



Strasbourg / Warsaw, 24 March 2014

Opinion no. 755 / 2014

CDL-AD(2014)006
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DIRECTORATE OF HUMAN RIGHTS (DHR)
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW
OF THE COUNCIL OF EUROPE

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS
AND HUMAN RIGHTS
(OSCE/ODIHR)

JOINT OPINION

ON THE DRAFT LAW
ON DISCIPLINARY LIABILITY OF JUDGES

OF THE REPUBLIC OF MOLDOVA

adopted by the Venice Commission
at its 98th Plenary Session
(Venice, 21-22 March 2014)

on the basis of comments by

Mr James HAMILTON (Substitute member, Ireland)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Konstantine VARDZELASHVILI (Substitute member, Georgia)
Mr Nils ENGSTAD (Expert, DHR, Norway)

Table of Contents

| | | |
|------|--|----|
| I. | Introduction | 3 |
| II. | Scope of the opinion..... | 3 |
| III. | Executive Summary | 3 |
| IV. | Analysis of the Law article by article..... | 5 |
| A. | Chapter I - General provisions..... | 5 |
| B. | Chapter II Disciplinary Board | 9 |
| C. | Chapter III - Examination procedure of disciplinary cases..... | 11 |
| | Section 1 - The notification concerning the actions which may constitute disciplinary actions..... | 11 |
| | Section 2 - Verification of notifications | 12 |
| | Section 3 - Admissibility examination of notifications | 12 |
| | Section 4 - Case examination by the Disciplinary Board..... | 12 |

I. Introduction

1. By a letter of 9 January 2014, the Minister of Justice of the Republic of Moldova requested the Venice Commission to provide an opinion on the draft Law on disciplinary liability of judges (CDL-REF(2014)002).
2. Mr James Hamilton, Ms Hanna Suchocka and Mr Konstantine Vardzelashvili acted as rapporteurs for the Venice Commission. Mr Nils Engstad provided an expert opinion at the request of the Directorate of Human Rights (of the Directorate General of Human Rights and the Rule of Law, hereinafter DHR). Since the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) had reviewed a previous version of the draft Law in 2012¹, it was agreed that OSCE/ODIHR would also participate in the preparation of this joint opinion.
3. A delegation of the Venice Commission visited Chisinau, Moldova, on 11-12 February 2014 to meet with the Committee for Appointments and Immunities of the Parliament, the members of the Working Group responsible for the drafting of the Law, the Superior Council of Magistracy, the Ministry of Justice of Moldova and several NGOs. OSCE/ODHIR also participated in this country visit.
4. This joint opinion takes into account the information obtained during the above-mentioned visit.
5. The present joint opinion was adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 march 2014).

II. Scope of the opinion

6. One of the concerns raised during the meetings held in Chisinau is that Article 8 of the draft Law which creates the Disciplinary Board as an independent body would be in conflict with Article 123 of the Constitution of Moldova.
7. However, it is for the national courts and, in particular, the Constitutional Court of the Republic of Moldova to assess the compatibility of national laws with the Constitution of Moldova.
8. The role of the Venice Commission and of the OSCE/ODIHR is to advise on the conformity of the provisions of Constitutions and other national laws with European standards and OSCE commitments. Therefore, this joint opinion will only deal with the conformity of the draft Law with European and OSCE standards and best practices.
9. The Venice Commission, the DHR, and the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Law or related legislation that the Venice Commission, the DHR and OSCE/ODIHR may make in the future.

III. Executive Summary

10. Many of the provisions included in the draft Law are in line with European and OSCE standards and this is to be welcomed.

¹ See the OSCE/ODIHR Opinion on the draft Law of the Republic of Moldova on the Disciplinary Responsibility of Judges, Opinion no. JUD-MOL/217/2012 [LH], issued on 14 December 2012.

The Venice Commission, the DHR and the OSCE/ODIHR recommend, however to:

1. Key Recommendations

- A. explicitly restrict removal from judge's position to the most serious cases or cases of repetition or of incapacity, or behaviour that renders judges unfit to discharge their duties; [pars 42-43]
- B. specify in the draft Law the criteria for selection of candidates of civil society members of the Disciplinary Board as well as the mechanism for the appointment and functioning of the Commission which is intended to select them; [par 53]
- C. state that alternate members should act as replacements for recused or abstaining members [par 63]
- D. limit the right to submit a notification either to persons who have been affected by the act(s) of the judge or to those who have some form of "legal interest" in the matter; [par 64]
- E. strengthen the role of the inspector-judges and in particular give them the responsibility to draft the charges; [par 71]
- F. give the judge the right to require the hearing of witnesses or other persons during the examination of the disciplinary case; [par 78]
- G. add a clear provision that would prevent the same member of the Superior Council of Magistrates from engaging in all the consecutive steps of the disciplinary proceedings (including appeals procedures); [par 83]

2. Additional Recommendations

- H. explicitly refer to *intention* and *gross negligence* in offences described in Article 4.1.a and Article 4.1.b;
- I. enhance Article 4.1.d by prohibiting judges from "unduly" interfering with the judicial activity of other judges; [par 24]
- J. merge Article 4.1.g, Article 4. 1. i and Article 4. 1. j into one article on "undue delays and deficiencies in the performance of duties"; [par 25]
- K. delete Article 4.1.m, or revise and merge with Article 4.1.p; [par 26]
- L. clarify the wording of Articles 4.1.o and 4.1 p; [pars 31-33]
- M. revise Article 4.2 so that disciplinary proceedings are only initiated in cases involving gross and inexcusable professional misconduct; [pars 35-36]
- N. enhance the list of sanctions under Article 6 by adding other possible sanctions, while specifying that certain sanctions, such as a reduction of salary, can only apply in cases of deliberate wrongdoing; [par 38 and 41]
- O. reconsider the ban on transfers of judges during the period of disciplinary sanctions; [par 45]
- P. amend Article 11.2 so that the Disciplinary Board itself may dismiss members who fail to fulfil their duties, and pre-determine the order in which possible alternative members shall be appointed in such cases; [pars 56-57]

- Q. provide for a procedure to be followed in case of revocation of a notification and explicitly mention that there must be a public interest in the pursuit of the disciplinary proceedings; [par 67]
- R. provide that decisions on admissibility panels be notified to the judge concerned; [par 75]
- S. provide that every appeal against disciplinary proceedings should prevent the decision from becoming final until the appeal is determined; [par 81]
- T. detail the procedure before the Superior Council of Magistracy; [par 81] and
- U. add a provision on the publication of final decisions. [par 85]

The Venice Commission, the DHR, and the OSCE/ODIHR remain at the disposal of the Moldovan authorities for any further assistance they may need.

IV. Analysis of the Law article by article

11. This opinion is based on an English translation of the draft Law. The translation may not accurately reflect the original version on all points and certain comments may result from problems in the translation.

A. Chapter I - General provisions

12. Article 2 sets out the “Principles of procedure on disciplinary cases of judges”. These principles (legality, respect for judicial independence, fair procedure, proportionality of the sanction with the committed offence, transparency) are in line with international standards and are to be welcomed.

13. Article 3 on “Grounds for disciplinary liability” states that “violation of other normative acts constitutes a disciplinary offence only if the violation constitutes a disciplinary offence under Article 4 of this Law”. This Article is to be welcomed in as much as it limits the disciplinary responsibility of judges.

14. However, it raises the question of what the relationship between criminal or administrative law and the disciplinary Law is to be where an offence could be both a criminal or administrative offence and an offence under the disciplinary Law. It would seem desirable to provide that where an event consists of an offence under criminal or administrative law as well as under the disciplinary law, the criminal or administrative proceedings take precedence. A provision for what disciplinary action is to be taken once the proceedings are concluded and for appropriate suspension of disciplinary hearings would be useful, as well.

15. Article 4 enumerates 16 types of misconduct (acts, abstentions and omissions) which constitute disciplinary offences. In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards².

16. Most of the disciplinary offences enumerated are in line with European and OSCE standards, and do not raise any objection. Some of them however are not drafted in a sufficiently clear way so that the requirement of “foreseeability” of the European Court of Human Rights - which requires that the conduct giving rise to disciplinary action be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of

² See the CCJE Opinion no. 3 (2002), paragraphs 63-65.

his or her actions and thereupon regulate his or her conduct³ - can be considered as fulfilled.

17. Article 4.1.a, defines a disciplinary offence as *"failure to observe the duty to abstain when the judge knows or should know about existence of one of the circumstances provided by law for abstention, as well as making repeated and unjustified statements of abstention in the same case, which has the effect of delaying the consideration of the case."*

18. It is quite uncertain what is meant by making repeated and unjustified statements of abstention in the same case, which has the effect of delaying the consideration of the case.

19. A failure to abstain when the judge *"should know"* about the existence of a specific circumstance seems to describe a situation where the failure is committed with negligence. An *"unjustified abstention"* could also be due to ordinary negligence. However a mere negligence should not give cause to disciplinary actions. Only failures performed intentionally or with gross negligence should give rise to disciplinary actions⁴. In order to avoid the risk of judges being held liable for ordinary negligence in this respect, Article 4.1.a should state that the acts or omissions concerned can only lead to disciplinary actions when performed intentionally or with gross negligence.

20. Article 4.1.b defines "intentional application, or application with bad faith, or repeated negligence of legislation contrary to uniform judicial practice" as a disciplinary offence. This Article is not clear and could be interpreted, in concrete situations, in such a way as to weaken the independence of judges instead of guaranteeing it.

21. A judge may not be limited to applying the existing case-law. The essence of his/her function is to independently interpret legal regulations. Sometimes judges may have an obligation to apply and interpret legislation contrary to "uniform national judicial practice". Such situations can occur, for instance, in light of international conventions, and where decisions from international courts supervising the international conventions may alter the current national judicial practice.

22. The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction⁵ 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. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so.

23. This Article should be re-drafted; it could refer to malice and gross negligence following the wording of the Recommendation of the Committee of Ministers on Independence, Efficiency and Responsibilities of Judges, which states that "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross

³ See *N.F. v. Italy*, ECtHR Judgment of 2 August 2001 (Application no. 37119/97), paragraphs 29-30; *Volkov v. Ukraine*, ECtHR Judgment of 25 May 2013 paragraphs 173ff

⁴ OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia suggest in paragraph 25 that disciplinary proceedings should be limited to "alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute.

⁵ CM/Rec(2010)12E / 17 November 2010 Recommendation 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), par 66 "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence." See also The Venice Commission's Joint Opinion with OSCE on Constitutional Law on the Judicial System and Status of Judges of Kazakhstan also recommends that "disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the draft law or judicial mistakes."

negligence.”⁶ This recommendation may be disregarded in case it is based on an erroneous translation.

24. Article 4.1.d defines a judge's "*interference in the judicial activity of another judge*" as a disciplinary offence. For the sake of clarity, the term "undue" should be added in the sentence: undue interference in the judicial activity of another judge.

25. Offences described under Article 4.1.g, Article 4.1.i and Article 4.1.j could be covered in one article on "undue delays and deficiencies in the performance of duties".

26. Article 4.1.m defines the fact of "*committing an act with elements of a crime or offense that was detrimental to the prestige of justice*" as a disciplinary offence.

27. This Article is not clear and seems to introduce criminal elements in the disciplinary procedure. Disciplinary procedure should not be mixed up with criminal procedure, but should, on the contrary, be kept separate.

28. A disciplinary sanction might be imposed on a judge after an acquittal before a criminal court or where the criminal proceedings against him or her have been discontinued but such disciplinary actions and proceedings must not violate the presumption of innocence provided by Article 6.2 of the European Convention on Human Rights. "Disciplinary bodies should be capable of establishing independently the facts of the cases before them"⁷.

29. The words "elements of a crime" should be removed. In that case, the paragraph would read "*committing an act or offense, that was detrimental to the prestige of justice*" and would therefore very much look like Article 4.1.p which deals with "actions affecting the honour or professional integrity or reputation/prestige of justice". It is therefore recommended to delete Article 4.1.m or merge a revised version of Article 4.1.m with Article 4.1.p.

30. The "use of inappropriate expressions in the judgments or reasoning of judgments obviously contrary to legal rational, that may affect the prestige of justice or dignity of the position of a judge;" is an offence according to Article 4.1.o.

31. The grounds "use of inappropriate expressions" and "reasoning obviously contrary to legal rational" appear to be too broad and may run counter to the principles set forth in Recommendation CM/Rec(2010)12 paragraph 66, i.e., that "[t]he interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence".

32. Moreover, concepts such as "the prestige of justice" or the "dignity of the position of a judge" as criteria for evaluating the content of judicial judgements are too vague. These matters are not only lacking in precision but are also too subjective to form the basis for disciplinary complaints. Article 4.1.o should thus be revisited and either clarified or removed.

33. The offence of "(other) actions affecting the honour or professional integrity or reputation/prestige of justice" (Article 4.1.p) requires a more precise definition, to avoid varying and possibly conflicting interpretations of this provision.

⁶ Recommendation CM/Rec(2010)12, para. 66.

⁷ See judgment [Allen v. the United Kingdom \[GC\]](#), no. 25424/09 [GC], ECHR 2013, § 103, 104 and 124.

34. According to Article 4.2 “a disciplinary offence will be committed if a chairmen and deputy chairmen of courts will [fail] to fulfil the tasks set out in Article 16/1 of the Law no. 514-XIII of 6 July 1995 on judicial organization in case that this failure affected the court’s activity.”

35. Disciplinary proceedings should generally be initiated in case of professional misconduct that is gross and inexcusable, bringing the judiciary in disrepute. Applying disciplinary sanctions to an act that could have merely “affected the court’s activity” is excessive. Article 4.2 should be revised.

36. Moreover, Article 16/1 of the Law no. 514-XIII lists powers and responsibilities of the Chairperson and Deputy Chairperson of Courts. Therefore, defining as a disciplinary offense any failure to execute those powers, if it somehow affected the court’s activity, would be unreasonable. For instance, should the failure to suggest “to the Superior Council of Magistracy the appointment of one or more judges from the court as investigating judge” (Art 16/1.e) or failure to represent “the court of justice in the relations with public authorities and mass-media” (Art 16/1.n) be defined as a disciplinary offense?

37. Article 6.1 prescribes four different types of disciplinary sanctions, namely warnings, reprimands, reductions of salary, and removal from office.

38. Having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality when the competent body has to decide on a sanction. From this point of view, the authors of the draft may also wish to consider adding “temporary suspension from office” as another possible disciplinary sanction. Other possible sanctions could be withdrawal of cases from a judge, or moving a judge to other judicial tasks.⁸

39. It is to be welcomed that the draft Law itself provides that the sanction to be applied should be proportional to the offense committed (see Article 2.d) “*proportionality of the sanction with committed offence*” and Article 7.2): “*Disciplinary sanctions shall be applied proportionally to the seriousness of the disciplinary offense committed by the judge and his/her personal circumstances. Seriousness of the disciplinary offense is determined by the nature of the committed action and the consequences produced. The consequences produced should be assessed taking into account both the effects on the people involved in the judicial process in which the offense was committed and the consequences for the image and prestige of judiciary*”.

40. Nevertheless, the wording of Article 6 could be further improved.

41. As concerns reduction of salary, it should be recalled that paragraph 55⁹ of Recommendation CM/Rec(2010)12 opposes systems making judges' core remuneration dependent on performance. Therefore it is recommended to specify that reduction of salary may be applied only in cases of deliberate wrongdoing and not in cases having more to do with performance.

42. As concerns “removal from office”, Article 6.6 states “Removal from judge’s position is the de jure termination of a judge’ powers as a result of committing a disciplinary offence; the proposal to remove a judge from the office shall be submitted by the Superior Council of Magistracy, as provided by law”. “A disciplinary offense” is quite a vague wording for such a strong sanction and this paragraph would benefit from being further detailed. Removal

⁸ CM/Rec(1994) 12/ 13 October 1994, Principle VI.

⁹ CM/Rec(2010)12E / 17 November 2010 § 55 “Systems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges”.

should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties¹⁰.

43. Article 6.2 and Article 6.7 deal with sanctions that can be applied to chairpersons or deputy chairpersons of a court. "For judges who act as chairmen or deputy chairmen of court, in addition to the sanctions specified in paragraph 1, the sanction of removal from office of court chairman or deputy chairman can be also applied." "Removal from the office of court chairman or deputy chairman shall be applied for a disciplinary offenses set out in Art. 4.2 of this Law and constitutes the termination of the term of office of a court chairman or deputy chairman. The proposal to remove from the office of court chairman or deputy chairman should be submitted by the Superior Council of Magistracy, as provided by law."

Article 4.2 refers to the list of powers and duties of the court chairperson and deputy chairperson as defined by Article 16/1 of the draft law no. 514-XIII of 6 July 1995 on judicial organization. Failure to meet any of the requirements on this list should not automatically lead to a disciplinary sanction, let alone to removal from the office. It is therefore suggested to draft Article 6.7 in a more restrictive manner.

44. As mentioned above, it is to be welcomed that the principle of proportionality is reflected in draft Article 7.2.

45. Article 7.5 provides that "Throughout the validity period of the disciplinary sanction, the judge cannot be transferred, appointed as court chairman or deputy chairman, or promoted to another court." While the ban on promotion is understandable, the prohibition on transfers to other courts is less clear. Recommendation CM/Rec(2010)12 provides that "[a] judge should not receive a new appointment or be moved to another judicial office without consenting to it, *except in cases of disciplinary sanctions* or reform of the organisation of the judicial system" (emphasis added). Even if transfer is not added as an alternative disciplinary sanction, the prohibition on transfers during the validity period of a disciplinary sanction is perhaps not necessary.

B. Chapter II Disciplinary Board

46. The creation of a Disciplinary Board which is separate from the Superior Council of Magistracy is to be welcomed (Article 8.1).

47. It could be useful to harmonise this Article - which defines the Disciplinary Board as a body which examines disciplinary cases and applies disciplinary sanctions to judges - with Article 7 which states that disciplinary proceedings could be brought against *resigned* judges.

48. Article 9.1 defines the composition of the Disciplinary Board (5 judges and 4 persons from civil society). Such a composition is to be welcomed as it should help ensure transparency, as well as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism.¹¹

49. Article 9.3 provides that a competition will be organised to choose the civil society representatives on the Disciplinary Board and this is to be welcomed.

¹⁰ It is important to ensure that "judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties" the United Nations Basic Principles on the Independence of the Judiciary, paragraph 18.

¹¹ See the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, paragraph 9.

50. Members will be selected for a fixed term of six years (Article 9.4) and this is to be welcomed, as well.

51. According to Article 9.5 “the term of office of a member of the Disciplinary Board is extended de iure until the establishment of a college in a new composition.” It is recommended to extend the term of the member until the examination of the cases, in which the member is involved, is completed.

52. Article 10.1 provides that members of the Disciplinary Board from among judges shall be elected by the General Assembly of Judges, as follows: 2 judges from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. It is to be welcomed that judges are elected by their peers. However, it is not clear what the rationale is for composing the Disciplinary Board mainly of representatives of the senior judiciary. Why are the judges requested to elect of 4 out of 5 judges from the Supreme and appellate courts? Furthermore it should be expressly mentioned that election is done by secret ballot.

53. Article 10.3 provides that “Members of the Disciplinary Board from among civil society representatives, including four alternates, shall be appointed by the Minister of Justice, being selected through public competition. The competition is organized by a committee for selection of candidates which includes representatives appointed by the Superior Council of Magistracy. The numerical and nominal composition of the Commission, its mode of functioning and criteria for selection of candidates are set out in the Regulation on the selection of members of the Disciplinary Board, approved by the Ministry of Justice, after consultation with the Superior Council of Magistracy.”

54. As mentioned above, the organisation of a competition to choose the civil society representatives on the Disciplinary Board is to be welcomed. However, it would be desirable that the criteria for selection of candidates as well as the mechanism for the appointment and functioning of the Commission which is intended to select candidates be specified in the law itself rather than in a regulation. Furthermore, it should be made clear that the Minister's function in appointing these persons is a formal one and that the appointment is carried out in accordance with the recommendations of the Commission which selects candidates.

55. Article 11.1.e states that the term of office of a member of the Disciplinary Board may be terminated or cancelled upon reasoned proposal of the Disciplinary Board, that was adopted by a vote of 2/3 of its members, in case of failure, without good reason, to fulfil the duties of the member of the Disciplinary Board set out under this Law, for at least 3 months. The reference to a vote of 2/3 of the members needs to be clarified namely whether this refers to the total number of members or of those present and voting.

56. According to Article 11.2 the reasoned proposal of the Disciplinary Board to revoke the term of office of a member of the Disciplinary Board shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her with another member. The Board should itself be able to dismiss the member rather than simply remitting the matter to the body which elected the member to revoke the appointment. The credibility of the Disciplinary Board would be undermined if this body failed to do so. However, there needs to be a very clear provision to invoke the procedure where a member fails to attend to duties to ensure that proper notice is given.

57. Article 11.3 which states that “In case of termination or cancelation of the term of office of a member of the Disciplinary Board, its place will be filled by an alternate member” should add that the order of alternate members should be pre-determined, in order to make clear which alternative member is to fill in a vacant post.

58. The election of the Chairman of the Board by its members, by secret ballot, provided for in Article 12.1, is to be welcomed. However, it would be desirable for the Board also to elect a Vice-Chairman to act in the absence of the Chairman rather than the arrangement provided for in Article 12.3 that in the absence of the Chairman the oldest member present should take the chair.

59. With regard to the provision for the removal of the Chairman, as well as a reasoned proposal from three members (Article 12.4) there also needs to be a vote of the members of the Board, who should not have to wait for three months of inaction before taking action themselves. A 2/3 majority could also apply as in the case of the removal of ordinary members.

60. The random case distribution provided in Articles 12.2.b, 21.2 and 30 is to be welcomed.

61. Moreover, there is a need for providing a mechanism for deciding on the reduction of the workload of judicial members of the Disciplinary Board (Article 13.3)

62. Article 14.4 provides that "In case a Member of the Disciplinary Board declares abstention, he/she cannot be obliged by the decision of the Board to participate in the examination of the case for which he/she declared abstention." This provision is to be welcomed, but should refer not only to cases of abstention, but also to cases of recusal.

63. However, it seems to be contradicted by paragraph 5 which states that "The recusal or abstention shall not be admitted if as a result of the abstention or recusal it will be impossible to ensure the deliberative meeting of the Board". Such a provision should not be used. An alternative member should act as a replacement for the recused member.

C. Chapter III - Examination procedure of disciplinary cases

Section I - The notification concerning the actions which may constitute disciplinary actions

64. Article 19 enumerates the persons or bodies entitled to submit "notifications concerning actions which may constitute disciplinary offences". According to Article 19.1.a the notification regarding the committed actions which may constitute disciplinary offenses committed by judges can be submitted by "any interested person". This right should be limited either to persons who have been affected by the acts of the judge or to those who have some form of "*legal interest*" in the matter.

65. In this case (if Article 19.1.a) is redrafted with the above limitations), Article 19.2, which states that "Those stipulated under par. (1) can submit notifications concerning the actions which have become known to them in exercising their rights or functions or based on the information disseminated by media" could remain as it is.

66. However, it should be borne in mind that there is a potential risk of misuse of this provision, as notifications may then be submitted solely on the basis of rumours, or merely by malicious intentions placing improper pressure on the judge concerned.

67. In Article 19.4, the provision, which deals with the case of revocation of a notification, should specify the body competent on deciding the pursuit of the disciplinary proceedings, the procedure to be followed and should state that there must be a public interest in the pursuit of the disciplinary proceedings.

Section 2 - Verification of notifications

68. According to Article 21, notification on actions that may constitute disciplinary offences shall be filed with the secretariat of the Superior Council of Magistracy, which does not investigate. Investigations are the task of the inspector-judges to whom cases are distributed on a random basis. These provisions are to be welcomed.

69. Article 23 defines what a “Verification of notification” is and lists the obligation (Article 23.2) and the rights (Article 23.3) of the inspector judge who is charged to verify the notification. Article 23.2 could usefully add a reference to “any explanations provided by the judge” to the list of matters which are to be contained in the report.

70. Article 26 provides that when the verification is over, the inspector-judge shall prepare a report, which, together with the disciplinary case file, shall be presented (...) for examination to the admissibility panel of the Disciplinary Board (paragraph 1). The report shall contain the brief description of the facts alleged by the author of the notification, the facts identified by the inspector-judge, the evidence presented by the author of notification and the evidence collected during the verification by the inspector-judge (paragraph 2). Explanations provided by the judge should be added to this list.

71. Article 26 seems to limit the role of the inspector-judge to preparing and substantiating the disciplinary case file. Inspector-judges should have a strengthened role and in particular should be responsible for drafting the disciplinary charges. Such a provision should be usefully added to the draft Law which is silent on this aspect of the procedure. The inspector-judge would be the best placed for this since the admissibility panel should act only as a filter – deciding on the admissibility -but should not be involved in the drafting of charges.

Section 3 - Admissibility examination of notifications

72. According to Article 27, the file is then examined by an admissibility panel consisting of 3 members (2 judges, 1 representative of civil society) of the Disciplinary Board appointed by decision of the Disciplinary Board (Article 27.1) which will decide on the admissibility or rejection of the notification (Article 27.2).

73. Article 28 deals with the admissibility examination of the notification. A decision on admissibility is to be adopted where at least one member of the panel voted in favour of declaring the notification admissible. Rejection of the notification, on the other hand, requires a unanimous vote (Article 28.4). This seems to balance the system in favour of acceptance. While this is an unusual system, it is acceptable: it was explained to the delegation during the mission that this was required in order to ensure the efficiency of the admissibility panel and would enhance the involvement of all in the work of the admissibility panel.

74. It is to be welcomed that decisions rejecting the notification shall be mandatorily motivated (Article 28.6).

75. Article 28.7 should provide that decisions of admissibility panels should be notified not only to the person who submitted the notification, but also to the judge concerned.

Section 4 - Case examination by the Disciplinary Board

76. Article 30 provides that cases are assigned at random by the Board Chairman to members of the Board who will be appointed reporter judges; this distribution at random is to be welcomed. However, it might be useful in order to simplify the procedure to entrust the inspector-judge in charge of the case to present it before the Disciplinary Board and fulfil the duties of the reporter judge.

77. Article 31 which deals with participants in the disciplinary case (“the judge referred in disciplinary case, the representative of judicial inspection and the person who filed the notification”) provides in paragraph 3 that “Repeated absence and in the absence of pleas alleging of the judge or of the person who filed the notification or of their representatives at the meeting of the Disciplinary Board shall not prevent its consideration”. This provision is to be welcomed as it is a preventive tool against obstructive non-appearances before the Board.

78. Article 31.5 further states that “The Board member appointed reporter or any member of the Disciplinary Board may require hearing of witnesses or to other persons within meeting of examination of disciplinary case”. The judge whose case is considered by the Board should be provided with similar rights.

79. Article 34 provides that Disciplinary Board meetings are public unless the Board decides otherwise, either ex officio or based on the request for a closed session of the judge referred in the disciplinary case, in the interests of public order or national security, or where necessary to protect the privacy of the participants in the disciplinary proceedings. This provision is to be welcomed, since it specifies that public proceedings are the rule, and that closed sessions shall only take place in very specific circumstances, following a reasoned decision of the Board.¹²

80. Article 35 which deals with the deliberation and adoption of the decision of the Disciplinary Board should specify that the reporter judge should not take part in the vote on the decision.

81. Art 39.1 provides that decisions of the Disciplinary Board can be appealed to the Superior Council of Magistracy and that the Disciplinary Board decisions become final after 15 days from the receipt of the copy of the motivated decision. Every appeal against disciplinary proceedings should prevent the decision from becoming final until the appeal is determined (not only decisions to dismiss a judge from the office of Court chairman or from office as a judge as provided in Article 38.2).

82. The procedure before the Superior Council of Magistracy is very briefly mentioned in Article 39. It should be regulated in more detail to ensure to the parties to the case a fair and transparent judicial review.

83. Under the provisions of this draft Law alone, it appears that a member of the Superior Council of Magistrates may file a notification on a disciplinary offense (under Art. 19.1b), and later appeal against the decision of the Disciplinary Board (Art. 39.1) thereby bringing the case before the Superior Council of Magistrates, on which he or she may then also vote on appeal, along with the other Superior Council of Magistrates members (Art. 39.4). In other words, the current draft Law lacks a clear provision that would prevent the same member of the Superior Council of Magistrates from engaging in all these consecutive steps of the disciplinary proceedings, which might raise very valid concerns of potential bias and lack of impartiality. To avoid this, it is recommended that such a prohibition be added in the text of the law, unless it already features in another law (in which case that other law should helpfully be referenced).

84. Article 40 provides that decisions of the Superior Council of Magistracy can be appealed to the Supreme Court of Justice “by people who have filed complaints, judicial inspection or the judge concerned”. It is not clear why the judicial inspection should be

¹² See the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, paragraph 26.

allowed to appeal. The appeal should be allowed to the parties concerned – the complainant and the judge concerned.

85. Finally, a provision on the publication of final decisions should be added to the draft Law.

* * *