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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BULGARIA

DRAFT OPINION

ON THE JUDICIAL SYSTEM ACT

on the basis of comments by

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I. Introduction

1. By letter of 14 October 2016, the Monitoring Committee of the ²Parliamentary Assembly of the Council of Europe requested the Venice Commission to prepare an opinion on the Bulgarian Judicial System Act, as amended by the two packages of amendments passed in March and July 2016 (CDL-REF(2017)034).

2. The Commission invited Mr Alexander Baramidze, Mr Richard Barrett, Mr Martin Kuijer and Mr Guido Neppi Modona to act as rapporteurs for this opinion.

3. On 11-12th September 2017, a delegation of the Commission, composed of Mr Alexander Baramidze, Mr Richard Barrett, and Mr Martin Kuijer, accompanied by Mr Grigory Dikov from the Secretariat, visited Sofia and met with parliamentarians, State executive authorities, and representatives of the judiciary and of the civil society. The Venice Commission is grateful to the Ministry of Foreign Affairs for the excellent preparation of the visit.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the translations of JSA provided by the Bulgarian authorities. Inaccuracies may occur in this opinion as a result of incorrect translations.

5. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, … 2017).

II. Background information

A. The 2015 reform of the Constitution

6. The 1991 Constitution of Bulgaria and the Judicial System Act (JSA) of 1994 shaped the contours of Bulgarian judiciary, with the Supreme Judicial Council (SJC) at the centre of the system. Historically, both judges and non-judicial magistrates (prosecutors and investigators) were seen in Bulgaria as belonging to the judicial system. Thus, the JSA regulates a broad spectrum of issues related to the organisation of courts and the prosecution service.

7. From the outset, the SJC played roughly the same role as this body has in present form – to oversee the appointments and careers of magistrates (judicial and non-judicial), to impose disciplinary measures on magistrates, to manage the budget of the judiciary, etc. The system created in the early 90s, however, suffered from certain weaknesses, the main being the lack of internal and external independence of judges and prosecutors, and the exposure of the system to undue political influences.[1]

8. Throughout the past two decades the Bulgarian authorities have made several amendments to the Constitution and to the JSA in order to address this issue. Some of the amendments were made in response to recommendations by the Venice Commission.[2] The Venice Commission would like to compliment the Bulgarian authorities for their acknowledgment of the

[1] See, European Commission, *Reinforcement of the Rule of Law*, Nijmegen: Wolf Legal Productions, 2002, p. 68. In 2002, the SJC was already in its fourth term although theoretically it should have been in its second term as members are appointed for 5 years.

[2] See, in particular, CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, CDL-AD(2003)16, Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria; CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, CDL-AD(2009)011, Opinion on the Law on Judicial Power, CDL-AD(2010)041, Opinion on the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, and CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria.

deficiencies of the system, and for their continuous effort to reform it and to bring the Bulgarian system in line with the European standards and best practices.

9. The last round of constitutional reform led to the adoption of constitutional amendments in December 2015. They provided for a more balanced composition of the SJC (on this see more below), introduced the election of lay members by a qualified majority in Parliament,[3] created two separate chambers within the SJC (one for judges and one for the prosecutors), and reduced the role of the Minister of Justice (who is now chairing only the Plenary of the SJC, without the right of vote). Most of the changes brought by the 2015 constitutional reform are to be assessed positively.[4] That being said, some issues remained unresolved at the constitutional level, as well as in the legislation.

B. Scope of the present opinion

10. The purpose of the present opinion is to comment on those outstanding issues. While the opinion focuses on the 2016 amendments, the Venice Commission, where necessary, will give recommendations concerning other parts of the JSA.[5]

11. That being said, the Venice Commission is not in a position to give an exhaustive analysis of the JSA. The Commission is aware of other problems of the Bulgarian judiciary, such as, for example, uneven distribution of workload and resources amongst Bulgarian courts,[6] unnecessarily formalistic procedures,[7] interference with the system of automated distribution of cases,[8] reported virulent media attacks on judges, etc. These issues are left outside of the scope of the assessment. The focus will be on those provisions which define the balance between independence and accountability of the judicial system.

12. Finally, the present opinion will not repeat all of the recommendations that the Venice Commission made earlier, in its previous opinions on the Bulgarian judiciary. These recommendations remain valid, with due regard to the latest amendments.

III. Analysis

A. Composition of the SJC

1. The quota of elected judicial members

13. The Plenary SJC is composed of 25 members. The Bulgarian National Assembly elects 11 members, judges elect 6 members, prosecutors elect 4 members and investigating magistrates elect 1 member. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General are *ex officio* members. Finally, the

[3] See Article 130 § 3 – as recommended by the Venice Commission, see CDL-AD (2003)012, § 15 (5).
[4] See, in particular, its recommendations in CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria.
[5] Including the most recent amendments adopted in July 2017 – see CDL-REF(2017)040.
[6] EC CVM Technical report, January 2017, https://ec.europa.eu/info/sites/info/files/swd-2017-24_en.pdf p. 4.2
[7] See the executive summary of the final report prepared by a group of European experts in December 2016 on the Bulgarian prosecution system, http://www.mjs.bg/Files/Executive%20Summary%20Final%20Report%20BG%2015122016.pdf, "Overview".
[8] International Association of Judges, Report for the 1st Study Commission on Bulgaria, http://www.iaj-uim.org/iuw/wp-content/uploads/2015/08/2015_1_Bulgaria.pdf, answer to question no.1.

Minister for Justice retains the role of chairing the plenary meetings of the SJC albeit in a non-voting capacity.

14. In the previous opinion on the Bulgarian judiciary[9] the Venice Commission recommended to define the quota of judicial members "within the parameters of the Recommendation of the Committee of Ministers." The Recommendation CM/Rec(2010)12) states that "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary" (§ 27). The current composition of the SJC still does not correspond to this parameter. Thus, judges *elected by their peers* are in a *net minority* at the Plenary: they have only six votes out of 25. Other votes belong to prosecutors, lay members, and two *ex officio* members who, while being judges, are not elected by their peers. Similarly, in the Judicial Chamber judges elected by their peers represent less than a half of all members: out of 14 members of the chamber 6 are elected judges, six are lay members and two are *ex officio* members (two chief judges). Therefore the recommendations of the previous opinion by the Venice Commission were not fully implemented.[10]

15. As a result of the 2015 reform, the Plenary SJC was stripped of most of its "appointment, disciplining and removal" powers, which went to the respective Chambers. This was an essential step forward. However, the current *rapport de force* within the SJC is still not in favour of the elected judicial members. The Plenary SJC (where elected judicial members are in a clear minority) kept some important powers vis-à-vis the judiciary. The most important are the power to propose candidates for the positions of the President of the Court of Cassation and the President of the Administrative Court (for the appointment by the President), as well as the power to remove elected judicial members.[11]

2. Lay members and elected prosecutorial members

16. Under Article 19b, lay members are elected by a majority of 2/3rd of the MPs. This is a welcome approach, in line with the previous Venice Commission recommendations.[12] The Venice Commission has recommended several anti-deadlock mechanisms in case this majority cannot be reached. The Commission has also proposed to work with the Bulgarian authorities to develop some other anti-deadlock mechanisms.[13] This proposal remains valid.

17. However, a source of concern for the Venice Commission is that prosecutors, and the Prosecutor General (PG) in particular, are still significantly involved in the governance of judges, *inter alia* with regard to certain non-disciplinary matters. This was criticised in the 2010 Venice Commission opinion on Ukraine, which suggests that "the inclusion of the Prosecutor General as [an] *ex officio* member [of the Judicial Council] raises particular concerns, as it may have a deterren[t] effect [on] judges and be perceived as a potential threat. The Prosecutor General is a party to many cases which the judges have to decide, and his presence on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges whose decisions he disapproves of. […]."[14] The 2010 opinion was cited with

[9] CDL-AD(2015)022, § 43

[10] The GRECO, in its most recent report, considers that this composition still "poses a risk of politicisation of decisions concerning judges' careers". See https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16807342c8, p. 28.

[11] The Venice Commission will not analyse other powers of the Plenary.

[12] See, for example, CDL-AD(2015)022, §§ 46-51.

[13] Ibid., § 51.

[14] CDL-AD(2010)029, Joint opinion by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal, § 30

approval by the European Court of Human Rights (the ECtHR) in the *Oleksandr Volkov* judgment.[15] Due to the hierarchical nature of the prosecution service, the other prosecutorial members of the Council may feel obliged to follow the positions taken by the PG.

18. While the model of a judicial council where judges and prosecutors sit together in a plenary formation is not unknown (it exists, for example, in France), in its 2015 opinion the Venice Commission noted that "in former socialist countries, there is a legacy of too powerful prosecution systems, which endanger the independence of the judges".[16]

19. Not only do prosecutors have a quota in the Plenary SJC – they may even be present in the Judicial Chamber of the SJC, as the law provides that lay members elected by Parliament may also come from the ranks of prosecutors (see Article 16 § 3 of the JSC). It appears that in the current composition of the SJC several lay members are former prosecutors. Thus, even though the Judicial Chamber and the Prosecutorial Chamber are institutionally separated, former prosecutors may sit in the Judicial Chamber together with judges.

3. Possible solutions

20. The Venice Commission considers that elected judicial members should play a more important role within the SJC. The most radical solution would be to abandon the current model of an integrated SJC and create two separate bodies – one supreme council for judges (where elected judicial members would have at least half of the votes) and another supreme council for prosecutors and investigators.

21. If judges and prosecutors are to remain together within the same Council, the powers of the Plenary SJC should be reduced. Most importantly, the powers related to the appointment/dismissal of two chief judges, and the power to remove elected judicial members of the SJC should be transferred to the Judicial Chamber. Additionally, the composition of the Judicial Chamber of the SJC should be changed, in order to increase the proportion of judges elected by their peers.

22. Whatever solution is chosen, it will require amendments to the Constitution. The Venice Commission understands that yet another constitutional reform may be a complex and lengthy endeavour. Hence, intermediate solutions should be considered, pending the preparation of a constitutional reform. Some adjustments may be done at the legislative level. Below are the examples of such amendments, which arguably may be done without changing the Constitution.[17]

23. At present a majority of 17 members is needed for selecting candidates to the positions of the two chief judges. It means that the two chief judges may be elected even without the votes of judges elected by their peers (elected judicial members). The JSA could provide that a successful candidate to these two positions needs to receive a double majority: i.e. in addition to the overall majority of votes of the Plenary SJC the candidate should be supported by the majority of elected judicial members. Alternatively, the JSA might require pre-approval by the Judicial Chamber of candidates to the two top positions in the judiciary (in this case, decisions of the Judicial Chamber should also require a "double majority"). The same principles should govern the process of removing elected judicial members from the SJC. In essence, important decisions affecting the judiciary should not be adopted without the support of the majority of the elected judicial members.

[15] ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 114, ECHR 2013
[16] CDL-AD(2015)022, § 28
[17] Indeed, it belongs to the Constitutional Court of Bulgaria to decide, in the final instance, whether any of the proposed models is compatible with the constitutional design of the SJC.

24. Another legislative reform could be aimed at ensuring the pluralistic composition of the SJC.[18] The Venice Commission recommends revising the nomination procedure; the JSA may provide that well-established professional associations of lawyers (the Bar, the judges' associations, etc.), law schools and NGOs working in the legal sphere have a formal role in the nomination process (for example, that a certain quota of candidates are presented to the National Assembly by those bodies). That would ensure a more pluralistic composition of the SJC and the greater involvement of the civil society in the governance of the judiciary.

B. Position and powers of the prosecution service

25. The question discussed above – about the role of prosecutors in the judicial governance – is closely related to a more general question about the position of the Prosecutor General (PG) within the judicial system.

1. Accountability of the PG

26. The JSA establishes largely symmetrical institutions for judges and prosecutors. The PG, under the Constitution and the JSA, enjoys essentially the same status as the President of the Court of Cassation and the President of the Administrative Court. Such a model has its positive and negative sides. On the one hand, the prosecution service is not controlled by other branches of government. On the other hand, it is unclear who may hold the PG accountable. This paradox was noted in a recent PACE report.[19]

27. The Constitution does not provide for a vote of "no confidence" in the PG by Parliament. Neither can the PG be removed by the Government. The only form of political accountability of the PG provided by the JSA consists of an obligation to submit reports to the SJC and to Parliament (see Article 138a §§ 1 and 2).

28. The Venice Commission does not recommend introducing the vote of "no confidence" in the PG, or the subordination of the PG to the Government. This is a very delicate issue: the risks of politicisation of the office of PG should not be underestimated.[20] Nevertheless, in this situation, other effective mechanisms of accountability should be in place.

29. Under the Constitution the chief prosecutor may be removed by the President at the proposal of the SJC for *specific breaches*: either for having committed a crime (Article 129 § 3 p. 3 of the Constitution), or for a specific breach of official duties/unethical behaviour (see Article 129 § 3 p. 5, which provides for the removal of the PG for "grave breach or systematic dereliction of the official duties, as well as actions damaging the prestige of the judiciary"). However, it appears that these mechanisms of accountability are very difficult to use, due to a combination of several factors.

30. The first is that the SJC has no independent fact-finding capacity. A motion by the SJC to the President proposing the removal of the PG under Article 129 § 3 pp. 3 and 5 of the Constitution for a crime/misconduct should be supported by solid evidence. To collect such evidence the SJC would have to turn either to the Inspectorate, or, if the PG's misbehaviour has criminal nature, to the prosecution service itself. However, in Bulgaria the prosecution

[18] See CDL-AD(2015)022, § 39

[19] Committee on Legal Affairs and Human Rights, "New threats to the rule of law in Council of Europe member States: selected examples", report by Mr B. Fabritius, p. 32

[20] See CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", § 25; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 120, 121, and 122

service has a quasi-monopoly on criminal investigations.[21] In the case of *Kolevi v. Bulgaria*,[22] the ECtHR found a violation of Article 2 of the European Convention on account of the impossibility of an independent investigation into alleged offences committed by the PG.[23] It appears that no significant progress in this area has been made since 2015.[24] Thus, the mechanism provided by Article 129 § 3 p. 3 (removal of the PG for a crime) is very difficult to put in practice.

31. The mechanism provided by Article 129 § 3 p. 3 of the Constitution (removal of the PG for another serious misconduct, falling short of a crime) also remains, in the specific context of Bulgaria, a theoretical possibility only. This is mainly due to the very powerful position of the PG within the prosecution system and within the SJC. Even assuming that there is no need to conduct a separate criminal investigation into PG's actions, and even assuming that the Inspectorate has the will and the resources to collect evidence, there are little chances that such initiative would succeed in the SJC, because the PG has enough powers to prevent the progress of such case.

32. Despite a certain decentralisation of the prosecution system in 2016, the PG remains the most influential functionary of the system. Thus, under Article 136 §§ 3 and 4 of the JSA the PG may "direct" prosecutors and investigators through their administrative heads and issue written instructions to lower prosecutors in specific cases (see Article 138 § 1 p. 6). It is positive that the PG cannot anymore issue *verbal* orders to lower prosecutors (Article 143 § 2); but nothing prevents the PG from addressing them *written* instructions, quashing their decisions or even directly exercising their competencies (Article 143 § 3 and Article 139 § 2). In essence, the PG personifies the prosecution system with all its considerable powers, and is the superior of all prosecutors and investigators in the country.[25]

33. The above principles of the organisation of the prosecution system are not wrong *per se*. It is legitimate to establish a "unitary prosecuting magistracy" where "each administrative head is subordinate to the Prosecutor General and to the superior administrative heads" (Article 136 §§ 1 and 4). It is also legitimate for the PG to provide methodological guidance regarding the work of all prosecutors and investigating magistrates for an accurate and uniform application of the laws. However, those powers of the PG should be taken into consideration when defining his or her position within the SJC, where the PG sits as an *ex officio* member while being the hierarchical superior to at least five other members.

34. In practice, the influence of the PG within the SJC extends even further. The Venice Commission observes that lay members with prosecutorial background may later return to their previous functions in the prosecution system (see Article 28 § 1 of the JSA). That means that at the end of their mandate they become again hierarchically subordinate to the PG. Furthermore, nothing in the law prevents the PG to trigger checks in respect of their previous work as prosecutors while they serve as lay members of the SJC. (By contrast, elected judicial members are not in the same position vis-à-vis the two chief judges; their internal

[21] See http://www.mjs.bg/Files/Executive%20Summary%20Final%20Report%20BG%2015122016.pdf, page 8

[22] ECtHR, no. 1108/02, judgment of 5 November 2009

[23] See https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2770042&SecMode=1&DocId=2283172&Usage=2

[24] http://hudoc.exec.coe.int/eng#{"EXECIdentifier":["004-3557"]}

[25] In response to the *Kolevi* judgment, the Bulgarian Government proposed an action plan. That plan identified structural defects of the Bulgarian prosecution system: the strictly hierarchical structure of the system, the lack of clarity as to the procedure for temporary removal from office of the PG, and the apparent lack of special procedure for his/her dismissal. See the reference in footnote no. 23.

independence is better protected, and, as a result, there is less risk that they would act as a "block" protecting the interests of their superior).

35. Finally, extensive powers of the prosecution service and the position of the PG within it may give the latter a certain *de facto* leverage over some other members of the SJC, even those who are not professionally linked with the prosecution system.

36. The Venice Commission notes that under the JSA, the Plenary SJC needs 17 votes out of 25 to lodge a motion of impeachment of the PG before the President (see Article 33 § 3).[26] That means that prosecutorial members,[27] together with those lay members who have prosecutorial background may relatively easily block any such initiative. Furthermore, at present the procedural framework for this type of accountability is not entirely clear,[28] which is yet another factor impeding the effective use of this mechanism.

37. In sum, in the current Bulgarian system there is a weak structure for accountability of the PG who is essentially immune from criminal prosecution and is virtually irremovable by means of impeachment for other misconduct. This is problematic in itself, and in the system of judicial governance it distorts the balance of power as a strong PG sits as an *ex officio* member of the SJC while being the hierarchical superior to at least five its members (or even of a bigger number, if lay members with prosecutorial background are counted).

2. Possible solutions

a. Mechanism of "impeachment" under Article 129 § 3 p. 3

38. The Venice Commission recommends revising the procedures which may lead to the removal of the PG from office for misconduct under Article 129 § 3 p. 3 of the Constitution. It is necessary to ensure that investigations into the alleged misconduct by the PG are effective. Such investigations should be conducted by a person or a body independent from the PG.[29] This person or body should have a capacity to conduct its own fact-finding (and not be dependent on the prosecution service in obtaining evidence). Finally, prosecutorial members of the SJC should not have the blocking power in the process of such investigations, and the majority needed for lodging an impeachment motion before the President should be reduced.

39. It belongs to the Bulgarian legislator to design the impeachment procedures under Article 129 § 3 p. 3 of the Constitution; for possible solutions, the Venice Commission refers to a discussion in its previous opinion on a similar topic concerning Georgia.[30]

[26] The Venice Commission notes a contradiction between the text of Article 33 § 3 which provides that the "voting [in the Plenary SJC in relation to election and removal of the PG and two chief judges] shall always be by open ballot" and Article 173 § 11 which provides that the Plenary SJC shall elect the PG and the two chief judges "in a secret ballot".

[27] Under Article 35 § 1 the PG would not have the right to vote in this situation.

[28] Thus, for example, it is difficult to understand whether those proceedings should be triggered by the Inspectorate, or by a certain number of members of the SJC itself, and which body will conduct the preliminary inquiry and collect evidence (cf. Article 175 § 5, Article 173, and Article 312 § 2). It is equally unclear whether members of the SJC who initiated the "impeachment" of the PG would be able to take part in the final voting on the motion, and how that would affect the majority required under Article 33 § 3.

[29] For example, by the Judicial Chamber, although other solutions are also possible.

[30] CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 69 et seq.

40. The Venice Commission reiterates that the reforming of the accountability mechanisms related to the PG does not call for a symmetrical easing of procedures related to the removal of the two chief judges or judicial members of the SJC. While judges should be independent, this concept is not fully applicable to the prosecutors;[31] it is more accurate to speak of "autonomy" rather than full-fledged "independence" of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable.

b. Powers of the prosecution outside of the criminal law sphere

41. In Bulgaria, the prosecution service has exclusive power to bring criminal charges: private prosecution is not developed, and the power to bring (or not) charges is not subject to judicial review. Prosecutors have the capacity to collect information, including by covert means; they have coercive powers of search, seizure and arrest (those powers are, by contrast, subject to a judicial review). In addition, the prosecution is also in charge of the "general supervision of legality" (see Article 127 § 2 of the Constitution; Article 136 § 5 of the JSA). This is a loosely defined competency to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, conduct checks and issue binding orders even where there is no case to answer under the Criminal Code.

42. In the 2009 opinion on the previous version of the JSA,[32] the Venice Commission recommended circumscribing powers of Bulgarian prosecutors related to the general oversight of the legality (i.e. not related to the criminal law sphere).[33] In particular, Article 145 of the JSA allows prosecutors to "require documents, explanations, other materials", "conduct checks in person", summon individuals for questioning, and issue binding orders "within the competence" of the prosecution service. Since this "competency" (related to the general oversight of legality) is described very vaguely, coercive powers listed in Article 145 have no clear limits. In addition, Article 145 § 4 imposes on private individuals and companies the obligation to cooperate with the prosecutors, in particular by "letting them [i.e. the prosecutors] access to the premises and places concerned". Again, this provision appears to give the prosecution almost an unfettered power to enter private premises, whenever the "interests of the legality" call for it.[34]

43. In the opinion of the Venice Commission, coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed. The JSA should describe, with sufficient precision, in which cases (falling outside of the scope of the Criminal Procedure Code) the prosecutors may seize documents, summon people for questioning, enter private premises, issue binding orders, etc. If such actions interfere with privacy, secrecy of correspondence, etc., they should be accompanied by appropriate procedural safeguards (such as the requirement of a "reasonable cause", the need to obtain prior judicial authorisation, etc.).

c. Suspension of judges

44. Finally, the Venice Commission is particularly worried by one of the amendments to the JSA passed in July 2017, which indirectly gives the prosecution service an important power over the judges. Under the new Article 230 "if a judge […] is charged with intentional publicly

[31] See, for example, CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 20; CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 6

[32] CDL-AD(2009)011, §§ 12 and 33

[33] See http://www.mjs.bg/Files/Executive%20Summary%20Final%20Report%20BG%2015122016.pdf, page 11

[34]

prosecutable criminal offence, the respective chamber of the Supreme Judicial Council shall suspend the said magistrate from office until the close of the criminal proceedings. […]".

45. As understood by the Venice Commission, in the Bulgarian system the "bringing of charges" against a person often corresponds to an early phase of the pre-trial investigation. The prosecution at this moment does not need to have strong evidence against the person concerned; that will be required later, when the case is sent to a trial court with a bill of indictment. The decision to bring charges is not subject to a judicial review. Article 230 introduces an obligation for the Judicial Chamber of the SJC to suspend the judge in case charges are brought by a prosecutor ("shall"). Indirectly, therefore, prosecutors are given the power to initiate the suspension of judges for a potentially long period of time on the basis of (relatively) scant evidence. This may be very dangerous for the judges' independence. Even if charges are ultimately dropped, the suspended judge would have to transfer his/her cases to other judges, and, during the period of suspension, will only receive a minimal salary. Suspension would have devastating effects on the life and career of a judge and this power could easily be abused.

46. The Venice Commission accepts that a judge, against whom serious accusations are forwarded, may be suspended from duties. However, it should belong to the Judicial Chamber to verify how serious and well-founded those accusations are. In the current version of Article 230, the Judicial Chamber of the SJC appears to perform only a formal role of approving the suspension whenever the prosecution has initiated the mechanism under Article 230. Instead, the JSA should stipulate clearly that the Judicial Chamber has to review the substance of the accusations and decide whether the evidence against the judge is persuasive enough (without necessarily being "beyond reasonable doubt") and whether it calls for a suspension. When doing so, the Judicial Chamber of the SJC should be able to fix short time-limits for investigations against suspended judges.[35]

47. In sum, the Venice Commission recommends three groups of measures: revision of the procedure of impeachment of the PG, circumscribing the powers of the prosecution service in the non-criminal sphere, and giving the Judicial Chamber the power to control the suspension of judges under investigation.

C. Early removal of an elected member of the SJC

48. Article 130 § 8 pp. 2 and 4 of the Constitution provide that the mandate of a member of the SJC should be terminated if he or she is convicted of a criminal offence or is dismissed from office "by reason of breach of discipline" or disqualified from exercising legal profession/activities. From Article 27 § 4 it appears that the removal of an elected member of the SJC in the case of conviction is not automatic, but needs a confirmation by the SJC. Such proceedings should be initiated by 5 members of the Plenary SJC or 3 members of the respective chamber, or at the request of 1/5th of the magistrates or 1/5th of MPs. 17 votes of members are required to terminate the mandate of a member of the SJC. It appears that a convicted person may continue sitting in the SJC and deciding on the most important questions implicating the country's judiciary pending those proceedings. The SJC could introduce the possibility of suspension of such members before the final decision is taken by the SJC on the termination of the mandate. One may also question whether the majority of 17 members is not

[35] The Venice Commission notes that the Constitution permits to terminate the mandate of a judge only in case of "entry into effect of a sentence imposing a penal sanction of deprivation of liberty". At the same time, new Article 230 provides for suspension in all cases where the judge "is charged with intentional publicly prosecutable criminal offence", independently of whether or not this offence is punishable with a prison term. In essence, the judge may be suspended in connection with a crime which will not call of his/her removal from office. That does not seem logical, although, indeed, the constitutionality of this provision should be assessed by the Constitutional Court of Bulgaria.

too big in cases which concern the removal of a person who has been convicted for a criminal offence in a final instance.

D. Standing commissions of the SJC

49. Under Article 37 § 3 of the JSA, two standing commissions are created within the two respective chambers of the SJC: a standing Commission on Appraisal and Competitions (CAC) and a Commission on Professional Ethics (CPE). The CAC makes proposals to the respective Chamber on appointments, promotions, transfers, dismissals of judges and prosecutors, appointments of presidents/heads of offices; it performs the appraisal of judges, prosecutors, and presidents of the courts (with the exception of the two chief judges and the PG who are appointed by the President of the Republic on proposal of the Plenary SJC). The function of the commissions on professional ethics is to "conduct enquiries", "collect the requisite information" and "draw up an opinion regarding the moral integrity possessed by the candidates" to various magistrates' positions.

50. The CAC and the CPE have a mixed composition: they include members of the two chambers of the SJC and external short-term members, elected by judges/prosecutors of a top level of the judiciary/prosecution service. The ratio of internal/external members and the procedure of their selection are not set in the JSA. It is also unclear which members of the respective chamber of the SJC sit in each of the standing commissions (elected members representing magistrates, *ex officio* members, lay members). This is regulated by the Plenary SJC (Article 37 § 2). Given the significant powers of the CAC and the CPE, described above, the Venice Commission considers that the composition of the two commissions should be regulated in the JSA.

E. Inspectorate

51. In addition to the SJC, activities of courts and magistrates are supervised by the Inspectorate, composed of the Inspector General (IG) and ten ordinary Inspectors. of the JSA).

52. The IG and the Inspectors are elected by Parliament with the qualified majority of 2/3 of the votes. Inspectors should have work record as high-level judges and prosecutors (see Article 42 of the JSA).

53. The Constitution stipulates that the work of the Inspectorate must not affect the independence of judges (Article 132a § 6). In 2015, the Venice Commission refrained from assessing whether the powers of the Inspectorate are in line with this principle.[36] The 2016 reform of the JSA resulted in the substantive increase of powers and competencies of the Inspectorate vis-à-vis the judges.

54. Thus, although the Inspectorate cannot discipline or dismiss magistrates (the final say belongs to the respective chambers of the SJC), it collects and supplies the information on the basis of which the SJC can act. The Inspectorate is also a filtering mechanism for disciplinary cases: if the Inspectorate finds that an "alert" about the alleged misbehaviour of a magistrate is not worth attention, the case does not go any further.[37] In addition, the Inspectorate evaluates performance of magistrates and courts. The inspectorate also conducts integrity checks and examines "applications against infringement of right to have case examined and disposed within reasonable time" (Chapter 3A of the JSA). An inspection results with a report by an inspector; such report should contain "recommendations and a time limit for their

[36] CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, § 80

[37] Unless the case is brought to the SJC by the Minister of Justice or the competent president of the court/head of the prosecutorial office.

implementation" (Article 58 § 2). The inspections conducted by individual inspectors are subject to appeal to the IG, but, if approved, they become final (Article 58 § 3). Reports resulting from such evaluation influence the appraisal of individual magistrates (see Article 198 § 2).

55. In sum, the Inspectorate is competent to examine virtually every aspect of activities of courts, prosecution offices, individual judges and prosecutors: internal organisation and working arrangements, consistency of the jurisprudence, financial situation of magistrates, their assets, their behaviour in the private sphere, etc.

56. In the 2008 opinion, the Venice Commission recommended that "the inspection […] should only concern material issues such as the efficiency with which the judicial bodies have spent the money allocated to them. The inspectors should not have the power to investigate complaints; that should be left to the Supreme Judicial Council itself, since this requires knowledge of or experience with the administration of justice."[38] Clearly, this recommendation was not followed. On the contrary, competencies of the Inspectorate have been expanded considerably.

57. It belongs to the Constitutional Court of Bulgaria to decide whether the powers of the Inspectorate are constitutionally permissible. The Venice Commission will concentrate on another question, namely whether the current scheme represents a danger for the independence of the judiciary. The Venice Commission fears that such danger exists. Even if the formal decision-making power remains with the SJC, entrusting the Inspectorate with so many new functions (which are often overlapping with the functions of the SJC – on this see more below) may result in shifting the real power from the SJC to the Inspectorate. This is why it is particularly important to examine the method of election of the Inspectors, their status and the powers they have.

1. Elections and accountability of Inspectors

58. The eligibility criteria and the method of election of Inspectors, in conjunction with their powers vis-à-vis the judiciary, is a source of concern for the Venice Commission. On the one hand, all Inspectors should have a solid professional record as senior magistrates. That guarantees that they are familiar with the judicial system. On the other hand, the Inspectors are elected by the National Assembly (see Article 44). That creates a risk of political influence over this body. The 2015 Opinion welcomed the fact that the inspectors are elected with a 2/3 majority (§ 76); in theory, this should lead to the election of more neutral figures, who have no strong political affiliation. However, the rapporteurs understood that the 2/3 majority, in the Bulgarian context, is often achieved through the distribution of "quotas" in covert political negotiations. That means that, at the end of the day, each inspector is likely to have some political obligations vis-à-vis one or another party.

59. This should be avoided; in order to increase political detachment of the inspectors the Venice Commission recommends giving the Chambers of the SJC the power to nominate a certain number of candidates for the appointment by Parliament.[39]

60. Little is said in the JSA about the accountability of the Inspectors. Article 48 of the JSA provides that Inspectors, like judges, may be removed from office before the end of their term for "a serious breach or systematic failure to discharge the official duties, as well as actions damaging the prestige of the judiciary". The proposal to remove inspectors should be made by 1/5th of the National Assembly or by the Plenary SJC. However, it is not clear who takes the final decision. Article 48 may be understood as implying that this power belongs to the National

[38] CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, § 46
[39] The Venice Commission aknowledges that total political neutrality may be hard to achieve.

Assembly.[40] In the opinion of the Venice Commission, even though the National Assembly is the appointing body, it should not necessarily have the power to remove the Inspectors. After all, the name of this body is "the Inspectorate *with the Supreme Judicial Council*" (italics added). That implies that the Inspectorate should have some institutional links to the SJC. These links may be created if the nomination and removal powers are given to the SJC (at the proposal of a certain number of members of the SJC).

2. Functions of the Inspectorate

61. Functions of the Inspectorate are defined by the JSA imprecisely, in an all-encompassing manner. As a result, it is unclear what is the exact role of the Inspectorate vis-à-vis the SJC.

a. An overlap between the functions of the Inspectorate and of the SJC

62. The line between appraisals (by the SJC) and inspections (by the Inspectorate) is blurred. Under Article 197 § 4, appraisals by the SJC are supposed to assess "professional competence, performance characteristics and compliance with the […] code of ethics". Provisions describing the tasks of the Inspectorate are formulated differently (see Article 54 § 1), but it is clear that Inspectorate focuses on virtually the same elements when it examines the performance of a particular judge, analyse his/her decisions, working arrangements, compliance with the time-limits, "actions damaging the prestige of the judiciary", etc. So, appraisals and inspections have a very similar object of examination.[41]

63. Inspections and appraisals are not a part of one sequential procedure. Sometimes they interrelate, and sometimes simply co-exist. There is no strict hierarchy between them - inspections may trigger extraordinary appraisals, while appraisals may trigger inspections (cf. Article 30 § 5 p. 10, Article 56 § 1 and Article 197 § 5 p. 3).

64. A similar overlapping exists between inspections, appraisals and disciplinary proceedings. The Venice Commission has previously noted that performance evaluation and disciplinary sanction should be distinct.[42] In the Bulgarian system, an inspection may trigger formal disciplinary proceedings (Article 54 § 1 p. 6), may be used as a criterion for the appraisal (Article 198 § 2), trigger an extraordinary appraisal, or may result in a simple notification addressed to the president of the court/head of a prosecutor's office, or to the SJC (Article 54 § 1 p. 5).[43] In essence, every inspection may become a part of an appraisal process and/or a disciplinary case, and *vice versa*.

[40] Article 30, which lists the powers of the Plenary SJC and the Chambers of the SJC, does not mention competencies related to the removal of Inspectors.

[41] For example, the SJC, is supposed to examine *inter alia* professional skills of the judge (see Article 198 § 1). The Inspectorate is tasked with checking procedural arrangements and consistency of the case-law (see Article 54 § 1 p. 3 of the JSA), which necessarily involves assessment of professional skills. The function of "analysing and summarising the case-law of the court" belongs at the same time to the general assembly of judges of each court (see Article 79 § 2 p. 1), and to the Inspectorate (Article 54 § 1 pp. 3 and 4). Most importantly, the results of the inspections seem to be a separate factor in the promotion process, *in addition* to the results of the appraisal (see Article 192 § 1).[41] At the same time, the inspection reports are taken into account as a part of the appraisal process (see Article 198 § 2).

[42] CDL-AD (2014)007, Joint Opinion by the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe - Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 9.

[43] To these procedures other occasional verifications add up. Thus, under Article 173 § 9 and Article 186 the two standing commissions of the SJC (the CAC and CPE) draw up reports on the professional standing and moral integrity of the candidates for appointments and promotion. To prepare those reports the commissions may conduct "inquiries" (Article 37 § 9). Commissions on

b. A risk of encroachment on the constitutional mandate of the SJC

65. As shown above, functions of the Inspectorate and of the SJC are note clearly distinguished. Furthermore, some of the current provisions of the JSA appear to give the Inspectorate an independent role in the decisions regarding judicial careers and discipline (see, for example, Article 198 § 2 p. 3). This is problematic: these powers under the Constitution belong to the SJC Chambers, and there is no need to create parallel structures with the same functions. Indeed, the Inspectorate may continue to play a *supportive* role vis-à-vis the SJC, as a body collecting information and conducting inquiries. However, inspection reports (which are, under the JSA, not subject to any external review) should not be an element in its own right in the decisions concerning appraisal, promotions, etc.

66. The Venice Commission recommends that the respective provisions should be revised. First, the JSA should distinguish more clearly between functions of the Inspectorate and functions of the SJC (in particular between inspections and appraisal). Second, the JSA should ensure that the powers of the Inspectorate do not encroach on the constitutional mandate of the SJC.

c. Procedures; investigative powers of the Inspectorate

67. It is understood that the inspections may concern performance/activities of individual judges or of the courts in general. These two types of inspections should be described separately. Inspections related to the evaluation of personal performance of judges, their behaviour etc. create more risk for the judicial independence; such inspections should therefore be described in more detail. However, there is surprisingly little in the JSA to explain *how* the Inspectorate conducts those checks and with which powers it is endowed.

68. It is particularly important to regulate in more detail *extraordinary* inspections into the activities of individual judges, not provided by the annual plan. Such inspections are to be prompted by "alerts" (Article 56 § 1) – i.e. complaints lodged against judges by individuals.

69. In principle, general procedure of such inspections should not necessarily be regulated in the JSA itself. The law may delegate this task to one of the bodies of judicial administration. However, it is not entirely clear, under the JSA, who may adopt such general rules. Article 30 § 2 pp. 17 and 20 give the Plenary SJC the power to issue "statutory instruments of secondary legislation" and "decide on other organisational matters common to the Judiciary". Article 54 § 1 p. 10 provides that the Inspectorate (as a collective body) should "adopt internal rules for carrying out testing and examinations […]". Article 56 § 3 provides that "the Inspector General shall issue an order establishing the procedure for carrying out inspections" and Article 60 § 1 stipulates that one of the functions of the IG is to "provide overall organisational and methodological guidance to the operation of the Inspectorate".

70. The Venice Commission recalls that the IG has the power to order extraordinary inspections and define their object, time-limits, etc. (see Article 58 § 1). Furthermore, the IG may "exercise control over the activity of the inspectors" in specific cases (Article 60 § 1 p. 3). The IG is, therefore, a sort of a chief executive officer within the Inspectorate. It would be preferable that general rules governing inspections are set by another body – preferably by the SJC (since, again, the Inspectorate should have institutional links to the SJC). These general

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ethics also exist at the level of the relevant courts and prosecution offices (see Article 39b §§ 1 and 2): apparently, they will also have some investigative powers vis-à-vis the magistrates. Article 191a § 1 mentions "checks by the superior judicial authorities"; it is unclear, however, what those "checks" are and how they are different from inspections (conducted by the Inspectorate) and appraisals (conducted by the SJC).

rules should be publicized, and should contain safeguards against arbitrary, lengthy or repeated inspections into the same matter.

71. Article 58 § 3 very summarily sets out the legal position of the inspected judge. It remains unclear whether the judge concerned needs to be heard by the inspector before finalising the results of the inspection. Such hearings (which do not necessarily need to be public) may be required whenever the inspection involves any in-depth factual inquiry. In some cases the judge concerned could be informed about the "alerts" which concern him/her.

72. Article 59 is the only provision that deals with the fact-finding powers of the Inspectorate. It is formulated very broadly: inspectors should be afforded access to "materials required for the implementation of the said powers" (see also Article 59 which imposes on the presidents of the courts the "duty to cooperate" with the inspectors). While there is no doubt that inspections, verification of financial declarations and integrity checks may require giving the inspectors access to certain documents, the inspectors' investigative powers should not be unlimited, and should be subject to supervision by an independent authority (for example, the SJC). General rules governing inspections (whatever they are called) should explain which types of materials an inspector may have access to without any special prior authorisation.

73. Results of an inspection are formulated in writing and submitted to the judge concerned (Article 58 § 3). The judge may submit objections to the IG, who must give a reasoned answer. It appears (although the JSA is not clear on this point) that the IG is an appellate instance *vis-à-vis* the Inspectors (Article 58 § 3). That implies that the IG has a power to quash or amend "inspection reports" prepared by the Inspectors. It is unclear, however, whether the decision of an Inspector not to proceed with the case is communicated to the other party (who is at the origin of the "alert") and whether that party has the right of appeal.

74. There are other elements of the procedure which need to be developed further.[44] The Venice Commission will not be too prescriptive in this respect. It is clear, however, that functions and powers of the Inspectorate, as well as the procedures of individual inspections, should be better described either in the JSA itself or in a regulative instrument adopted in furtherance thereof.

F. Judicial appointments; acquiring of tenure

75. Article 183 of the JSA provides that the respective chamber of the SJC "shall designate five-member competition commission for the holding of competitions" in respect of entrants to the judiciary. The said commission must include one member of the CAC, discussed above, who is also a sitting judge, one academic and three practising judges nominated by the general assembly of the respective court for which the competition is being held and drawn at random by the respective chamber of the SJC. The commission ranks applicants based on their numerical scores resulting from written and oral examinations. These scores are then passed to the SJC. The CPE (Commission on Professional Ethics) also provides the respective chamber with information on the "moral integrity" of a candidate and prepares an opinion on each. Based on this information, the competition commission proposes candidates for the initial appointment to the relevant court for the approval by the Chamber.

76. The Venice Commission welcomes the fact that judicial appointments, save for the two chief judges and the PG, will be made by the respective chambers of the SJC. Moreover, the Commission welcomes the objective criteria and in-built majority of judicial nominees on the competition commissions.

[44] See, in a similar spirit, CDL-AD(2014)006, §§ 64 et seq.

77. However, for the Venice Commission it is unclear how the CPE forms an opinion on the moral integrity of an applicant based upon the information specified in Article 186a § 2 or what this term is intended to encompass. For example, it is unclear how the *curriculum vitae* and motivation letter of candidates could reasonably be used when assessing their "moral integrity". The term "moral integrity" is too vague to be used as an objective assessment of judicial candidates. It is necessary to identify criteria based on which integrity of a candidate could be assessed. Moreover, the respective roles of the competition commissions and of the CPE should be clarified.

78. The Constitution and the JSA maintained probationary periods for judges (Article 129 § 3 of the Constitution; Articles 196 and 207 of the JSA). The Venice Commission welcomes that it is the Judicial Chamber that makes the determination on the acquisition of tenure (Article 165 § 1 p. 6). However, the Venice Commission recalls that it has always been critical of the very idea of probationary periods for judges: such status undermines their independence.[45]

79. If the probationary period is to be maintained, the refusal of appointment to the position of tenure should remain an exception. As was noted in the Opinion on the Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", "a refusal to confirm the judge in office should be made according to objective criteria and with same procedural safeguards as apply where a judge is removed from office".[46]

G. Court presidents

a. Election

80. Under the 2016 reform, general assemblies within each court were given the competence to nominate candidates for the presidents' positions, while the final decision belongs to the SJC (see Article 79 § 2 p. 2). However, from Article 169 § 3 pp. 5 and 6 it appears that, in addition to candidates supported by the general assembly, the Judicial Chamber of the SJC may also consider self-nominated candidates or candidates proposed by the Minister of Justice.

81. In its 2014 opinion on Georgia, the Venice Commission supported the election of court presidents by the judges of the same court, by secret ballot.[47] This recommendation is valid for Bulgaria as well. However, since Article 130a § 5 p. 4 of the Constitution reserves the power to appoint the presidents to the Judicial Chamber of the SCJ, general assemblies of judges could receive at least the *exclusive* power to nominate candidates for the subsequent approval by the Judicial Chamber of the SJC.[48]

b. Powers

82. Under the JSA, presidents of the courts have a very powerful position. Some of the powers do not raise any objection: after all, it is only natural that a president manages the support staff and the property of the court, oversees the proper functioning of the administrative services, archives, electronic registers, collects statistics, prepares generalised reports, etc.

[45] CDL-AD(2002)015, §§ 34 et seq., and CDL-AD(2008)009, § 48; see also CDL-AD(2010)028, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, §§ 85-91,

[46] CDL-AD(2005)038, § 30

[47] CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, § 84

[48] It is conceivable that for the position of the two chief judges a different nominating procedure is provided by the JSA.

83. However, a president should not be seen as being hierarchically superior to "ordinary" judges: s/he should not be in a position to give them directions concerning their cases – neither *de jure* nor *de facto*. Therefore, it is important that powers of the presidents are formulated with sufficient precision, so as to limit any possibility of abuse. Under the JSA, a president of the regional court has the power *inter alia* to "organise the work" of judges (Articles 80 § 1 p. 2). This power, if broadly construed, may lead to interference with the judicial independence. Furthermore, Article 80 § 2 provides that orders of the president issued "in connection with the working arrangements of the court" are binding on judges. This formula is too vague, and may be interpreted as giving the president the power to interfere with the procedural decisions of other judges.

84. The presidents also have powers in the disciplinary field. Article 327 of the JSA gives the president the power to "draw the attention of judges […] to any breaches committed thereby in the institution and progress of cases or in the working arrangements thereof". The president may also issue disciplinary sanctions in the form of "reprimands" (Article 311 § 1), or initiate disciplinary proceedings (Article 312 § 1 pp. 1 and 2). These powers put presidents in a hierarchically superior position vis-à-vis their fellow judges, which should be avoided. In addition, in the current system there are bodies specifically entrusted with initiating disciplinary cases (the Inspectorate), and imposing disciplinary sanctions (the SJC chambers). The Commission previously said that "the best protection for judicial independence, both internal and external can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence".[49]

85. Some of the powers of the presidents overlap with the functions of the Inspectorate and the SJC. Thus, higher presidents organise "inspections" of the lower courts (see, for instance, Article 86 § 1 p. 6), which also appears to be within the ambit of the Inspectorate. The Venice Commission considers that both powers in the disciplinary field and "inspection" powers should be withdrawn from the presidents.

86. The presidents have an important power of seconding judges to other courts. Under Article 81 the power to second the judge belongs to the president of a higher court; however, no appeal lies against this decision (86 § 1 p. 12). Article 227 permits secondment of judges to another court for 3 months, "in exceptional cases", against their will (by a reasoned decision), or with consent for a 12-months' time-period. However, the law does not explain in more details what those "exceptional cases" are, and why one judge should be preferred over another for a compulsory or consensual secondment.

87. The rapporteurs were told in Sofia that the secondment power is sometimes abused by the courts' presidents; consensual secondments to a better place are sometimes used as an incentive, while compulsory secondments are used as a punishment. Under the current law, secondment decisions are fully within the discretion of the presidents (except in few special cases, like the prohibition of secondment of pregnant women etc. – see Article 227 § 3). The Venice Commission considers that there should be an external check on the presidents' power to second; for example, such decisions should be appealable to the SJC Chambers by interested parties (those who were seconded against their will or who wished to be seconded but were not).

H. Appraisal procedure

88. Section IV of Chapter 9 speaks of appraisals, which are applied to junior judges, to judges preparing for tenure and, every five years, to tenured judges (until they receive two consecutive appraisals with "good or "very good" grades). The JSA also provides for extraordinary appraisals (Article 197 § 5): these are conducted for the purposes of promotions or, if requested

[49] CDL-AD(2010)004, Report on the Independence of the Judicial System Part I, § 71 *in fine.*

by the Inspectorate, in cases "where there are data of sustained deterioration of the quality of work or non-compliance with the ethics rules" (p. 3).

89. The 2016 amendments described situations in which the appraisal should be conducted (see Articles 196 and 197). This is worth praise. The Venice Commission is generally in favour of a system of evaluations of judges.[50] It is important to ensure, however, that those evaluations ("appraisals") are not misused to undermine the judicial independence. Furthermore, criteria for appraisal should be clearly described in the law.

90. The JSA outlines certain general appraisal principles. Further details of the appraisal procedure are regulated by the Rules enacted by the Plenary SJC (according to Article 209b). On 23 February 2017, the Plenary SJC adopted the Regulation on the Indicators, the Methodology and the Procedure for Appraisal of a Judge, Chairperson and Deputy Chairperson of a Court. The Venice Commission does not have the English translation of this document; it will, therefore, base its recommendations on the text of the JSA. If the JSA is taken alone, the Venice Commission notes, with regret, that the methodology of appraisal is not very clear.

91. Article 198 § 1 sets out appraisal criteria for all magistrates (judicial and non-judicial). They are as follows: professional knowledge and skills (pp. 1-3), efficiency and discipline (p. 4); compliance with ethical rules (p. 5).

92. To this list of criteria, Article 198 § 2 adds a number of "indicators" which should be "taken into account". These "indicators" include: compliance with deadlines (p. 1), rate of reversals of decisions taken by the magistrate (p. 2), results of inspections (p. 3), and the overall caseload of the court/prosecution office (p. 4).

93. Finally, Article 199 § 1 mentions "specific criteria" which should be used in the appraisal of a judge. They are formulated as follows:

> *"1. complying with the schedule for conduct of court hearings;*
> *2. skill of conducting a court hearing and drawing up a record of proceedings;*
> *3. administrating cases and appeals, preparing for a court hearing;*
> *4. number of [appealed and reversed decisions]; the ability to reason and justify judicial instruments and to analyse evidence shall be subject to evaluation."*

94. The relation between "criteria" (197 § 4), "indicators" (Article 198 § 2), and "specific criteria" (Article 199) is very unclear. In particular, it is difficult to say whether "indicators" and "specific criteria" only *develop* the "criteria", or whether they *add* new elements. Some of the "specific criteria" and indicators are quantitative (compliance with deadlines, number of reversals, etc.), some are qualitative (related to the skills), whereas Article 199 § 1 p. 4 includes both qualitative and quantitative elements. Indicator in Article 198 § 2 p. 3 refers actually to a *source of information* (inspection report), and not to a *factor* to be evaluated. The overall case-load of the court (Article 198 § 2 p. 4) is not an indicator *per se*, but rather the method of assessment of other indicators (such as the compliance with the deadlines, for example). Finally, the relative weight of criteria, "specific criteria" and indicators is not established.

95. In sum, the criteria for appraisal set out in Articles 197 – 199 are heterogeneous and partly overlapping. That makes the appraisal process less rational and less predictable. No methodology of appraisal is perfect; however, there is certainly room for improvement of the current system, if the following recommendations are followed.

[50] CDL-AD(2014)038, §§ 59-60, CDL-AD(2014)007, § 11

96. First, it is necessary to explain the interrelation between "criteria", "indicators" and "specific criteria" (for example, by attaching a number of indicators to each criterion).

97. Second, inspection reports should not be treated as criteria or indicators. Otherwise the Inspectorate becomes an additional appraising body, which is wrong. The Venice Commission notes that inspection reports are not subject to appeal, and that the SJC has virtually no control over their content. It should be stated clearly in the JSA that results of the inspections (or reports of any other bodies external to the SJC, like ethics commission within the courts) have no predetermined weight for the SJC, and should be assessed critically. The power to appraise should remain with the SJC.

98. Third, it is important to separate quantitative and qualitative criteria. The CCEJ observed that "evaluation must be based on objective criteria. Such criteria should *principally* [italics added] consist of qualitative indicators but, in addition, may consist of quantitative indicators".[51]

99. Speaking of quantitative criteria, the Venice Commission has already criticised systems of evaluation which rely too heavily on the mathematical assessment of quantitative performance of judges. [52] The law should stipulate clearly that appraising a judge's ability to manage the administration of justice, for example through the keeping of deadlines, complying with schedules etc., should take into account the work-load and other relevant circumstances.[53]

100. The reversals rate (the number of decisions reversed / invalidated – see Article 199) should not be used as an important factor. The Venice Commission acknowledged the relevance of the criterion, but has always stressed that its "weight" in the appraisal should remain limited.[54] Article 199 § 1 p. 4, which provides that the number of appealed decisions is a factor on which a judge is appraised on, may be misleading. A successfully appealed decision is not necessarily a negative reflection on the individual decision; the Committee of Ministers of the Council of Europe (CM/Rec(2010)12 to member states on judges: independence, efficiency and responsibilities, p. 70) recommended that "judges should not be personally accountable where their decision is overruled or modified on appeal". Moreover, it would undermine judicial independence if a judge's career development was dependent not on coming to decisions on a fair and reasoned basis, but on the basis of decisions of a superior court.[55] In sum, the Venice Commission recommends that the number of appealed judgments should only be utilized as an appraisal factor where it is established to arise from continued resistance to following clear legal rules.

101. Speaking of the qualitative indicators, there is a question of how to assess ethical behavior of a judge. From the JSA it appears that ethical matters are assessed either in connection with a specific behavior – and then this is a subject of disciplinary proceedings – or "in general". Thus, as was explained by the authorities to the GRECO, under the JSA "the indicators which need to be taken into account [for the purposes of appraisal] are: (i) […] (ii)

[51] Opinion no. 17 "On the evaluation of judges' work, the quality of justice and respect for judicial independence", § 49 (6)

[52] CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the Former Yugoslav Republic of Macedonia", §§ 99 et seq.

[53] To a certain extent the indicator mentioned in Article 198 § 2 p. 4 addresses this concern – the overall caseload of the court and of the fellow judges should be taken into account to gauge the productivity and work organisation skills of a judge.

[54] See, for example, CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 55.

[55] Heavy reliance on the "reversals rate" in the appraisal process may have another (unintended) consequence; due to corporatist feelings a higher court's judge may feel reluctant to overturn debatable decisions of a colleague from a lower court, knowing that the latter is in the "red zone" due to the high number of reversals.

[…] identification of acts breaching the prestige of the judiciary […] as carried out by the SCJ Inspectorate; (iii) opinion of the ethics committees to the relevant body of the judiciary, which includes an assessment of the recusals and self-recusals under the [relevant procedural codes]."[56]

102. For the Venice Commission, it is not correct to evaluate magistrates on the basis of general opinions about their personality, character etc. (see point iii above), without reference to specific ethical breaches.[57] Furthermore, those specific ethical breaches ("acts breaching the prestige of the judiciary" in the formulation of the 2017 regulation – see p. ii above) should be established in disciplinary proceedings, not by the Inspectorate, but by the relevant chambers of the SCJ. Again, the Inspectorate should not assume the power to pronounce on the alleged grave violations of ethical rules. Such cases should be treated within the framework of disciplinary proceedings by the respective chambers of the SJC.

103. It is also open to doubt whether the number of recusals and self-recusals is a good criteria for assessing ethical behavior. First of all, it is not clear whether all recusals should be calculated, or only those that have been confirmed on appeal. Next, as regards self-recusals, their number may be related to the fact that the judge puts the threshold of impartiality very high, and withdraws from a case whenever there may be a slightest doubt in his/her impartiality. Unless clearly unreasonable, such behaviour is laudable.

I. Disciplinary procedures

104. The issue of disciplinary liability of magistrates is dealt with in Articles 307 – 328k of the JSA. Overall, the JSA meets many of the European standards in this sphere: an independent body takes decisions concerning disciplinary action (at least for more serious sanctions – see Article 311 § 2), disciplinary proceedings are adversarial (Article 313), decisions need to be reasoned (Article 320 § 7), sanctions are pre-fixed (Article 308), the imposition of a specific sanction is subject to the principle of proportionality (Article 309), a limitation period for imposing a disciplinary penalty is introduced (Article 310, § 1; cf. *Oleksandr Volkov* judgment, § 139), and an appeal before a judicial body is guaranteed (Article 323).[58] Certain issues, however, remain – in particular regarding the substantive grounds for disciplinary liability.

105. Article 307 § 3 defines the main grounds for imposing a disciplinary sanction:

> *"1. Any systematic failure to keep the deadlines provided for in the procedural laws;*
> *2. any act or omission that unjustifiably delays the proceedings;*
> *3. any act or omission, including a breach of the Code of Ethical Behaviour of Bulgarian Magistrates, which damages the prestige of the Judiciary;*
> *4. any failure to discharge other official duties".*

[56] Quoted from the 2017 GRECO report, cited above, p. 31

[57] However, it appears that this is exactly how the ethical assessment is made. From the 2017 Rules it is clear the "acts breaching the prestige of the judiciary" are assessed separately from the "opinions of the ethics committees". Such "opinions" may have effect only for the initial appointment, but not for the periodic or *ad hoc* evaluation of the judges.

[58] Speaking of the procedure, the Venice Commission draws attention to Article 318 § 1 which provides no exceptions to the non-public character of the disciplinary proceedings. The UN Basic principles on the Independence of the Judiciary require that "[t]he examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge" (§ 17). As to the *later* stages of disciplinary proceedings, the presumption should be rather in favour of public hearings. As stated in the Kyiv Recommendations on Judicial Independence, "[...] transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed" (§ 26).

106. It is positive that the disciplinary breach is defined in § 2 of Article 307 with reference to the guilt ("a *culpable* [emphasis added] failure to discharge official duties, as well as damaging the prestige of the Judiciary").[59] For example, when assessing the failure to meet procedural deadlines, the SJC should assess the overall workload in the respective court/office, the performance of colleagues, etc. The automated system of random distribution of cases may also create temporary inequality in work, even if case-weight is taken into account. It would be better to specify, for the sake of clarity, in § 3 that not "any" but only "unjustifiable" failure to meet deadlines and discharge duties is punishable.

107. The reference in § 3 p. 3 to acts which "damage the prestige of the judiciary" and to the Code of Ethical Behavior is problematic.[60] The Venice Commission has previously noted that concepts such as the "dignity of a judge" are too subjective to form the basis of a disciplinary liability.[61] Similarly, the Commission has previously commented that "undermining the reputation of the court and judicial function" is excessively vague.[62]

108. The Venice Commission acknowledges that, in defining unethical behavior, the law may have recourse to some comprehensive formulas. In such cases, it is better to use a mixed legislative technique: together with such comprehensive formulas, the law should list most common types of unethical behavior. These may include, for example, heavy drunkenness in public, grossly indecent or disorderly behavior, failure to comply with civil obligations ascertained by a court decision, obsessive gambling, fraternizing with known criminals, publicly attacking constitutional values, etc.). These specific examples will cover the majority of situations in which a judge may be considered to be acting unethically, and will also serve as guidance for those rare cases where the all-embracing formula may be needed.

109. The wording used in § 3 p. 4 – "any failure to discharge other official duties" – is particularly vague. It is positive that Article 309 introduces the principle of proportionality for determining disciplinary sanctions. However, Article 307 § 3 p. 4 still comes dangerously close to making a substantive assessment of the judicial decision-making process as such. *In extremis*, an unusually high reversal rate may be used as an additional factor in the appraisal process (see above). As regards the disciplinary liability, it may only "deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes".[63] The rapporteurs of the Venice Commission were assured, during the meeting with the SJC in Sofia, that this provision may trigger disciplinary liability only if a judge concerned "intentionally misapplied the law". This is positive, but it would be preferable that this approach is reflected in the law itself. Thus, the JSA should make it clear that judicial errors cannot give rise to disciplinary liability, unless they are committed "in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence".[64]

[59] It is understood that "actions damaging the prestige of the judiciary" should also be culpable.
[60] See also Article 54 § 1 p. 8 which stipulates that inspections by the Inspectorate should examine to "actions damaging the prestige of the judiciary". It is unclear whether those actions are examined for the purposes of triggering a disciplinary case, or may be assessed independently of the disciplinary proceedings.
[61] CDL-AD(2014)018, Joint Opinion – Venice Commission and OSCE/ODHIR – on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 22.
[62] Opinion on Laws on the Disciplinary Liability of Judges and Evaluation of Judges of the Former Yugoslav Republic of Macedonia CDL-AD(2015)053, § 36
[63] CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 60
[64] CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of

110. Finally, the JSA does not regulate the question of the standard of proof and the nature of evidence permitted in disciplinary proceedings. It is thus not clear which evidence is considered to be relevant, admissible or sufficient and what criteria are used for that purpose – probably, such matters can be regulated with reference to the relevant procedural codes.[65]

IV. Conclusion

111. The 2015 amendments to the Bulgarian Constitution brought in many positive changes. In particular, the separation of the Supreme Judicial Council (SJC) into two chambers, for judges and for prosecutors, and the election of the lay members with a qualified majority are major steps forward. However, the current system has still some deficiencies, and the progress achieved by the constitutional amendments and by the 2016 revisions of the Judicial System Act (the JSA) should be solidified by further structural reforms, both at the constitutional and legislative levels.

112. The key recommendations of the Venice Commission in this respect are as follows:

- judges elected by their peers should represent at least half of the members of the Judicial Chamber of the SJC; the Judicial Chamber should receive some of the powers of the Plenary in respect of judges (in particular the power to appoint/remove two chief judges and to remove elected judicial members); alternatively, these decisions should be taken by a "double majority" of the elected judicial members and all members of the SJC;
- to increase the accountability of the Prosecutor General (PG), the JSA should develop a procedure allowing for effective and independent investigation into alleged misconduct of the PG;
- functions and powers of the prosecution service outside of the criminal law sphere should be seriously curtailed;
- suspension of judges under investigation should be subject to an effective control by the Judicial Chamber of the SJC;
- the SJC should have the power to nominate candidates to the position of Inspectors, and remove them in cases of serious breaches.

113. In addition, the Venice Commission invites the Bulgarian authorities to consider following measures:

- well-established professional association of lawyers, law schools, etc. should be formally involved in the process of nomination of lay members of the SJC;
- the composition of the standing commissions of the SJC should be regulated by the JSA;
- general assemblies of courts should have the *exclusive* right to nominate candidates to the position of court president;
- the powers which put presidents in a hierarchically superior position *vis-à-vis* their fellow judges should be reconsidered; in particular, powers in the disciplinary field (to impose reprimands and to initiate disciplinary proceeding) and inspection powers should be withdrawn from court presidents;
- refusal of tenure should be accompanied by guarantees similar to those provided for removal from office;

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the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, § 22

[65] See CDL-AD(2014)032, § 31.

- the functions of the Inspectorate should be clearly separated from the functions of the SJC; the procedure of inspections should be regulated in more detail, to prevent unwarranted, lengthy, or invasive inspections;
- appraisal criteria and indicators should be reviewed and better organised; the reversals rate should not be used as an important criterion;
- the substantive grounds for disciplinary liability should be described more precisely; the law should specify the concept of acts "damaging the prestige of the judiciary" and stipulate clearly that honest judicial errors do not give rise to disciplinary liability.

114. The Venice Commission remains at the disposal of the Bulgarian authorities and the Parliamentary Assembly for further assistance in this matter.