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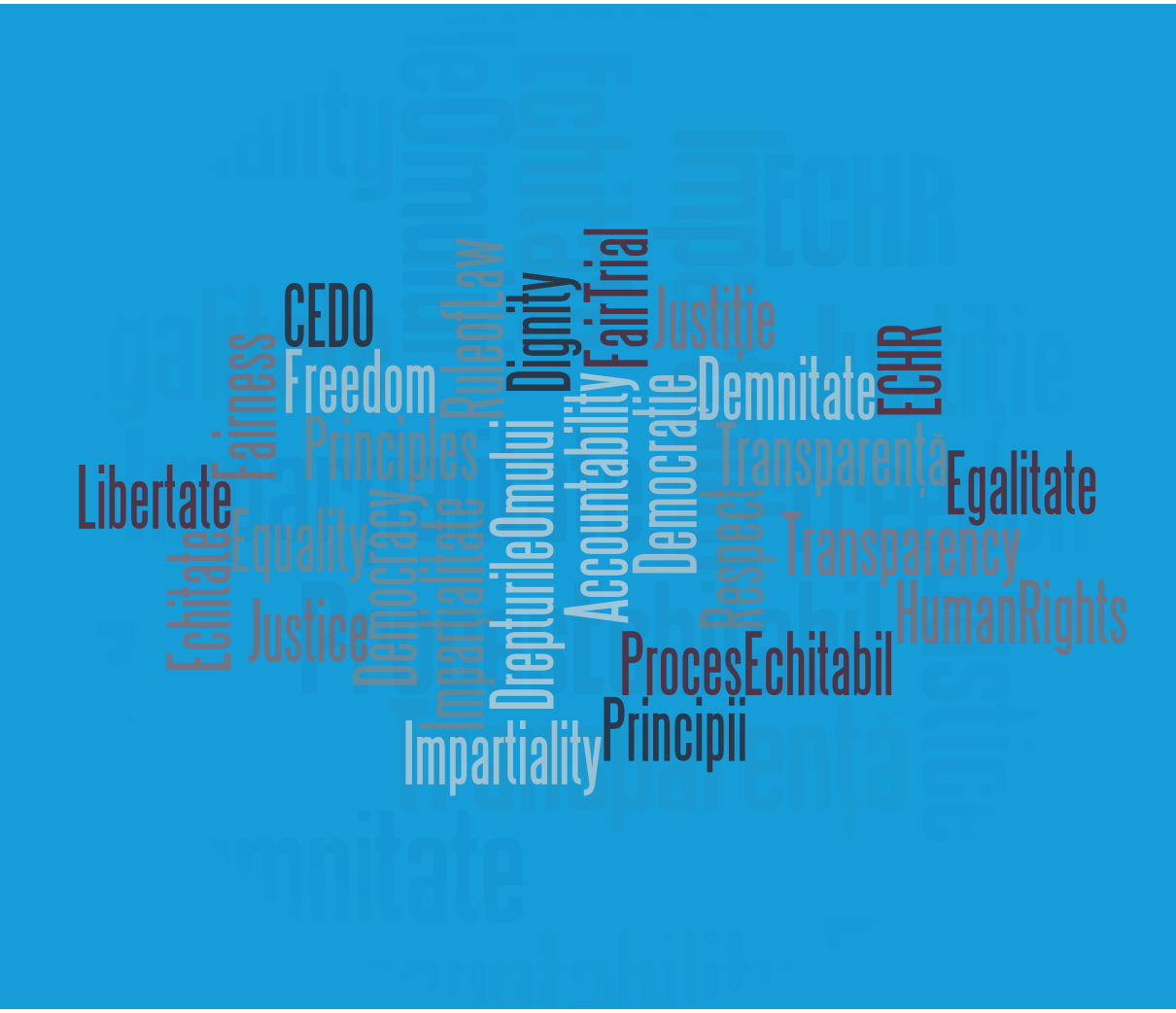

LRCM | LEGAL RESOURCES CENTRE FROM MOLDOVA

POLICY DOCUMENT

Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges

Pavel GRECU **Nadejda HRIPTIEVSCHI**

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Executive summary

The Legal Resources Centre from Moldova (LRCM) calls the decision-makers to amend the legislation on the disciplinary liability of judges by strengthening the status and by placing greater responsibility on the Judicial Inspection, as well as by reducing the number of stages and bodies involved in examining complaints related to judges' disciplinary offences.

The LRCM examined Law no. 178 on the disciplinary liability of judges and its application throughout the first year of implementation and drafted the public policy document entitled „Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges". The document highlights several shortcomings in the existing system of disciplinary liability of judges, caused both, by a flawed legal framework, and a problematic practice in terms of its implementation.

Law no. 178 created a quite complicated judges' disciplinary liability mechanism. Thus, a complaint related to the judges' disciplinary offences can be examined by five bodies – the Judicial Inspection, the Admissibility Panel of the Disciplinary Board, the Plenary of the Disciplinary Board, the Superior Council of Magistracy and the Supreme Court of Justice – each, at one stage or another, having the power to annul the decision of the body which has previously examined the disciplinary case. According to official data, 72% of all complaints filed in 2014 were dismissed by the Judicial Inspection as manifestly unfounded. Out of these, only 28% were appealed before the Admissibility Panels of the Disciplinary Board. The rejection decisions, issued by the Judicial Inspection, are not published and the appeals against them are rejected in proportion of 97%. A closer examination of the complaints dismissed as manifestly unfounded, reveals that the Judicial Inspection, although does not comply with the time limitation for rejecting the complaints as manifestly unfounded, seems to reject a large number of them with the purpose to reduce the workload of the Admissibility Panels and the Plenary of the Disciplinary Board. In such a system the risk of rejecting well-founded complaints is very high.

At the same time, the Judicial Inspection has no powers provided by law to frame into legal norms the actions indicated in the complaint and to present the disciplinary charges. As a result, the member rapporteur of the Disciplinary Board often has to act as an accuser against a judge, although he/she should be neutral, and the Judicial Inspection's representative has a formal presence at the meeting. Such a system affects both the rights of judges and the capacity of the system for self-accountability.

During the first year of Law no. 178 implementation, statistics showed that the rate of instituting disciplinary procedures in 2015 decreased by almost 27% compared to 2014,

although the circle of subjects who currently can file complaints has been extended. Thus, if in 2014 an action was brought for every 48 disciplinary complaints, then in 2015, an action was brought for every 61 complaint. Additionally, the rate of the judges' sanctioning decreased by four times. Given that according to recent polls, about 75% of the population do not have trust in the justice system, such a significant decrease of the sanctioning rate is hard to explain, but with a complicated and formalistic mechanism of judges' disciplinary sanctioning.

Upon adoption of Law no. 178 no recommendations of the Venice Commission and national or international experts were taken into account. Following one year since its implementation, the involvement of decision-makers in assessing and improving of the judges' disciplinary liability system seems totally timely and appropriate, so as to effectively ensure the judges' accountability and contribute to the increase of the litigants' credibility in judiciary. The document „Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges" includes a series of recommendations. These refer, in particular, to granting the Judicial Inspection a functional autonomy from the Superior Council of Magistracy, power to verify the disciplinary complaints, to reject those that do not contain indications of disciplinary offence and to present charges on the grounds of disciplinary cases directly in the Plenary of the Disciplinary Board. In order to ensure the accountability of the Judicial Inspection, the decisions to reject the complaint and the decisions to dismiss the disciplinary procedures by the Judicial Inspection have to be published on its website and are to be appealed before the Disciplinary Board Panels. For the purpose of ensuring a fair trial within a reasonable time, the decisions of the Disciplinary Board are to be directly appealed before the Supreme Court of Justice.

1. The purpose of the document and the relevant legal framework

1.1. The purpose of the present document

The present document is drafted with the aim to initiate discussions with decision-makers, in particular with the Ministry of Justice (MJ), Superior Council of Magistracy (SCM), Disciplinary Board (DB) and Judicial Inspection (JI), regarding the gaps in legislation related to disciplinary liability of judges and necessity of their amendment. The document refers in particular to amendments to Law no. 178 on the disciplinary liability of judges as of 26 July 2014, in force since 1 January 2015 (*Law no. 178*), Law no. 947 on the Superior Council of Magistracy as of 19 July 1996 (*Law no. 947)* and an eventual necessity for drafting of a new law on the Judicial Inspection.

Upon adoption of Law no. 178 no recommendations of the Venice Commission and national or international experts were taken into account. Below are some key issues identified both based on the recommendations of the Venice Commission and the analysis and monitoring of the DB activity by the LRCM as well as several alternative solutions proposed to each issue that was identified. We aimed to identify the parameters of a disciplinary liability mechanism that would ensure an accountable justice system in the Republic of Moldova. The draft of the document was discussed with the representatives of the SCM, DB, and JI during the workshop on 26-27 November 2015 and afterwards finalised by the LRCM. We hope that recommendations provided in this document will be useful for decision-makers in the process of improving the legal framework on disciplinary liability of judges.

1.2. The context of adoption of Law no. 178 on disciplinary liability of judges

The work on the draft law on disciplinary liability has started in September 2012,[1] once the working group by the MJ has been created. The composition of the working group included members of the SCM and the DB, judges, employees of the MJ and representatives of civil society. A study on the spectrum of disciplinary offences and disciplinary procedure regarding judges in the Republic of Moldova was made available to the working group,[2] and some of its conclusions were

[1] Order by the Minister of Justice no. 417 as of 13 September 2012.

[2] Study on the spectrum of disciplinary offences and disciplinary procedure regarding judges in the Republic of Moldova, drafted by Nadejda Hriptievschi, available upon request.

used while drafting of the new law. The first public debate on the draft law was held in December 2012. The MJ received opinions on the draft law from the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the international expert Cristi DANILET and representatives of the civil society from Moldova (Centre for Analysis and Prevention of Corruption and Raisa BOTEZATU, an honourably resigned Judge of the SCJ and an human rights expert).[3]

Following the debate and opinions received, the MJ amended the draft law and submitted it to the Government for approval. The draft law was approved by Government Decision no. 831 as of 28 October 2013 and submitted to the Parliament as a priority for consideration on 29 October 2013, registered under no. 423. Although several persons present at debates and experts who presented their written opinions mentioned that the draft law creates a complicated procedure and groundlessly reduces the role of the JI, by not granting it the right to institute disciplinary procedures and reject unfounded complaints, these issues were not taken into consideration while amending the draft law. The main argument of the MJ representatives and members of the working group, who supported the establishment of Admissibility Panels and empowered them with the right to declare complaints admissible, was the lack of independence of the JI.

On 14 November 2013 the Parliament adopted the draft law on disciplinary liability of judges in the first reading. On 23 December 2013 the draft Law had to be adopted in the second reading, but it was withdrawn from the agenda of the Parliament.[4] At the direction of the Parliament, the MJ submitted the draft law for expertise to the Council of Europe Office in the Republic of Moldova and the European Commission for Democracy through Law (Venice Commission). On 24 March 2014 the Joint Opinion of the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights (ODIHR/OSCE) on the draft law on disciplinary liability of judges of the Republic of Moldova no.755/2014[5] (***hereinafter the Opinion of the Venice Commission***) was issued.

On 1 April 2014, LRCM held a public debate on the draft law on disciplinary liability of judges, attended by representatives of the Parliament, MJ, SCM, DB, JI and civil society. Within this event the opinion of the LRCM on the draft law on disciplinary liability of judges[6] was presented and a number of issues that could be improved in the draft law were discussed, including those based on the Opinion of the Venice Commission. On 17 April 2014, the LRCM submitted to the Parliamentary Commission „Legal Commission for Appointments and Immunities" a number of proposals for amending the draft law on disciplinary liability of judges.[7] As far as we know, the project was discussed within the Legal Commission for Appointments and Immunities and proposals from other organizations were received as well. The amendments or conclusions of the debate in the Parliament have not yet ever been published, although the project was at the Parliament for more than 6 months.

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3 All these opinions are available upon request.

4 The project was withdrawn upon the request of Mrs. Raisa APOLSCHI, see the verbatim report as of 23 December 2013.

5 Joint Opinion of the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights (ODIHR/OSCE) on the draft law on disciplinary liability of judges of the Republic of Moldova as of 24 March 2014 is available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282014%29006-e.

6 LRCM, Opinion on draft law no. 423 on disciplinary liability of judges, 31 March 2014, available at: http://crjm.org/wp-content/uploads/2014/04/CRJM-opinie-lege-rasp-discipl-jud1.pdf.

7 LRCM, Proposals on amendment of draft law no. 423 on disciplinary liability of judges, 17 April 2014, available at: http://crjm.org/wp-content/uploads/2014/02/2014-04-17-PrLege-RaspDisc-Judecatori_CRJM.pdf.

On 21 July 2014 the Government adopted Decision no. 610 by which it assumed the responsibility for the draft law on disciplinary liability of judges (in the version submitted by the Government to the Parliament without taking into account at least the recommendations of the Venice Commission). The President promulgated the law on 11 August 2014. Law no. 178 as of 25 July 2014 was published in Official Gazette on 15 August 2014 and entered into force on 1 January 2015.

Thus, the adoption of Law no. 178 was quite difficult, which may reflect either the lack of political will to create an adequate legal framework to hold judges disciplinarily liable, or an interest in maintaining the status – quo, or conceptual misunderstandings between decision-makers on some aspects of the law. Undeniable is the fact that signals on some important shortcomings of the draft law on disciplinary liability have been given already at the stage of the project drafting, but were not taken into consideration.

1.3. Some findings of the Venice Commission on draft Law no. 178

By its opinion no. 755/2014 the Venice Commission expressed its view on the compatibility of the draft law with international standards. Because of the problematic process of adoption of the draft law, none of the proposals by the Venice Commission have been taken into account. Therefore, many of the Venice Commission recommendations are still valid for the discussion on the improvement of the mechanism for disciplinary liability of judges.

The Venice Commission appreciated as positive the fact that the draft law provided for the creation of the DB separately from the SCM (para. 46).[8] However, it expressed concern regarding the fact whether art. 8 of the draft law, that provides for the establishment of the DB as an independent body did not violate art. 123 of the Constitution of the Republic of Moldova, which states that „*Superior Council of Magistracy ensures ... the application of disciplinary sanctions against judges*". Finally, the Venice Commission has not ruled on this issue, noting that it is the duty of the Constitutional Court of the Republic of Moldova to express opinion on the compatibility of the national legislation with constitutional norms (this subject we will further discuss in Chapter 5 of the document).

The Venice Commission also pointed out that an exhaustive list of disciplinary offences stipulated by the draft law is a practice that meets international standards. It was mentioned that such a practice is better than giving a general definition that could be too vague (para. 15). Similarly, the Consultative Council of European Judges (CCJE) mentioned that, although in many states disciplinary procedures are instituted based on very general grounds, it was desirable that they were as specific as possible.[9]

The Venice Commission came with a series of recommendations to improve the draft law that are also valid for Law no. 178. In our view the most important of them are the following:

- The Commission proposed to introduce into the draft law the possibility to suspend the disciplinary procedure when an act constitutes a disciplinary offence and at the same

[8] The existence of a specialized body on the examination of cases regarding disciplinary liability of judges, being a separated one from the self-administration body of the system is also recommended by Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia - Judicial Administration, Selection and Accountability, 23-25 June 2010, in particular paragraphs 2 and 5 as well as by Recommendation CM/ Rec (2010) 12 p. 69.

[9] CCJE, Opinion no. 3 (2002), para. 63-65.

time a crime or misdemeanour. There is also no provision in the draft law that would clarify what disciplinary action shall be taken after the criminal or misdemeanour procedure is closed (para. 14).

- Regarding the sanction of salary reduction, the Venice Commission recommended that the draft law should specify that this sanction can only be applied in cases of deliberate violation and not in cases related to the performance judges (para. 41). This recommendation also results from Recommendation CM/Rec (2010)12 stating that the core remuneration of a judge must not depend on his/her performance.[10]

- The Commission has also referred to the composition of the DB. Although the Comission appreciated the fact the members of the SCM who are judges are elected by their colleagues namely by the General Assembly of Judges, it did not understand the rationale of electing the majority of judges from among the higher courts, i.e. two judges from courts of appeal, two from the Supreme Court of Justice (SCJ) and only one from among courts (para. 52).

- Referring to the dismissal of the DB members, the Venice Commission first of all noted that it shall be determined whether the 2/3 of the DB votes for dismissal of a member refers to 2/3 of the total number of members or to the votes of members that are present (para. 55). Secondly, the Venice Commission considers that the DB should be able to revoke a member of the DB independently, without the intervention of the body that has elected him/her. Otherwise, the credibility of the DB could be jeopardized. However, this requires a clear procedure for revocation of the member that does not fulfil the obligations of a member, with his/her prior notice thereof (para. 56). Thirdly, the Venice Commission recommended that the list of substitute members that can replace the revoked member should be pre-determined in order to make it clear who should fill in a vacant position (para. 57).

- The Commission welcomed the election of the Chairperson of the DB by a secret vote of its members and recommended also the election of the deputy Chairperson with the view to replace the Chairperson in case of his/her absence or vacancy of the position (para. 58). The draft law provided that the Chairperson had to be replaced by the oldest member of the DB, a provision that was also maintained in the Law no. 178.

- According to art. 14 para. (5) of the draft law, the recusal or abstention shall not be admitted if as a result of it, it is impossible to ensure the deliberative meeting of the Board. The Venice Commission has criticized this formulation and proposed that a substitute member should replace the recused or abstaining members (para. 63).

- One of the most important findings of the Venice Commission refers to the strengthening of the JI role in disciplinary procedures. The Commission found that

[10] Committee of Ministers Recommendation CM/Rec (2010)12, para. 55.

according to the draft law the role of inspector-judges consists only in making verifications and preparing of a disciplinary case file. According to the Commission, the JI should be responsible for drafting the disciplinary charges (para. 71).

The Commission also stated that the procedure would be simplified if the Inspection presented the case before the DB (para. 76). Thus, the inspector-judge shall fulfil the duties of the member rapporteur. Also, according to the Commission, the maintenance of the member rapporteur institution under the conditions stipulated by the draft law should be accompanied by an indication that the member rapporteur should not take part in voting on the judgement (para. 80).

- Finally, the Commission noted that according to the draft law, the complaints concerning disciplinary offences may be also filed by a member of the SCM. However, the draft law does not prevent the same member from expressing his/her opinion on the same case, if it has reached the SCM following an appeal filed against the decision of the DB. The absence of prohibition might raise concerns of potential bias of this member at the examination of the case by the SCM (para. 83).

Thus, the Venice Commission, although it did not state its opinion on some important issues, such as establishment of Admissibility Panels or the required number of appeals in disciplinary procedures, had identified a number of provisions in the draft law that could be improved. The present document includes key recommendations of the Venice Commission that have not been taken into consideration, but are still valid from our point of view. We consider that the recommendations listed above are important for consideration by decision-makers in case of potential revision of Law no. 178. Some of these are described in detail below.

2. The role of the Judicial Inspection in disciplinary procedures

The following chapter refers only to the role of the JI in disciplinary procedures and is designed to draw the attention of decision-makers to the necessity of amendments to the current legal framework on the JI. The implementation of proposals on amending role of the JI in disciplinary procedures involves modification of the status and increase of the number of inspector-judges. The document does not include the analysis of all functions of the JI, therefore, does not provide solutions regarding the status and number of inspector-judges. These issues should be addressed by a potential working group, if the creation of such a working group will be supported by the decision-makers in order to draft a new law or regulations, and to amend the Law on the SCM in the part that refers to the JI.

2.1. The difference between a petition and a complaint

Under art. 19 of Law no. 178, complaints can be filed by any interested person, the SCM members, the Board for Evaluation of Performance of Judges[11] and the JI, ex-officio, following verifications carried out in accordance with its competencies.[12] The circle of people who may lodge a complaint is quite wide, which ensures free access to the system of accountability of judges, being an important prerequisite for an effective system.

Law no. 178 distinguishes between petitions submitted to the SCM and complaints about disciplinary offences. Practically this should mean that the JI examines only the complaints on disciplinary offences and petitions addressed to the SCM are examined by the Secretariat of the SCM. In case the petition concerns, in essence, the issue related to the disciplinary liability of a judge, it should be submitted for examination to the JI according to the procedure stipulated by Law no. 178. The respective procedure is not expressly stipulated by Law no. 178, but is apparent in the spirit of Law no. 178 and Law on the SCM that regulates the role of the SCM and the JI. The respective provisions shall be included in the Regulation of the SCM activity to ensure uniform application of the legal provisions.

However, the JI report for 2015 shows that the JI examines both petitions and complaints. Thus, for the period from 1 January to 31 December 2015, 580 petitions and 1,889 complaints

[11] Art. 23 para. (4) of Law no. 154 on selection, performance evaluation and career of judges.

[12] Art. 7[2] of the Law on SCM.

have been distributed to the JI for examination. As a result of examination of complaints the JI issued 1,367 dismissal decisions, 231 restitution decisions and 5 decisions by which the procedure was terminated (at the request of the petitioner).[13]

2.2. Verification of complaints by the Judicial Inspection

The stage that refers to the verification of the complaint by the JI is not sufficiently regulated by law since the outcome of the verification is not clear and the role of the JI is unjustifiably limited. And namely, while verifying the complaint, the JI has only three options:

a) restitution of the complaint by the JI within three days in case the conditions of form and content provided for by art. 20 of Law no. 178 are not met, explaining to the person his/her right to lodge a new complaint;
b) dismissal of the complaint, within 10 days from the date it was distributed, through a reasoned decision, if the complaint is manifestly unfounded under art. 20 para. (2) of Law no. 178;
c) verifying the complaint, if it has not been returned or dismissed, within 30 working days from the date of its receipt by the JI (with the possibility of term extension up to 15 calendar days by the chief inspector-judge) and presenting the report to the Admissibility Panel of the DB alongside with the case file for examination (art. 26 of Law no. 178).

Each of the three options available to the JI are analysed below and we highlighted the existing loopholes where they exist from our point of view.

2.2.1. Restitution of complaints

Under art. 20 para. (1) of Law no. 178, the complaint regarding the actions of a judge that may constitute disciplinary offences must contain:

a) identity data and contact information of the author of the complaint;
b) name of the judge referred to in the complaint;
c) date and place where the actions described in the complaint were committed;
d) brief description of actions that would constitute disciplinary offences;
e) indication, where applicable, of evidence confirming the alleged actions or names of persons, who may confirm information reported by the author of the complaint, if they exist at the moment of lodging the complaint;
f) date and signature of the author of the complaint.

If the complaint does not meet the requirements on the form and content stipulated by art. 20, the inspector-judge, within 3 working days from the day the complaint was distributed to him/her for preliminary verification, returns it to the author indicating the established shortcomings through a decision without appeal and explains the right to lodge a new complaint (art. 22 para. (1) of Law no. 178). The inspector-judge, who returned the complaint, sends a copy of the letter on restitution of the complaint to the chief inspector-judge for information and statistics record keeping.

[13] SCM, Annual Activity Report of the Judicial Inspection for 2015, available at: http://SCM.md/files/Inspectia_Judecatoreasca/Raport_inspectia2015.pdf.

The system of restitution of complaints was introduced to allow the JI to filter those complaints that do not meet the basic requirements for a complaint. The law does not require their publication nor does it stipulate for the appeal procedure because the restitution of a complaint allows the person who filed it, to lodge it again, upon correcting shortcomings identified by the JI. We consider that the system of restitution of complaints is necessary and appropriate, constituting a method of filtering those complaints that do not meet the requirements of form and content. The experience gained in the first year of implementation of Law no. 178 shows that out of 1,889 complaints registered in 2015, the JI issued only 231 decisions of restitution, which amounts to 12%. These data suggest that generally the filed complaints meet the requirements of form and content.

2.2.2. Dismissal of complaints as manifestly unfounded

The inspector-judge can dismiss the complaint within 10 days from the date it was distributed, through a reasoned decision, if the complaint is manifestly unfounded. The decision is signed by the inspector-judge to whom the complaint was distributed and countersigned by the chief inspector-judge. The JI decision to dismiss the complaint may be challenged by the author of the complaint within 15 days from the date of receiving the decision before the Admissibility Panel of the DB (art. 22 para. (2) of Law no. 178). According to data on the implementation of Law no. 178 in 2015, the use of the dismissal decisions by the JI is quite high. Thus, out of 1,889 complaints the JI issued 1,367 decisions by which complaints were dismissed as manifestly unfounded, which constitutes 72%. It is important to note that these 72% do not usually reach the Plenary of the DB, because the Admissibility Panel is the last remedy, and they almost in all cases have upheld the decisions on dismissal by the JI. For example, in 2015, out of the 1,367 decisions on dismissal issued by the JI, 385 were challenged before the Admissibility Panels, which constitutes 28%. Out of those 385 appeals the Admissibility Panels examined 179 complaints, the other 206 remaining a backlog for 2016. Out of 179 examined appeals 5 appeals were admitted and 174 appeals were dismissed, which constitutes 97%.[14] Apart from those 72% of dismissed complaints, the JI has the possibility to propose to the Admissibility Panels the dismissal of a complaint by means of a report drawn up following the verifications (see the analysis of the reports below). These data clearly show that main part of the complaints related to the disciplinary liability of judges is examined exclusively by the Judicial Inspection. Therefore, its approach to the disciplinary complaints directly affects the efficiency of the system of disciplinary liability of judges.

Under art. 20 para. (2) of Law no. 178 the complaint is considered manifestly unfounded, if it contains actions that do not refer to offences stipulated by art. 4 of Law no. 178, if the limitation period stipulated by art. 5 of Law no. 178 has expired or if it is declared repeatedly, providing no new evidence. It seems that this provision is not sufficiently applied by the JI and Admissibility Panels. Or they examine and dismiss as manifestly unfounded the complaints that, in fact, refer to disciplinary offences and which the JI verifies.

The possibility of the JI to reject the complaint as manifestly unfounded was introduced only after public consultations regarding the draft law as a result of a proposal submitted by experts from civil society. The initial draft did not provide for such a competence, which was noted by

[14] SCM, Annual Activity Report of the Judicial Inspection for 2015.

experts as quite a burden for the Admissibility Panel and the DB. Accordingly, it was proposed to provide a possibility for the JI to dismiss those complaints that cannot be classified as disciplinary offences, for instance such complaints which refer to the legality of decisions.[15] Respectively, this competence means that the JI shall dismiss only those complaints that do not fall within the disciplinary liability and shall not dismiss complaints that the JI verifies and then states that the invoked circumstances have not been proven. In order to find the circumstances of the offence, the JI must carry out a complete verification of the complaint within the framework of which it shall request explanations from the judge and other required evidence. If the actions alleged in the complaint require any additional verification, apart from a strictly legal analysis of the complaint as involving disciplinary liability, this already means that the complaint is not manifestly unfounded. For this reason the legislator has provided only 10 days to dismiss the complaint as manifestly unfounded, compared with 30-45 days for verification.

In conclusion, it can be stated that the strict application by the JI of the possibility to dismiss the complaint as manifestly unfounded is important, because only the JI and the panel composed of 3 members of the DB express their opinion on the matter. In practice it seems that the JI often qualifies as manifestly unfounded the complaints for which it carried out verifications, including over the period of 10 days, although in such cases it should draw up the reports suggesting to the Admissibility Panel the dismissal of the complaint. It is possible that one of the causes of such an approach is a desire to limit the workload of both the JI and Admissibility Panels as well as of the DB Plenary, limiting the way that can be passed by the complaint up to the Admissibility Panel. However, if the JI abuses the privilege of dismissal of manifestly unfounded complaints granted by law, fitting into this category also the actions that require verification, the confidence in the system of disciplinary liability and professionalism and fairness of the JI will suffer. If the JI will have the competence to dismiss the complaints that do not contain the elements of a disciplinary offence after verifying them (as proposed in point 2.2.3. below), the negative practice of the JI to qualify as manifestly unfounded such a big number of complaints (72% of complaints) will disappear.

2.2.3. Complaints verifications and report drafting. Absence of express provisions on the legal framing of actions and presentation of the accusation to the judge

If the complaint is neither returned nor dismissed, the JI can proceed with the verification. The verification of the complaint is carried out within 30 working days from the date of its receipt by the JI, with the possibility of term extension up to 15 calendar days by the chief inspector-judge. The verification of the complaint by the JI ends up with drafting of a report which, together with the disciplinary case file, is presented to the Admissibility Panel of the DB for examination (art. 26 of Law no. 178). The report drafted by the inspector-judge shall contain the brief description of the actions alleged by the author of the complaint, the facts identified by the inspector-judge, the evidence presented by the author of the complaint and the evidence collected during the verification by the inspector-judge (art. 26 para. (2) of Law no. 178).

These provisions are insufficient and inappropriate because they do not stipulate a clear outcome of the JI activity upon verification of complaints. **The law does not stipulate any**

[15] For details see the draft law on disciplinary liability of judges in the version of 13 September 2013 and the table with objections and suggestions received by the authors of the law.

competence of the JI to frame into legal norms the actions stated in the complaint and found during verification. This gap leads to problematic practices, when in some cases the complaint is dismissed solely on the ground of failure to indicate a particular alleged offence in the complaint.[16] With such an approach, it appears that the average citizen who does not have legal training, being a part of a legal proceeding where he/she faced some actions that might entail disciplinary liability of a judge, shall define the invoked action from the legal standpoint. Based on the reported data, the JI does not make any difference between reports where it proposes to dismiss the complaint and those where it proposes to admit it. Thus, in 2015, the JI drafted and submitted 257 reports to the Admissibility Panels. The Admissibility Panels examined 156 reports, out of which 31 were accepted and 125 were dismissed[17], thus representing a rate of admissibility of 20% of complaints from the total number of reports submitted by the JI.

Another important aspect not expressly covered by the law is related to bringing the disciplinary accusation to the judge. The absence of clear accusations from the JI can even affect the right to defence of the judge. Under the current regulations the JI shall present the complaint to the judge and request his/her explanations. Thus, the judge shall submit explanations regarding the filed complaint, even if it does not clearly state the alleged disciplinary offences. Upon the judge's explanations, he/she usually is not called for hearings anymore and even is not informed about the decision by the Admissibility Panel. Therefore, if the complaint is declared admissible, the judge, if he/she wishes, can appears before the Plenary of the DB to make statements. The judge may present new explanations and evidence at the Plenary of the DB. However, the judge does not receive the decision of the Admissibility Panel that is not required to be reasoned, but contains references to the offence or offences imputed to the judge and is submitted only to the DB for examination (art. 28 para. (5) of Law no. 178). The judge served with the summons may request to become familiar with the case file. Moreover, he/she may request time to become familiar with the case and also present new evidence during the investigation of the case by the Plenary of the DB (art. 32 para. (3), art. 34 para. (4) of Law no. 178). However, the exercise of these rights by the judge requires additional time. It would be more appropriate and fair towards the judge, if he/she knew either at the stage of verification of the complaint or after the decision by the Admissibility Panel is taken about the exact offences imputed to him/her so as to prepare properly for the hearing of the case by the Plenary of the DB. ***In other words, the law should clearly stipulate when the disciplinary procedure shall be initiated and the moment when the disciplinary accusation is presented to the judge***.

The current legal provisions do not clearly stipulate the competence of the JI to propose the dismissal of the complaint to the Admissibility Panel if the actions invoked by the complaint have not been proven. So far the practice between the inspector-judges appears to differ as regards the way they formulate the conclusion in the report and the content the reports. We consider that the JI can formulate, even if not expressly required by law, two types of conclusions in the reports presented to the Admissibility Panel: a proposal to dismiss the complaint as the reasonable suspicion that the judge had committed the alleged offence have not been found or a proposal to admit the complaint, if there is the slightest suspicion that the judge could have committed the alleged offence. However, these competences should be expressly provided by law in order to prevent different interpretations and practices.

[16] For example, the decision by the Admissibility Panel no. 17/4 as of 30 March 2015; decision no. 35/8 as of April 17, 2015.

[17] SCM, Annual Activity Report of the Judicial Inspection for 2015.

In conclusion, we consider that the current provisions regarding the complaint verification and the report does not stimulate and does not make the JI more responsible to carry out qualitative verification, as, formally, the JI bears no liability for the outcome of the procedure. The role of the JI is limited to presenting of the report to the Admissibility Panels. The Admissibility Panel has to declare the complaint admissible or inadmissible. Thus, if the JI has not exercised the powers to verify diligently the complaint, the Admissibility Panel can request the JI to carry out new additional verifications (art. 28 para. (2) of Law no. 178). However, if the JI does not comply with requests and does not present the completed file, the consequences of such acts are not regulated. As far as the JI reports on complaints and requests of the Admissibility panels are not published, the activity of the JI lacks transparency and, hence, an accountability mechanism of external empowerment. Accordingly, the JI should be vested with the competence to dismiss after verification the complaints that do not contain elements of a disciplinary offence. The JI decision shall be reasoned, published and be subject of appeal before Admissibility panels. Such a mechanism would entail the involvement of Admissibility panels just to check the legality of the JI actions and the JI will be responsible to motivate the dismissed complaints. Publication of the JI decisions on dismissal shall constitute an additional accountability mechanism for its activity. On the other hand, Admissibility panels being not loaded with reviewing of all JI reports will be able to exercise effective control of the legality of decisions on dismissal adopted by the JI.

2.3. The role of Inspection in the case examination at the Plenary of the Disciplinary Board - absence of express provisions regarding the presentation of the accusation

The presence of a JI representative at the examination of the disciplinary case by the DB is mandatory (art. 31 para. (4) of Law no. 178). Furthermore, Law no. 178 provides that the JI is represented by the inspector-judge who has verified the complaint or another inspector-judge appointed by the chief inspector-judge (art. 31 para. (4)). However, the JI role in examining the case at the Plenary of the DB is not clear, because according to the law the JI has no specific competence at the stage of the hearing before the DB. On the contrary, Law no. 178 provides for the member rapporteur of the DB the competences to prepare the case file and to present the report on the disciplinary case (art. 32 and art. 34 para. (3) of Law no. 178). Thus, the member rapporteur ensures the preparation of the case file for examination, summons the parties and other participants in the disciplinary proceedings and drafts the judgement of the DB (art. 31 para. (1)). The responsibilities to prepare case for examination and to draft the DB judgement are competencies that belong to a member of the DB and do not raise any questions. However, in art. 34 para. 3) of the Law it is stipulated that the disciplinary case examination begins with the presentation of the report by the DB member appointed as a rapporteur on the disciplinary case. This competence is not clear and may raise doubts about the impartiality of the member. In its opinion, the Venice Commission has drawn attention to this issue and to the fact that the member rapporteur should not take part in the deliberation on the case. We consider that it is not appropriate for member rapporteur to present the report drafted by the IJ during the examination of the disciplinary case. Moreover, in our

opinion, the JI should present charges on the case, so as to ensure the adversarial principle in the disciplinary procedures and to eliminate the risk of partiality of the member rapporteur. The role of the member rapporteur and the JI in the case examination is detailed in section 4.1. hereof.

In the first half of 2015 the JI did not even participate in the examination of cases by the Plenary of the DB. In the second half of the year, representatives of the JI began to be attend the meetings of the DB, and expressed the position of the JI in all the examined cases. However, they do not present the report of the JI, do not present the charges to the judge and do not put questions to the parties; in other words, they have a passive procedural conduct. Also, usually one inspector-judge participates in all the cases examined by the Plenary of the DB in that particular day, regardless of the fact who was the inspector-judge who carried up the verifications in a particular case. As a result, the presence of the inspector-judge at the case examination at the Plenary of the DB often seems to be a formality.

In conclusion, Law no. 178 does not expressly stipulate the competence of the JI to frame in legal norms the actions complained of by the person in his/her complaint, the competence to bring a disciplinary accusation against the judge and does not provide right of the JI to institute disciplinary procedures. These competences are not expressly assigned even to the Admissibility Panels. Furthermore, the attribution of these competences to Admissibility Panels seems inappropriate, given that they do not collect evidence and do not work on a permanent basis. In this context, we consider that Law no. 178 shall be amended to vest the Judicial Inspection with competences to bring a disciplinary accusation against the judge and the right to institute disciplinary procedure. Also the JI shall directly present at DB hearings the reports on cases which have elements of a disciplinary offence, without requiring the admissibility stage.

3. Admissibility Panels: role and necessity

Under the legislation in force prior to Law no. 178, a disciplinary case could be examined by four bodies: JI, DB, SCM and SCJ. Following the adoption of Law no. 178 a new entity appeared in the disciplinary procedure for judges: the admissibility panel consisting of two members-judges and a member from civil society of the DB (art. 27 para. (2)). The panels have two basic functions: examination of the admissibility of complaints on disciplinary offences of judges and examination of appeals against the decisions on dismissal of complaints issued by the JI. According to the explanatory note to the draft law, the admissibility stage was introduced to verify and avoid potential abuses against judges.[18]

Even at the stage of debating the draft law, which later became Law no. 178, the LRCM expressed some concerns about the introduction of the admissibility procedure for the disciplinary cases against judges.[19] The LRCM mentioned, inter alia, that the disciplinary procedure will be complicated, that the admissibility procedure will not ensure effective protection against abuse, that the JI will exercise crucial influence on the admissibility and that there is a risk of certain incompatibility of members of the Admissibility Panel while examining the merits of the case.

Previously, the mechanism for instituting disciplinary procedures was considered inefficient and unequal because this competence was given only to members of the SCM, who based on petitions received from litigants and verifications carried out by the JI, could decide whether to institute the disciplinary procedures or not. The refusal to institute a disciplinary procedure was motivated briefly, if at all. A more efficient example is considered the Romanian system, which vested the JI with the competence to initiate the disciplinary procedure.[20] However, under Law no. 178 the competence of instituting disciplinary procedure has been granted to Admissibility Panels. The first indicator of the Admissibility Panels efficiency would be the rate of instituted disciplinary procedures. In 2015 **the rate of instituting disciplinary procedures fell by almost 27% compared with 2014**. In 2014 out of the approximately 2,500 petitions related to the discipline of judges the SCM members have instituted 52 disciplinary procedures.[21] While in 2015, when 1,889 complaints were filed, the Admissibility

[18] Explanatory note to the draft law on disciplinary liability of judges, available at: http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/2411/language/ro-RO/Default.aspx.

[19] LRCM, Opinion on the Draft Law on the Disciplinary Liability of Judges, 31 March 2014, Chisinau, pages 16-18.

[20] Romania, Law no. 317 as of 1 July 2004, on the Superior Council of Magistracy, art. 45 para. (6) letter b).

[21] Explanatory note on the activity of the Disciplinary Board in 2014.

Panels have admitted only 31 report (practically instituted disciplinary procedures).[22] Thus, **if in 2014 one case was instituted based on every 48 disciplinary complaints, than in 2015 one case was instituted based on every 61 complaint**. Given that the circle of subjects who can file complaints has been increased, the lower rate of instituting disciplinary procedures can be explained either by the complicated mechanism of complaints examination, by the overly formalistic approach of the JI when declaring the complaints as manifestly unfounded, (see details below), or by the decreased quality of the filed complaints.

A significant decrease was also registered with the rate of sanctions applied per meeting of the DB. Within 10 meetings in 2014, the DB applied 16 sanctions,[23] while in 2015, within 11 meetings[24] at which the cases were examined following new procedure, only 5 warning were applied.[25] Thus, if in 2014 the DB applied 1.6 sanctions per meeting, then in 2015, following new procedure there were applied 0.4 sanctions per meeting. **It seems that the rate of sanctioning for judges decreased four times**. Thus, we can observe that before the implementation of a new mechanism, the degree of accountability of judges was much higher, at least in terms of quantity. ***In conditions where, according to the latest surveys, around 75% of the population do not trust the justice system,[26] such a great decrease of the rate of sanctioning is hard to explain otherwise than by a too complicated and formalistic mechanism of disciplinary liability of judges.***

The statistical data above shows that the rate of instituting disciplinary procedures decreased, and, respectively, that of sanctioning as well. However, **one of the most important issues related to the admissibility stage in disciplinary cases of judges is whether it fulfils its function of the JI overseer for which it was initially established**. It was mentioned above that in some cases the JI applied a broad interpretation of the concept of "manifestly unfounded" complaints, dismissing complaints just because the author of the complaint did not indicate the provision of the law that qualifies the disciplinary offence of the judge. We have to analyse what was the reaction of the Admissibility Panels to this practice.

The first issue refers to the broad interpretation of the concept of "manifestly unfounded" complaints. The Admissibility panels have the competence to verify the correct application by the JI of grounds for dismissal of complaints. The JI can dismiss a complaint only if it is manifestly unfounded (art. 22 para. (2) of Law no. 178). The law explicitly defines three situations when a complaint can be considered manifestly unfounded.[27] The absolute majority of dismissal decisions issued by the Inspection refer to the failure of the author to indicate the offence stipulated by art. 4 of Law no. 178. However, there were found cases where the JI dismissed the complaints as manifestly unfounded, for example, on the grounds that

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[22] SCM, Annual Activity Report of the Judicial Inspection for 2015, p. 2 and 6. For the sake of clarity: filed 1,889 complaints, out of which 257 reports were drawn up by the JI. Out of those 257 reports, the Admissibility Panels have examined 156 reports, of which 31 report was admitted.

[23] Out of which: 12 notices of warning, 3 reprimands and a motion to dismiss from office.

[24] This concerns the meetings held in 2015 when the disciplinary cases were examined on the merits, following new procedure: on 27 February, 27 March, 24 April, 8 May, 29 May, 19 June, 10 July, 2 October, 6 November, 4 December and 14 December.

[25] The situation in 2014 is similar to that of the previous years: in 2013 there were applied 18 sanctions, in 2012 – 19 sanctions, in 2011 – 16 sanctions, in 2010 –16 sanctions.

[26] IRI survey, 21 October, 2015, available at: http://www.iri.org/sites/default/files/wysiwyg/2015-11-09_survey_of_moldovan_public_opinion_september_29-october_21_2015.pdf.

[27] Art. 20 para. (2) of Law no. 178 provides that the complaint is considered manifestly unfounded if (1) there are facts which do not refer to offences stipulated under art. 4, (2) the limitation period stipulated under art. 5 has expired or (3) it is declared repeatedly presenting no new evidence.

there is insufficient evidence that would support the allegations made to the judge,[28] on the grounds that there were objective circumstances which justified the action of the judge,[29] on the grounds that the intention of the judge to commit disciplinary offence was not proved[30]. These and many other cases show that the JI either misinterprets the syntagm "manifestly unfounded complaint" or having no competence to institute a disciplinary procedure or not, uses the respective ground in this sense. Alongside with it, out of 179 appeals filed against the decisions of the JI and examined by the Admissibility Panels in 2015, **5 appeals were accepted and 174 were dismissed**. At the same time, the DB has also dismissed all 20 appeals filed against the decisions of the Admissibility Panels examined in 2015.[31] Statistical data show solidarity between disciplinary bodies and a practice of "non-interference" in the decisions of the lower-level body.

The second issue concerns the holder of the competence to qualify disciplinary offences. Basically, Law no. 178 does not expressly stipulate who has the duty to qualify disciplinary offences. It would be logical, if the JI was the body that formulates and presents the accusation before disciplinary bodies, similarly to criminal proceedings. While formulating the accusation the JI inevitably should be able to qualify actions stated in a complaint as one or the other offence stipulated by the law. This function arises both from practice of similar structures vested with investigation functions (e.g. prosecutor's office) and simply because it would impose an undue burden on the shoulders of litigants, who are not always professional lawyers, but complained about misconduct of a judge, to be aware of the way how to qualify disciplinary offences, resulting often from the practice of disciplinary bodies. In case the complaint is dismissed on grounds of failure to indicate the disciplinary offence stipulated by the law or incorrect indication of a disciplinary offence, it might create a situation that a judge, who has committed a disciplinary offence, was not sanctioned because the author of the complaint did not know how to qualify the actions of the former better. To avoid such situations, the JI or Admissibility Panel should assume the competence of qualifying the actions under the legal provisions, when the authors have failed to do so. Even if we admit, that the JI, under the current law, does not have a clear role in bringing the accusation, then qualification of disciplinary offences should be done by the Admissibility Panel, which, according to the proceedings, institutes disciplinary procedures (similar to the way the SCM previously qualified disciplinary offences in the decision on instituting of disciplinary procedures). In reality, both the JI and Admissibility Panels decline the competence to qualify disciplinary offences and claim that the author is obliged to indicate correctly the disciplinary offences under art. 4 of Law no. 178.[32] The Admissibility Panels, owing to their control function, shall either assume this competence or order to the JI to qualify disciplinary offences, thereby determining a constructive practice of the JI. However, the practice of the Admissibility Panels confirms the practice of the JI. In such a context, Law no. 178 should expressly stipulate the holder of the competence to qualify disciplinary offences imputed to the judge.

[28] AP no. 2, Decision no. 108/16 as of 18 September 2015.

[29] AP no. 1, Decision no. 38/5 as of 6 April 2015.

[30] AP no. 1, Decision no. 31/5 as of 6 April 2015.

[31] SCM, Activity report of the Disciplinary Board subordinate to the Superior Council of Magistracy, 2015

[32] For instance: AP, Dec. no. 49/10 as of 30 April 2015, Dec. no. 17/4 as of 30 March 2015, Dec. no. 35/8 as of 17 April 2015, Dec. no. 41/5 as of 6 April 2015.

To conclude, while the Admissibility Panels support the practice of the JI, that are sometimes deficient, and the DB supports the practice of the Admissibility Panels, and the rate of instituting disciplinary procedures and, respectively, that of accountability of judges has decreased significantly, it is difficult to justify the existence of the intermediary body between the JI and the DB, unless it is an additional filter, kept deliberately to limit the capacity of the judiciary of self-responsibility. We consider that the JI should have the competence of instituting the disciplinary procedures and the competence of direct submission to the DB Plenary of disciplinary cases where it finds the elements of a disciplinary offence. In such a context, the Admissibility Panels would be most appropriate to examine the appeals against the decisions by the JI on dismissal of complaints as manifestly unfounded and decisions on dismissal of complaints containing no elements of disciplinary offences upon verification.

4. Case examination by the Plenary of the Disciplinary Board. Other aspects related to the Disciplinary Board

4.1. The role of the member rapporteur at the hearings of the Disciplinary Board

The member rapporteur is a member of the DB who was randomly assigned a disciplinary case file and who has certain specific duties regarding this file within the case investigation by the DB. The rapporteur has the competences of preparing the case file for examination by the DB (art. 32 of Law no. 178), of presentation of the report on the disciplinary case (art. 34 para. (3) of Law no. 178) and in drafting of the DB decision (art. 32 para. (1) letter c) of Law no. 178) etc. Usually, in practice, the members rapporteurs are the most prepared on the case file they report on and they ask the participants present at the hearings the most questions.

The case examination by the DB begins with the presentation of the report by the member rapporteur. The report contains the actions imputed to the judge and the legal norms that apply to this actions. The reading of the report by the member rapporteur is a procedure that remained valid from the old procedure, when the JI and the author of the complaint were not summoned to the hearing. Under the circumstances where the presence of the JI at the case examination is obligatory, it should present the case; this is also the opinion of the Venice Commission.[33] Otherwise, the inspector-judge does not have anything to do, but to support the initial report of the JI and his/her presence at the case examination becomes formal and unnecessary. ***Therefore, as mentioned above in section 2.3., the competences of the member rapporteur have to be reviewed to exclude the competence of presenting the case at the beginning of examination before the Plenary of the DB.***

4.2. Composition and revocation of the Disciplinary Board members

Members of the DB from among judges are elected by the General Assembly of Judges as follows: 2 members from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. Five substitute members are elected at the General Assembly of Judges, applying the same proportionality (art. 10 para. (1) and (2) of Law no. 178). Although the fact that judges, who are members of the DB, are elected by their colleagues within

[33] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, adopted on 21-22 March 2014, para. 76 and 80.

the framework of the General Assembly of Judges, was highly appreciated by the Venice Commission, it did not understand the rationale of electing the majority of judges from among the higher courts.[34] In the case of amendment of Law no. 178, we recommend to discuss the respective issue and, possibly, change the proportionality by including of 2 members - judges from the courts, 2 – from Courts of Appeal and 1 – from the SCJ.

The term of office of a member of the DB, who does not fulfil at least three months without valid reason, his/her obligations established by law, may be revoked upon a reasoned proposal of the DB, adopted by a vote of at least 2/3 of the DB members (art. 11 para. (1) let. e) of Law. 178). The reasoned proposal of the DB to revoke a member of the DB shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her by another member (art. 11 para. (2) of Law no. 178). The provision stipulating the possibility of revoking of a member, who does not fulfil the obligations of membership, is important for the functionality and credibility of the DB. However, the text of the law does not clearly stipulate that the DB decision on revocation of a member is binding and therefore his/her automatic substitution with an alternate member. ***The Venice Commission has examined the provisions regarding the revocation of the DB member and recommended the following: (1) to clarify the law whether the 2/3 of the DB votes for revocation of a member refers to 2/3 of the total number of members or to the votes of members that are present[35] and (2) to consider the possibility of the DB to revoke the DB member independently, provided that the law establishes a clear procedure for revocation of the member who does not fulfil the obligations of a member, with his/her prior notice thereof.[36]***

The previous law on disciplinary liability of judges provided a deputy chairperson of the DB.[37] Law no. 178 provides that in case of vacancy of the Chairperson position or temporary absence of the DB Chairperson, his/her powers are exercised by the oldest member of the DB (art. 12 para. (3) of Law no. 178). We consider this provision is not an appropriate one, given that it requires a rather ad-hoc replacement because the person can vary depending on who is present at the meeting. The activity of the DB is quite complex and requires permanent involvement at least in the organization of its activity. ***We consider that the introduction of the deputy Chairperson is necessary and appropriate, to assist the Chairperson of the DB in organizing the activity of the DB and ensure continuity in case of his/her absence. The Venice Commission also recommended the election of the deputy Chairperson in order to replace the Chairperson in case of his/her absence or vacancy of the position.[38]***

4.3. Incompatibility of the Disciplinary Board members from civil society

The DB consists of 5 judges and 4 persons from among civil society. The DB members from civil society must have an irreproachable reputation, enjoy authority in society, have at least 7 years of experience in law and are obliged to respect the restrictions specified in art. 8 para. (1) let. b) and c) and para. (3) of Law no. 544 as of 20 July 1995 on the Status of the Judge (art. 9 para. (3) of Law no. 178).

[34] The Opinion of the Venice Commission, para. 52.

[35] The Opinion of the Venice Commission, para. 55.

[36] The Opinion of the Venice Commission, para. 56.

[37] Art. 2 and 8 of Law no. 950 on the Disciplinary Board and disciplinary liability of judges, as of 19 July 1996.

[38] The Opinion of the Venice Commission, para. 58.

Art. 8 para. (1) let. b) and c) and para. (3) of Law no. 544 stipulate the following restrictions:

- to be a Member of the Parliament or counsellor of the local public administration authority (para. (1) let. b));
- to be affiliated to parties or carry out activities of political nature, including in the period of detachment from office (para. (1) letter c);
- the judge is not entitled to provide media representatives with information about the cases under consideration in court, but has to do so through the person responsible for relations with the media (para. (3)).

Although the term "civil society" represents an activity of a person outside of any public office, regardless of its category, in practice there has already been a situation when the provisions of Law no. 178 seemed not sufficiently clear. And namely, the SCM has revoked a member of the DB, who after the appointment as a member of the DB, a university lecturer, accepted the position of the Head of the Cabinet of the Minister of Internal Affairs.[39] In its decision the SCM has focused on the political character of the function of the Head of the Cabinet of the Minister of Internal Affairs, which is a senior state function. The decision is important and should serve as a guide for other situations of incompatibility of the DB members from civil society holding any public position. ***However, in order to clarify the provisions of the law and to prevent similar situations in the future, it would be useful to stipulate expressly in art. 9 para. (3) of Law no. 178 that the DB member from civil society can not hold any other public position.***

4.4. Recusal or abstention of members. Substitute members

Under art. 14 para. (5) of Law no. 178, the recusal or abstention shall not be admitted, if as a result of the abstention or recusal it will be impossible to ensure a deliberative meeting of the Board. This norm was introduced in the context that we don't have a tradition of replacing permanent members with ad hoc members if necessary. The Venice Commission has criticized the norm under art. 14 para. (5) and proposed that a substitute member can replace the recused or abstaining member.[40] We support the recommendation of the Venice Commission and consider that the involvement of a substitute member if the meetings of the DB are not deliberative due to recusal or abstention of the DB members will ensure greater confidence in the impartiality of the DB.

To implement the recommendation related to the replacement of the recused or abstained member, but also to create clarity regarding the alternates, ***provisions of art. 10 para. (2) and (3) of Law no. 178 shall be supplemented and the regulations that enforce them shall provide a clear procedure for election and replacement by substitute members of permanent members or those whose term of office was terminated.*** The Venice Commission recommended that the list of substitute members that can replace the revoked member should be pre-determined in order to make it clear who should fill in a vacant post.[41]

[39] The SCM decision no. 676/27 on the notification of Mr. Valeriu Doaga, Chairman of the Disciplinary Board subordinated to the Superior Council of Magistracy, with reference to the incompatibility with the position held by a member of the Board, as of 29 September 2015.

[40] The Opinion of the Venice Commission, para. 63.

[41] The Opinion of the Venice Commission, para. 57.

5. Appeals in disciplinary procedures: SCM or SCJ?

According to the procedure established by Law no. 178, a complaint on disciplinary offences of judges can go through five bodies,[42] each of which, at one stage or another, can annul the decision of the body, which has previously examined the disciplinary case. The analysis of the opportunity of the Admissibility Panels has been presented in section 2.2. If we admit that the option of simplifying the procedure through the exclusion of the stage of admissibility will be chosen, the disciplinary system for the judges remains with three levels of jurisdiction.

The DB decisions can be appealed before the SCM. If the SCM wishes to change the solution, it has to follow the procedure and the the contents of the decision provided for the DB (art. 39 para. (4) let. b) of Law no. 178). The SCM decisions in disciplinary cases may be appealed against before the SCJ, which will examine the appeal through a Board consisting of 5 judges (art. 40 para. (2) of Law no.178). Surprisingly, the SCJ still applies the provision of Law no. 947, under which the examination of the SCM decisions is limited to the procedure of issuing/adopting of the decision (art. 25 para. (1)),[43] although Law no. 178 does not provide for such an exception. Apparently, the SCJ interpreted the absence of expressly stated norms that would overturn the exception under art. 25 as the intention of the legislator to keep the exception of Law no. 947. Although, it would seem that namely by not introducing an exception in the special law on disciplinary liability, the legislator has overturned the exception.

Essentially, according to the above-mentioned procedure, there is an effective remedy (substantive and procedural) before the SCM, and based on the interpretation of the SCJ, there is also an appeal focused only on the procedure of issuing/adopting the decision at the SCJ. Following the extremely narrow interpretation of the norm on the limits of examining complaints regarding the SCM decisions, the SCJ has developed a practice to annul the decisions by the SCM for formal reasons.[44] The negative effect of this practice is that the SCM does not reexamine the cases in which its decisions were annulled on procedural grounds. Therefore, it creates a decisional vacuum, where the SCM cannot decide on a matter for formal reasons. In the case of disciplinary or criminal proceedings this situation can be particularly

[42] Judicial Inspection, Admissibility Panel, Plenary of the Disciplinary Board, the Superior Council of Magistrates and the Supreme Court of Justice.

[43] SCJ Dec. no. 3d-3/15 as of 30 April 2015, Dec. no. 3d-4/15 as of June 30, 2015.

[44] SCJ, Dec. no. 3-11/14 as of 12 June 2014, in the case of issuing the order for the prosecution of judges Eugeniu Clim, Aureliu Colenco, Valeriu Harmaniuc and Ala Nogai; Dec. no. 3d-3/15 as of 30 April 2015.

dangerous for the whole system. It seems that by limiting the appeal to the SCJ they wished to restrict the intervention of the courts into the administration of the judiciary system by the SCM. However, as a result, the SCM decisions are cancelled irrevocably and thus, it affects anyway the merits of the case. Under these circumstances the limited appeal to the SCJ on procedural issues is no longer justified. Another question is whether two appeals in disciplinary procedures against judges are justified.

The Venice Commission raised the issue in the opinion no. 755/2014 whether the provision of art. 8 of Law no. 178 that establishes the DB as an independent body is compatible with art. 123 of the Constitution.[45] This issue is closely linked to the ability of the DB to decide on disciplinary actions independently. In a recent study, an international expert, Cristi DANILET, recommended amending of the Constitution or requesting an interpretation from the Constitutional Court, with the view to grant to the DB the right to decide on disciplinary matters without involving the SCM. In Romania, for example, the decisions of the SCM section responsible for disciplinary liability of judges are directly challenged before the High Court of Cassation and Justice, without their review by the SCM Plenary.[46]

The Constitution of the Republic of Moldova under article. 123 para. (1) stipulates that „*The SCM ... ensures the application of disciplinary measures*". But the Constitution does not state how many members should be in the SCM or the way they shall be elected. The number of the SCM members and their election procedure is stipulated by the organic law. Under the law, there are 12 members of the SCM, 3 of them are members ***de jure***,[47] 3 are law professors elected by the Parliament by vote, and six are judges elected by the General Assembly of Judges (art. 3 para. (1)-(4) of Law no. 947). The DB consists of nine members: 5 members are judges elected by the General Assembly of Judges and 4 persons from among civil society are appointed by the Ministry of Justice based on a contest organized by a committee that also includes the representatives of the SCM (art. 10 para. (1) and (3) of Law no. 178).

Essentially, the election of the DB members is similar to the election of the SCM members, and the representatives of the Board who are not judges are elected in a way that involves the SCM. Under these circumstances the DB can be considered an extension of the SCM, similar to the sections in Romania. Taking into account that the text of the Constitution provides that the SCM "***ensures the application of***" and not "***apply***" disciplinary measures, having additionally analysed the organic law, we can conclude that the General Assembly of Judges and the SCM may delegate to the DB the competence to apply disciplinary sanctions for judges independently.

The establishment of the DB as an independent institution (art. 8 para. (1) of Law no. 178), can be interpreted as a tendency to place the DB at the same level with the SCM and not making it subordinated, or outside of it. Being independent, the DB has more autonomy and more responsibility, and its repeated verification by a body elected in a similar way seems to be a duplication of efforts and a waste of administrative resources. Indeed, to clarify this lack of corroboration between legal norms, it would be appropriate to refer to the Constitutional Court, which would determine whether the DB can, within the limits of the Constitution, impose disciplinary sanctions, without further verification by the SCM, but respecting the

[45] See items 6-7.

[46] Romania, Law no. 317 as of 1 July 2004, regarding the Superior Council of Magistracy, art. 51.

[47] The Chairperson of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General.

right to an effective remedy through an appeal submitted directly to a panel of the SCJ. Under such circumstances, without prejudice to the rights and independence of judges, there might be created a more simple and efficient disciplinary system, which would not keep judges and litigants in suspense longer than necessary. Another solution would be supplementing of art. 123 para. (1) of the Constitution with the following wording: „The Superior Council of Magistracy shall exercise its powers directly or through affiliated bodies".

On the other hand, if the exclusion of the SCM from the disciplinary procedure mechanism seems inappropriate, then in order to simplify the disciplinary procedure there should be considered the exclusion of the appeal before the SCJ. To comply with the ECHR, for a procedure, where the civil rights and obligations are considered, it is sufficient that the guarantees to a fair trial are respected at least at one level of jurisdiction. The ECHR requires the establishment of at least one of the following models: a specialized disciplinary body must meet the requirements of art. 6 of the ECHR, or if it does not meet the requirements of art. 6 of the ECHR, it must be controlled by a "*judicial body that has full jurisdiction*" to ensure the guarantees stipulated by art. 6 § 1.[48] These requirements describe the minimum standard to be implemented by the Contracting States. In this context, if the DB ensures the guarantees provided by art. 6 § 1 of the ECHR, a remedy through an appeal before the SCM, which under the current legislation is obliged to respect the same guarantees as the DB, might be sufficient. Given that the SCM will ensure the above-mentioned rights, an additional appeal to the SCJ is unnecessary. In any case, this is a matter of opportunity and has to be decided by the competent authorities. Also, in case of this option, it would be appropriate to approach the subject of the SCM independence, where 5 members out of 12 are, in one way or another, are representatives of the executive power or the Parliament.

In conclusion, the national authorities are called upon to consider the most appropriate forum for challenging the decisions of the DB, which is either the SCM or the SCJ. In the authors' opinion, the fairest choice would be a direct appeal against the decision of the DB before the specialized panel on disciplinary procedures of the SCJ, which would have the jurisdiction to hear the case in substance and procedure. Thus, it would exclude the duplication of competences between the DB and the SCM, and also the internal conflict of interest within the SCM, which on one hand is the body that regulates the activity of the JI and the DB, participates in the election of the JI and some of the members of the DB, can lodge complaints against the actions of judges, but on the other hand is the body which examines appeals on disciplinary cases (basically the body that files complaints and the last body that is examining them until the complaint is submitted to the SCJ).

[48] ECtHR, Judgement on the case of Albert and Le Compte v. Belgium, as of 10 February 1983 § 29, Judgement Gautrin and Others v. France, as of 20 May 1998, § 57.

6. The role of the author of the complaint in the disciplinary procedures

Disciplinary procedures against judges have both elements of the civil procedure and criminal procedure and should meet the requirements of a fair trial.[49] In the context of this issue there are two important principles which cover the right to a fair trial: the adversarial principle[50] and the principle of equality of arms.[51] To ensure the observance of these principles in the disciplinary procedure it is important that both, the judge concerned in the complaint, and the opposite party are provided with all the appropriate rights, such as: to present evidence, to study the materials of the case, to present the case before the disciplinary bodies, to challenge the judgement etc. Typically, the opponent of the judge in disciplinary procedures should be the inspector-judge who investigated the case. In the Republic of Moldova a mixed system granting such rights to both the JI and the author of the complaint has been chosen.

The author of the complaint is a new subject in the disciplinary procedures. Under art. 19 para. (1) letter a) of Law no. 178 the complaints on the disciplinary offences of judges can be filed by any interested person, members of the SCM, Board for Performance Evaluation of Judges and the JI. However, most often, when we refer to "the author of the complaint" we mean "any interested person", i.e. the litigants. Under the old legislation, the litigants filed a petition based on which the SCM could institute disciplinary procedures. If the SCM decided to institute a disciplinary procedure, the litigant did not have any procedural status any more, and the case was investigated by the JI at the order of a member of the SCM. Under the legislation in force, the author of the complaint has a much more active role. The author of the complaint is summoned for the hearing at the DB Plenary (art. 31 para. (1) of Law no. 178), can be represented by a lawyer (art. 31 para. (2)) can recuse members of the Board or the Admissibility Panels (art. 34 para. (2)), can study the materials of the case and submit new requests and evidence (art. 32 para. (3)), can challenge the decision of the DB before the SCM (art. 39 para. (1)), can challenge the decision of the SCM before the SCJ (art. 40 para. (1)) etc.

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[49] ECtHR, Judgement on the case of ***Oleksandr Volkov v. Ukraine***, as of 9 January 2013, §§ 87-91.

[50] The ECtHR defines the adversarial principle as providing opportunities for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (dec. ***Ruiz-Mateos v. Spain, as of 23 June 1993, § 63)***.

[51] The principle of equality of arms is defined by the ECtHR as providing for each party a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party (dec. ***Bombo Beheer BV v . the Netherlands***, as of 27 October 1993, § 33.).

In 2015, the authors of complaints participated in meetings on at least five disciplinary cases.[52]

In Romania the litigants who complained to the JI do not have an active role in disciplinary procedures. They can challenge the resolution to dismiss the complaint issued by the JI,[53] but since the disciplinary procedure was instituted, the JI is the body that formulates the accusation against the judge and provides adversarial conditions in disciplinary procedures, including by challenging the decisions of the SCM before the High Court of Cassation and Justice. Also in Romania, the disciplinary action is presented before the sections by the judicial inspector who initiated it and only in case if it is impossible, by a judicial inspector appointed by the chief inspector.[54]

In the Republic of Moldova, the JI, in addition to its investigative competences, has the same rights as the authors of complaints. If compared with the inspection in Romania, the JI from Moldova does not have the competence to dismiss the complaint on the grounds of absence of elements of a disciplinary offence and the law does not provide expressly that the JI should present the case before the DB. However, under the law, the JI is bound to be present at the meetings of the DB Plenary. In practice, the inspector-judges who are attending the meetings are not active and support the JI reports that are either of dismissal of the complaint or of admission of the complaint, without adding anything or argue the JI position before the Plenary. However, there is apparently an established practice that a single inspector-judge participates in all the hearings that take place during a day, and presents the position of the IJ in all the cases, regardless of the fact whether he/she carried out verifications in the case or not.

In case of future amendments to the legislation, public authorities, and especially the judiciary should have a clear vision of the model of disciplinary liability of judges that they want to implement. Otherwise, in a disciplinary procedure with a body of the JI that does not accept the responsibility for accusation and disciplinary bodies acting as the protection filters for the judiciary, the presence of the author of the complaint throughout the procedure could be appropriate. Or else, the disciplinary procedure could become a formality in which there is no other view than that of the judge concerned. On the other hand, in a system where the JI is effective, active and autonomous, and disciplinary bodies assume the role to ensure a responsible legal system, the participation of the author of the complaint in disciplinary procedures becomes unnecessary and even exaggerated.

[52] For example, the authors of complaints participated in disciplinary procedures instituted against judges Renata Popescu-Balta, Iurie Timbalari, Mihail Ciugureanu, Nicolae Costin, Oleg Melniciuc.

[53] Romania, Law no. 317 as of 1 July 2004, on the Superior Council of Magistracy, art. 47 para. (5)

[54] Ibidem, art. 49 para. (2) letter b).

7. Suspension of the judge from office during the disciplinary procedure

In Romania, a judge or prosecutor, against whom a disciplinary procedure was instituted, can be suspended from office. Art. 53 para. (1) of Law no. 317 provides that during the disciplinary procedure, the corresponding section of the SCM, can order, ex officio or by the proposal of the judicial inspector, the suspension of the magistrate from office until final determination of the disciplinary action, if continuous exercising of the terms of office can influence the impartiality of the disciplinary procedures or if the disciplinary procedure is of such nature that can seriously undermine the prestige of justice.

Recently, the Constitutional Court of Romania declared that the suspension of a judge from office is constitutional only if the decision ordering the suspension can be appealed against separately until the final determination of the disciplinary action.[55] Such a mechanism (suspension from office during disciplinary procedures) is missing in the legislation of the Republic of Moldova, although it would be useful in cases where the continuous exercising of the terms of office still can influence the impartiality of the disciplinary procedures or if the disciplinary procedure is of such nature that can seriously undermine the prestige of justice.

[55] The Constitutional Court of Romania, Press Release, 10 November 2015, available at: http://www.juridice.ro/wp-content/uploads/2015/11/Comunicat_de_presa_10_noiembrie_2015.pdf.

8. Summary of recommendations

Initially the authors of the document proposed several policy options, i.e. several operating models for the disciplinary procedures regarding judges. The draft document was presented to the representatives of the SCM, the Disciplinary Board, and the Judicial Inspection at the workshop held on 26-27 November 2015 in mun. Chisinau. Following these discussions, the authors of the document have noted considerable divergence in the visions of each body of the SCM on the operating mechanism for disciplinary liability of judges in the Republic of Moldova. Thus, to avoid confusion in promoting the amendment of Law no. 178 and not to create artificial conditions for delaying of these amendments, the authors of the document propose the following recommendations. It is important to note that these recommendations do not represent the opinion of all participants in the workshop, and where a consensus was not found the authors of the document have proposed the option that they believe is the best for the system of disciplinary liability of judges to reach the goal of the effective accountability of judges. We reiterate that the document is designed to initiate discussions on amending the legal framework pertaining to disciplinary liability of judges and not as a final document that covers all the issues and solutions.

A. General recommendations to streamline and simplify the disciplinary procedures

I. Organization and autonomy of the Judicial Inspection (Recommendations based on Romanian experience and debates within the workshop held on 26-27 November 2015):

To fulfil the task of investigation in disciplinary cases in an independent and neutral way the Judicial Inspection shall be reformed following the model given below:

1. Operational (functional) autonomy from the SCM. Even if the Judicial Inspection remains within the SCM, the former must have distinct functions clearly provided by the law;
2. The SCM shall appoint the Chief Inspector based on a public contest, after which the latter organizes public contests for selection of other members of the Judicial Inspection, and for the necessary staff;
3. The Judicial Inspection shall have a separate legal personality, separate budget and shall directly receive complaints related to disciplinary liability of judges;
4. Alongside with this reform the number of inspector-judges and staff, who assist them, shall be increased (for the sake of economy, a part of the Judicial Inspection staff can be assigned from the SCM Secretariat).

II. The role of the Judicial Inspection at the stage of preliminary verification and disciplinary investigation:

It is recommended to ensure two stages of disciplinary case investigation: preliminary verification and disciplinary investigation. It is also recommended to grant the Judicial Inspection the competence to institute disciplinary procedure (including ex officio) and reorganize the Admissibility Panels so that they examine appeals against the orders by the Judicial Inspection.

As an example, the following procedure can be proposed:

1. The stage of preliminary verification of the complaint by the Judicial Inspection. Duration - 30 days, with the possibility of term extension up to 15 days by the chief inspector-judge. Solutions available at this stage:
    a. The order by the Judicial Inspection on dismissal of complaints containing no elements of disciplinary offences – can be challenged before the panels for examination of appeals against the orders issued by the Judicial Inspection;
    b. The order on initiation of a disciplinary procedure (Judicial Inspection can qualify (frame in a legal norm) the disciplinary offence ex officio) – proceed with the disciplinary investigation.
2. Disciplinary investigation. Duration – 30 days, with the possibility of term extension up to 15 days by the chief inspector-judge. Solutions available at this stage:
    a. The order by the Judicial Inspection on dismissal of the disciplinary procedure, if the investigation fails to find reasonable doubt that a disciplinary offence has been committed – can be challenged before the panels for examination of appeals against the orders issued by the Judicial Inspection;
    b. Disciplinary report, if there is a reasonable doubt that a disciplinary offence has been committed – is submitted directly to the Plenary of the Disciplinary Board for examination.

III. The role of the Judicial Inspection in examination of the case by the Plenary of the Disciplinary Board

It is recommended to grant the Judicial Inspection the competence to present charges on the disciplinary case. This excludes the competence of the member rapporteur in presenting the case. It is important that the disciplinary case shall be argued before the Disciplinary Board by the judicial inspector who carried out the disciplinary investigation and, only in case if it is impossible, by a judicial inspector appointed by the chief inspector. The member rapporteur remains responsible for preparing the case file for the hearing and drafting of the Disciplinary Board decision.

IV. The role of the author of the complaint

The involvement of the author of the complaint should be limited to the stage of initiation of a disciplinary procedure: namely, complaining to the disciplinary body, challenging the dismissal order or the order of procedure dismissal issued by the Judicial Inspection to the Admissibility Panel of the Disciplinary Board. This option is plausible only if the judicial system assumes full responsibility for accountability of judges, who commit disciplinary offences, in

particular through: granting to the Judicial Inspection the competence to institute disciplinary procedure, qualifying (framing the actions into legal norms) of disciplinary offence by the Judicial Inspection, presentation of accusations before the disciplinary bodies by the Judicial Inspection, ensuring the challenging of the decisions before the superior body etc.

V. Appeal procedures on decisions of the Disciplinary Board

We recommend amending art. 123 of the Constitution as follows: „The Superior Council of Magistracy shall exercise its powers directly or through affiliated bodies " or to request an interpretation from the Constitutional Court that would potentially establish a legal framework to appeal directly to the SCJ after consideration of the case by the Disciplinary Board in order to simplify and streamline the disciplinary procedure. In case of sanctioning by dismissal from the office, the SCM shall proposes to the President of Republic of Moldova the dismissal based on the final judgement of the Disciplinary Board or the SCJ.

B. Specific recommendations that would improve the disciplinary procedure and can be operated directly based on international standards and already accumulated practice

I. Recommendations related to the proper conducting of a disciplinary procedure

1. Introduce a provision under which in case of criminal and disciplinary proceedings initiated on the same offence, the disciplinary procedure shall be suspended until the final decision in the criminal case. If the offence contains several actions, one of which is criminal and the other disciplinary offence, the Disciplinary Board shall examine only the part of the action related to the disciplinary liability and suspend the examination on the other part, as mentioned above;
2. Introduce the possibility to suspend the judge from office, if continuous exercising of the terms of office can influence the impartiality of the disciplinary procedures or if the disciplinary procedure is of such nature that can seriously undermine the prestige of justice, with the right to challenge the decision ordering the suspension until the final determination of the case, separately from the judgement on the merits;
3. Stipulate expressly the provision in the law on the competent body to examine petitions submitted to the SCM (to decrease the workload of the Judicial Inspection on complaints that do not refer to disciplinary liability of judges);
4. Stipulate expressly the provision in Law no. 178 on appeals against decisions of dismissal issued by the Judicial Inspection, in case the present competences of the Judicial Inspection and of the Admissibility Panel are maintained;
5. Stipulate a provision regarding the publication of the Judicial Inspection decisions on dismissal, in case the present competences of the Judicial Inspection and of the Admissibility Panel are maintained. This transparency ensuring measure would raise accountability and credibility of the Judicial Inspection;
6. If the DB decisions are to be appealed before the SCM, there shall be specified an interdiction for the SCM member, who submitted the complaint, to participate in the

examination of the appeal on the decision of the Disciplinary Board in the case where he/she has filed a complaint;

7. If the decision of the SCM or DB is annulled for formal reasons (e.g. has not been signed by all members), it is natural that the disciplinary file shall be transmitted to the inferior body to correct the error that was found. There shall be introduced a norm which provides for the possibility of transmitting the file for reexamination when there was committed a procedural error that can be corrected by the inferior body.

II. Recommendations related to the composition and terms of office of the Disciplinary Board members

1. Provide for the position of the deputy Chairperson of the Disciplinary Board;
2. Amend the proportionality of election of judges-members of the Disciplinary Board by including 2 member-judges from the courts, 2 – from Courts of Appeal and 1 – from the SCJ;
3. Clarify art. 11 para. (1) letter e) of Law no. 178 by a provision expressly specifying that the revocation of a member can be done by a vote of 2/3 of the elected/appointed members of the Disciplinary Board;
4. Provide for the possibility of the Disciplinary Board to revoke a member of the Board independently and a detailed procedure for revocation of the member who does not fulfil the obligations of a member, with his/her prior notice thereof;
5. Stipulate expressly in art. 9 para. (3) of Law no. 178 that the Disciplinary Board member from civil society cannot hold any other public position;
6. Provide for the possibility of ad hoc involvement of a substitute member of the Disciplinary Board, if the meetings of the Disciplinary Board are not deliberative due to recusal or abstention of its members and, respectively, exclude the norm stipulated under art. 14 para. (5) of Law no. 178;
7. More detailed regulation on the election process for substitute members and the way the list of substitutes is drawn up.

The Legal Resources Centre from Moldova is a not-for profit non-governmental organization based in Chişinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice and effective observance of civil and political rights in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner.

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