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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

NORTH MACEDONIA

OPINION

ON THE DRAFT LAW ON THE JUDICIAL COUNCIL

Adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019)

on the basis of comments by

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I. Introduction

1. On 7 February 2019, Mr Zoran Zaev, the Prime Minister of North Macedonia, requested the Venice Commission to provide an opinion on the Draft Law on the Judicial Council (hereinafter the "draft law", CDL-REF(2019)005). On 6 March 2019, the Venice Commission received a revised text of the draft law amended by the authorities of North Macedonia in the light of the recommendations that are formulated in the present opinion on the basis of the original text of the draft law (CDL-REF(2019)005rev). The essence of those most recent amendments is described in § 61.

2. Messrs Richard Barrett, Philip Dimitrov, and Ciril Ribičič acted as rapporteurs. Due to the limited time available, this opinion was prepared without a visit to Skopje.

3. The present opinion was prepared on the basis of a translation of the draft law provided by the national authorities. The translation might not always accurately reflect the original version; therefore, certain inaccuracies may occur in this opinion as a result of incorrect translations.

4. This opinion was adopted by the Venice Commission at its 118th Plenary Session (Venice, 15 - 16 March 2019).

II. Relevant previous opinions and the scope of the present opinion

5. This opinion follows six opinions concerning the judiciary of North Macedonia, adopted by the Venice Commission in 2005,[1] 2014,[2] 2015,[3] 2017,[4] and October[5] and December 2018.[6] In its first two opinions, the Venice Commission analysed constitutional amendments concerning the judiciary, including some matters relevant for the present opinion, such as appointment and dismissal of judges, scope of the judges' immunity, composition of the Judicial Council (hereinafter the "JC"), and appeals against the decisions of the JC (hereinafter the "2005 opinion" and the "2014 opinion").

6. In its opinion of 2015 (on the Laws on the Disciplinary Liability and Evaluation of Judges, hereinafter the "2015 opinion"), the Venice Commission assessed the earlier versions of the Law on Courts and the Law on the JC as well as the Law on the Council for Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a Judge (the CDF). Insofar as the Law on the JC is concerned, the 2015 opinion focused on the disciplinary bodies, procedures, offences and sanctions as well as professional evaluation of judges.

7. Some of the recommendations formulated in the 2015 opinion (e.g. the abolishment of the CDF and the transfer of its powers back to the JC) were implemented by the legislator in 2017. The Venice Commission, in its 2017 opinion, welcomed those changes, but identified additional

[1] CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia".
[2] 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.
[3] CDL-AD(2015)042,Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia".
[4] CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on the Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection (hereinafter the "2017 opinion").
[5] CDL-AD(2018)022, Opinion on the Laws amending the Law on the Judicial Council and the Law on Courts of "the former Yugoslav Republic of Macedonia".
[6] CDL-AD(2018)033, Opinion on the draft amendments to the Law on Courts of "the former Yugoslav Republic of Macedonia".

issues that the new procedural arrangement may raise, mainly as regards the disciplinary proceedings and the process of appointment of candidates to the judicial positions.

8. The 2018 opinion on the Laws amending the Law on the Judicial Council and the Law on Courts (hereinafter the "October 2018 opinion") focused on grounds for disciplinary liability of judges, disciplinary procedures and bodies as well as the performance evaluation system of judges. The Venice Commission's assessment was overall positive. The opinion praised the draft laws as laying solid foundations to the well-functioning judiciary and suggested some amendments in order to improve the clarity of the texts. The opinion also recommended that these two laws be reassessed after a certain period of time in order to see how their provisions are implemented in practice and to make the necessary adjustments. The present opinion should be read in conjunction with the October 2018 opinion due to their close connection.

9. Finally, in December 2018, the Venice Commission adopted a follow-up opinion on the draft law amending the Law on Courts (hereinafter the "December 2018 opinion"). The draft law was welcomed by the Commission as it addressed most of the previous recommendations of the 2015 and October 2018 opinions and therefore increased significantly the coherence and clarity of the Law on Courts.

10. The aim of the present opinion is not to examine all aspects of the organisation of the judiciary of North Macedonia. It analyses only the draft law with focus on those elements which have been examined earlier, in the previous opinions. Furthermore, the present opinion does not mention all the positive changes the draft law brings, but rather focuses on problematic areas.

III. Analysis

A. Presidency of the JC (Articles 6 - 8)

11. Article 6 of the draft law reflects Article 104 of the Constitution which provides that the JC consists of 15 members: eight members are elected by the judges from their ranks (three of them must belong to the non-majority communities), three members are elected by Parliament with the mechanism of a double majority (absolute majority of the members of Parliament along with the majority of the representatives of the non-majority communities) and two members are elected by Parliament upon the proposal of the President of the Republic (one must represent the non-majority communities). The Minister of Justice and the President of the Supreme Court are *ex officio* members. The President of the JC and his/her deputy are elected from among the members of the JC by majority of its members with voting rights (Article 8).

12. The 2015 opinion recommended that the President of the JC should be elected from among the lay members of the Council with the two-thirds majority of all the members (§ 66). This recommendation is still valid and of particular relevance in the context of the JC of North Macedonia which is, in its current formation, characterised by a majority of judicial members elected by their peers.[7]

B. Election of the members of the JC (Articles 11 and 12)

13. Article 11 contains a list of eligibility requirements for the members of the JC. The draft law supplements this list with a new condition for lay members: absence of conviction for the misuse of official duty or for another criminal offence punishable by unconditional imprisonment of at least six months that makes him/her unworthy to perform the function of a JC member. This is a positive change as it ensures coherence with Article 32 (1) which considers such a conviction as a ground for the termination of the term of office of the JC members.

[7] See also CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 35.

14. A new condition is added to the list also for the judicial members: absence of punishment with the disciplinary measure of salary reduction *in the last five years*. This amendment seeks to ensure consistency with Article 78 (2) of the Law on Courts, as proposed to be amended (see CDL-REF(2018)62). Pursuant to the latter, a judge punished with that disciplinary measure "cannot be elected to a higher court, as a member of the JC, […] for *the duration of the measure*". However, the consistency between those provisions is not fully achieved: Article 11 does not refer to the *duration of the measure* while Article 78 (2) does not mention *the last five years.* It is recommended to harmonise those provisions.

15. In order to be elected as a member of the JC a candidate should successfully pass the integrity and psychological tests, which are to measure their integrity, social skills, and good reputation. According to Article 12 the aim of psychological tests is to check the social skills of candidates. The integrity and psychological tests are conducted by the JC which may engage, to this end, experts from independent professional institutions. A candidate for the lay membership should also be a person who, in the practice of his/her legal profession, distinguished himself/herself by his/her scientific or professional work or by his/her public activities.

16. The Venice Commission has continuously objected against the use of psychological tests for the recruitment of judges, and entrusting those tests to external experts in psychology.[8] In addition, it is quite unusual to see these tests as a pre-condition for the election of a judicial member of the JC. This mechanism gives the JC the possibility of screening the candidates, who should, normally, be elected by and represent the judiciary. The Venice Commission recalls that all candidates to the positions of judicial members are already active judges, so they normally should have already at least minimal social skills and integrity. This mechanism is likely to replace the free election of the judicial members with a system of co-optation, which does not fit well to the idea of "judicial members elected by their peers". While it is perfectly reasonable to have formal eligibility requirements, and for the JC to control the process of elections, the rationale for the idea of the JC selecting or even shortlisting candidates is not clear nor seems acceptable. The Venice Commission invites the authorities to reconsider this provision.

C. Selection and disciplinary liability of judges/court presidents (Articles 45 - 76)

1. Selection (Articles 45 - 50)

17. According to Article 47, the JC selects a judge for a first instance court *in accordance with the order determined in the final ranking* from the list of candidates who have finished the training of the Academy for Judges and Public Prosecutors (the Academy) and who have applied following a public announcement of the position. The JC will then discuss at a session attended by at least two-thirds majority of all its members having a voting right and select judges with at least eight votes (Article 49 (1) – (2)). It is unclear what is the relation between the score received by a candidate from the Academy and the voting in the JC, which also includes, as follows from the Law on Courts, the results of the testing (Article 45). Indeed, the score received by the candidates at the exams in the Academy may and should play an important role in the appointment decision. However, the exam is followed by a voting in the JC, which means that the question of appointment is not decided at the level of the Academy. As recommended in the 2017 opinion (§ 21), the relative weight of the scoring from the Academy and the results of the tests conducted by the JC (or any other examination of the candidates) should be indicated by the law. The Venice Commission notes in addition that when the JC votes for or against a candidate, it is a discretionary decision. However, if the ranking from the Academy is binding (see Article 47 (2)), it is unclear what is the importance of the voting/any tests which may be conducted. This should be clarified.

[8] CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, § 49; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, § 113.

18. In the 2017 opinion the Venice Commission also expressed doubts (§ 20) about the obligation of every member of the JC to state publicly his/her opinion in respect of each candidate (see Article 49 (3)). Indeed, individual members of the JC should have a right to state their opinion, but it should not be an obligation. If the objective of the draft law is to make the decision-making process more transparent for public scrutiny, the duty of each member to give reasons for his/her vote may be replaced with a requirement of a collective reasoned decision on appointment/promotion, reflecting the position of the majority of the JC, accompanied by dissenting opinions of members who voted against, if they wish to give their reasons.

19. As regards the selection of a judge/court president for a first instance court and appellate court in the region where 20% of the citizens speak "an official language other than the Macedonian language" or a judge/court president for the Administrative Court, the Higher Administrative Court and the Supreme Court, Article 50 requires not only a two-thirds majority of all the members with a voting right, but also a majority of the *attending members* belonging to the non-majority communities. The Venice Commission understands the necessity to ensure that non-majority communities in North Macedonia play an important role in the process of appointment of judges. Nevertheless, the Commission would like to draw the attention of the legislator to the complications which the special majority rule of Article 50 might create. According to the draft law, in the composition of the JC there must be at least four members belonging to the non-majority communities (in practice there may be more). If two of them vote against a candidate and two vote for him/her, it is unclear how such a deadlock will be solved. Any two members belonging to the non-majority communities would be able to block the decision-making process. The Venice Commission has already expressed its reserves about the appointments to State positions along the ethnic lines (see the 2014 opinion, § 61). Therefore, the legislator is invited to reconsider this rule, or, at least, to ease this requirement.

2. Disciplinary proceedings (Articles 60 - 73)

20. The disciplinary procedure was described in the October 2018 opinion (§§ 16 - 36). Some recommendations made in that opinion are addressed by the draft law. For instance, now it is clearly specified in Article 63 that the rapporteur-member of the JC (who verifies whether a complaint is "timely and complete") is determined by name order. Nevertheless, the main recommendations are still valid. In particular, the disciplinary system still lacks a filtering mechanism, which would allow for the dismissal of clearly unmeritorious complaints about the judge's behaviour. The October 2018 opinion invited the authorities to think of a filtering mechanism in order to avoid that the judges find themselves facing many disciplinary proceedings brought by disappointed litigants (§§ 17 - 18).

21. Under the current system a complaint may be introduced with the JC by any person (Article 62 of the draft law). Such complaints may either be submitted directly to the JC or first addressed to the president of the respective court, who may then transmit it to the JC (Article 68 of the Law on Courts). Under the current version of Article 79 of the Law on Courts a court president was required to initiate disciplinary proceedings before the JC against a judge of his/her court when he/she "knew or was obliged to know about the existence of the legal reasons" for doing so. This Article was amended following a recommendation of the December 2018 opinion (§§ 64 - 65). Under the new formulation, a court president may be held liable only for covering up judges in certain *evident* situations (see CDL-REF(2019)008). This amendment would allow the court president to filter manifestly inadmissible complaints. However, it would not prevent the complainant to address directly to the JC. Therefore, there is still a need for filtering the complaints submitted directly to the JC in accordance with Article 62 of the draft law. The latter, unlike its current version, specifies that a complaint must be "reasoned". This is positive, but it is not of any help for filtering.

22. Once a complaint is received, the JC distributes it to one of its members, determined in accordance with name order, who will act as rapporteur. The role of the rapporteur is limited to verifying whether the complaint is "timely and complete". The rapporteur then submits his/her opinion to the JC (Article 63) that may reject the complaint if it finds it untimely and/or incomplete. Otherwise, the JC establishes a commission composed of three members who are selected by drawing lots from among its members with a right to vote (hereinafter the "Inquiry Commission"). Unlike the current law (Article 56), the draft law specifies that two members are selected from the pool of judicial members whereas one is selected from the pool of lay members (Article 63 (3)). This amendment is welcome as it follows a recommendation of the October 2018 opinion (§ 26).

23. The Commission's role is to collect and assess the evidence in order to formulate a proposal to the JC (to drop the disciplinary proceedings, to dismiss, or to impose a lesser disciplinary sanction - see Articles 64 - 66). The October 2018 opinion recommended giving the power to take admissibility decisions to a smaller body within the JC such as the Inquiry Commission itself, for example (§ 20), which would be able to dismiss untimely, incomplete, or clearly unmeritorious complaints (for example, containing allegations of judicial errors which have already been duly examined by a court of appeal, or which could have been examined in this manner but have not been raised by the complainant in the appeal proceedings). This would certainly decrease the workload of the JC and make the function of the rapporteur-member unnecessary. The Commission invites the lawmaker to consider this option.

24. Should the filtering function be performed by the Inquiry Commission, it would be recommended to require a unanimous vote to declare a complaint inadmissible so that in case of doubt the Plenary of the JC can decide. The inadmissibility decision by the Inquiry Commission should be final.

25. The president and members of the Inquiry Commission participate in the hearing before the Plenary of the JC but are excluded from voting (Article 68 (3)).[9] A member of the JC who is "submitter" cannot be the rapporteur, a member of the Inquiry Commission (Article 63 (4)) and is excluded from voting in the Plenary (Article 68 (4)). However, it is not entirely clear whether an *ex officio* member can be the rapporteur or the submitter. The draft law is also silent as to whether a rapporteur can vote on the proposal of the Inquiry Commission. It would be useful to clarify these points.

26. Under the current law the Plenary of the JC takes a decision on a disciplinary case with the two-thirds majority. That means any decision needs to have support of 8 out of 11 members (7 out of 10 members, in case the submitter of the complaint is a member of the JC). The draft law, instead, requires the support of at least 7 members (Article 68 (5)). This change is reasonable because under the draft law not only the Minister of Justice but also the President of the Supreme Court are excluded from voting on the disciplinary liability (Articles 6 and 68 (5)).

27. If the submitter of a complaint is not a member of the JC, 7 out of 10 members (which equals to two-thirds majority), and otherwise 7 out of 9 members, would be able to make a decision on the disciplinary liability. However, dismissal needs the support of at least 8 members (out of 9 or 10 depending on whether the submitter is a member of the JC or not) (Article 71). This near-unanimity might be difficult to meet. In addition, there might be a situation of incompatibility excluding some members of the JC from the voting process (for example, if the case concerns a relative). The number of members with voting rights might therefore be even less than 9.

[9] This function of the Inquiry Commission – to present a specific proposal – explains why the members of this commission cannot vote in the Plenary on the merits of the case, which leads to the complications described in §§ 27 - 29 of the present opinion.

28. In its October 2018 opinion, the Commission concluded that two-thirds majority would be acceptable (§ 31). With such a high majority no decision can be made without some support from lay members. This may, however, jeopardize the efficiency of the disciplinary proceedings as a whole. The problem with the current system is that the pool of members who can take the decision is too small. This is due to the fact that the President of the Supreme Court and the MoJ are not voting[10], the "submitter" is not voting, and that three members of the Inquiry Commission are not voting either, because of the specific role the Inquiry Commission plays in the disciplinary proceedings. If one adds members who may have potential conflicts of interests, it makes the whole system fragile and prone to blockages. There are different possible ways of addressing this issue; the Venice Commission invites the authorities to re-examine the decision-making process from this perspective, in order to reduce the risk of blockages.

29. Turning back to the system as it is designed in the draft law, the Venice Commission notes that it is now clearer how the Plenary of the JC decides on a proposal of the Inquiry Commission. The Inquiry Commission submits to the Plenary a report with one of the following proposals: to dismiss the judge, to impose a lesser disciplinary measure or to drop the case (Article 66). If the Inquiry Commission proposes a lesser disciplinary measure the Plenary decides with *at least seven votes* to accept the proposal. If the Plenary fails to reach this majority, then a vote is taken on other disciplinary sanctions starting from the most severe to the least severe ones until the Plenary reaches at least seven votes for one of the sanctions. If no disciplinary sanction gets the support of seven members the case is dropped automatically unless at the same session a unanimous decision for repeating the voting is taken. At least seven members can also suggest that the Plenary votes on the dismissal (Article 70). For the sake of clarity and consistency with Article 71, Article 70 might provide that in the latter case the decision on the dismissal is taken with at least eight votes.

30. Pursuant to Article 71, the proposal of the Inquiry Commission for the dismissal can be accepted by the Plenary with *at least eight votes*. If this majority is not reached, the Plenary votes on other disciplinary measures starting from the most severe sanctions to the least severe ones. Here again it would be useful to clarify whether the vote is automatic or should be proposed at least by one member and that in case no additional vote is proposed the case should be automatically dropped.

31. Although, if compared to the current law, the draft law is much clearer in respect of the decision-making process, there is still a room for improvement. According to Article 69, the decision on the proposal of the Inquiry Commission to drop the case is taken by at least seven votes. However, the law does not clarify what happens if this majority is not met; does a vote on the disciplinary sanctions (starting from the most severe to the least severe ones) is taken? May seven members propose a vote on the dismissal? It would be advisable to clarify these points.

32. The law is also silent on the majority by which the decisions of the Inquiry Commission are taken (unanimously or simple majority?). A clarification on this would be welcome.

[10] In this respect, the Venice Commission recalls that it has always recommended that if the Minister of Justice was to be included as an *ex officio* member of the JC, he or she should not have the right to vote on disciplinary measures against judges (See for example CDL-AD (2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, § 63; CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §§ 58 - 59; CDL-AD(2007)028, Report on Judicial Appointments, § 33). However, the Commission has never been that categorical in respect of the President of the Supreme Court. The risk of conflict of interests in respect of the President of the Supreme Court may be eliminated simply by providing in the law that members who were involved at the initial stage of the disciplinary proceedings as "accusers" do not participate in the adjudication of disciplinary cases (see the 2017 opinion, § 11).

3. Appeal (Article 74)

33. Pursuant to Article 74, the judge/court president against whom disciplinary proceedings were initiated have a right to appeal to an Appeal Council – a body composed of judges of different levels defined by drawing lots at a plenary meeting of the Supreme Court, for each individual case. The Appeal Council shall "confirm or revoke" the decision of the JC. In the event of "revocation" the proceedings are reopened and the JC takes a final decision.

34. The Venice Commission has consistently asserted that there should be the possibility of an appeal to an independent court against decisions of disciplinary bodies.[11] Under the current law, the JC takes a final decision, "*appraising the guidelines*" of the Appeal Council. The October 2018 opinion invited the drafters to elaborate what exactly this wording entails. The opinion also stated that the law should explain what happens if the JC, following the re-opening of the proceedings, insists on its original position and disregards the guidelines of the Appeal Council (§ 39). Instead, the present draft leaves simply the final decision up to the JC without any obligation for the latter to take into consideration the decision (or guidelines) of the Appeal Council. This solution makes the right of appeal ineffective for the person who introduced the appeal. The Venice Commission is of the opinion that once the Appeal Council has found in favour of the judge/court president, this decision should be final[12] and implemented accordingly by the JC which might eventually necessitate reopening the disciplinary proceedings (e.g. in the event of violation of procedural rights of the judge/court president during the previous proceedings).

35. That being said, the Appeal Council should not substitute the JC. In a recent opinion, the Commission stressed that "Judicial Councils should have a certain discretion, which must be respected by the appellate body", and that "in exercising its appellate review the appellate body should act with deference to the [Judicial Council] as regards the establishment of the factual circumstances and interpretation of the relevant rules of conduct".[13] The Appeal Council should be able to annul decisions of the JC only in cases of gross errors in the application of procedural and substantive law.

D. Suspension and dismissal of the members of the JC (Articles 32 - 35)

1. Suspension of a member of the JC (Article 33)

36. According to Article 33, the JC may suspend a member in the event that this member is formally charged with some criminal offences (misuse of official duty and powers in carrying out his/her function, or another criminal offence punishable by an unconditional imprisonment of minimum six months, making the convicted person unfit to perform the duties of a member of the JC. See Article 32 (1) – (4)). These are serious charges which may justify the suspension of a member.

37. The draft law adds a new ground of suspension to this Article: a member may be temporarily removed if a disciplinary procedure has been initiated against this member. The Venice Commission is of the opinion that decisions on suspension of a member in this last case should take into account the gravity of the accusations and the existence of at least a probable cause that a serious disciplinary offence has been committed.[14]

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[11] See, for example, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, § 62; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 110; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 43; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 25.

[12] In this regard see CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, § 5.

[13] CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, § 151.

[14] On this point see CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, § 30.

38. That being said, the suspension of a member of the JC creates a risk of paralysing the work of the JC. The Venice Commission recalls that for certain decisions the law requires very high majorities and quorums (see § 27 above). If two members are suspended, one may wonder whether it would still be possible to dismiss a judge/court president during the period of suspension. Moreover, it is to be noted that contrary to the disciplinary proceedings (which are strictly time-barred; see e.g. Articles 63 (6) and 64 (3)) the criminal proceedings might last many years.

2. Dismissal of a member of the JC (Article 35)

39. At least 20 judges or 4 members of the JC with a right to vote can make a request for the initiation of disciplinary proceedings against a member of the JC. In this case these 4 members and the member against whom the request is made should not take part in the decision on the dismissal.[15] The law is silent on this issue which might be expressly stated. In this case only 8 out of 13 members will be voting. Article 35 (4) requires at least 8 votes for the dismissal including votes of at least two judicial members and two lay members. Assuming that 4 out of 5 lay members make a request for the initiation of disciplinary proceedings, the Plenary of the JC would not have the majority necessary for dismissal.

40. Furthermore, according to the 3rd paragraph the procedure for determining the disciplinary responsibility of a member is the same as the procedure applicable to judges/court presidents. Does that mean that the JC should establish an Inquiry Commission composed of three of its members who will be excluded from voting on the dismissal (Article 68 (3))? If the answer is affirmative, it remains in this case only 5 members with a right to vote, which is not sufficient for the dismissal.

41. A solution might be to give to each member of the JC the right to file a complaint against another member. Nevertheless, even in this scenario, after the establishment of the Inquiry Commission, only 8 members with the right to vote will be able to vote, which means a unanimous vote would be the only way to dismiss a member. A unanimous vote may be quite difficult to reach, so here the JC is facing a broadly similar problem as in the case of disciplinary proceedings against the judges (see §§ 26 - 28 above).

42. One of the dismissal grounds is the failure "to file a statement of assets and interests in accordance with law". The Venice Commission has already expressed its view on the same disciplinary ground in respect of the dismissal of judges in its December 2018 opinion. The Venice Commission stated that not only the failure to file a declaration, but also a declaration containing gross inaccuracies should lead to the dismissal. And, by contrast, minor or unintended omissions in a declaration of assets should not lead to the dismissal (§ 37). This recommendation is valid also for the dismissal of a member of the JC.

E. Performance evaluation of judges (Articles 77 - 102)

1. Criteria and method of evaluation (Articles 77 - 89)

43. The criteria and procedures for the evaluation of the work of a judge have been assessed in the October 2018 opinion. The opinion made several recommendations to bring the system in line with the international standards: in particular, the opinion recommended not basing the evaluation system predominantly on the productivity levels, missed deadlines, and particularly on the reversals' rates (§ 45). That being said, the opinion recalled that the values to be assigned to different elements depend on the priorities set by the legislator which should be based on an in-depth analysis of the court statistics and, in consequence, differ widely from one country to

[15] As regards the members of the JC, the draft law does not provide for other disciplinary sanctions than dismissal.

another. That is the reason why the opinion stressed that the effectiveness of the performance evaluation system (elements of evaluation, scores attached to them, etc.) should be reviewed, after a test period. For this very same reason, the October 2018 opinion recommended that instead of describing in details the evaluation criteria and the value to be assigned to each of them, the law could contain only the most fundamental parameters and entrust the JC with the task of developing a system of indicators which should be published and revisited regularly (§ 46).

44. The Venice Commission observes that several recommendations of its October 2018 opinion are taken into account and the evaluation system is overall improved.

45. First of all, the draft law attributes more weight to the evaluation of the quality of conducting a procedure (which includes the quality of decisions taken) compared to other more quantitative criteria (numerical output, reversals rate, compliance with the time-limits, etc.). This follows the recommendation of the October 2018 opinion and is thus welcome. However, as stated in the latter opinion, this system would benefit from a trial period of few years and then could be re-evaluated on the basis of past experience (§ 48).

46. The draft brings some other positive changes; under the draft law the ordinary evaluation is conducted every four years (Article 79 (1)) instead of two years under the current law. This follows a recommendation of the October 2018 opinion (§ 47) as well. The number of members of the Commission entrusted with the assessment of the quality of conducting court proceedings is increased from 3 to 5 (Article 83 (3)) and the assessment methods of the Commission are regulated in the law (Article 84). Article 90 (2) specifies that if a former international judge applies for a position of judge, he/she will automatically receive a positive evaluation.

47. Finally, in the October 2018 opinion (§ 76) the Venice Commission criticised the idea of the reduction of the performance evaluation score of a judge in connection with decisions of this judge which led to a finding of a violation of the European Convention on Human Rights by the European Court of Human Rights. In the draft law this element was excluded from the performance evaluation, which is welcome.[16]

2. Role of the evaluation in the promotion of judges (Articles 77 - 90)

48. According to Article 79 there are two sorts of evaluations: ordinary and extraordinary. The latter is conducted in case a judge applies for a promotion (election to a higher instance court or for a position of court president). The draft law extends the application of this evaluation to other situations (when a judge applies for a position in another court of the same instance or a member position in the JC). This is not open to criticism.

49. Under the current Article 46 of the Law on Courts, to be eligible for the appointment to a court of first Instance, a court of appeal and the Supreme Court, a candidate should have work experience indicated in that Article and obtain the "highest positive mark" in two regular consecutive evaluations (see CDL-REF(2018)027). The "highest positive mark" equals under the current law on the JC to a "very good" grade that a person can have if he/she obtains more than 140,5 out of 200 points (under the positive evaluation there are two other grades: "satisfactory" and "good". See Article 116 of the Law on the JC currently in force).[17]

50. Using the performance evaluation for the purpose of promotion is a reasonable approach. However, the October 2018 opinion stated that the threshold ("very good") was set too high: there

[16] See in this regard CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges.
[17] The similar eligibility requirement is provided for candidates to the positions of court president in Article 47 of the Law on Courts.

might be practical reasons why a judge might not be able to achieve the highest grade over two consecutive evaluations, and yet be a good candidate for promotion (§ 55).

51. This recommendation was followed; first of all, the Law on Courts was amended and the requirement of "highest positive mark" in two regular consecutive evaluations was replaced by a "positive evaluation". The draft law removes different levels (satisfactory, good, very good) under the positive evaluation. If a judge receives more than 100 out of 180 points he/she is positively assessed, otherwise the assessment is negative (Article 91). This simplifies the procedure of promotion and lowers the threshold.

52. However, the method of selection is still complicated; Article 48 provides an additional list of criteria for the evaluation of candidates (expert knowledge and specialization in the field, capability in resolving legal issues, communication and inter-personal skills, attitude to work, length of judicial service, etc.). Some of those criteria overlap with those assessed in the framework of the performance evaluation, and some of those criteria have been criticized in the previous opinions (the number of reversed and altered decisions, the number of resolved cases in relation to the orientation number, etc.). One may wonder whether they need to be taken into account once again.

53. It seems that a performance evaluation is only a first (eliminatory) step which allows a candidate to have the right to be assessed in accordance with the criteria enumerated in Article 48. Based on these criteria the JC establishes a ranking of candidates who are then elected with a two-thirds majority of all the members having voting rights. The method of establishment of the priority order is to be described in a JC regulation. Delegation of this task to the JC is a reasonable approach; it ensures more flexibility in regulating those matters and contributes to the conciseness of the law. However, the authorities may wish to consider providing for some basic rules in the law. For instance, the law should make clear which body within the JC is entitled to conduct the evaluation of the candidates under Article 48 in order to establish a priority order of candidates and how its members are elected/appointed.

54. It is also suggested to clarify in the law to what extent the ranking of candidates and/or their grades (if the candidates are attributed grades) influences the selection of candidates by voting in the Plenary of the JC.

3. Negative evaluation as a ground for dismissal of judges (Article 91)

55. The draft amendments to the Law on Courts examined by the December 2018 opinion proposed to use two extraordinary "negative" evaluations as a ground for dismissal (Article 76 (1)). However, following the opinion of the Venice Commission (§ 45), the term "extraordinary" was removed from the concerned provision. Under the last version of the Law on Courts which seems to be currently under consideration in Parliament, "if in two consecutive assessments the judge does not fulfill the criteria for successful work, by his fault without justifying reasons" he/she may be dismissed. It is positive that the unsuccessful work is linked to the fault of the judge. This addresses the criticism formulated in the October 2018 opinion (§§ 62 - 63).

56. In its October 2018 opinion, the Commission admitted that a bad evaluation can lead to a disciplinary sanction (§ 59) and repeated this statement recently in its December 2018 opinion (§ 43). Nevertheless, the Commission shares also the CCJE's opinion: "a permanent appointment should not be terminated simply because of an unfavourable evaluation. It should only be terminated […] where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard" (Opinion no. 17, § 29). To serve as a ground for dismissal, "bad evaluation" should convincingly demonstrate total ineptitude of the judge to perform judicial functions. In the proposed system of evaluation, however, the line dividing the positive and negative evaluation is very fine: a judge may be promoted if he/she receives more than 100 points (positive evaluation) and may be

dismissed if he/she receives only two points less (less than 100 points which equals to a negative evaluation). The Commission invites the authorities to consider and clarify this point.

57. However, the Venice Commission is not ready to propose any better solution. This threshold (100 points out of 180) reflects the system of criteria which was developed by the Law on the JC for professional evaluations. Whether those criteria are rightly chosen, and whether their relative weights, attached by the law, are appropriate will become clear after, probably, two or three rounds of evaluations. So, for the time being, this question may be left open. The Venice Commission recalls, however, that regulating such details as the exact value of different elements for professional evaluations in the law contains an inherent risk that it will be difficult to change those values, if they prove to be incorrect. Thus, a more appropriate approach would be to leave this matter for the regulation by the JC itself.

4. Re-evaluation and appeal (Articles 98 - 99)

58. According to Article 98 a judge/court president has the right to object before the JC to the evaluation received. The JC may reject or accept the opposition or issue a decision for re-evaluation. In the event that a judge/court president requests a re-evaluation, the JC is obliged to carry out a re-evaluation (Article 99 (3)). However, the law does not provide for a right to object to or appeal to a court of law against the abovementioned decisions of the JC or the result of the re-evaluation.

59. The Venice Commission refers to its 2011 opinion on the draft law on judges and prosecutors of Turkey: "The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. […] In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases."[18] The authorities are recommended amending the draft law in that sense.

IV. The most recent revision of the draft law

60. On 6 March 2019 the Venice Commission received a revised text of the draft law amended by the authorities of North Macedonia in the light of the above recommendations (CDL-REF(2019)005rev). The Commission is pleased to observe that the revised draft law addressed most of its recommendations.

61. *Inter alia*, the following improvements deserve to be mentioned: the president and deputy president of the JC are elected from among its lay members, psychological tests are not used anymore for the election of members of the JC, there is no individual obligation for the members of the JC to publicly explain their vote in the process of recruitment/promotion of judges, the Inquiry Commission is empowered to reject manifestly inadmissible complaints against judges (a filtering mechanism), procedural requirements regarding the disciplinary liability of judges and members of the JC are clearer and more realistic, the Appeal Council has the power to annul a decision of the JC regarding the disciplinary liability of judges/court presidents only in cases of gross errors in the application of law, and its decisions are final, and the result of the performance evaluation and re-evaluation can be challenged before the Appeal Council.

[18] CDL-AD(2011)004, § 76. See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 92.

V. Conclusion

62. The constant efforts of the authorities of North Macedonia to bring the rules governing the judicial system in line with the international standards and best practices are praiseworthy. Those efforts in the past two years went mostly in the right direction.

63. The draft law under consideration is to be assessed overall positively. It brings many useful amendments. For instance, a finding of a violation of the European Convention on Human Rights is not anymore a reason for the reduction of the performance evaluation score of judges.

64. The draft law is clearer and internally coherent. The Venice Commission observes with satisfaction that a significant number of its previous recommendations are followed. An overall assessment permits to conclude that the provisions of the draft law are mostly in line with the international standards and, if interpreted and implemented in good faith, can ensure the independence and efficiency of the judiciary.

65. Despite this generally positive assessment, the Venice Commission considers that further improvements might be considered on the following matters:

- The authorities are invited to assess whether the majorities/special majorities required in the Plenary of the Judicial Council (the JC) to take decisions on the appointment and promotion of judges, or on the disciplinary liability of judges and members of the JC are realistic. The decision-making process should be designed in such a way as to ensure that the Plenary of the JC would not find itself in the situations where it would be impossible or extremely difficult to take a decision;

- As regards the disciplinary procedure, the law should provide for a filtering mechanism for the complaints submitted against judges directly to the JC; the power to decide on the admissibility of the complaints might be given, instead of the Plenary of the JC, to a smaller body within the JC. The Appeal Council should have a final say on the appeal against a disciplinary sanction imposed by the JC, but, at the same time, the Appeal Council should act with deference to the JC, and should be able to annul decisions of the JC only in cases of gross errors in the application of procedural and substantive law;

- The procedure of recruitment of judges needs to be explained more clearly in the law. In particular, the law should specify what role the ranking of candidates established by the Academy for Judges and Public Prosecutors plays in the selection process, and how it affects the voting by the JC, and what is the place of any “integrity and psychological tests” which may be conducted by the JC in the selection process;

- The relative weight of various parameters accounted for in the performance evaluation should be kept under constant revision. It is more appropriate to attribute the exact numerical values to those parameters in the regulations adopted by the JC, rather than in the law itself, in order to be able to change them if needed. The law should explain how the scores obtained in the performance evaluations affect the decisions of the Plenary of the JC concerning the promotion of the judges.

66. The Venice Commission observes with satisfaction that the last version of the draft law implements many of the above recommendations (see §§ 60 and 61 above).

67. The Venice Commission remains at the disposal of the authorities of North Macedonia for further assistance in this matter.