE DISCIPLINARY LIABILITY  
AND EVALUATION OF JUDGES**

**OF “THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”**

**on the basis of comments by**

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## Table of contents

|             |  |           |
|-------------|--|-----------|
| <b>I.</b>   | <b>INTRODUCTION .....</b>  | <b>3</b>  |
| <b>II.</b>  | <b>BACKGROUND INFORMATION .....</b>  | <b>3</b>  |
| <b>III.</b> | <b>ANALYSIS .....</b>  | <b>4</b>  |
| <b>A.</b>   | <b>Preliminary remarks.....</b>  | <b>4</b>  |
| <b>B.</b>   | <b>Disciplinary violations and sanctions (the Law on Courts).....</b>  | <b>5</b>  |
| 1.          | <b>General recommendations on the dismissal of judges .....</b>  | <b>5</b>  |
| 2.          | <b>Disciplinary offences .....</b>   | <b>6</b>  |
| a)          | <b>Overall description of the system of disciplinary offences.....</b>   | <b>6</b>  |
| b)          | <b>Article BB (“minor” disciplinary offences) .....</b>  | <b>7</b>  |
| b)          | <b>Article CC (“severe” disciplinary offences) .....</b>   | <b>8</b>  |
| c)          | <b>Article DD (“serious” disciplinary offences which may result with a dismissal).....</b>   | <b>10</b> |
| d)          | <b>Article GG (offences specific to the courts’ presidents).....</b>   | <b>13</b> |
| 3.          | <b>Disciplinary sanctions .....</b>  | <b>13</b> |
| <b>C.</b>   | <b>Disciplinary bodies and procedures (the Law on the Judicial Council and the Law the Council for Determination of Facts) .....</b> | <b>14</b> |
| 1.          | <b>The composition of the Judicial Council.....</b>  | <b>14</b> |
| 2.          | <b>The Council for Determination of Facts (the CDF) .....</b>  | <b>16</b> |
| a)          | <b>The reason behind the creation of the CDF .....</b>   | <b>16</b> |
| b)          | <b>Composition of the CDF.....</b>   | <b>17</b> |
| 3.          | <b>Disciplinary procedures .....</b>   | <b>18</b> |
| a)          | <b>Investigation by the CDF and decision by the Judicial Council .....</b>   | <b>18</b> |
| b)          | <b>Appeals Council.....</b>  | <b>21</b> |
| <b>D.</b>   | <b>Evaluation (the Law on Courts) .....</b>  | <b>22</b> |
| <b>IV.</b>  | <b>CONCLUSIONS.....</b>  | <b>24</b> |

## I. INTRODUCTION

1. On 2 October 2015 the Directorate of Neighbourhood and Enlargement Negotiations (DG NEAR) of the European Commission requested an opinion of the Venice Commission on the legislation of the “Former Yugoslav Republic of Macedonia” (hereinafter – “the Republic”) related to the disciplining and dismissal of judges and their professional evaluation. The opinion of the Venice Commission was sought in respect of the following laws:

- the 2006 Law on Courts, as amended;
- the 2006 Law on the Judicial Council, as amended, and
- the 2015 Law on the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge (hereinafter “the Law on the CDF”).

2. In addition, the Venice Commission was asked to assess the 2015 draft amendments to the Law on Courts and the Law on the Judicial Council which were pending before the Macedonian Parliament (“the 2015 Draft Amendments”).<sup>1</sup>

3. Mr R. Barrett, G. Neppi Modona, Mr C. Ribičič, and Mr A. Varga acted as rapporteurs on behalf of the Venice Commission. On 12 and 13 November 2015 a delegation of the Venice Commission visited Skopje and met with State officials and politicians concerned, as well as with the judges, members of the civil society and of the expert community. The delegation is grateful to the Macedonian authorities for the organisation of the visit and for the possibility to discuss the legislation with the relevant stakeholders.

4. This Opinion is based on the English translation of the laws and of the draft legislation at issue provided by the European Commission. This translation may not always accurately reflect the original version in Macedonian on all points; therefore, certain issues raised may be due to problems of translation. The Venice Commission regrets that it did not receive an official translation of the relevant texts from the Macedonian authorities, despite its requests to this end.

5. *This Opinion was adopted by the Venice Commission at its ... Plenary Session (...)*

## II. BACKGROUND INFORMATION

6. The Law on Courts and the Law on the Judicial Council were enacted in 2006; since then they have been repeatedly amended. The two laws<sup>2</sup> as well as the Constitution of the Republic<sup>3</sup> contain provisions recognising the importance of judicial independence. The practical application of those laws, however, led to a relatively high rate of judicial dismissals;<sup>4</sup> thus, from 2007 to 2014, the Judicial Council initiated a total of 63 procedures against judges,<sup>5</sup> which is above the European average,<sup>6</sup> especially given the size of the population of the country. It must

<sup>1</sup> See the three Laws and the Draft Amendments in CDL-REF(2015)046

<sup>2</sup> Articles 1 -3 of the Law on Courts; Article 2 of the Law on the Judicial Council

<sup>3</sup> Article 98 of the Constitution

<sup>4</sup> The Venice Commission acknowledges that the high rate of the judicial dismissals is not, by itself, the ultimate proof of the lack of independence of the judiciary: such statistical data may have perfectly reasonable explanation. More generally, it is difficult to assess the level of independence of the judiciary on the basis of statistical data only, without looking into the substance of the law and without analysing specific cases of dismissals of individual judges. However, a relatively high level of judicial dismissals is a marker which calls for a more in-depth examination of the system of accountability of judges.

<sup>5</sup> The overall number of judges in the Republic, according to the information received during the visit, is approximately 600 persons. Population of Macedonia is slightly over 2 million people.

<sup>6</sup> According to the 2014 CEPEJ report (page 357), in 2012 44 judges were dismissed in 44 responding European states, among which 16 in England and Wales and 13 in Turkey.

be noted that in the last few years the number of judicial dismissals dropped significantly compared to the previous period.

7. As a result of the 2014 parliamentary elections a centre-right coalition obtained a qualified majority of votes in the Parliament. The opposition contested the fairness of those elections and decided to boycott the work of the Parliament. In the summer of 2014, the ruling coalition, notwithstanding the absence of the opposition in the Parliament, started the process of amending the Constitution. Some of the draft amendments modified the composition of the Judicial Council.

8. In August 2015 the Ministry of Justice of the Republic requested an opinion of the Venice Commission on those constitutional amendments. The opinion was adopted in October 2015 at the 100<sup>th</sup> Plenary Session. Following the opinion, the draft constitutional amendments were revised and voted again in Parliament in January 2015; however, the procedure required by the Constitution for the enactment of those amendments has not been completed, due to the escalation of a political crisis which started in January 2015 and reached its climax in the spring of 2015. Thus, at present the amendments to the Constitution are still not enacted.

9. In parallel with the process of constitutional amendments, in February 2015 the Parliament (still in absence of the opposition) adopted a new law creating a Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge (hereinafter – the “Council for Determination of the Facts” or the CDF). This was a new body supposed to investigate the disciplinary cases against judges. Most of the members of the Council for Determination of the Facts have been elected, but it has not yet started its operations.

10. Following the adoption of this law, the Law on Courts and the Law on the Judicial Council were reviewed again twice; the last set of amendments (the 2015 draft amendments) has been voted by the Parliament in the first reading but has not yet been enacted.

### **III. ANALYSIS**

#### **A. Preliminary remarks**

11. Before turning to the substantive analysis of the relevant laws, the Venice Commission notes that the initiative to amend the Constitution and the legislation was taken and the respective texts adopted by the ruling coalition while the opposition was absent from the Parliament. The Commission finds this situation problematic, because such important reforms must normally receive a broadest possible political support, otherwise there is a risk that the public would perceive them (rightly or wrongly) as an attempt by the ruling majority to capture the newly created bodies, and, through them, to establish its control over the judiciary.

12. Second, the Venice Commission observes that creation of the CDF was a very important development. In essence, that new body received the exclusive right to initiate disciplinary proceedings against judges, the power which previously belonged to the members of the Judicial Council itself and to some other officials. Under Article 105 of the existing Constitution it is the Judicial Council which “decides on the disciplinary accountability of judges”. The Venice Commission is not in a position to assess constitutionality of the new institutional arrangement involving the CDF in this process – it is the prerogative of the Macedonian Constitutional Court. However, it would be more prudent to legitimise the creation of the CDF at the constitutional level as well. That being said, the Venice Commission is not in favour of the creation of the CDF as a separate institution – see the chapter on the disciplinary bodies and proceedings below.

13. Third, the Venice Commission discerns a certain lack of coherence between the constitutional reform started in 2014 and the legislative amendments of 2015. The 2015 Law on the CDF was adopted before the completion of the constitutional reform of the Judicial Council, as if there was no relation between these two bodies whatsoever. The Commission considers that those two reforms should have been approached systematically, both at the Constitutional and at the legislative levels. If, following recommendations contained in the present Opinion, the Macedonian authorities decide to revise the institutional structure of the bodies administering the judiciary it would be advisable to engage in a comprehensive and consistent reform at both levels – Constitutional and legislative.

## **B. Disciplinary violations and sanctions (the Law on Courts)**

### **1. General recommendations on the dismissal of judges**

14. In the current system, the dismissal of a judge may result either from the application of Articles 54 - 76 of the Law on the Judicial Council (which regulates the procedure for determining disciplinary liability as defined in Article 76 and 77 of the Law on Courts), or from the application of Articles 77 - 95 of the Law on the Judicial Council (which regulate the procedure for establishing “unprofessional or un-conscientious performance of the judicial function” as defined in Article 75 of the Law on Courts). These two parallel grounds for dismissal are imposed within two separate procedures; the former procedure can end in dismissal or a lesser disciplinary measure, while the latter can end only in dismissal. This co-existence of two parallel grounds for dismissal and two different procedures is very confusing.

15. The Law on Courts, as proposed to be amended, removes the duality of grounds for dismissal which exists in the current system. Now the only ground for dismissal is a serious disciplinary offence.<sup>7</sup> Furthermore, the amendments in the proposed Article AA of the Law on Courts lead to a clearer categorisation of types of misbehaviour into three groups: minor, severe and serious disciplinary breaches.<sup>8</sup> These are welcome developments. However, significant difficulties remain.

16. First of all, the Draft Amendments set out a very long list of circumstances which can lead to a disciplinary sanction. The Venice Commission is worried by the fact that many of the offences in this catalogue are formulated too vaguely. For example, a judge may be disciplined for “causing more severe disruption of the relations in the court”, which is a very vague definition. Such obscure formulas open the door to abusive interpretations and are very dangerous for judicial independence. The Venice Commission has previously highlighted the requirement that “conduct giving rise to disciplinary action be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct. More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application.”<sup>9</sup> Indeed, depending on the constitutional tradition of the state, a more general formula for judicial misconduct can be acceptable, but only under condition that it is understood to be narrowly interpreted.

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<sup>7</sup> The Venice Commission notes that Article 31 of the Law on the Judicial Council stipulates that the Council has the power “to decide on the disciplinary accountability of the judges”, and, in the next point, “to determine the unprofessional and unethical performance of the judicial function”; it is unclear why this provision has not been amended in the 2015 Draft Amendments.

<sup>8</sup> It is understood that “serious” breaches are regarded as more grave than “severe”; the choice of words here is open to doubt but, probably, it is a translation issue.

<sup>9</sup> CDL-AD(2014)006, Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova, § 16

17. Second, many disciplinary offences are overlapping. Thus, for example, Article CC introduced by the Draft Amendments establishes four types of violations which involve exceeding procedural time-limits, and three types of violations which relate to inappropriate behaviour of the judge outside of the work context (for more details see below). Again, such overlapping risks creating a lot of confusion in practice.

18. Third, the current Law on Courts, as well as the Draft Amendments, do not always link disciplinary breaches to the fault of the individual judge. Individual judges cannot bear individual liability for the efficiency of the judicial system as a whole. Indeed, references to the fault exist in certain isolated provisions (for example, p. 1 of Article CC speaks of the “inefficient and inaccurate conduct of the court procedure through the fault of the judge”). However, the absence of the reference to the fault of the judge in other provisions may be interpreted as implying that it is not a mandatory element for establishing the judge’s liability, while it should be so. The liability of the judges should be considered in the light of their influence on workload and backlog. For example, delays in the court proceedings may be caused by the judge’s lack of organisational skills, but may as well be explained by objective reasons outside his/her control, for example, by the failure of the court bailiffs to ensure appearance of witnesses. Failure to meet productivity targets or procedural deadlines may be explained by these targets being set unreasonably high, or deadlines fixed unreasonable short. Non-compliance with deadlines should be measured according to the judge’s experience, workload, “how large the support staff is, the quantity and quality of infra-structures (with special reference to buildings and information technology)” as it was mentioned in § 38 of the Opinion 6(2004) of the CCJE<sup>10</sup> and to the average workload in that court or other similar courts. Without this meticulous measurement the disciplinary proceedings may be transformed into instruments of intimidation, which is completely against the independence of judges.

19. It is thus recommended to introduce in the Law on Courts a general clause that would require the disciplinary bodies to take due account of the degree of the judge’s fault and permit the judges to forward defences such as those described above. Actually, Article 74 of the Law on the Judicial Council does stipulate that in the sentencing process the Judicial Council has to take into account “the degree of responsibility” of the judge. However, the very existence of a disciplinary breach (not only the sanction) should be conditioned upon the fault of the judge. The honest and hard-working judges should not be disciplined for the situations which result from the poor management of the judicial system as a whole or from other circumstances outside their control.

20. The Venice Commission will now turn to the more specific analysis of the Law on Courts, in the light of the 2015 Draft Amendments.

## **2. Disciplinary offences**

### ***a) Overall description of the system of disciplinary offences***

21. The Venice Commission notes that, in the past several years, despite the existence of multiple different grounds for disciplinary liability, only one ground has been used in the vast majority of procedures: Article 75, section (1) sub-section (2) of the Law on Courts<sup>11</sup> was used as the basis for 53 out of the 63 procedures initiated and 41 out of 44 judicial dismissals have been on this ground. These statistics show that although the current legislation contains a long

<sup>10</sup> Opinion no 6 (2004) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on fair trial within a reasonable time and judge’s role in trials taking into account alternative means of dispute settlement, as adopted by the CCJE at its 5th meeting (Strasbourg, 22-24 November 2004)

<sup>11</sup> “Unprofessional, untimely and inattentive exercise of the judicial office in conducting the court proceedings in specific cases”

list of disciplinary violations and provides different sanctions, most of these provisions remain essentially a dead letter.

22. The Venice Commission observes that while the existing duality of grounds for dismissal is now being removed, which is certainly positive, the Draft Amendments create an even more complex labyrinth of various disciplinary offences and sanctions, often formulated in obscure terms and overlapping. It remains to be seen how this new disciplinary system will operate in practice. There is a risk, however, that the adoption of the Draft Amendments in their current form will not make the system more clear and predictable. On the one hand, most of those provisions might never be used in practice, as happened before; at the same time, their very existence could have a chilling effect on the judiciary, put unnecessary pressure on judges and restrain their independence. The Venice Commission thus invites the Macedonian authorities to revise the system of disciplinary breaches and punishments in line with the recommendations outlined below.

23. In doing so, the Macedonian authorities should be guided by the general rule formulated in p. 70 of the Recommendation 2010(12) of the Committee of Ministers of the CoE:<sup>12</sup>

*“Judges should not be personally accountable where their decision is overruled or modified on appeal.”*

This principle is also developed by Opinion 6(2004) of the CCJE<sup>13</sup> as follows:

*“36. Some countries consider the percentage of the decisions reversed on appeal as an indicator. An objective evaluation of the quality of judicial decisions may be one of the elements relevant for the professional assessment of a single judge, (but even in this context one should take into account the principle of judicial internal independence and the fact that reversal of decisions must be accepted as a normal outcome of appeal procedures, without any fault on the part of the first judge). However, the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity seems inappropriate to the CCJE. Among several aspects that could be discussed with reference to this problem, the CCJE underlines that it is a feature of the justice system based on "procedures", that the quality of the outcome of a single case depends heavily on the quality of the previous procedural steps (initiated by the police, public prosecution, private lawyers or parties), so that evaluation of judicial performance is impossible without evaluation of each single procedural context.”*

24. The Venice Commission will now focus on the specific disciplinary offences, as described in the Draft Amendments.

***b) Article BB (“minor” disciplinary offences)***

25. Article BB<sup>14</sup> sub-section 2<sup>15</sup> lists as a minor disciplinary violation “causing disorder in the court relations that affect the performance of the judicial function”. The open nature of the concept of disorder, as well as the lack of any clear test as to whether such behaviour has affected the performance of the judicial function, has the potential to introduce subjectivity into the disciplinary process.

<sup>12</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)

<sup>13</sup> Cited above

<sup>14</sup> It is unclear why the separate points in Article AA are numbered, while in Article BB they are marked as “bullet points”.

<sup>15</sup> Sections and sub-sections will be identified in the text below as “s.” and “ss.”

26. Another “minor violation” described in this Article consists of the “failure to act upon the request of the Judicial Council [...], Council for Determination of the Facts [...], the Supreme Court [...] and the higher court”. The meaning of this provision is unclear: what sort of “requests” those bodies may address to a lower court? This provision creates a risk of overly broad interpretation and should be either explained or removed.

**b) Article CC (“severe” disciplinary offences)**

27. Ss. 1 of the new Article CC defines as a severe disciplinary offence a situation when a judge in more than five cases per year has exceeded the legal time-limits for taking procedural actions. Further down the same Article in ss. 4 defines as a severe disciplinary violation a breach by the judge of the “reasonable time” requirement. Ss. 10 introduces liability in the case of “a decision [...] made by the Supreme Court [...] finding a violation of the right to trial within a reasonable time”. Ss. 15 speaks of the “violation of the specified schedule for acting upon cases”. Although not every breach of the domestic time-limits or of the schedule will necessarily amount to a breach of the “reasonable time” requirement, these provisions are to a certain extent overlapping which creates confusion. Another question is which body or court should establish the breach of the “reasonable time” requirement under ss. 4 of this Article, and in which procedure, and who establishes the “specific schedule for acting upon cases” mentioned in ss. 15.

28. Ss. 3 lists as a severe disciplinary violation the “biased conduct of court proceedings in particular in terms of equal treatment of parties.” First, it is not clear whether a finding of bias must be based on an appeal judgment. “Unequal treatment of parties” or “bias” of a judge are against the principle of fair trial and should normally lead to the quashing of a judgement. Hence, if a disciplinary body establishes that the judge was guilty of such behaviour in a particular case, that case should normally be reopened. However, what happens if the original decision was confirmed on appeal, or the parties did not appeal at all? The law is not clear on these points.

29. The next question is to what extent the judge concerned should be aware of his/her bias or should be responsible for the unequal treatment of the parties? The existence of a bias is often established from the point of view of a reasonable external observer, which does not necessarily mean that the bias actually existed or that the judge realised that he had a predisposition against one of the parties. The judgement may even be quashed if there is an appearance of bias, even though the actual existence of bias is not proven. Next, the “unequal treatment” of the parties may result from a well-established practice or other external factors which the judge does not really control. Even if the court of appeal establishes that one of the parties has been put in a disadvantage vis-à-vis another by the first instance court, the judge’s fault in it may be minimal. Finally, this offence overlaps with the “more severe violation of the rights of parties and other participants in the proceedings” (ss. 13) and “violation of the principle of non-discrimination on any ground” (ss. 14).

30. Ss. 6 defines as a severe violation “public disclosure of information and data on court cases in which no final decision has been made”. However, it is a *duty* of the judge to inform the public about the progress in the examination of cases, scheduled hearings, procedural steps taken or to be taken, etc. Some of the “information and data” may indeed be confidential, but some should be publicly available. The Venice Commission has previously noted that the “requirement of judges [...] not to disclose *any* information in the performance of their duties [...] seems excessive. It would be appropriate to refer to confidential information. [...]”.<sup>16</sup> It would therefore seem more appropriate to restrict the application of ss. 6 to the disclosure of

<sup>16</sup> CDL-AD(2013)035, Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan, §60

confidential information. Moreover, there should be clear rules indicating what sorts of information are confidential, what information is destined to the parties only, and what may be shared with the general public. In absence of such rules the judge should not be disciplined for the disclosure.<sup>17</sup>

31. Ss. 8 speaks of a “violation of the regulations or otherwise violating the independence of judges during trial”, which is categorised as a severe violation. A clearer description of actions which constitute violations of judicial independence should be included. As regards a “violation of the regulations” the Venice Commission has noted previously that “working procedures established by a court may cover a great variety of judicial acts or tasks required from a judge, some of which may be quite insignificant.”<sup>18</sup> Whereas “disciplinary proceedings [...] should deal with gross and inexcusable cases of professional misconduct that also bring the judiciary into disrepute”, such insignificant violations should “not serve as a ground for the imposition of disciplinary sanctions”.<sup>19</sup> Restricting the scope of ss. 8 to severe violations of the regulations would remove the potential for disciplinary action over insignificant violations of the regulations.

32. Ss. 9 lists as a severe disciplinary violation a “severe breach of the rules of the Code of Ethics violating the reputation of the judicial function”. As outlined previously by the Venice Commission, such codes are ill-suited to disciplinary action and often lack sufficient specificity to fulfil the requirements of foreseeability.<sup>20</sup> The Venice Commission has noted that “[t]he purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence.”<sup>21</sup> The Commission has acknowledged that “there will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations” and that “serious violations of ethical norms could also imply fault and acts of negligence that should in accordance with the law lead to disciplinary sanctions”.<sup>22</sup> However, “in order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice.”<sup>23</sup>

33. Ss. 11 lists as a severe disciplinary violation a “more severe violation of public law and order, which undermines [a judge’s] reputation and the reputation of the court.” This provision likewise lacks sufficient clarity and foreseeability. While a “more severe violation of public law and order” may be statutorily defined in other laws (for example, in the Code of Administrative Punishments or elsewhere), the requirement that the conduct also undermines the judge’s reputation and the reputation of the court is open to subjectivity, and should be excluded or narrowed to more specific types of offences.

34. Ss. 11 overlaps with ss. 12 which lists as a severe disciplinary violation “indecent and undignified behaviour in public places”. Furthermore, both ss. 11 and ss. 12 overlap with ss. 9 which speaks of a violation of the Code of Ethics affecting the reputation of the judicial function. The very same indecent behaviour in public, for example, may be examined under ss. 9, 11 and 12 of Article CC. Such parallelism is to be avoided.

<sup>17</sup> CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 24; see also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90

<sup>18</sup> CDL-AD(2014)018, Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), §32

<sup>19</sup> Ibid

<sup>20</sup> Ibid, §25

<sup>21</sup> CDL-AD(2013)035, Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan, §30

<sup>22</sup> Ibid, §31

<sup>23</sup> Ibid

35. The Venice Commission has previously noted that a “concept such as the ‘dignity of a judge’ is relatively vague and too subjective to form the basis for a disciplinary complaint”.<sup>24</sup>

*“[...] While judges should conduct themselves in a respectable way in their private life, it is difficult to lay down very precisely the standards applying to judges' behaviour in their off-duty activities, also considering the constant evolution in moral values in a given country.”<sup>25</sup>*

36. In the absence of a specific list of undignified or indecent acts, concepts such as “indecenty” and “indignity” should be avoided as bases for disciplinary action. Equally in ss. 13 the concept of “undermining the reputation of the court and judicial function” is excessively broad.

37. Ss. 14 lists as a severe disciplinary violation, “violation of the principle of non-discrimination on any ground”. As with ss. 3, it is not clear whether a finding of discrimination must be based on findings of an appeal judgment. If this is not the case, a more detailed objective test to determine [non-]discrimination should be included. Furthermore, it is unclear whether this provision prohibits discrimination in the judicial decision-making, discrimination at work (in respect of the colleagues, for example), discriminatory behaviour in private life, etc.

38. Ss. 17 lists as a severe disciplinary violation “causing more severe disruption of the relations in the court that significantly affect the performance of the judicial function”. The issues with this provision mirror those outlined in the comments on Article BB ss. 2 above.

39. Ss. 18 apparently speaks of the judge’s failure to declare his property; it is, however, not normal that such behaviour is characterised as a medium-gravity disciplinary violation. The Venice Commission recalls that “full asset disclosure has proved a valuable weapon in combating corruption in other countries”.<sup>26</sup> In the opinion of the Venice Commission the requirement to disclose assets and revenues should be associated with a sanction which is serious enough to serve the purpose of deterrence. While an exception may be made for minor or unintended omissions in the declarations, in principle the failure to declare assets is a sufficiently serious violation to give rise to a dismissal.

40. Finally, the condition in ss. 19 that repeated minor violation is tantamount to a severe violation should be limited by a time-period when the previous minor violation has been committed.

***c) Article DD (“serious” disciplinary offences which may result with a dismissal)***

41. Article DD stipulates that only “incompetent or unconscientious performance of the judicial function” may be regarded as a “serious” disciplinary violation. A similar provision is contained in the draft Article 53 of the Law on Judicial Council which stipulates that a judge may be dismissed for having committed a “disciplinary violation stipulated by law, making [the judge] unworthy to perform the judicial function and due to unprofessional and negligent performance of the judicial function”. The question is whether grossly inappropriate behaviour of the judge in the private sphere, seriously harming the image of the judiciary, may be characterised as a “serious” violation. The formula used in the Draft Law suggests that the grounds for dismissal should always be connected with the performance of the judicial function. This is inappropriate: serious or repeated indecent behaviour in public must also be a ground for dismissal.

<sup>24</sup> CDL-AD(2014)018, Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §32

<sup>25</sup> Ibid, §29

<sup>26</sup> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

42. S. 1, ss. 2 lists as a “serious” violation “misuse of office and exceeding official authorisation”. This provision is extremely broad as it can be interpreted as sanctioning any judicial act not permitted by law. This has the potential to have a chilling effect on the independence.

43. Indeed, “a judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions.”<sup>27</sup> However, the disciplinary liability should not replace the system of appeals. The Venice Commission has noted previously that “[d]isciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes”.<sup>28</sup>

44. Rather, as the Venice Commission has noted, “the legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence.”<sup>29</sup> Ss. 2 should therefore be applied only where a judge acts in bad faith, with the aim of benefiting or harming a party to the proceedings, or driven by self-interest, or as a result of gross and evident negligence.

45. S. 1, ss. 2 provides that it is a serious disciplinary violation if during a calendar year the Judicial Council established that the judge missed dead-lines in more than five cases, *or* (italics added) if more than 20% of his/her decisions have been repealed, *or* more than 30% of them have been modified. It is unclear how the first breach, which is considered as a serious violation, namely the failure to meet dead-lines in five cases, relate to the breach described in Article CC s. 1 ss. 1, which is formulated identically.

46. The Venice Commission has previously noted that such criteria for the establishment of a disciplinary violation as the number of overturned decisions “should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.”<sup>30</sup> “In addition, a distinction might be drawn between decisions made on the basis of obvious errors, which any lawyer of reasonable competence should have avoided and decisions where the conclusion arrived at was a perfectly arguable one which nonetheless was overturned by a higher court.”<sup>31</sup>

47. Independence of every judge is a precondition that must allow every judge and every panel of judges to make effort in order to change the practice – to adopt a different decision – if s/he thinks it appropriate in a particular case. Only *stubborn resistance* against an *enhanced practice* which leads to a repeated overturning in cases where there is a well-established and clear case-law should probably be counted as a blatant lack of professionalism. “The threshold of reversals would need to be quite high and the rule for exceptions to be established by the

<sup>27</sup> Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, Strasbourg, 23-27 November 2007, p. 63

<sup>28</sup> CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §60

<sup>29</sup> CDL-AD(2014)006, Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova, §22

<sup>30</sup> CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §36

<sup>31</sup> *Ibid*, §37

Council of Judges would have to be very generous.”<sup>32</sup> The same criticism may be formulated regarding violation of rights so decided by the ECtHR. Judges should follow the European jurisprudence but an erroneous decision should not necessarily result with their dismissal.

48. Furthermore, the “modification” of the lower court judgements may be relatively minor or reflect the discretionary power of the appellate court (for example, the appellate court may reduce a sentence imposed by a lower court even though the lower court acted lawfully and within the authorised limits).

49. S. 1, ss. 3 lists as a serious disciplinary violation “failure to accomplish the expected results at work for more than eight months without justifiable reasons, which is determined by the Judicial Council [...] by the number of decided cases compared to the approximate number of cases that the judge needs to decide monthly determined by the decision of the Judicial Council [...]”. The issues with this provision largely reflect those addressed in the comments on ss. 2 above.

50. With regard to workloads, the Venice Commission has more specifically commented that “[w]ith respect to the workload of the judge concerned, where he or she has concluded a lesser number of cases than required by the orientation norm or where criminal cases have had to be abandoned due to delays for which the judge is responsible, these are matters to be considered. It is important, once again, that the actual cases be evaluated. It cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues”.

51. S. 3 provides that it shall be a serious disciplinary violation “[i]f twice in a row his/her performance is evaluated by the Judicial Council [...] with a negative mark”. This provision is also reflected in Article GG, s. 1, ss. 8 in the context of disciplinary action against presidents of the courts. Again, ss. 3 of Article DD makes no provision for the allocation of cases of varying degrees of difficulty and thus has the potential to give rise to disciplinary action where a judge has failed to meet the specified workload despite performing to the standards expected of a reasonable judge.

52. The Venice Commission has noted previously that evaluation and disciplinary liability are (or should be) two very different things. “Disciplinary liability requires a disciplinary offence. A negative performance, which leads to a negative overall result of an evaluation, can also originate from other factors than a disciplinary offence. Therefore, the proposal that repeatedly low or negative overall evaluation results shall lead to the Ethics and Disciplinary Commission instigating disciplinary proceedings raises problems, because the reasons for a negative result could be other than a disciplinary offence. [...]”<sup>33</sup>

53. Another problem with the use of the “negative evaluation” criteria is that the performance evaluations in the Macedonian system include, as one of the elements which affect the final “mark” given to the judge, the very same factual situations which are regarded as disciplinary breaches. Thus, under the 2010 amendments to the Law on Judicial Council, (see Articles 111 - 112), the ratio of quashed, discontinued or amended decisions is taken into account in order to assess the performance of the judge. The evaluation also takes into account the rate of the delayed procedural actions (Article 109) and the number and type of disciplinary sanctions imposed on the judge (Article 113). In other words, the same omission may be counted twice – as a separate disciplinary breach or as a factor affecting the overall evaluation which, in turn, may be regarded as a disciplinary breach.

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<sup>32</sup> CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §40

<sup>33</sup> *Ibid.*, §102

54. It is therefore recommended that negative evaluations should not carry any weight in disciplinary proceedings. The problematic conduct under examination has to be such that it attracts disciplinary liability by reference to separate disciplinary criteria rather than only being found in criteria for performance evaluation. However the same conduct might be relevant for the purpose of performance evaluation and at the same time cause disciplinary liability.

55. Finally, s. 4 of Article DD provides that if the judge “commits more serious violation more than twice” it is regarded as a serious violation. Probably, it is a translation problem and this provision in fact speaks of the repetition of a “severe” violation (which is a violation of the medium degree). If this is the case, it means that the violations related to the behaviour of the judge in the private sphere may lead to his/her dismissal; however, there is still an inconsistency between this provision and the general definition of the “severe” disciplinary offence which may lead to the dismissal, which is contained in the draft Article 53 of the Law on Judicial Council.<sup>34</sup> Furthermore, the Article should specify whether it should always be a repetition of the same “severe” offence, and within which time-frame.

#### **d) Article GG (offences specific to the courts’ presidents)**

56. Article GG lists grounds for initiating a disciplinary procedure against a president of a court. Most of the arguments, made in respect of Article CC, are applicable to Article GG: the formulas used by this provision are dangerously vague (for example “failure to implement work programme”), and occasionally overlapping (thus, the same omission may be characterised as a “failure to exercise the tasks of the court administration”, and as “causing more severe violation of the relations in the court”, whatever the latter exactly means). This Article should be reviewed accordingly.

### **3. Disciplinary sanctions**

57. Article FF establishes a catalogue of disciplinary sanctions. In principle, “having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality [...]”.<sup>35</sup> As the rapporteurs of the Venice Commission have learnt during the visit, in practice most of the disciplinary proceedings which had been initiated against the judges had ended with the judge’s dismissal, while the law provided for a variety of possible less severe sanctions. It is important to have a staggered approach to the application of disciplinary sanctions; the situation where the judges are either not disciplined at all or immediately dismissed reveals a serious malfunctioning in the mechanism of accountability of judges.

58. The Venice Commission notes that under Article FF the same sanctions may be applied to the breaches of different gravity. It is unclear what the reason is behind creating a complex hierarchy of offences if the sanctions applied for them are the same.

59. Furthermore, amongst the sanctions the Draft Law mentions a temporary transfer of a judge to another court. This is most unusual – the judges are generally transferred from one court to another to support the normal functioning of the latter, i.e. as an organisational measure<sup>36</sup> and not as a punishment. In addition, transferring a judge even for a short period of

<sup>34</sup> Which reads as follows: “A judge shall be dismissed from his/her judicial function due to committed disciplinary violation stipulated by law, making him unworthy to perform the judicial function *and due to unprofessional and negligent performance of the judicial function* [italics added] upon conducted disciplinary proceedings”.

<sup>35</sup> CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§37-38

<sup>36</sup> See in this respect Article 39 of the Law of Court which provides that, as a general rule, transfer is not allowed without the consent of the judge involved, and that such transfers are “exceptionally” permitted to help another court with dealing with its backlog etc.

time is a very costly option, as the judge concerned should be given appropriate housing and otherwise compensated for the drastic change of his lifestyle. In absence of such compensations a transfer may be a much more serious measure than, for instance, a reduction of salary. And, paradoxically, shorter the period of transfer is, the more serious the consequences for the judge and his family are (contrary to the logic of the Article which puts the upper limit of the duration of the transfer which implies the opposite approach). Hence, it is recommended not to use transfer as a disciplinary sanction.

### **C. Disciplinary bodies and procedures (the Law on the Judicial Council and the Law the Council for Determination of Facts)**

60. This chapter deals mainly with appointment, composition, and competencies of the collegial bodies provided for in the three Laws. They are the Judicial Council, the Appeal Council (provided by Article 96 of the Law on the Judicial Council), and the Council for Determination of Facts (the CDF, created in the 2015 by the Law of the same name).

#### **1. The composition of the Judicial Council**

61. The Venice Commission deems judicial councils as appropriate instruments for protection of judges' independence while ensuring their accountability. It stated that such councils have the advantage of being able to provide valuable expert input in the appointment/disciplining of judges and thus to shield them at least to some extent from political influence. However, there is no common principle or legally binding rule in Europe to and how to set up such councils: hence, the below recommendations are based on the "best practices" and soft-law instruments<sup>37</sup> rather than on the hard law.

62. First of all, the Venice Commission draws the attention of the authorities to its 2014 opinion on the draft amendments to the Macedonian Constitution.<sup>38</sup> In this opinion the Venice Commission suggested changing a balance between judicial and lay members of the Judicial Council in favour of the latter (i.e. essentially to reduce the number of the judicial members), and supported the idea of removing the Minister of Justice and the President of the Supreme Court from the composition of the Council as *ex officio* members.<sup>39</sup>

63. Article 6 of the Law on Judicial Council provides that three members are elected by the Parliament with the mechanism of a double majority (absolute majority of the members of the Parliament along with the majority of the representatives of the non-majority communities) and two members are nominated by the President of the Republic (one must be representative of the non-majority communities minority) and then elected by the Parliament. With regard to the election of five lay members, the Venice Commission reiterates its previous recommendation that they should be elected by the two-thirds majority of the Parliament. Furthermore, in the current constitutional design, as regards the two members nominated by the President, the Law is not very clear as to whether they also should be elected by a double majority and "from the total number" of MPs. The current law might specify whether the two lay members nominated by the President are elected by the Parliament with the same majority provided for three other lay

<sup>37</sup> Such as, for example, the UN Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (para 3-7, 11, 22), Venice Commission Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004).

<sup>38</sup> CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§53 et seq.

<sup>39</sup> In addition, apart from the recommendation to ensure a right balance between the judicial members and the lay members, the Venice Commission observes that fifteen members are probably too many for a judiciary of about 600 judges and a country of slightly over two million people.

members.

64. Article 26 of the Law on the Judicial Council provides that the lay members are elected by the Parliament from among university professors of law, attorneys and “other eminent lawyers”. The wording does not exclude that in the last category be comprised judges, as it has already been the case with the previous compositions of the Judicial Council. Paradoxically, many of the lay members of the Judicial Council could be in fact judges, with the exception of the Minister of Justice, who is a member *ex officio*. The Venice Commission recommends providing that the lay members of the Judicial Council cannot belong to the judiciary, as already stated in §§75-76 of the 2014 Opinion.

65. Article 6, s. 1, ss. 1 of the Law on the Judicial Council provides that the president of the Supreme Court shall be an *ex officio* member of the Judicial Council, along with the Minister for Justice, the latter participating in the work of the Council without the right to vote.<sup>40</sup> By contrast, the President of the Supreme Court would appear to have full voting rights. This could lead to a situation where the President of the Supreme Court, as a member the Judicial Council, adjudicates on alleged disciplinary violations of judges within his or her own court. The Venice Commission notes that until 2015 under Article 78 the President had the power to initiate the disciplinary proceedings against the judges. That meant that the President was occasionally playing a double role of an “accuser” and a “judge” in the proceedings before the Judicial Council. The problem of conflict of interests was to a certain extent addressed in the Draft Amendments which give the exclusive power to initiate disciplinary proceedings to the CDF. However, Article 32 of the Law on the CDF provides that the CDF may act on the basis of “written submissions” introduced *inter alia* by the presidents of the courts. Hence, the President of the Supreme Court may still find him/herself in a situation of a conflict of interest if s/he examines, as a voting member of the Judicial Council, a case which s/he had earlier brought to the attention of the CDF.

66. Article 8 of the Law on the Judicial Council provides that the President of the Council is elected from among the members of the Judicial Council with the absolute majority and that the Minister of Justice and the President of the Supreme Court cannot be elected President and Deputy President. The provision is welcome. In addition, as the Venice Commission repeatedly recommended,<sup>41</sup> the President should be elected from among the lay members with the 2/3 majority of all the members,<sup>42</sup> in order to give the JC more democratic legitimation and credibility before the public and to remove the impression of a corporatist management of the judiciary. The recommendation is of particular relevance in the contest of the Macedonian Judicial Council in its current formation, characterized by a strong majority of members belonging to the judiciary.<sup>43</sup>

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<sup>40</sup> See the 2014 Opinion on the seven amendments to the Constitution, cited above.

<sup>41</sup> CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §35

<sup>42</sup> CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22

<sup>43</sup> During the consultations in Skopje some of the Macedonian judges expressed discontent that due to the professionalization of the office of member of the Judicial Council, after being elected members of the Judicial Council they become more reflective of the executive branch of power. In principle, there is no strict rule in this respect, and, indeed, a Judicial Council should not necessarily be a full-time body. Although the “permanent” status of members of the Judicial Council may be seen as an additional guarantee of their independence, it may also have the opposite effect: “judicial” members of the Judicial Council will not anymore feel themselves as a part of the judiciary and will act more in line with the more political wing of the Council represented by the lay members.

## 2. The Council for Determination of Facts (the CDF)

### a) *The reason behind the creation of the CDF*

67. Setting up of a new institution, even a judicial council, does not grant automatically a better administration of the judiciary. In the Republic regulations on the Judicial Council *per se* were an important step towards an independent and efficient judiciary, but its composition and the rules of proceeding were not properly achieving this goal. Neither is the new Council for Determination of Facts (the CDF) itself a guarantee of a better administration of the judiciary.

68. Before the 2015 Law on the CDF, the initiative for dismissal of judges was up to any member of the Judicial Council, the president of the court where the judge concerned worked, the president of the higher court,<sup>44</sup> or the general session of the Supreme Court (see Articles 54 and 78 of the Law on the Judicial Council amended in 2015). In the previously existing system a Commission, composed by five members of the Judicial Council, was entrusted with examining the admissibility of the initiative and submitting a proposal to the Plenary of the Judicial Council for a decision. If the Judicial Council agreed to continue the proceedings against the judge, the Commission would hold a hearing involving the judge concerned, examine evidence and make a final proposal to the plenary Judicial Council, which had the ultimate power to dismiss the judge. The Plenary included all five members of the Commission.

69. The law then in force did not exclude participation in the final decision of one or more judges who had acted in the previous steps of the proceeding as accusers and investigators. This situation raised concern in the 2013 GRECO Evaluation Report. In particular, GRECO recommended that “with due regard to the principle of judicial independence, the authority to initiate proceeding and to investigate be separated from the authority to decide on sanctions”.

70. Moreover, on 30 April 2015 the European Court of Human Rights issued a judgment in relation to one of the applications made by dismissed Macedonian judges,<sup>45</sup> The Court found a violation of Article 6 § 1 in that the Judicial Council was “not an independent and impartial tribunal” because the member of the Judicial Council who had initiated the procedure (the President of the Supreme Court) had also voted on the dismissal decision of the Judicial Council, thus acting as both “prosecutor and judge” in the case.

71. In February 2015 the Law on the Council for Determination of the Facts was adopted. This law created a new body responsible for the initiation of the disciplinary proceedings before the Judicial Council and for the preliminary investigation of disciplinary cases. The Law on the Judicial Council was also amended and to a certain extent simplified, since the cases received from the CDF were henceforth examined immediately by the Plenary Judicial Council, without the involvement of the five-member Commission, which ceased to exist.

72. During the meetings in Skopje the Macedonian authorities explained the need for the creation of the CDF by the risk of the conflict of interests, inherent to the existing system. In support they referred to the *Mitrinovski* judgment (which, in fact, was adopted after the enactment of the 2015 Law on the CDF), and to the 2013 GRECO report.

<sup>44</sup> For example, the President of the Supreme Court, if the case concerned a judge of the Court of Appeal

<sup>45</sup> ECtHR, *Mitrinovski v. the Former Yugoslav Republic of Macedonia*, no. 6899/12, §§40 - 46

73. The Venice Commission agrees that “a mixture of different powers in one hand, in particular, the power to initiate the proceedings and the power to adjudicate [...] risks leading to problems [...]”.<sup>46</sup> Indeed, a person or a body initiating a disciplinary procedure as an “accuser” should not then take part in the determination of charges in the capacity of a “judge”. That being said, this does not require the creation of a separate institution; a clear division of functions within the same body would suffice to address the concerns raised by the ECtHR. Most probably, there would be no violation in the *Mitrinovski* case if the law provided for an obligation of the President of the Supreme Court to withdraw from the examination of the case by the Judicial Council due to his previous involvement in this case in the capacity of an “accuser”. The same concerns the 2013 report by GRECO – nothing in it reads as requiring the creation of a *separate body* entrusted with the exclusive power to initiate disciplinary and dismissal procedures.

74. The Venice Commission furthermore observes that the creation of a separate full-time body of such kind is an onerous endeavour even for a big State: for such an institution to be efficient it should be adequately staffed and funded.<sup>47</sup> The Venice Commission stresses that from 2012 onwards the number of initiated dismissal procedures in the Republic has actually decreased dramatically compared with the previous years (only one procedure was initiated in 2012, four in 2013 and one in 2014). Against this background, the need for the creation of a new full-time body is far from being evident.

#### **b) Composition of the CDF**

75. Article 6 of the Law on the CDF provides that the Council is composed of 9 members, with a four years’ mandate: three retired judges (one from non-majority communities), three retired public prosecutors (one from non-majority communities), two retired professors of the faculties of law (one from non-majority communities), and one retired lawyer. The President and the Deputy President are elected from among the members of the Council. All 16 members are elected by the judges (Article 16).

76. In the opinion of the Venice Commission, the method of appointment of the members of the CDF does not ensure the democratic legitimation of this body. Article 32 of the Law on the CDF provides that all members of the Council (including the lay members) are elected by the judges, giving the impression that disciplinary responsibility is an issue to be decided solely by the appointees of the judicial corporation. This removes the very important “democratic element”, which is, by contrast, present in the Judicial Council where at least some members are elected by the Parliament.<sup>48</sup>

77. The Venice Commission recalls its position in the Opinion on the draft law on the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina, where the Commission stressed that it is important to have “a balance between the need to protect the independence of the HJPC and the interest in ensuring its public control and in preventing corporatist management”.<sup>49</sup> While in that opinion it was recommended that a *majority* of the HJPC members should be elected by the judiciary, the Venice Commission has never been in favor of systems where *all* members of the body were elected by the judges. Given that now the CDF

<sup>46</sup> CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §16

<sup>47</sup> The Venice Commission notes in this respect that under Article 31 of the Law on the CDF the salaries of the members of the CDF “shall be adequate to the salary of the members of the Judicial Council”.

<sup>48</sup> See the Venice Commission opinion about the balance between judicial and lay members of the Judicial Council in the 2014 Opinion on the Seven Amendments to the Macedonian Constitution, CDL-AD(2014)026, cited above,

<sup>49</sup> CDL-AD(2014)008, §30

has obtained very important powers in the sphere of the judges' discipline, it is recommended that a significant proportion of its members are appointed by democratically elected bodies, most preferably by the Parliament with a qualified majority of votes.<sup>50</sup> The latter solution would increase democratic accountability of the judiciary while providing sufficient protection against domination of this body by political appointees.

78. That being said, a better solution would be to abrogate the Law on the CDF altogether and to return the power to initiate disciplinary proceedings to the members of the Judicial Council (or a special body within the Judicial Council), providing, at the same time, that members who were involved at the initial stage of the disciplinary proceedings as "accusers" or "investigators" do not participate in the adjudication of disciplinary cases as "judges".<sup>51</sup> Many other Judicial Councils, for example in Bosnia and Herzegovina and Kosovo, adopted a solution where within the framework of the Judicial Councils there exist disciplinary commissions whose task is to determine facts in disciplinary proceedings against judges.<sup>52</sup> (See also the comment in § 12 above).

79. In addition, there seems to be no reason why initiating the disciplinary proceeding should be entrusted to a body fully composed of *retired* legal professionals. The Venice Commission notes that the law on CDF does not set any upper age-limit for the candidates. While the professional involvement of retired persons may be quite useful in certain situations, the permanent character of the CDF speaks against this solution in the case at hand.

### **3. Disciplinary procedures**

#### ***a) Investigation by the CDF and decision by the Judicial Council***

80. The 2015 Draft Amendments remove the two parallel procedures which, under the current laws, may lead to the dismissal of the judge. Thus, Articles 75 et seq. of the Law on the Judicial Council (governing the "procedure for establishing unprofessional and unethical performance of the judicial function") are removed; there is to be only one procedure ("disciplinary procedure" described in Article 53 onwards) in which the judge's liability may be invoked. This development is welcome.

81. As from 2015, any disciplinary procedure should start in the CDF. Article 32 of the Law on the CDF establishes that it is competent to act "upon all written complaints submitted by citizens, legal entities, presidents of courts on the work of judges or presidents of courts, as well as for the delay of court procedures, and upon rumours or upon other obtained information for the work on judges". It is most unusual for a disciplinary body to act on the basis of "rumours" or "other obtained information". Disciplinary proceedings should be started based on factual grounds what requires reliable sources, and the decision to open a case should mention the verifiable factual background which led to the opening of the proceedings.

82. The disciplinary procedure before the CDF is very complicated and tortuous. A rapporteur appointed by the CDF from among its members decides about the admissibility of the request and submits the request to the full CDF. If the CDF accepts the request as admissible, it appoints a four-member Commission for investigating the case, submitting the materials of the case to the accused judge, and summoning the judge to a hearing. Following the hearing the

<sup>50</sup> An anti-deadlock mechanism may be required in the case the necessary majority may be reached.

<sup>51</sup> See CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §74

<sup>52</sup> See also, as a possible model, suggestions of the Venice Commission in CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, § 42

Commission prepares and submits a report to the full CDF, which either submits a request to the Judicial Council for initiating the disciplinary procedure, or rejects the initiative and thus closes the case.

83. Under the Law on the CDF the procedure before this body has nearly all the features of a formalised judicial procedure: public sessions (Article 34)<sup>53</sup>, existence of the officially published Rules of Procedure (Article 38), admissibility deliberations (Article 40), establishment of the Commission with investigative powers (Article 40)<sup>54</sup>, investigation (Article 42), adversarial hearing before the Commission involving the “accused” (Article 43), minutes of the hearing (Article 46), formal report of the Commission (Article 47), a formal decision by the Plenary CDF (article 49).<sup>55</sup>

84. In view of the above, is unclear what is left to the Judicial Council. Indeed, Article 63 of the Law on the Judicial Council still provides for a full hearing before this body, and without the involvement of the Judicial Council a judge cannot be held liable or dismissed. However, the Judicial Council cannot intervene until the CDF decided that there is a case to answer. The CDF in fact may dismiss the case as ill-founded, i.e. it obtained a very important power which before only the Judicial Council had. The very name of this newly created body implies that it plays essential, if not exclusive, role in the establishment of facts of the case. Hence, there is a risk that in practice the real decision-making power will now belong to the CDF, while the Judicial Council will play a role of an appellate panel at the best.<sup>56</sup>

85. Be it as it may, it is quite unusual that the preliminary examination of a complaint about the judge’s alleged misbehaviour takes the form of a full-blown judicial process. Indeed, certain rules should apply at this stage as well (for example, the judge concerned should be notified without unnecessary delay about the opening of the investigation). However, the “judicialisation” of this phase seems to be absolutely unnecessary, unless this phase is supposed to become the most important part of the disciplinary process.

86. In sum, there is a risk that the CDF will *de facto* replace the Judicial Council in the matters of the judges’ discipline, which raises a question of compatibility of the new institutional design with the current Article 105 of the Macedonian Constitution which entrusts the Judicial Council, and nobody else, with the power to “decide on the disciplinary accountability of judges”. It may also be quite dangerous for the judges’ accountability given the very “corporatist” composition of the CDF itself. Therefore, the Venice Commission reiterates its proposal to abrogate the law on the CDF and return to the previous system of initiation of the disciplinary proceedings, while adding rules preventing possible conflicts of interest.

87. The Venice Commission will now turn to more technical details concerning the procedures before the CDF and the Judicial Council.

88. Article 54 § 1 of the Law on the Judicial Council is not clear as to whether the disciplinary procedure is to be initiated by any individual member of the CDF or only by the CDF as whole.

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<sup>53</sup> Although it is not clear how this general principles that the sessions of the CDF should be public is compatible with the provision of Article 39 which provide for confidentiality in the disciplinary proceedings.

<sup>54</sup> The English translation of this article mentions appointment of “the president and the chairman of the Commission”. Probably, it is a translation error and the original text speaks of the President and Vice-President.

<sup>55</sup> From the text of the Law on the CDF it is unclear whether there should be a hearing before the Plenary CDF, in addition to a hearing before the CDF.

<sup>56</sup> The Venice Commission observes that the eligibility criteria for the members of the CDF (see Article 6 of the Law on the CDF) and members of the Judicial Council (Article 11 of the Law) are very similar; however, since the members of the CDF are retired professionals chances are that they would be more senior in professional terms as well; it is an additional factor which increases the weight of the CFD in the decision-making process, since it would be very difficult for the Judicial Council not to agree with the opinion of the group of their more seniour colleagues.

89. Article 54 § 2 of the Law on the Judicial Council states that “[d]isciplinary action [which?] is urgent and confidential, shall be run without the presence of the public and by respecting the dignity and reputation of the judge, taking into consideration the protection of personal data of the judge according to the regulations on protection of personal data.” However, under § 3 the judge concerned may request an open hearing on his case, which should be decided ultimately by the Council. It thus appears that Article 52 establishes a presumption in favour of the examination of disciplinary cases behind closed doors.

90. The Venice Commission observes that the UN Basic Principles on the Independence of the Judiciary,<sup>57</sup> stipulate that “the examination of the [disciplinary cases against a judge] *at its initial stage* [italics added] shall be kept confidential, unless otherwise requested by the judge.” Examination of the case by the Judicial Council in the current system, especially after the creation of the CDF, is not the “initial stage” of the proceedings. It is recommended thus to reverse the presumption in line with the Venice Commission’s previous recommendations that “sessions, as a general rule, be held in public and be held in camera only exceptionally, at the request of the judge and in the circumstances prescribed by law.”<sup>58</sup> “[P]ublicity should also be the guiding principle for later stages of disciplinary proceedings.”<sup>59</sup> By contrast, the examination of the case by the CDF may (and even should) take place behind the closed doors, at least as a general rule (as rightly indicated in Article 39 of the Law on the CDF).<sup>60</sup>

91. Furthermore, Article 54 § 2 allows considerable scope for deciding not to hold disciplinary proceedings in public on the basis of urgency or confidentiality, or in order to respect the “dignity and reputation of the judge”. Indeed, it could be argued that such considerations apply in every disciplinary hearing. The interest of the public being properly informed about the developments of the disciplinary proceedings in many cases shall outweigh the private interest of the judge to keep certain details confidential. The law must make clear that the “privacy interest” of a judge does not have precedence in all circumstances, and that the Judicial Council will conduct a balancing exercise when deciding on the request of a judge to have a closed hearing.

92. The title of the Chapter starting with Article 56 is “Disciplinary Commission”. However, it is understood that after the creation of the CDF references to such Commission were removed from the text of the relevant provisions. Therefore, the reference to the Commission should be removed from the title of the Chapter as well.

93. Article 61 of the Law on the Judicial Council provides that a judge shall be informed of the decision of the Judicial Council following a preliminary investigation and a decision to initiate disciplinary proceedings. However, no specific provision is made for informing the judge concerned of the existence of a preliminary investigation, especially if it is closed at the very early stage. For the Venice Commission, the law should “enable the judge to be informed of the investigation as early as the preliminary investigation stage to allow him/her to benefit from his/her right to counsel in early stages.”<sup>61</sup> This may be problematic, particularly given the relatively short period of fifteen days between a decision to initiate disciplinary proceedings and the schedule of the disciplinary hearing before the Judicial Council.

<sup>57</sup> Endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<sup>58</sup> CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §26

<sup>59</sup> Ibid.

<sup>60</sup> Indeed, those recommendations stand as long as the current system, involving a special procedure before the CDF, remains in force.

<sup>61</sup> CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §50

94. Article 64 § 1 provides that “[t]he claimant and the judge shall be invited [to] the hearing, and the obtained evidence shall be submitted to them by [the CDF]”. The Venice Commission has recognised that the complainant “may have a legitimate interest in participating to the proceedings, in particular where his/her rights are infringed as a result of judge's misconduct. The input of the complainant may also serve to shed light on the concrete circumstances of a given case.”<sup>62</sup> However, the Venice Commission has “also recommended that clear criteria be provided [...] on the basis of which the [disciplinary body] can decide whether the hearing of the complainant is necessary in a given case.”<sup>63</sup> Such provisions “should also indicate unambiguously whether the complainant may be invited to the hearings before the [disciplinary body] as an exception to the principle of confidentiality and under which conditions.”<sup>64</sup> It is recommended that such criteria be included in Article 64 § 1.

### ***b) Appeals Council***

95. The judge dismissed by a decision of the Judicial Council has the right to appeal against that decision before a second-instance body, called “the Council for deciding on appeals by the Judicial Council” (Appeals Council) and established under Article 96 of the Law on the Judicial Council.

96. It is not entirely clear how the members of the Appeals Council are selected. It appears that the Appeals Council is formed within the Supreme Court on an *ad hoc* basis in each case separately and composed of nine judges, of whom three were to be Supreme Court judges, four Appeal Court judges and two judges of the court to which the applicant belonged. In the opinion of the Venice Commission, it is very important that the composition of the appellate judicial body be predetermined by law. Normally the disciplinary decisions should be reviewed by a judicial impartial body (Supreme Court of Cassation, Supreme Administrative Court, United Civil Panels of the Court of Cassation etc.), which decides with all the guarantees of the judicial proceeding. Hence, entrusting the power to a permanent court of law (instead of an *ad hoc* body) would probably be a preferable solution in this case.<sup>65</sup>

97. Next, although the President of the Supreme Court does not sit personally on the Appeals Council, it is unclear what role the President plays in defining the composition of this body. Such a system creates a possibility for a conflict of interests – for example, if the President of the Supreme Court took the initiative to initiate proceedings before the CDF (see Article 32 of the Law on the CDF).

98. Article 97a provides that “[d]uring the procedure before the Council, the judge or the presiding judge against whom a procedure is conducted has the right to a fair trial in accordance with the guarantees set out in Article 6 of the European Convention for Protection of Human Rights.” First, given its place in the text it is not entirely clear whether this provision relates to the right of the judge to a fair trial at *all stages* of the proceedings, only before the Judicial Council or only before the Appeals Council. More particularly, nowhere in the Law on the Judicial Council is the right of a judge to representation explicitly enshrined. According to the Venice Commission “this right should be set out in a [standalone] article and apply to all stages

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<sup>62</sup> Ibid, §47

<sup>63</sup> Ibid., §48

<sup>64</sup> Ibid

<sup>65</sup> The Venice Commission observes that under the 2014 constitutional amendments it was proposed that the Constitutional Court would hear appeals lodged against a decision of the Judicial Council on the dismissal and other disciplinary sanctions pronounced against a judge. The Venice Commission concluded as follows (§95): “Better solution would be to keep appeal jurisdiction within the Supreme Court but at the same time develop rules which would prevent any possibility for conflict of interests between members of the JC, members of the appeal chamber within the Supreme Court, and those who have the right to initiate disciplinary proceedings against judges”.

of disciplinary proceedings and not only in the context of hearing before the [Judicial Council].”<sup>66</sup>

#### **D. Evaluation (the Law on Courts)**

99. Articles 98 – 131 of the Law on Courts deal with the professional evaluation of judges. These provisions are very detailed and establish intricate mathematical models which are supposed to evaluate judges’ performance, and give them “marks” which are then used in deciding on promotions or applying sanctions.

100. In the opinion of the Venice Commission, the evaluation system, as presented in the Law on Courts, puts too much emphasis on the quantitative criteria and disregards the qualitative aspect of the judicial decision-making. Thus, Article 102 is entitled “qualitative criteria”: however, in essence it refers to the number of missed procedural dead-lines and the number of cases overturned on appeal. The general impression that this part of the Law on Courts gives is that the main measure of professionalism of a Macedonian judge is his or her productivity and punctuality.

101. The Venice Commission reiterates its previous recommendations related to the disciplinary liability of judges and the use of “quantitative” criteria based on the number of decisions overturned on appeal or missed dead-lines. This is a dangerous path. As the Venice Commission observed in a Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan,<sup>67</sup> “it is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. [...] Quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation.”

102. The Venice Commission further refers to its opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia,<sup>68</sup> where it held as follows (a long quotation is needed since the Armenian system of evaluations was very similar to the one proposed in the Macedonian legislation under examination):

*“37. If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. [...] Simply counting the number of cases dealt with is crude and may be completely misleading. [...]*

*38. Measurement of the ‘observance of procedural periods’ [...] again may point to a possible problem, but it is important that the judge be given an opportunity to explain any apparent failings in this regard.*

*39. Measuring the ‘stability of judicial acts’ [...] is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge. [...] Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. [...].*

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<sup>66</sup> Ibid, §50

<sup>67</sup> CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §55

<sup>68</sup> CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-40, 42-43, 49-50 and 77-78

40. *The threshold of reversals would need to be quite high and the rule for exceptions to be established by the Council of Judges would have to be very generous. Such a system of on-going assessments is likely to produce a timid judiciary [...].*

42. [...] *[T]he caseload of judges in Armenia increases annually and could potentially reach unsustainable levels. Insofar as a judge is able to dispose of a certain number of cases annually, should the caseload continue to increase, it would be unfair to evaluate the judge on the basis of a percentage of disposed cases without properly analysing the reasons for the increase in the caseload. [...]*

43. [...]. *Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? [...] The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it.”*

103. All the above is fully applicable in the Macedonian context. First of all, the judge's individual performance should be assessed in the light of objective factors, such as the increase/decrease in the court's backlog, availability of trained assistants (secretaries, bailiffs, etc.) and equipment (computers, printers, etc.), etc. The productivity levels (see Article 105) should be fixed with reference to the average productivity of other judges, and after mandatory consultations with the judges of the courts concerned. Although the law mentions the “complexity of cases” as a factor taken into account when defining the productivity levels (Article 105), it does not explain how this complexity will be defined by the Judicial Council in advance. Even in the most elaborated systems the *real* complexity of cases belonging to a certain pre-determined category may only be guessed. Productivity levels set in advance by the Judicial Council may prove to be unfeasible; hence, they should be applied with due regard to the real situation the judge faced.

104. Compliance with the procedural dead-lines should be assessed on the basis of the same principles. The current system takes into account the overall number of cases where the deadlines were complied with (Article 109). However, it does not assess whether the dead-lines themselves were realistic or not, whether the judge had necessary resources to comply with the dead-lines, to what extent the parties to the proceedings contributed to the procedural delays, etc.

105. Generally, a system essentially based on numerical objectives may lead to a destructive pattern of behaviour: for example, personal statistics of a judge would look much better if the judge produces a big number of cases where all procedural dead-lines were complied with, while there are only few cases where the judge was behind schedule. To achieve this result the judge would be tempted to put few very complex cases aside, accumulating there all the procedural delays, in order to have the overwhelming majority of his cases “clean”. It would penalise parties involved in the complex (and probably the most serious) cases.

106. Another source of concern is the part of the Law related to the evaluation of the performance by the courts' presidents (see Articles 118 et seq.). It appears that the court's presidents are scored mostly on the basis of the performance of the ordinary judges. This may push presidents to become “productivity watchdogs” within their courts and may ultimately undermine judicial independence.

107. The same “quantitative” approach is applied by Article 47 of the Law on Courts to the election of the presidents of the courts. To be elected as a president, the judge has to be graded, in the past two years, with the highest positive grade and should have obtained the

highest number of points in relation to other candidates that have applied. Such approach is counterproductive. A court president should be – of course – a good judge, hard-working and well-organised. However his/her tasks are primarily of administrative nature, consequently not necessary the judge with the highest marks will be the best president. Additional competences – studies in the field of public finances, public or business administration, previous administrative functions within the judiciary are also very important, as well as interpersonal skills.

108. The same provision stipulates that candidates for the positions of court presidents shall annex to their applications “a Work Programme for the duration of the term of office”. Under Article GG of the Draft Amendments “failure to implement work programme” is considered as a disciplinary offence which may lead to the president’s dismissal from his/her position. It means that a candidate, who might have never been in the president’s shoes, should prepare a work plan for the whole court for the next 4 years. Such program will certainly be taken into account when this candidate is compared to other prospective candidates - otherwise there is no reason for the inclusion of this requirement in Article 47. All that might push the candidates to commit themselves (often unrealistically) to higher and higher performance levels. And when the candidate “with a highest bid” is appointed, the existence of the disciplinary liability for non-compliance with the “work program” will make him or her to do everything to reach the productivity levels set in the “work program”. This is a very dangerous provision, which may stimulate the presidents and the judges under their supervision to “cut corners” in order to achieve numerical productivity, which may be detrimental to the quality of the judicial decision-making.

109. In the opinion of the Venice Commission, Articles 98 – 131 of the Law on the Judicial Council and Article 47 of the Law on Courts, in the current form, may have a negative impact on the judicial independence and the quality of their work and should be subjected to a profound revision.

110. More generally, the comprehensive revision of the legislative framework could possibly be improved by assembling the laws which currently deal with the judiciary in a unitary law, organized in three sections, devoted respectively to the Courts, the Judicial Council, and the disciplinary responsibility and procedures.

#### **IV. CONCLUSIONS**

111. The Venice Commission is sympathetic to the constant efforts of the Macedonian authorities to improve the accountability of the judiciary. It recognises that finding a right balance between accountability and independence of judges is an extremely difficult task. The Macedonian legislation seeks to achieve it through very detailed regulations which are supposed to describe every aspect of the functioning of the judiciary. However, as a result of many patchwork amendments in the past, the legislation under consideration became overly complicated, overlapping and at places obscure, which may increase the feeling of insecurity amongst judges and negatively affect their independence and efficiency. Hence, the Venice Commission calls for a comprehensive revision of the legislative framework, in order to make the provisions on the judges’ accountability simpler and, at the same time, clearer.

112. The revision of the legislative framework could be also supported by making good use of Article 37 of the Law on the Judicial Council which gives the Council the power to adopt “rules of procedure and the manner of operation and other issues within [its] competencies”. The large power to enact regulations could be the occasion to transfer to the internal regulations dozens of articles that make the law on the Judicial Council and the Law on Courts so heavy and complex.

113. The Venice Commission has identified the following most important recommendations, which could help the Macedonian authorities in the process of the comprehensive revision of the legislative provisions:

- Judges should not be disciplined for situations which are outside of their control and which may be reasonably explained by the malfunctioning of the judicial system as a whole; Disciplinary sanctions should not interfere with the judge's independence in the decision-making and should never extend to differences in legal interpretation of the law or judicial mistakes.
- Only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation; the disciplinary system should use less drastic sanctions for smaller violations; dismissal of a judge should only be ordered in exceptionally serious cases;
- The functions of the Council for Determination of Facts should be transferred back to the Judicial Council, provided that members or bodies of the Judicial Council who are involved at the initial stage of the disciplinary proceedings as "accusers" or "investigators" do not participate in the final adjudication as "judges"; if the Macedonian authorities insist on maintaining this new body, a substantial part of its members should be elected by the Parliament with a qualified majority of votes, and the procedure before this Council should be simplified;
- The special Appeal Council should be replaced by an impartial judicial body predetermined by law; evaluation should be distinct from the disciplinary proceedings;
- Under-performance should not be automatically equated with a disciplinary violation and the evaluating body should assess objective factors influencing the judge's productivity and compliance with the time-limits; productivity objectives established by the bodies managing the system and procedural dead-lines should be realistic;

114. The Venice Commission understands that implementation of the recommendations contained in the present Opinion may require a considerable amount of work. It therefore expresses its readiness to assist the Macedonian legislator in this process.