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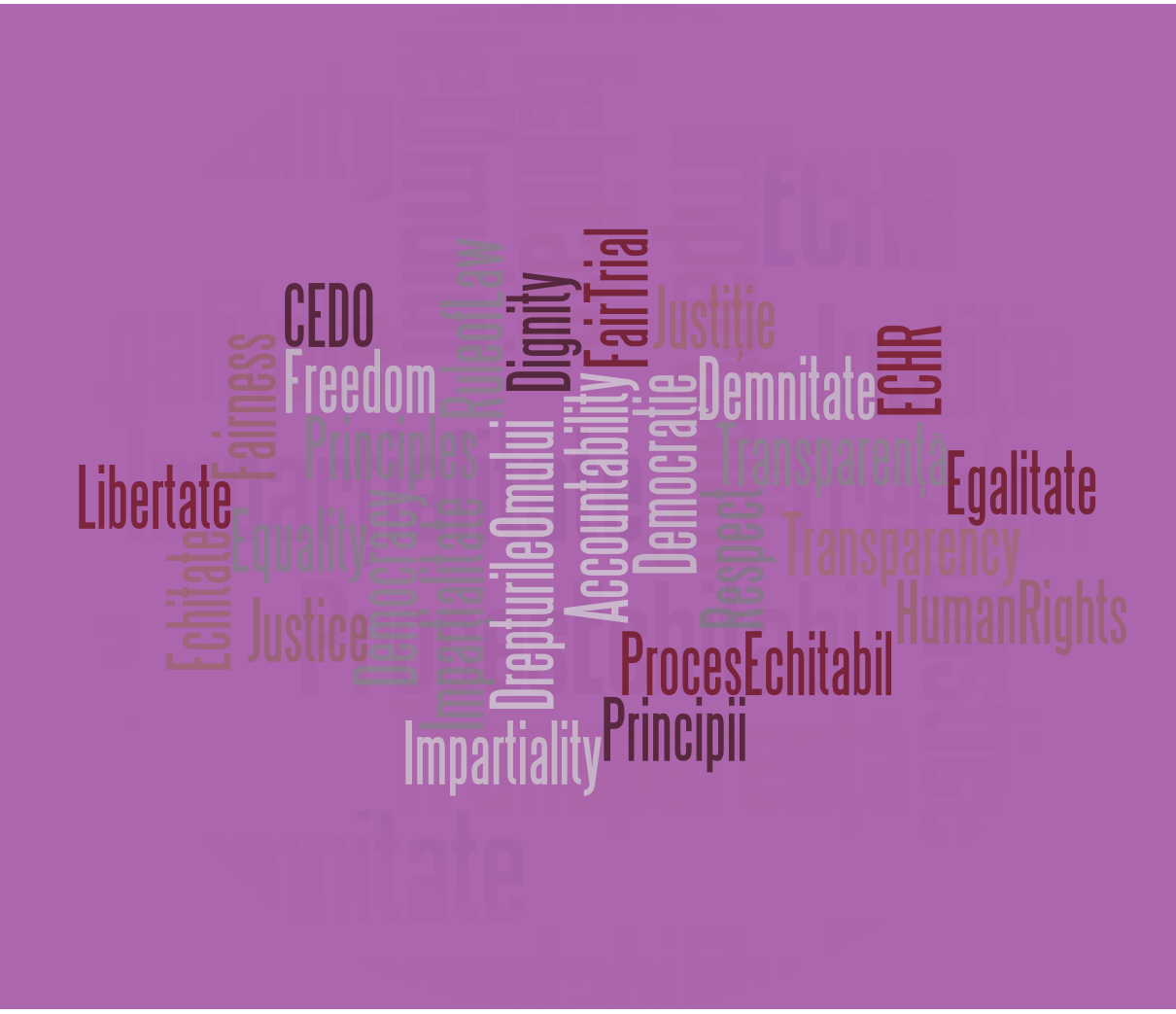

LRCM
LEGAL RESOURCES CENTRE FROM MOLDOVA

POLICY DOCUMENT

Analysis of the legislation and practice regarding disciplinary liability of judges 2015-2016

Pavel GRECU **Nadejda HRIPTIEVSCHI**

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Chisinau, 2016

Table of Contents

Abbreviations

1. **Disciplinary Board** – Plenary of the Disciplinary Board of Judges
2. **Admissibility Panels** – Admissibility Panels no. 1 and 2 of the Disciplinary Board
3. **SCM** – Superior Council of Magistracy
4. **SCJ** – Supreme Court of Justice
5. **Ministry of Justice** – Ministry of Justice of the Republic of Moldova
6. **ECHR** – European Convention on Human Rights
7. **ECtHR** – European Court of Human Rights
8. **CCP** – Civil Procedure Code no. 255 as of 30 May 2003
9. **CPC** – Criminal Procedure Code no. 122 as of 14 March 2003
10. **Law no. 178** – Law no. 178 as of 25 July 2014 on the disciplinary liability of judges
11. **Law no. 947** – Law no. 947 as of 19 July 1996 on the Superior Council of Magistracy
12. **Law no. 544** – Law no. 544 as of 20 July 1995 on the Status of Judges
13. **Repealed Law no. 950** – Law no. 950 as of 19 July 1996 on the Disciplinary Board and disciplinary liability of judges, repealed on 1 January 2015
14. **Law no. 154** – Law no. 154 as of 5 July 2012 on selection, performance evaluation and career of judges
15. **Regulations of the Disciplinary Board** – Regulations on the Disciplinary Board activity approved by the Decision of the Superior Council of Magistracy no. 144/7 as of 3 March 2015
16. **Regulations of the General Assembly of Judges** – Regulations on the functioning of the General Assembly of Judges approved by the Decision of the General Assembly of Judges as of 23 November 2012, amended by Decision of the General Assembly of Judges no. 11 as of 11 March 2016
17. **Regulations of the Judicial Inspection** – Regulations on the organization, competence and manner of operation of the Judicial Inspection, approved by Decision of the Superior Council of Magistracy no. 89/4 as of 29 January 2013

18. **Regulations on the selection of the civil society representatives** – Regulations on the selection of the civil society representatives to the Disciplinary Board of Judges, approved by the Order of the Ministry of Justice no. 91 as of 1 February 2016

19. **Recommendation CM/Rec(2010)12** – Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member stateson judges: independence, efficiency and responsibilities, available at https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true

20. **OSCE/ODIHR Kyiv Recommendations** – OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2010, available at http://www.osce.org/odihr/KyivRec?download=true

21. **Opinion of the Venice Commission on the draft Law on disciplinary liability of Judges, 2014 -** Joint Opinion no. 755/2014 on the draft Law on disciplinary liability of Judges of the Republic of Moldova drafted by the European Commission for Democracy through Law (Venice Commission), Directorate of Human Rights (DHR) of the Directorate General of Human Rights andthe Rule of Law of the Council of Europe and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), adopted by the Venice Commission at its 98th Plenary Session, 21-22 March 2014, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)006-e#

22. **Analysis of Law no. 178 by the LRCM** – Public policy document „Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges", February 2016, available at http://crjm.org/wp-content/uploads/2016/04/CRJM-Politici-8-Disciplinar-ENG.pdf

Executive summary

The Legal Resources Centre from Moldova (LRCM) recommends the decision-makers to amend the legislation on the disciplinary liability of judges by strengthening the status, increasing the number of inspecting judges and 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 and reviewing certain disciplinary offences. Judicial Inspection should improve the quality of checks carried out in disciplinary cases and present charges in disciplinary cases. The Plenary of the Disciplinary Board and the Superior Council of Magistracy should improve the reasoning of decisions in disciplinary cases, ensuring the assessment of each invoked offence. The Supreme Court of Justice should publish full texts of decisions on all examined disciplinary cases.

Law no. 178 on the disciplinary liability of judges, being in force since 1 January 2015, introduces a new mechanism of disciplinary liability of judges. The Law has introduced a series of improvements. These include broadening of the range of subjects who may lodge complaints and expressly provides obligation to state reasons in writing for any dismissal by the Judicial Inspection, stipulating stages of disciplinary procedure and the rights and obligations of the subjects involved, improvement regarding the components of disciplinary offences, broadening the range and regulation of the consequences of disciplinary sanctions, extending the term of disciplinary liability from one year to two years. At the same time new procedure is unjustifiably complicated. 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 by the body which has previously examined the disciplinary case. The procedure requires simplification.

Law no. 178 provides for the competence of the Judicial Inspection to dismiss, within 10 days, as manifestly unfounded those complaints that are not related to the disciplinary liability of judges. Out of 1,889 complaints, 1,367 or 72% of all complaints were dismissed by the Judicial Inspection as manifestly unfounded in 2015. Out of these 1,367 decisions, 385 or 28% were appealed before the Admissibility Panels. This competence implies that the Judicial Inspection should dismiss only those complaints that do not fall within the disciplinary liability domain and can be quickly identified based on the contents of the complaint and accompanying materials. In practice, the Judicial Inspection interprets broadly the syntagm „manifestly unfounded complaints" and dismisses even complaints that contain elements of

disciplinary offence. The Judicial Inspection often fails to comply with the term of 10 days. Such practice is contrary to Law no. 178.

> ***It is recommended*** *to exclude the institute of manifestly unfounded complaints from disciplinary procedure. Instead, it is proposed to split the stage of complaints verification in two steps: the first – preliminary verification, with extended term of verification, maintaining the obligation of the Judicial Inspection to give reasons for dismissing complaints and providing for ways to challenge the rejection, and the second – disciplinary investigation only of those complaints that contain signs of offence.*

Regarding complaints' verification by the Judicial Inspection, it is noted in the present document that the quality of reasoning in the reports of the Judicial Inspection has been improved. It is also more open to carry out additional checks when ordered by the Admissibility Panels. Yet, there are signs that the Judicial Inspection does not carry out such thorough verifications for all judges with regard to whom a complaint was lodged. The law does not stipulate a mechanism for discharge/abstention of inspecting judges from investigation/ presentation of a disciplinary case. Also the law does not expressly assign the competence to qualify disciplinary offences to any body, although this competence should be assigned to the Judicial Inspection. Uncertainty regarding this issue creates problems during advanced examination of the complaint by Admissibility Panels and the Disciplinary Board. At the same time, Admissibility Panels cannot carry out verifications and examine only the reports and materials submitted by the Judicial Inspection. Members of Admissibility Panels panels are not employed full-time. On the other hand, inspecting judges, who are employed full-time and have the obligation to verify disciplinary complaints, are not responsible for legal classification of acts and presentation of the indictment in the Plenary of the Disciplinary Board. The law provides for the presence of the Judicial Inspection representative during examination of the case by the Plenary of the Disciplinary Board, but such presence is rather formal and is limited to delivering reports/decisions issued at the stage of verification.

> ***It is recommended*** *to enhance the status of the Judicial Inspection expressly stipulating in the law its functional autonomy from the Superior Council of Magistracy, providing for a transparent and merit-based mechanism for appointment of the members of Inspection, increasing the number of inspecting judges and providing accountability mechanisms for them. Also, the Judicial Inspection should have the competence of legal classification of the alleged acts of judges in disciplinary procedure and presentation of disciplinary charges before the Plenary of the Disciplinary Board.*

Admissibility Panels of the Disciplinary Board have a dual role. On the one hand, they examine the admissibility of disciplinary complaints, and on the other hand, have the important role of checking the activity of the Judicial Inspection, in particular by examining the appeals submitted against the decisions by the Judicial Inspection dismissing the complaints as manifestly unfounded. There was found a positive trend in the practice of Admissibility Panels to submit high-profile cases, which were originally declared manifestly unfounded, but contain elements of disciplinary offence, to the Plenary of the Disciplinary Board for examination. This practice is an important safeguard against the abuses of the Judicial Inspection. However, members of the Disciplinary Board who are also members of Admissibility Panels, have a

heavy workload, which includes examining appeals against decisions by the Judicial Inspection and the admissibility of complaints. For this reason, there is a risk that the position of the member of the Disciplinary Board, and especially from among members representatives the civil society, will not to be attractive in the future. Also, there is always the risk of a superficial examination on the part of the Admissibility Panels, given the high workload and the way of operation only at the meetings, without having a full employment. Likewise, the admissibility stage complicates and holds up disciplinary procedure.

> ***It is recommended*** *to exclude the stage of admissibility and assign to the Judicial Inspection the competence to initiate disciplinary procedure. At the same time with the view to ensure accountability of the Judicial Inspection, the decisions to reject the complaint or dismiss the disciplinary procedure by the Judicial Inspection have to be published on its website. It is also recommended to establish a mechanism for examination of appeals against decisions/orders by the Judicial Inspection dismissing disciplinary complaints. The present Admissibility Panels renamed into Appeal Panels can serve as such mechanism.*

The Disciplinary Board is the key body in the mechanism of the disciplinary liability of judges. It is an independent body that examines disciplinary cases regarding judges and applies disciplinary sanctions. The Disciplinary Board usually gives reasoning for the decisions, but there were found some aspects that could be improved. In particular, it was noted that in several cases the reasoning of the Disciplinary Board for each separate offence is missing or is not clear. Also, the Disciplinary Board does not provide sufficient reasoning for sanctions application and in some decisions the connection between invoked individualization grounds and case circumstances is not clear. The Disciplinary Board is reluctant to apply the sanction of salary reduction. The Disciplinary Board does not have a consistent practice as regards qualification of acts in disciplinary offences, sometimes applying one disciplinary offence for two violations, but in other cases applying two disciplinary offences for a single violation. Also, the Board does not follow a uniform structure of in its decisions. These issues are related to the practice of the Disciplinary Board, and it should undertake measures to redress these inconsistencies.

> ***It is recommended*** *for the Plenary of the Disciplinary Board to improve the quality of reasoning of its decisions as regards (1) motivation of the disciplinary sanctioning/ individualization of sanctions, (2) clarification of situations when one act is qualified as several disciplinary offences, (3) clarification of situations when several acts are qualified as one disciplinary offence, (4) clear analysis on each disciplinary offence admitted by the Admissibility Panel and (5) establishing and following a single structure for all decisions by the Disciplinary Board.*

According to Law no. 178, the decisions of the Disciplinary Board can be appealed against at the Superior Council of Magistracy and subsequently at the Supreme Court of Justice. As showed by the practice in 2015 and within first nine months of 2016 the SCM usually upholds the decisions by the Disciplinary Board, and in case of their overturning either applies sanctions or applies tougher sanctions. On the other hand, the SCM is more lenient in cases concerning the SCJ judges, overturning disciplinary sanctions in their regard. When examining disciplinary appeals, the SCJ continues to apply, unjustifiably, the provisions of law on the SCM

that limits the competence of the latter to examining of the procedure of issuing/adopting the decision. Also unjustifiably, the SCJ does not publish on its website reasoned decisions on the decisions issued with regard to disciplinary appeals. The expediency of existence of two ways to appeal against decisions by the Disciplinary Board is questionable. The SCM and the Disciplinary Board are very similar in their composition and way of operation as quasi-judicial bodies. Moreover, the SCM members can submit complaints regarding disciplinary acts and appoint the Judicial Inspection. On the other hand, international standards require granting of a full judicial appeal in disciplinary procedure which may be provided by the SCJ.

> ***It is recommended*** *to simplify the disciplinary procedure by exclusion of the stage of complaint examination by the SCM as regards the decision by the Disciplinary Board. At the same time, the SCJ should fully examine the complaint in substance and procedure. Also, the SCJ has to publish all fully reasoned decisions in the disciplinary cases.*

Law no. 178 provides for a detailed list of 16 disciplinary offences. Some judges have expressed concern regarding the existence of a too detailed list of disciplinary offences. The authors of the analysis argue that providing a detailed list of offences is necessary and useful, especially in order to delimit clearly the domain of disciplinary liability and to protect judges from potential abuses. The text of some of the disciplinary offences could be improved, but a detailed list is more preferable than general provisions serving as grounds for disciplinary liability. Most sanctions applied within the last two years are for the violation of mandatory rules. This shows that in the Republic of Moldova there is a serious issue in terms of compliance with legal norms even by the courts, and this justifies the continued existence of such offence in Law no. 178.

> ***It is recommended*** *to improve art. 4 of Law no. 178 as regards offences stipulated by letters d, m, p. It is recommended to the Disciplinary Board, upon analysis of complaints regarding violation of mandatory rules of legislation, to indicate expressly the mandatory rule violated by the judge when the sanction is applied and to establish the subjective side of the disciplinary offence. Setting the subjective side for disciplinary offences committed by judges is the competence of the disciplinary bodies and not of the courts while considering the merits, appeal or cassation. When examining complaints related to the failure to meet the deadline by judges, the disciplinary bodies should consider thoroughly the nature of the case, the consequences incurred as a result of failure to meet the deadline by the judge and/or his/her workload. This offence should not be found in case of minor delays that did not produce serious consequences. It would also be useful to draft internal guidelines to unify the practice in terms of qualification of disciplinary offences with the view to establish a consistent practice and guidelines for litigants explaining specific issues/criteria for the application of disciplinary offences most often invoked in practice.*

Introduction

Disciplinary liability of judges is one of the key mechanisms for enhancing the responsibility of judges. States are called upon to regulate this domain by balancing two main interests – the need to provide functional mechanisms for enhancing the responsibility and to ensure real independence of judges. Basic international regulations on the disciplinary liability of judges suggest that states should provide clear regulations which could give rise to disciplinary liability of judges, excluding disciplinary liability for cases of minor offences and way of interpretation of the law and assessment of facts[1]. Disciplinary proceedings should be conducted by an independent authority or a court[2]. Regardless of the chosen authority, the judge shall be entitled to the guarantees of a fair trial under the rigours of art. 6 of the European Convention on Human Rights[3], and that ensures to the judge the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate[4].

In the Republic of Moldova, the confidence in justice is very low. 74,5% of population did not have confidence in justice in November 2011, [5], but in October 2016 it was already 89,6% of population[6]. As highlighted in Recommendation CM/Rec (2010)12, „Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning". Very low percentage of public confidence in justice, especially the fact of decrease of confidence in 2011, although a series of measures to reform the justice sector were undertaken, should alarm the national authorities and the judiciary with the view to identify the causes of low confidence and undertake effective measures for improvement of the justice system operation and, respectively, raise the confidence of society in justice.

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1 See, for instance, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, p. 66; OSCE/ ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para. 25.

2 Recommendation CM/Rec(2010)12, p. 69. OSCE/ ODIHR Kyiv Recommendations suggest creating a specialised body for disciplinary procedure, separate from Judicial Council, in order „to prevent allegations of corporatism and guarantee a fair disciplinary procedure". See *paragraphs 9, 14, 25-26 for details.*

3 See, for example, the following cases where ECtHR examined issues on disciplinary liability of judges and procedural guarantees that have to be observed: Judgement in the case of ***Harabin v. Slovakia***, 20 November 2012; Judgement in the case of ***Oleksandr Volkov v. Ukraine***, 9 January 2013; Judgement in the case of MC. ***Baka v. Hungary***, MC, 23 June 2016; Judgement in the case of ***Ramos Nunes de Carvalho e Sá*** v. Portugal, 21 June 2016; Judgement in the case of ***Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo*** v. Portugal, 21 June 2016.

4 Recommendation CM/Rec(2010)12, p. 69.

5 Institute for Public Policy, Barometer of Public Opinion, November 2011, http://www.bop.ipp.md/result?type=bar.

6 Institute for Public Policy, Barometer of Public Opinion, October 2016, http://www.bop.ipp.md/result?type=bar.

Disciplinary liability is one of the domains that require attention and intervention both at the legislative level and at the level of enforcement.

Analysis of legislation and practice on disciplinary liability of judges has two main purposes: to highlight main loopholes in the legislation on disciplinary liability of judges that directly affect the practice and to highlight some issues related to the practice of disciplinary bodies, which could be improved.

The analysis is primarily based on observations made during the monitoring by the LRCM of the Disciplinary Board meetings in 2015 until October 2016, analysis of decisions in disciplinary cases, as well as on observations and discussions with members of the Disciplinary Board, of the Judicial Inspection, judges and lawyers who participated in four workshops on disciplinary liability of judges organized within the period of September-October 2016. Also the analysis includes findings and recommendations presented earlier in the Public policy document „Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges". The reference period covers 2015 and the first nine months of 2016.

The document includes analysis of the most problematic, in the opinion of authors, issues of the legislation and practice on disciplinary liability of judges. These include the institution of the dismissal of complaints as manifestly unfounded, verification of disciplinary complaints and participation of the Judicial Inspection in the meetings of disciplinary bodies, role and appropriateness of the Admissibility Panels, holder of the competence to qualify disciplinary offences and selection procedure for the members of the Disciplinary Board. The document also analyses issues concerning judicial activity of the Plenary of the Disciplinary Board, and namely reasoning for sanctions application, legal classification of acts alleged to the judge concerned in disciplinary procedure, the structure of decisions and necessity to motivate each disciplinary offence. The document discusses the expediency of maintaining two ways to appeal against the decision by the Disciplinary Board provided by the current legislation. The document also analyses practical enforcement of some disciplinary offences that, in the opinion of the authors, have some problems as regards application and have raised more questions during the workshops mentioned above. We hope that this analytical document will stimulate discussions and improvements both at the legislative level and in practice used by the disciplinary bodies.

Chapter 1

Presentation of the disciplinary liability system

Law no. 178 on the disciplinary liability, being in force since 1 January 2015 (Law no.178), provides for a new system of disciplinary liability of judges. It contains several improvements as compared to the previous system of disciplinary liability. These include broadening of the range of subjects who may lodge complaints and expressly provided obligation to state reasons in writing for any dismissal by the Judicial Inspection, stipulating stages of disciplinary procedure and the rights and obligations of the subjects involved, improvement regarding the components of disciplinary offences, broadening the range and regulation of the consequences of disciplinary sanctions, extending the term of disciplinary liability from one year to two years. At the same time new procedure is unjustifiably complicated. 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 (disciplinary bodies) – each, at one stage or another, having the power to annul the decision by the body which has previously examined the disciplinary case.

The current system of disciplinary liability includes the following steps:

1) Filing complaints on potential disciplinary offences

Under art. 19 of Law no. 178, complaints can be filed by any interested person, members of the Superior Council of Magistracy (SCM), the Board for Evaluation of Performance of Judges[7] and by the Judicial Inspection, ex-officio, following verifications carried out in accordance with its powers[8]. 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 a transparent and effective system. Chief Inspector-judge distributes complaints at random to the inspectors-judges for verification[9].

2) Verification of complaints by the Judicial Inspection

Judicial Inspection consists of five inspectors-judges, one of them is the Chief Inspector-judge, subordinate under the law to the SCM. Inspectors-judges are employed full-time. The

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

[8] Art. 7[2] of Law no. 947 on the Superior Council of Magistracy (Law no. 947).

[9] P. 10.7 of the Regulations of the Judicial Inspection.

secretariat is ensured by the SCM. The Judicial Inspection has competence in five domains: verification of the organizational activity of the courts, examination of petitions regarding the ethics of judges, verification of complaints regarding disciplinary liability of judges, verification of applications addressed to the SCM to agree on criminal prosecution against judges and examination of the grounds for rejection of the SCM nominees for the office of judge/promotion.

According to Law no. 178 after the distribution of the disciplinary complaint the Judicial Inspection has the following three options:

a) **restitution** of the complaint by the Judicial Inspection within **3 days** in case the conditions of form and content provided for by art. 20 are not met, explaining to the person his/her right to lodge a new complaint. In case of the complaint restitution, the person who filed the complaint can file it again after correcting the errors of form and content.

b) **dismissal of the manifestly unfounded complaint**, within **10 days** from the date it was distributed, **through a reasoned decision, that is not public,** under art. 20 para. (2). The complaint is considered manifestly unfounded if it states facts which do not refer to offences stipulated under art. 4, if the limitation period stipulated under art. 5 has expired or if it is declared repeatedly presenting no new evidence. In case of dismissal of the complaint as manifestly unfounded, the person who filed the complaint may appeal against the decision dismissing the complaint within 15 days before the Admissibility Panels of the Disciplinary Board (art. 22 para. (2) of Law no. 178). Decisions by the Admissibility Panels on admission or dismissal of the appeal against the decisions by the Judicial Inspection are irrevocable and cannot be subject to any appeal and shall enter into force upon the date of adoption[10]. 1,889 complaints were filed in 2015, out of them 1,367 or 72% of all complaints were dismissed by the Judicial Inspection as manifestly unfounded. Given that these complaints can reach up to a maximum of three members of the Disciplinary Board, the responsibility of the Judicial Inspection for ensuring of a complete and accurate verification is very important.

c) **verification of the complaint**, if it has not been returned or dismissed, within **30 working days** from the date of its receipt by the Judicial Inspection (with the possibility of term extension up to 15 calendar days by the chief inspector-judge) and presentation of the report to the Admissibility Panel alongside with the case file for examination (art. 26 of Law no. 178).

The report by the Judicial Inspection should contain description of the actions alleged in the complaint and analysed by the Judicial Inspection and conclusion of the inspector-judge. The report is not public. The inspector-judge can provide two conclusions: a) admission of the complaint and submission of the disciplinary case for examination by the Plenary of the Disciplinary Board and b) dismissal of the complaint[11].

At the stage of complaint verification by the Judicial Inspection evidence and the judge's opinion are collected. Both the Admissibility Panels and the Plenary of the Disciplinary Board can further require additional verifications or new evidence, but it also means delaying the proceedings. Therefore, the quality of verifications performed by the Judicial Inspection at

[10] P. 48 of the Regulations of the Disciplinary Board.

[11] See Annex to the Regulation on Disciplinary Board activity for details.

this stage is particularly important. Unfortunately, neither legislation provides, nor time limits for verification permit to submit the report by the Judicial Inspection to the judge until its submission to the Admissibility Panel.

3) Examination of the admissibility of complaint and/or appeal against the decision dismissing the complaint by the Admissibility Panels of the Disciplinary Board

Admissibility Panels are formed from three members of the Board: two judges and a representative of the civil society. Admissibility Panels have two basic functions: a) examination of admissibility of complaints on disciplinary offences of judges and b) examination of appeals lodged against the decisions issued by the Judicial Inspection on dismissal of complaints.

Upon examination of the admissibility of complaints on disciplinary offences of judges the Panels can provide one of the following solutions: a) to admit the complaint and submit the disciplinary case for examination to the Plenary of the Disciplinary Board (decision does not require reasoning and is not published), or b) to dismiss the complaint by a reasoned decision that is published.

Upon examination of appeals lodged against the decisions issued by the Judicial Inspection on dismissal of complaints, the Admissibility Panel takes one of the following decisions: a) dismisses the appeal and upholds the decision on dismissal of a complaint issued by the Judicial Inspection, if examined materials prove that the complaint manifestly unfounded (decision should be reasoned and published) or b) admits the appeal and submits the complaint to the Judicial Inspection for preliminary verification, if case materials prove that the complaint is not manifestly unfounded (decision does not require reasoning and is published).

4) Examination by the Plenary of the Disciplinary Board of a disciplinary case and/or appeals against the decisions by the Admissibility Panels

The Plenary of the Disciplinary Board includes all members. Under Law no. 178, the Disciplinary Board consists of 5 judges and 4 persons from among civil society. The Disciplinary Board members do not work full-time. Under the law, the salary at workplace is retained for judges who are members of the Disciplinary Board, yet they have a reduced workload, depending on their tasks within the Disciplinary Board. The members of the Board from among representatives of civil society receive an allowance equivalent to one twentieth (1/20) of the salary of the Supreme Court of Justice judge for each attended meeting.

The Plenary has two main competences: a) examination of a disciplinary case following the decision by the Admissibility Panel on the admissibility of the complaint and b) examination of appeals against the decisions by the Admissibility Panels of the Board on dismissal of a complaint.

After examination of the disciplinary case, the Plenary of the Disciplinary Board can take one of the following solutions: a) find disciplinary offence and apply disciplinary sanction/s; b) find disciplinary offence and terminate disciplinary procedure, in case the prescription for disciplinary liability has expired; c) terminate disciplinary procedure, in case the disciplinary offence was not committed. All these decisions should be reasoned and published.

After examining the complaint, the Plenary of the Board should adopt one of the following decisions: a) dismiss the appeal and upheld the decision by Admissibility Panel (decision should be reasoned and published) or b) admit the appeal and take disciplinary case for examination of the merits.

5) Examination by the SCM of an appeal against the decision by the Disciplinary Board

The Disciplinary Board decisions can be appealed before the SCM. The SCM exercises self-administration of the judiciary. The SCM consists of 12 members appointed as follows:

- Six members from among judges, including two substitute members, are elected by secret ballot by the General Assembly of Judges, representing all levels of court instances;
- Three members from among titular law professors selected through a public contest by the Parliamentary Committee „Legal Committee for appointments and immunities" and appointed by the Parliament by the majority vote of the elected Members of Parliament;
- Three de jure members: The president of the Supreme Court of Justice, Minister of Justice and the Prosecutor General.

When examining the appeal against the decision by the Disciplinary Board, the SCM has the competence to examine the merits and procedure of the case. Upon examination of appeals, the SCM can decide on one of the following solutions: a) upheld the decision by the Disciplinary Board without modification or b) admit the appeal and adopt a new decision, in such a case there should be applied provisions on the examination procedure and the contents of the Disciplinary Board decision regarding the results of the disciplinary case examination. Both types of decisions should be reasoned and published.

6) Examination by the SCJ of an appeal against the decision by the SCM in disciplinary cases

The SCJ is the highest court of the country. Under art. 40 para. 2) of Law no. 178 applications for the appeal against the decisions by the SCM on disciplinary cases shall be examined by a panel of five judges of the SCJ, as a priority. Law no. 178 does not stipulate a limitation on the competence of the SCJ, therefore, it can examine the disciplinary appeal in substance and procedure. Law no. 178 does not include specific provisions on reasoning and publication of the SCJ decisions in disciplinary cases. Accordingly, while reasoning and publishing decisions in disciplinary cases the SCJ should follow general rules. But practice shows another state of affairs (see section 2.8 below).

Chapter 2

Problematic issues in the legislation and practice regarding disciplinary liability of judges

2.1 Dismissal of complaints by the Judicial Inspection as manifestly unfounded

Out of 1,889 complaints, 1,367 or 72% of all complaints were dismissed by the Judicial Inspection as manifestly unfounded in 2015. This is a significant percentage. Out of these 1,367 decisions, 385 or 28% of decisions were appealed against before the Admissibility Panels. Strict application by the Judicial Inspection of the possibility to dismiss the complaint as manifestly unfounded is important, because only the Judicial Inspection and the Admissibility Panel consisting of three members of the Disciplinary Board express their opinion on the matter. In the absolute majority of cases complaints that were initially declared manifestly unfounded do not reach the Plenary of the Disciplinary Board.

Law no. 178 provides for a term of 10 days to dismiss the complaint as manifestly unfounded. The possibility of the Judicial Inspection to dismiss the complaint as manifestly unfounded was introduced only after public consultations regarding the draft law on the disciplinary liability of judges, 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 experts as quite a burden for the Admissibility Panels and the Disciplinary Board. One of the proposals made by civil society and accepted by decision makers stated the possibility for the Judicial Inspection to dismiss complaints that cannot be classified as disciplinary offences, for example, complaints that relate to the legality of court decisions[12]. Thus, the institution of the dismissal of complaints as manifestly unfounded appeared. This competence presupposes that the Judicial Inspection should dismiss only those complaints that do not fall within the disciplinary liability domain and can be quickly processed based on the contents of the complaint and accompanying materials. The main purpose of this institution is to reduce the workload and allow the Judicial Inspection to focus only on verification of complaints pertaining to disciplinary liability of judges.

[12] 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, available at: http://www.justice.gov.md/public/files/transparenta_in_procesul_decizional/L_raspunderea_disciplinara_final_11-09-13.pdf and http://www.justice.gov.md/public/files/transparenta_in_procesul_decizional/Sinteza_obiectii_L_rasp_disciplinar.pdf.

In practice, the Judicial Inspection often fails to comply with the term of 10 days and dismisses lodged complaints as manifestly unfounded exceeding the term of 10 days. Also, the Judicial Inspection has the practice to dismiss as manifestly unfounded not only complaints that are obviously unfounded, but also complaints in regard to which verifications have been carried out and no disciplinary offence found[13]. Verifications are often limited to obtaining the opinion of the judge concerned. In such cases, the Judicial Inspection actually decides on the basis of those invoked by the author of the complaint versus those invoked by the judge without any further verification. Such an approach raises justified questions on the validity of verifications and differentiated approaches to them. In some cases, the Judicial Inspection also collects other evidence, but in others, usually those dismissed as manifestly unfounded confines oneself to the complaint and the opinion of the judge. It is not clear why the Judicial Inspection does not prepare more reports with the proposal to dismiss the complaint and resorts so often to dismissal of complaints as manifestly unfounded. Presumably, the intention of the Judicial Inspection is to relieve as much as possible the activity of the Plenary of the Disciplinary Board, because in case of drafting the report, the Admissibility Panel should provide opinion on admissibility and then follows appeal before the Plenary of the Board. However, such an approach is not correct, because it is contrary to Law no. 178 and raises questions both on the validity of verifications carried out and selectivity of approaches.

To conclude, the Judicial Inspection uses the institution of declaring as manifestly unfounded contrary to the legal norm and uses it to dismiss the complaints, where the Judicial Inspection finds no merits of the complaint or those invoked in the complaint are not confirmed. The problem of such an approach within the current legal framework is that by declaring as manifestly unfounded the complaints that actually raise disciplinary issues, requests deserving attention could be ignored both due to the lack of time and absence of the way of appeal in the Plenary of the Disciplinary Board.

Recommendations:

1. Amendment of Law no. 178, and namely, exclusion from the law of the institution of dismissal of a complaint as manifestly unfounded within 10 days, as well as exclusion of the stage of complaint admissibility examination. Verification of complaints should be divided into two stages: preliminary verification and disciplinary investigation.

2. For preliminary verification and disciplinary investigation, we recommend the following.
   a. 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:

[13] **Decision no. 31/5 as of 6 April 2015 by the Admissibility Panel no. 1**. can serve as an example. In this case, the author of the complaint alleged that the judge had committed a number of disciplinary offences, in particular, modified the object of action without any request by the party to a case, applied absolute nullity contrary to the law, collected from the representative of the contracting party amounts due under the contract based on the effect ***restitutio in integrum*** etc. The author of the complaint alleged that the judge's decision was cancelled by a higher court because of procedural irregularities committed by him, that decision remained final and irrevocable. The Judicial Inspection declared this complaint manifestly unfounded and mentioned that cancellation or modification of the judicial decision does not incur any liability if the judge who delivered it did not violate the law intentionally. Hence it follows that the Judicial Inspection nevertheless considers that some of the acts invoked by the author of the complaint could be disciplinary offences, but has determined that the accused judge did not violate the law intentionally. In other words, to dismiss the complaint filed in this case as manifestly unfounded, the Judicial Inspection has analysed the intention of the accused judge, which is a complex procedural stage, exceeding the stage of declaring applications manifestly unfounded.

I. 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;

II. The order on initiation of a disciplinary procedure (Judicial Inspection can qualify the disciplinary offence alleged to the judge) – proceed with the disciplinary investigation.

b. 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:

III. The order by the Judicial Inspection on dismissal of the disciplinary procedure, if the investigation fails to find reasoned suspicion 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;

IV. Disciplinary report, if there is a reasoned suspicion that a disciplinary offence has been committed – is submitted directly to the Plenary of the Disciplinary Board for examination.

3. Until amendment of Law no. 178, the Judicial Inspection should dismiss as manifestly unfounded only those complaints that are stipulated by law. Cases that contain elements of disciplinary offence should be verified and dismissed by the Admissibility Panels after examination of the report of the Judicial Inspection;

2.2 Verification of disciplinary complaints and participation of the Judicial Inspection in the meetings of disciplinary bodies

During verifications the inspector-judge is obliged to take all necessary measures to verify the alleged acts invoked by the author of the complaint and determine presence or absence of elements which may constitute disciplinary offence (art. 23 para. (2) letter a) of Law no. 178). This obligation is extremely important because namely on the activity of the Judicial Inspection at the first stages of disciplinary procedure depends how a disciplinary case will be completed. The only leverage that superior bodies have in the process of collecting evidence is to submit the case for additional verifications to the Judicial Inspection. Thus, the degree of diligence of the Judicial Inspection in the process of disciplinary complaints verification is crucial for disciplinary procedure.

In an informal meeting held on 19 February 2016 with the participation of members of the Disciplinary Board, the Chief Inspector-judge and the President of the SCM, the Disciplinary Board members expressed some reservations concerning the Judicial Inspection. In particular, they referred to undue quality of the Judicial Inspection reports, including the fact that what was mentioned in the complaints was not always reflected in the reports of Inspection. With regard to the poor quality of reports submitted by the Judicial Inspection to the Admissibility Panels the Chief Inspector-judge explained that this is due to a period of uncertainty in the enforcement of Law no. 178, because at the beginning the Judicial Inspection did not know, when exactly the reports should be prepared, and when preparing them did not draw conclusions. According to the statements of some members of the Admissibility Panels, recently the quality of reports has improved, but still not all reports reflect all claims alleged in the complaints and not respond to all the arguments of the petitioners.

At the same meeting, there was raised an issue that the Judicial Inspection displays certain reticence when the disciplinary file is sent for further verification by the Admissibility Panels. The emergence of this problem is difficult to explain given that both art. 28 para. (2) of Law no. 178 and p. 12.5 of the Judicial Inspection Regulations expressly provide for the opportunity of the Admissibility panels to submit disciplinary file for further verification. Based on the statements of some members of the Admissibility Panels this problem was partially solved. At present the Judicial Inspection performs additional verifications at the request of the Admissibility Panel based on a determination issued by the latter.

Although the activity of the Judicial Inspection seems to have improved, **in some cases it behaves unusually, thus, reflecting the tendency to protect some judges from being held disciplinary liable.**

For example, case **no. 35/8 as of 17 April 2015,** in which the author of the complaint claimed that Vasile NEGRUTA, the judge of Orhei Court, was in alcoholic inebriation during examination of a misdemeanor case[14]. Following a verification, Veronica CUPCEA, the chairperson of the court, found that the alleged facts were not true. However, the author of the complaint was refused in getting the audio recording of the hearing. The Judicial Inspection proposed to dismiss the complaint on the ground that the accused judge examined several cases on that day, and the refusal to give the video recording was reasoned by the fact that the state tax must be paid for it. However, for unclear reasons, the Inspection has not examined audio records that would reflect at least partially how the judge behaved on that day, and especially during the administrative proceedings in which the author of the complaint was involved. As a result, the disciplinary complaint was dismissed by the Admissibility Panel. We do not discuss the decision, but the way of investigation has not dispelled suspicions regarding the claimed offence.

Another example in this regard is the disciplinary case **no. 12/6 as of 18 March 2016 against Ion TURCAN, judge of Centre District Court [15]**. The complaint was filed against him by the Security and Intelligence Service (SIS). The representative of the SIS has brought a number of charges against Mr.Turcan, starting with undue receipt of goods from a person in controversy up to influencing on some judges in order to issue some decisions from the position of the chairperson of the court[16]. Initially the Judicial Inspection dismissed the complaint as manifestly unfounded, which according to the law means that the complaint did not refer to any of the disciplinary offences under art. 4 of Law no. 178. Then, the Admissibility Panel cancelled the decision by the Judicial Inspection and submitted the case to the Plenary of the Disciplinary Board. Upon examination of the case by the Disciplinary Board it was found that the file did not have enough evidence, because the complaint was dismissed as manifestly unfounded, and, respectively, appropriate verifications were not carried out. The case was submitted to the Judicial Inspection for additional verifications. After additional verifications the case again was reviewed by the Disciplinary Board. Nevertheless, even at this time, both some members of the Disciplinary Board and the representative of the SIS indicated that the Judicial Inspection

[14] Admissibility Panel no. 2, Decision no. 35/8 as of 17 April 2015, available at: http://csm.md/files/Hotarirele_CDisciplinar/2015/CA2/03/35-8.pdf.

[15] Disciplinary Board, Decision no. 12/6 as of 18 March 2016, available at: http://csm.md/files/Hotarirele_CDisciplinar/2016/12-6.pdf.

[16] For details see: LRCM, Newsletter no. 9, January-March 2016, p. 6, available at: http://crjm.org/wp-content/uploads/2016/06/CRJM-Newsletter-nr-9-RO-ian-mart-2016.pdf .

had not performed sufficient verifications. Also, according to the author of the complaint, the representative of the Judicial Inspection in that case, Valeriu CATAN, would have been in a conflict of interest with Mr. Ion TURCAN[17]. However, Mr. Catan did not abstain in that case. In this regard, the absence of a mechanism for recusal of inspectors-judges should be noted (see section 2.6 below). Consequently, for the lack of evidence, the Disciplinary Board did not apply any sanctions in this case, and the decision was also upheld by the SCM[18].

Another case that raised some questions about the Judicial Inspection is disciplinary procedure **no. 27/13 as of 2 October, 2015** against Oleg MELNICIUC, the chairperson of Riscani District Court, Chisinau municipality[19]**.** In that case, Mr. Melniciuc was accused by a lawyer that he would have behaved inappropriately towards her and that he infringed the principle of impartiality towards her client at the hearings. The necessity to listen to the recordings of the hearings was discussed at the meeting of the Plenary of the Disciplinary Board. Initially, CDs with records of the hearings presented by Mr Melniciuc have been listened to, and, as it turned out, they were empty. CDs presented by the lawyer were missing in the file materials after which at the same meeting they were found in a safe of the SCM. According to the chairwoman of the Admissibility Panel which examined the admissibility of the complaint, she listened to those sound recordings for the first time at the meeting of the Plenary of the Disciplinary Board. As a result, the disciplinary offence of the judge could not be found, on the grounds that at the admissibility stage the offence that was later found based on the audio recording of the hearings was not admitted. Thus, it is unclear why the Judicial Inspection did not present the audio recording to the Admissibility Panel. Furthermore, it is unclear why the case was not sent for additional verifications, or why the Judicial Inspection did not take any action on its own initiative based on this evidence, which apparently was discovered for the first time by the members of the Admissibility Panel at the meeting on examination of the complaint on the merits[20].

Another relevant case is against Garri BIVOL, the judge of Centre District Court and judges of the SCJ Iulia SARCU, Galina STRATULAT, Iulia OPREA and Ion DRUTA („Basconslux" case)[21]. In this case, the judges ordered the collection from the state budget of a sum in the amount of 14 mln. MDL for the demolition of the Republican Stadium (8 mln. for demolition and 6 mln. penalty) in the absence of a works contract concluded between Basconslux company and state authorities, without registration of the contract with the State Treasury and without organization of a public contest[22]. Initially the Judicial Inspection dismissed the complaint lodged by the Ministry of Finance as manifestly unfounded, which means that either verifications were not carried out or carried out superficially (see section 2.1 above). Following an appeal lodged by the Ministry of Finance, the Admissibility Panel cancelled the decision by the Judicial Inspection and submitted the case to the Disciplinary Board for examination. While

[17] According to the representative of the SIS, Mr. Catan had a share of the real estate belonging to the company „Nuntius" LLC, which was the defendant in a case brought by the complainant „Far-90" LLC. The representative of the SIS mentioned that Mr. Turcan had given instructions on the solution of the case that should be issued by judges subordinate to him.

[18] SCM, Decision no. 461/20 as of 05 July 2016, available at: http://csm.md/files/Hotaririle/2016/20/461-20.pdf.

[19] Disciplinary Board, Decision no. 27/13 as of 02 October 2015, available at: http://csm.md/files/Hotarirele_CDisciplinar/2015/27-13.PDF.

[20] For details see: LRCM, Newsletter no. 8, October-December 2015, p. 4, available at: http://crjm.org/wp-content/uploads/2016/05/CRJM-Newsletter-nr-8-ro.pdf.

[21] Disciplinary Board, Decision no. 22/9 as of 22 April 2016, available at: http://csm.md/files/Hotarirele_CDisciplinar/2016/22-9.pdf.

[22] For details see LRCM, Newsletter no. 10, April-June 2016, p. 3, available at: http://crjm.org/wp-content/uploads/2016/09/CRJM-newsletter-nr.-10-ro.pdf.

investigating the case of „Basconslux" beside the fact of declaring valid the contract, which was in fact invalid under the law, there was found a multitude of questionable circumstances, such as admission of the court complaint filed by „Basconslux" late and without paying the state duty in the amount stipulated by law, admission of a penalty of 6 mln. MDL without establishing the period for which the penalty is paid, failure to identify the goods obtained from the demolition of the Republican Stadium etc. Even the judge of the first instance court could not explain how the penalty of 6 mln. MDL was calculated or why the court complaint filed late was admitted. In these circumstances it is not clear to what extent the Judicial Inspection has carried out sufficient verifications and how these verifications could lead to the declaration of the complaint as manifestly unfounded. The Disciplinary Board reprimanded the SCJ judges[23], but this sanction was cancelled by the SCM on the grounds that judges cannot be held disciplinary liable for decisions they issued[24].

Another problem concerning the activity of the Judicial Inspection is related to its presence and contribution before the Disciplinary Board. Under art. 31 para. (4) of Law no. 178, the presence of the representative of the Judicial Inspection is mandatory. But the law does not stipulate that namely the inspector-judge, who carried out verifications, must be present, and does not stipulate what is his/her role at the meetings of the Disciplinary Board. As a result, quite often the representative of the Judicial Inspection present at the meeting of the Disciplinary Board is not the inspector-judge, who has carried out verifications in the particular case and, therefore, his/her presence is rather formal and limited to delivering of the report or decision on dismissal of the complaint as manifestly unfounded drafted by the inspector-judge at the stage of verification. Given that sometimes the Admissibility Panel accepts an appeal filed against the decision on dismissal issued by the inspector-judge and submits the case to the Plenary of the Disciplinary Board, the inspector-judge continues to support the decision on dismissal at the meeting. Thus, sometimes there are situations in which the judge is defended by the inspector-judge present at the meeting of the Disciplinary Board.

Situations of this kind happened in the cases mentioned above in this section. In another case, brought against the judge Maria IFTODI, concerning implicit recognition of the annexation of Crimea by the Russian Federation in the judgement, the inspector-judge also supported the judge at the meeting of the Disciplinary Board and even criticized the author of the complaint, Tatiana RADUCANU, the member of the SCM, for lodging the complaint, noting that the opinion of Mrs Raducanu regarding the fact of the annexation of Crimea by the Russian Federation does not matter because the whole country (Russian Federation) recognized this fact.

Cases such as those mentioned above and actions of the disciplinary bodies in these proceedings will inevitably be monitored more closely by the society. When the conduct of the Judicial Inspection in a delicate case is below the diligence expected by the society, there inevitably arise questions regarding the compliance with the obligation to be impartial while exercising of service duties, (p. 2.3 and 3.20 of the Judicial Inspection Regulations). When in cases of disciplinary procedure against judges of higher rank, it happens that because of the actions or inactions of the Judicial Inspection they are not subject to disciplinary liability, or

[23] Mr Garri BIVOL, the judge of the first instance court was not sanctioned because the limitation period for holding him disciplinary liable had expired.

[24] SCM, Decision no. 463/20 as of 05 July 2016, available at: http://csm.md/files/Hotaririle/2016/20/463-20.pdf.

even more, that the Judicial Inspection defends such judges, there even arise doubts on the independence of the Judicial Inspection from external influence. Inspectors-judges are obliged to carry out complete and diligent verifications concerning all judges regardless of their position in the judiciary. And in case of failure to fulfil this obligation, the inspector-judge can be held disciplinary liable by the SCM for unjustified refusal to perform service duties (p. 4.2 and 4.4 letter e) of the Judicial Inspection Regulations).

To conclude, the Judicial Inspection reports have improved lately and it is more open to carry out additional verifications when verifications are ordered by the Admissibility Panels. However, the Judicial Inspection still does not refer to all alleged infringements invoked in the complaint. At the same time, there are signs that the Judicial Inspection does not carry out such thorough verifications for all judges with regard to whom a complaint was lodged. As regards the presence of the Judicial Inspection at the meetings of the Disciplinary Board, it is very often rather formal and is limited to delivering reports/decisions issued at the stage of verification. In some cases, inspectors-judges actively support the position of judges, especially when cases concern the chairpersons of court instances or judges of higher courts. A selective approach to the way of carrying out verifications and way of conduct of the Judicial Inspection in different cases decreases the confidence of the society in the Judicial Inspection and is dangerous for the independence and accountability of the entire judicial system.

Recommendations:

Amendment of the legal framework:

1. Express provision of the law granting the Judicial Inspection a 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 and guarantees for independent performance of the competences;
2. Strengthening the independence and impartiality of the Judiciary Inspection by organizing objective and public contests on selection of members of the Judicial Inspection. The SCM should appoint the Chief Inspector-judge 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 should have a separate legal personality, separate budget and should directly receive complaints related to disciplinary liability of judges;
4. Establishing of a mechanism to notify the superior organs on cases of inaction of the Judicial Inspection in order to oblige it to carry out the duty on verification of disciplinary complaints diligently;
5. The number of inspector-judges and staff, who assist them, should be increased (for the sake of economy, a part of the Judicial Inspection staff can be assigned from the SCM Secretariat).

Activity of the Judicial Inspection:

1. Carrying out thorough and impartial verifications by the Judicial Inspection in all disciplinary cases, regardless of the status of the accused judge. The Judicial Inspection should reflect in the report or in the decision on dismissal all violations invoked in the complaint;

2. In case of admission of the appeal against the decision to dismiss the complaint by the Admissibility Panel, it would be appropriate that the Judicial Inspection be represented before the Disciplinary Board by a different inspector-judge than that who issued the decision on dismissal.

2.3 The role and appropriateness of the Admissibility Panels after almost two years of implementation of Law no. 178

The role and appropriateness of the Admissibility Panels of the Disciplinary Board after one year of activity were evaluated in the Analysis of Law no. 178 by the LRCM as of February 2016[25]. Apart from its role as the admissibility body and, in fact, the body that initiates disciplinary procedure, the Admissibility Panel also has the important role to verify the activity of the Judicial Inspection. Admissibility Panels exercise this competence, in particular, by examining the appeals submitted against the decisions by the Judicial Inspection dismissing the complaints as manifestly unfounded.

The authors of the analysis found that after one year of implementation of Law no. 178 the rate of instituting disciplinary procedures decreased by 27%, although before only members of the SCM could initiate disciplinary procedures and at present the circle of persons, who can file complaints, is far larger. Also, according to the analysis, the rate of sanctioning decreased from 16 sanctions applied within 10 meetings in 2014 to five sanctions applied within 11 meetings in 2015. In other words, the rate of sanctioning for judges decreased four times. Although these figures seem to be relative, since the compared data resulted from two different procedures, however these data reflect a trend: either after adoption of Law no. 178 the quality of justice administration has improved or newly established procedure has become too bureaucratic and judges who committed disciplinary offences could not be sanctioned because there were too many filters. Given the steady decline of the society confidence in justice, confirmed by surveys[26], the authors of the study concluded that still the problem was in too many filters, and namely: the Judicial Inspection, the Admissibility Panels, the Disciplinary Board, the SCM and the SCJ.

Besides the above mentioned data, the authors of the study also found some solidarity between the disciplinary bodies, or, out of 174 appeals filed against the decisions by the Judicial Inspection only five were admitted by the Admissibility Panels, and out of 20 appeals filed against the decisions by the Admissibility Panels the Disciplinary Board did not admit any. Moreover, Admissibility Panels did not seem to influence the practice of the Judicial Inspection to interpret the term „manifestly unfounded complaints" too broadly, which resulted in a big number of complaints dismissed by the Judicial Inspection (72% of filed complaints), although formally the Admissibility Panel is the body that initiates proceedings.

Under these circumstances, the authors of the analytical document concluded that, on the one hand, introduction of the Admissibility Panels unjustifiably hampered disciplinary procedure against judges, and on the other hand, they did not exercise sufficiently their competence to

[25] Analysis of Law no. 178 by the LRCM, pp. 13-16.

[26] According to the survey conducted by the IRI, on 21 October 2015 around 75% of the population had no confidence in the justice system at that period: http://www.iri.org/sites/default/files/wysiwyg/2015-11-09_survey_of_moldovan_public_opinion_september_29-october_21_2015.pdf.

check and correct the deficient practice of the Judicial Inspection, so it was recommended to exclude this body. Instead, the authors of the study suggested strengthening the independence and effectiveness of the Judicial Inspection. According to the recommendations the Judicial Inspection should decide on instituting disciplinary procedure, with the possibility of appealing against its decisions on dismissal of complaints or disciplinary procedure to the appeal panels. Thus, the Admissibility Panels will become appeal panels and will consider only appeals lodged against decisions by the Inspection on dismissal of complaints or on dismissal of the disciplinary procedure (see model in Annex no. 1). An alternative to this recommendation would be challenging the orders of the Judicial Inspection to a panel of Chisinau Court of Appeal, similarly to the disciplinary procedure in Romania.

An issue that has not been addressed sufficiently in the Analysis of Law no. 178 by the LRCM is the heavy workload of the Disciplinary Board members who are also members of the Admissibility panel. Only in 2015, 257 reports of the Judicial Inspection and 385 appeals on decisions by the Judicial Inspection were distributed to the Admissibility Panels. It seems an excessive amount of work for six people who are not employed full-time within the Disciplinary Board, given that members-rapporteurs on each case have to elaborate draft decisions. Heavy workload caused by the Admissibility Panels determined some members, representatives of the civil society and judges, members of the Disciplinary Board to resign the membership in this body. Under these circumstances the post of the member of the Disciplinary Board becomes unattractive and in the future there may be difficulties in the process of vacant positions filling, in particular from among civil society[27].

A positive aspect in the work of the Admissibility Panels was observed in particular in high-profile cases. In these cases, the Judicial Inspection dismissed as manifestly unfounded complaints that actually contained elements of disciplinary offences. Subsequently, the Admissibility Panels, having examined the complaints filed in these cases, submitted them for examination to the Disciplinary Board[28]. Although none of the judges in those cases was sanctioned, these examples reflect the importance of a body that examines decisions by the Judicial Inspection on dismissal of complaints. There is a tendency of the Judicial Inspection to dismiss as manifestly unfounded complaints in delicate cases, in such a way trying to keep them at the stage of verifications where the procedure is secret. Such conduct is contrary to the duty of the inspectors-judges to be impartial. Due to the Admissibility Panels, even if judges were not sanctioned, these cases were publicly discussed and came to the attention of the society. This allowed finding of some deficiencies and concerns in the administration of justice and the public debate about these issues might discourage the Judicial Inspection to exercise such partial conduct in the future.

Also, based on the data for the first nine months of 2016, we find that the rate of sanctioning has increased as compared to 2015 (see section 2.7 below). This may reflect a greater mobilization of the disciplinary bodies as compared to 2015.

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[27] Since the beginning of the term of office of the current composition of the Disciplinary Board the following persons have resigned from office: representatives of civil society (Nicolae SADOVEI, Sergiu URSU, Victor ZAHARIA, Dorian CHIROSCA) and representatives of judges Victor BOICO and Eugenia CONOVAL.

[28] For example, in disciplinary procedure against Oleg MELNICIUC, the chairperson of Riscani District Court, Chisinau municipality (DB Decision no. 27/13 as of 2 October 2015), Ion TURCAN, ex-chairperson of the Centre District Court, (DB Decision no. 12/6 as of 18 March 2016), Garri BIVOL, the chairperson of the Centre District Court, and Iulia SARCU, Galina STRATULAT, Iulia OPREA, Ion DRUTA, judges of the SCJ (DB Decision no. 22/9 as of 22 April 2016)

To conclude, there was found a positive trend in the practice of Admissibility Panels to submit high-profile cases, which were initially declared manifestly unfounded by the Judicial Inspection, but contain elements of disciplinary offence, to the Plenary of the Disciplinary Board for examination. This practice is an important safeguard against the abuses of the Judicial Inspection. However, members of the Disciplinary Board who are also members of Admissibility Panels, have a heavy workload, especially while examining appeals against decisions by the Judicial Inspection and examining admissibility of complaints. For this reason, there is a risk that the post of the member of the Disciplinary Board, and especially on the part of the civil society, will not to be attractive in the future. Likewise, the finding from the Analysis of Law no. 178 by the LRCM that remains valid, states that the admissibility stage complicates and holds up disciplinary procedure, and that because of this stage the Admissibility Panels permanently have the conflict of competences with the Judicial Inspection, the fact that leads to inefficiency of the disciplinary procedure against judges.

Recommendations:

1. To exclude the stage of admissibility and assign to the Judicial Inspection the competence to initiate disciplinary procedure. It is recommended to use the following models, according to which orders/decisions by the Judicial Inspection can be appealed against before:
   a. Appeal Panels formed of three members of the Disciplinary Board;
   b. Appeal Panels formed of three members, who are not a part of the Disciplinary Board, selected under the same procedure as the members of the Disciplinary Board;
   c. Panels of judges of the Court of Appeal Chisinau;
2. Members of the Disciplinary Board who are also members of Admissibility/Appeal Panels should receive higher remuneration as compared to members who do not participate in such Panels.

2.4 The assignee of the competence to qualify disciplinary offences

One of the issues discussed so far among disciplinary bodies refers to the assignee of the competence to qualify the acts alleged in complaints in conformity with disciplinary offences provided under art. 4 of Law no. 178. Although the law does not expressly stipulate specific disciplinary organ that has the duty to qualify disciplinary offences, it does not impose this obligation to the authors of complaint either. Upon careful analysis of art. 20 para. (1) of Law no. 178 we can observe that the author of the complaint is not required to qualify acts alleged to the judge under any legal norm. This norm requires the author of the complaint only to describe briefly the acts, which might constitute disciplinary offences (art. 20 para. (1) letter d) of Law no. 178).

A legal framework similar to that disciplinary at the stage of initiating the procedure results from the criminal procedure legislation. When a person files a complaint to criminal prosecution body, s/he must set out the facts forming the subject of the complaint, and is not required to qualify these facts as offences under the Criminal Code (art. 263 para. (3) of the CPC). Thereafter it is the duty of the criminal prosecution body to qualify the facts alleged

in the complaint as formal components of a crime, for example, in the order to bring formal charges (art. 281 para. (2) CPC), in the report submitted to the prosecutor with the proposal to terminate criminal prosecution (art. 289 para. (2) CPC), in the indictment (art. 296 para. (2) CPC). Before deciding on termination of criminal prosecution, the prosecutor may return the case to the body that carried out criminal prosecution to eliminate committed violations of legal provisions (art. 292 para. (1) of the CPC) or can personally carry out procedural actions for completing the criminal prosecution or redo actions performed with violation of the legal provisions (art. 292 para. (4) of Law no. 178). In other words, in the context of the subject addressed to, if the body that conducted the prosecution did not qualify the act or provided wrong legal qualification, the prosecutor can submit the case back to that body to correct the mistake or even can correct this error himself. Shall it be established during the case hearing that new circumstances appeared that will influence the legal qualification of the charges brought, the court, at the request of the prosecutor, should postpone the hearing of the case and should return the case to the prosecutor so that the criminal investigation of this crime is resumed and a new charge is formulated (art. 326 para. (2) CPC).

As compared with criminal procedure legislation and disciplinary legislation for judges, the civil procedure legislation expressly stipulates that the court complaint must contain legal circumstances (...) on which the plaintiff grounds its claims (art. 166 para. (1) letter e) of the CPC). Thus, if the applicant does not ground the acts on certain legal norms, the court can, as a procedural sanctioning, refuse to accept the court complaint for consideration. Therefore, civil legislation obliges litigants to ground the acts in the complaint on legal norms, but criminal legislation and disciplinary legislation for judges does not stipulate such an obligation for petitioners. Under such circumstances, when we speak about the obligation to provide legal qualification of disciplinary acts, this, by consequence, lies with the disciplinary bodies. The question that remains: what body is responsible for the qualification of disciplinary offences and what is the extent of involvement of other disciplinary bodies in qualification of offences?

The legislation on disciplinary liability of judges does not regulate the aspect regarding the body obliged to qualify disciplinary offences. Art. 26 para. (2) of Law no. 178 does not expressly stipulate the obligation of inspectors-judges to indicate the legal qualification of the acts alleged to the judge. It is confusing that neither the Model of the Judicial Inspection report provided by the Judicial Inspection Regulations requires the Judicial Inspection to indicate the legal classification of disciplinary offences in it (p. 12.4). The guidelines on complaints to the Judicial Inspection also make no reference to the qualification of disciplinary offences. It requires neither petitioners nor the Judicial Inspection to provide legal qualification of disciplinary offences.

One of the most controversial provisions of Law no. 178 is the norm under art. 20 para. (2), which states that „the complaint is considered manifestly unfounded if it states acts which do not refer to offences stipulated under art. 4". On the one hand, poor wording of this provision, and, on the other hand, broad interpretation of this provision by the Judicial Inspection, previously led to the dismissal of complaints as manifestly unfounded simply because the alleged acts were not qualified by the authors as one of the offences under art. 4. This practice was

supported by the Admissibility Panels at least in 2015[29]. This was faulty practice, firstly because if the authors of complaints were obliged to qualify disciplinary offences, such a requirement had to be introduced in art. 20 para. (1) describing the content of the complaint and not otherwise. (3) Secondly, „it would be undue burden on the shoulders of litigants, who are not always professional lawyers, but complained about offence of a judge, to be aware of the way how to qualify disciplinary offences, resulting often from the practice of disciplinary bodies" . Thirdly, „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"[30].

Unfortunately, there are cases when judges have not been sanctioned because the disciplinary bodies have no clarity on the competences of each body in terms of qualification of disciplinary offences. Failure to hold a judge disciplinary liable, simply because there is no consensus of disciplinary bodies on the legal qualification of disciplinary acts, is inadmissible and affects negatively the accountability of the judiciary.

A case that has been affected by uncertainty of disciplinary offences qualification is the disciplinary case mentioned above, concerning the judge Melniciuc. At the hearing of the given case there were found circumstances that were new to the members of the Admissibility Panel, but neither the Disciplinary Board nor the Judicial Inspection requested to submit the case for additional verification. Disciplinary bodies could use the practice of criminal cases, where, shall it be established during the case hearing that new circumstances appeared that will influence the legal qualification of the charges brought, the court, at the request of the prosecutor, should postpone the hearing of the case and shall return the case to the prosecutor so that the criminal investigation of this crime is resumed and a new charge is formulated (art. 326 para. (2) CPC). Due to the uncertainty of the acts qualification and confusion created by the disciplinary bodies, disciplinary offence could not be found in this case.

Another example that raises issues of qualification is the disciplinary case against the judge Iurie MOLDOVAN as of 23 September, 2016. In that case, there were invoked offences under art. 4 para. (1) letter b) intentional application, or application with bad faith or repeated gross negligence of legislation contrary to the uniform judicial practice and letter c) the actions of the judge in the process of administration of justice that prove serious and obvious professional incompetence. The judge was accused that he committed a disciplinary offence by termination of criminal prosecution through judgement of dismissal, although court investigators do not have such a competence, which is the exclusive competence of the prosecutor (art. 52 para. (1) p. 1) of the CPC). At the meeting the Plenary of the Disciplinary Board found that the judge Moldovan was wrong when he issued that judgement, but the Disciplinary Board decided to terminate the proceedings and not to apply sanctions. Apparently, that disciplinary offence has not been found in the respective case due to qualification failure, or the actions of the judge were not qualified as application of legislation contrary to the uniform judicial practice and the offence consisting in serious and obvious professional incompetence was a disciplinary offence too tough for the circumstances of this case.

[29] For example, Admissibility Panels, 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.

[30] Analysis of Law no. 178 by the LRCM, pp. 15.

These cases illustrate the urgent necessity of clarification between disciplinary bodies on the distribution of competences regarding the qualification of disciplinary offences. Even in the Analysis of Law no. 178 by the LRCM it was stated about the problem of disciplinary acts qualification in terms of exercising by the Admissibility Panels of control function over the Judicial Inspection. It is mentioned in the document that it would be logical, if the Judicial Inspection was the body that formulates and presents the accusation before disciplinary bodies, similarly to criminal proceedings. While formulating the accusation the Judicial Inspection inevitably should be able to qualify actions stated in a complaint as one or the other offence stipulated by the law. This function would arise primarily from the practice of similar structures having investigative functions such as investigative bodies in criminal proceedings, criminal prosecution body and prosecutor's office[31].

To conclude, in the presence of imperfect disciplinary legislation, disciplinary bodies have nothing to do but to resort to the practice of the bodies and procedures similar to disciplinary ones. Below we recommend some examples and stages where disciplinary bodies should qualify/re-qualify disciplinary acts.

Recommendations:

1. The Judicial Inspection, similarly to the criminal prosecution body, should qualify acts when notifying the judge on the lodged complaint (similarly to the indictment), for a judge to be informed about the disciplinary charges alleged to him/her and can defend against it;
2. If the Admissibility panels are excluded, and only the Appeal Panels are preserved, the legal classification of acts in a disciplinary complaint should be done exclusively by the Judicial Inspection. This should be expressly stated by the law;
3. If at the meeting of the Plenary of the Disciplinary Board new circumstances that change the qualification of disciplinary offence are found, the Disciplinary Board at the request of the Judicial Inspection or member rapporteur, should be able to return the disciplinary case to the Judicial Inspection for proper classification and bringing of new charges for the judge (similar to the procedure of resuming criminal prosecution in case of detecting new circumstances that change the legal qualification of the criminal offence at the hearing).
4. If the Admissibility Panels are preserved, the report of the Judicial Inspection submitted to the Admissibility Panel should contain qualification of each act invoked in the complaint;
5. If the Admissibility Panels are preserved, they, similarly to a prosecutor should present accusation to the court and ensure proper qualification of each disciplinary offence. It could be done on their own or they can submit the case to the Judicial Inspection for making additions and legal classification of the acts alleged to the judge. The Admissibility Panels should have the right to re-qualify offences that were wrongly qualified, because in the end the Panels initiate disciplinary procedure and should take responsibility for proper legal classification.

[31] Analysis of Law no. 178 by the LRCM, pp. 15.

2.5 The uncertainty regarding the selection of members of the Disciplinary Board

Law no. 178 has changed not only the disciplinary procedure but also the composition and way of election of some members of the Disciplinary Board. Since the entry into force of this law, the Disciplinary Board has encountered various difficulties related to its composition. One of these problems was related to the filling of vacancies in the Disciplinary Board.

The Disciplinary Board consists of 5 judges and 4 persons from among civil society. A member of the Disciplinary Board has a term of office of 6 years and cannot run for a second term consecutively (art. 9 para. (4) of Law no. 178). Members of the Disciplinary Board, who are judges, are elected by their colleagues at the General Assembly of Judges: two judges from the (SCJ), two from the courts of appeal and one judge from among courts of first instance (art. 10 para. (1) of Law no. 178). Members of the Disciplinary Board from among civil society are selected following a contest organized by a selection committee consisting of four representatives of the Ministry of Justice and three representatives of the SCM (p. 3 of the Regulations on the selection of the civil society representatives). Subsequently, members selected by the committee are appointed by the Ministry of Justice (art. 10 para. (3) of Law no. 178).

Final and transitional provisions of Law no. 178 state that the provisions on the composition and the term of office of the Disciplinary Board, on the election and appointment of members of the Disciplinary Board and on termination of the term of office of the Disciplinary Board member (art. 9-11) shall enter into force on the expiry of the term of office of current members of the Disciplinary Board (art. 41 para. (1)). This provision aims at preserving the continuity of the term of office of the Disciplinary Board which was obtained legally under the old law. At the initial period of enforcement of Law no. 178, a generally accepted interpretation within the SCM was that the provisions of new law on the composition and election procedure for the members of the Disciplinary Board would be applied after the end of the term of office of the Disciplinary Board, which began its operation in early 2014, i.e. after 2018.

Under old disciplinary law the Disciplinary Board was composed of five members-judges and five members-professors, two professors were appointed by the SCM and three - by the Ministry of Justice (art. 3 para. (6) of the repealed Law no. 950). The law did not stipulate the necessity to organize a contest. The term of office of the Disciplinary Board was 4 years and the Disciplinary Board members could be in the office not more than two consecutive terms (art. 1 para. (2) of the repealed Law no. 950).

Since the beginning of 2014, several professors have resigned from the post of the member of the Disciplinary Board, and respectively, they were replaced by other members appointed by the competent institutions. For example, in September 2015 the SCM organised a contest for filling of the function in the Disciplinary Board, which resulted in the appointment of Mr Vitalie GAMURARI a member of the Disciplinary Board from among civil society[32]. In the decision on appointment, the SCM stated that Mr. Gamurari was appointed as a member of the Disciplinary Board under the old law.

In early 2016, the Ministry of Justice should have appointed three more members of the Disciplinary Board from among the civil society. The Ministry of Justice decided to appoint

[32] SCM, Decision no. 840/34 as of 10 November 2015, available at: http://csm.md/files/Hotaririle/2015/34/840-34.pdf.

these members under the new law, i.e. not only from among professors, but from among the entire civil society, and to elect on the basis of a public contest and under the Regulations on the selection of members of the Disciplinary Board (art. 10 para. (3) of Law no. 178). On 4 May 2016 Mrs. Maria ORLOV, Mrs. Liliana TURCAN and Mrs. Veronica MOCANU were selected as members of the Disciplinary Board from among the civil society[33].

The Ministry of Justice decided to elect these members under a new law based on an interpretation of art. 41 para. (1) of Law no. 178 according to which the phrase „on the expiry of the term of office of current members of the Disciplinary Board" would mean expiry of the term of office of each member, individually. In other words, on the expiry of the term of office of one member, the future member shall be appointed under new law, and so on until the entire composition of the Disciplinary Board is appointed under new law.

Law no. 178 stipulates higher standards of transparency in the process of selection of civil society representatives to the Disciplinary Board than repealed Law no. 950. Therefore, application of the provisions of Law no. 178 for the contest organized by the Ministry of Justice is welcomed. However, partial application of new law has led to some problems. One of the first concerns refers to different and contradictory interpretation regarding the number of the Board members. The Ministry of Justice has applied provisions on the composition and election of members of the Disciplinary Board of Law. 178 for three new members, but has not complied with new norm under which the Disciplinary Board can be composed of a maximum of four persons from among civil society (art. 9 para. (1), as two members from among civil society, Mrs. Olesea PLOTNIC and Mr. Vitalie GAMURARI have already been appointed to the Disciplinary Board. Thus, the Ministry of Justice organized the contest under new rules, but appointed the representatives of the civil society under old law.

On the other hand, on 21 October 2016, the General Assembly of Judges elected Mr. Anatolie GALBEN, judge of Riscani District Court, a member of the Disciplinary Board from among judges according to the old procedure. Art. 3 para. (1) of old Law no. 950 provides that members who are judges shall be elected by open or secret vote. The General Assembly of Judges decided that Mr. Galben shall be elected by open vote. Election by open vote is not recommended when voting is not based on an objective assessment of the candidate, because of risks of external influence on the voters. Moreover, the Regulations of the General Assembly of Judges stipulates under p. 30 that voting for the members of the Disciplinary Board is secret and is carried out in specially designed voting booth. Thus, the choice of the open voting instead of secret vote does not seem to be justified in this case.

Another problematic issue results from the uncertainty regarding the moment when the term of office of the Disciplinary Board member ends. It is not clear whether the Ministry of Justice and the SCM appointed the members of the Board after 1 January 2015 for a term of 6 years or only until 2018, when the term of office of the current composition of the Disciplinary Board ends. According to previous practice the term of office of the Disciplinary Board members ended upon the completion of 4 years term of office of the Disciplinary Board. This practice results from the provisions of the old law under which „the term of office of the Disciplinary Board is 4 years" (art. 1 para. (2) of the repealed Law no. 950). By comparison, the new law stipulates that „the term of office of the Disciplinary Board member is 6 years"

[33] Commission on the selection of the civil society representatives to the Disciplinary Board of Judges, Decision as of 3 May 2016, available at: http://www.justice.gov.md/libview.php?l=ro&idc=4&id=3025.

(art. 9 para. (4) of Law no. 178). However, the next paragraph of article 9 stipulates that "the term of office of the Disciplinary Board member is extended de jure until the establishment of the Board in a new composition". By establishing of „a new composition", the legislator has implicitly regulated the existence of the beginning and the end of the term of office of the Disciplinary Board. Thus, corroborating these norms, as a result the legislator continues to recognize the concept of „the term of office the Disciplinary Board", hence the term of office of those three representatives of the civil society should end in 2018, after which new members of the Disciplinary Board will be elected/appointed for a period of six years. On the other hand, the practice of concurrent completion of the term of office of all members is also not a desirable one, since it does not ensure the continuity of activity and institutional memory of the collegial body. Accordingly, given the practice of different interpretation and application of the term of office of the Disciplinary Board members, this should be analysed and explicitly stated in the law.

We consider that the mode of appointment of the Disciplinary Board members is particularly important and should be urgently clarified. First of all, because it creates an institutional uncertainty for the Disciplinary Board. Secondly, the same norm is interpreted differently by two key institutions in the domain of justice, the SCM and the Ministry of Justice. So far these institutions cannot reach a common position on this issue and it questions the term of office of the Disciplinary Board.

Recommendations:

1. Finding a consensus between the Ministry of Justice and the SCM regarding the interpretation of art. 41 para. (1) of Law no. 178;
2. Amendment of Law no. 178 by express provision specifying the individual term of office of 6 years for the members of the Disciplinary Board. This option would allow maintaining of the institutional memory and uniform practice in disciplinary cases.

2.6 The issue of recusal of the Disciplinary Board members and inspectors-judges

The Disciplinary Board is a quasi-judicial body that must provide guarantees of a judicial tribunal when considering disciplinary procedures. 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. of the ECHR[34]. One of the desiderata under art. 6 § 1 of the ECHR towards the body, which examines civil rights and obligations or a criminal charge is that it shall be impartial[35].

Disciplinary Board acts basically as a tribunal under art. 6 of the ECHR and should ensure the principle of impartiality for the participants of the disciplinary procedure. At present, although the legislation provides a mechanism for recusal and abstention of the Disciplinary Board

[34] ECtHR, Judgement in the case of ***Albert and Le Compte v. Belgium***, 10 February 1983, § 29, Judgement in the case of ***Gautrin and others v. France***, 20 May 1998, § 57.

[35] ECtHR, Judgement in the case of ***Micallef v. Malta***, 15 October 2009, § 93.

members (art. 14 of Law no. 178), their recusal is complicated by some provisions. Disciplinary Board meetings are deliberative, if attended by at least 6 members (art. 15 para. (4) of Law no. 178). The recusal or abstention of the Disciplinary Board members is not permitted, if after abstention or recusal, it will be impossible to ensure the deliberative nature of the meeting of the Disciplinary Board (art. 14 para. (5) of Law no. 178). The Venice Commission has criticized this formulation as early as 2014 and proposed that a substitute member should replace the recused or abstained member[36].

In the disciplinary case examined by the Admissibility Panel no. 1, **Decision no. 61/8 as of 22 April 2016[37]**, the representative of a judge referred to in the complaint filed an application on recusal of Admissibility Panel no. 2 on the grounds that it violated the procedure of random assignment of the disciplinary cases. Given that at the time of filing of recusal there were only eight members in the composition of the Disciplinary Board, it rejected the application on recusal on the grounds that the recusal of three members would have made it impossible to ensure the deliberative nature of the meeting and in such a case the file should be submitted to the Plenary of the Disciplinary Board[38].

The dismissal of a recusal simply because it is impossible to ensure the deliberative nature of the meeting does not remove suspicions regarding the partiality of one or more members of the Disciplinary Board[39]. The law provides for the election of the substitute members to the Disciplinary Board (art. 10 para. (2) of Law no. 178), but they can be involved only in case of termination or revocation of the term of office of the Disciplinary Board member. The law does not provide for a mechanism of intervention of substitute members in case of impossibility to ensure the deliberative nature of the meeting.

Inspectors-judges also have an obligation to be impartial (p. 3.20 of the Judicial Inspection Regulations). According to p. 2.3 of the Judicial Inspection Regulations, whilst performing their duties inspectors-judges are obliged to be objective, unbiased and neutral. This implies manifestation of the same attitude towards all verified persons, not affecting the spirit of objectivity and impartiality.

However, there is no normative framework that would regulate recusal/abstention of inspectors-judges from investigating/presenting a disciplinary case. This also affects negatively the practice. For example, in the disciplinary case against Ion TURCAN, the judge of Centre District Court[40], the author of the complaint, representative of the SIS, requested the recusal of the inspector-judge Valeriu CATAN, who would have been in conflict of interest with the judge concerned in the proceedings. According to the representative of the SIS, Mr. Catan had a share of the real estate belonging to the company „Nuntius" LLC, which was the defendant in a case brought by the complainant „Far-90" LLC. The representative of the SIS mentioned that Mr. Turcan had given instructions on the solution of the case that should be issued by judges subordinate to him. The application on recusal remained unanswered by the Disciplinary Board. Neither Mr. Catan abstained from presenting that case.

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[36] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)006-e, § 63.

[37] Admissibility Panel no. 1, Decision no. 61/8 as of 22 April 2016, available at: http://csm.md/files/Hotarirele_CDisciplinar/2016/CA1/61-8.PDF.

[38] Disciplinary Board, Decision no. 9/12 as of 6 November 2015 (not published).

[39] ECtHR, Judgement Harabin v. Slovakia, 20 November 2012, §140.

[40] Disciplinary Board, Decision no. 12/6 as of 18 March 2016, available at: http://csm.md/files/Hotarirele_CDisciplinar/2016/12-6.pdf.

To conclude, the provision of Law no. 178 that recusal of members is not permitted when it is impossible to ensure the deliberative nature of the meeting is not the most successful solution for the good operation of the Disciplinary Board. A solution in this case is the introduction of substitute members (ad hoc members) for examination of a case when there are not enough members to ensure the deliberative nature of the meeting. In case of inspectors-judges, although the obligation of their impartiality exists, there is no expressly stipulated mechanism for recusal/abstention of inspectors-judges. The law should provide for such a mechanism. Until the amendment of the law the disciplinary bodies could apply the analogy of the law, thus establishing an internal practice for recusal of inspectors-judges.

Recommendations:

1. Establishing of a mechanism for replacement of recused/abstained members of the Disciplinary Board or Admissibility Panels by a substitute member (ad hoc member), if the deliberative status of the meeting cannot be ensured;
2. Establishing of the legal framework for recusal/ abstention of inspectors-judges. Applications for recusal/abstention of inspectors-judges could be examined by the Admissibility/Appeal Panel of the Disciplinary Board, or if the case has been examined on the merits, by the Plenary the Disciplinary Board.

2.7 Jurisdictional activity of the Disciplinary Board

The Disciplinary Board is the key body in the mechanism of the disciplinary liability of judges. It is an independent body that examines disciplinary cases regarding judges and applies disciplinary sanctions (art. 8 para. (1) of Law no. 178). The Plenary of the Disciplinary Board carries out jurisdictional activity in public meetings, ensuring adversarial principle, with the participation of judges, inspectors-judges and the author of the complaint. The Disciplinary Board meetings can also be attended by other persons interested in the disciplinary procedure, including the media. Starting with 2010, the practice of the Disciplinary Board has improved significantly, especially due to the qualitative reasoning of decisions. This positive practice was taken over and by the new composition of the Disciplinary Board, which became operational in early 2014. Since 2015, the Disciplinary Board has begun to apply Law no. 178 which contains a number of new provisions related directly to its judicial activity, including provisions regarding reviewed disciplinary offences, sanctions and their consequences, individualization of disciplinary sanctions etc. In this section we shall focus on the analysis of the judicial practice of applying sanctions.

Within the first nine months of 2016 the Plenary of the Disciplinary Board was convened in 14 meetings. Within those 14 meetings, the Disciplinary Board issued 47 decisions based on the examination of complaints, out of which, by 10 decisions 13 sanctions (four warnings and nine reprimands) were applied. Out of 13 sanctions applied by the Disciplinary Board, the SCM has cancelled five sanctions that were applied to Ion COTEA, judge of Cahul Court[41], and to the SCJ judges Iulia SARCU, Galina STRATULAT, Iuliana OPREA and Ion DRUTA[42]. Thus, within the reference period the Disciplinary Board applied 8 sanctions upon examination of

[41] SCM, Decision no. 107/5 as of 23 February 2016, available at: http://csm.md/files/Hotaririle/2016/05/107-5.pdf.

[42] SCM, Decision no. 463/20 as of 05 July 2016, available at: http://csm.md/files/Hotaririle/2016/20/463-20.pdf.

complaints. Out of 47 decisions issued based on the examination of complaints within the first nine months of 2016, 37 decisions are on the termination of proceedings because of absence of the disciplinary offence, which makes up 78%. In the same period, the Disciplinary Board examined 24 complaints of which only one was admitted in the case of the judge Adela ANDRONIC, where the Disciplinary Board applied warning, but who was later dismissed by the SCM. Altogether, 14 disciplinary sanctions were applied by the Disciplinary Board within the first nine months of 2016, of which nine have remained in force.

According to the Analysis of Law no. 178 by the LRCM, the Disciplinary Board applied 16 sanctions within 10 meetings in 2014 and applied five sanctions within 12 meetings in 2015 (the rate of sanctioning in 2015, if correlated with the number of meetings, had decreased almost fourfold as compared to 2014). The decrease of the sanctioning rate correlated with the number of meetings was obvious and one of the reasons for the decrease of sanctioning rate seemed to be the entry into force of Law no. 178 in early 2015. However, in 2016, in the first nine months, the Disciplinary Board has applied 14 sanctions within 14 meetings, but only nine of them remained in force. Thus, it appears that the rate of sanctioning increased in 2016 as compared to 2015, but overall the number of sanctions in 2016 remains smaller as compared to the years 2014, 2013, 2012 and 2011[43]. The increase of the number of sanctions in 2016 as compared to 2015 can represent a revival of disciplinary bodies after the entry into force of Law no. 178. At the same time, it should be mentioned that as compared to the situation in October 2015[44], the situation regarding the mistrust of the society in justice has not changed in September 2016. Mistrust of the population in justice remains at 75% according to the IRI survey[45], and according to the Barometer of Opinion as of October 2016, 89,6% of the population did not have confidence in justice[46].

Statistical data on disciplinary liability of judges help us understand the general trends in the system. However, to understand if there are any changes in the quality of functioning of the disciplinary mechanism for judges, it is necessary to analyse the practice of the disciplinary bodies and, in particular, of the Disciplinary Board. The practice of the Disciplinary Board, as of any other jurisdictional body, must be coherent and instructive regardless of the legislation in force. By „coherent" we mean that the practice of the Disciplinary Board must be constant, and when it changes there must be brought reasons in this regard. It must be clear for judges and litigants why the practice of the Disciplinary Board changes, when it happens. By „instructive practice" we mean that the decisions by the Disciplinary Board must be sufficiently clear to allow judges to adjust their conduct so as not to commit disciplinary offences similar to those found by the disciplinary bodies.

One of the key elements of a coherent and instructive practice is the reasoning of the decisions. Usually the Disciplinary Board provides quite detailed reasoning for its decisions. However, the reasoning could be improved on specific, but extremely important issues to adjust the conduct of judges, such as (1) reasoning of disciplinary sanctioning/individualization

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43 In 2013, 18 sanctions were applied within 14 meetings, in 2012–19 sanctions within 11 meetings, in 2011–16 sanctions within 16 meetings.

44 According to the survey conducted by the IRI, on 21 October 2015 around 75% of the population had no confidence in the justice system at that period: http://www.iri.org/sites/default/files/wysiwyg/2015-11-09_survey_of_moldovan_public_opinion_september_29-october_21_2015.pdf.

45 IRI, Survey as of September 2016, p. 31, available at: http://www.iri.org/sites/default/files/wysiwyg/iri_moldova_september_2016_moldova_poll_for_review.pdf.

46 See the data here: http://www.bop.ipp.md/result?type=bar. For comparison, in November 2011, 74,5% did not have confidence in justice (http://www.bop.ipp.md/result?type=bar).

of sanctions application, (2) qualification of one act as several disciplinary offences, (3) qualification of several acts as one disciplinary offence, (4) clear analysis on each disciplinary offence admitted by the Admissibility Panel and (5) following a single structure for all decisions by the Disciplinary Board.

To address these issues we shall analyse the decisions by the Disciplinary Board issued within the period of January 2015 – September 2016 by which sanctions were applied and which were available on the SCM website at the end of October 2016[47]. We shall analyse those judgements regardless of the fact whether the sanction applied by the Disciplinary Board was or not upheld by the SCM or the SCJ. Also in this section we shall avoid expressing opinion on the validity of decisions. Within the framework of this section, we shall analyse only the connection made by the Disciplinary Board between the acts found by the Disciplinary Board, disciplinary offences within which these acts fall and applied sanctions.

2.7.1 Reasoning for the application of sanctions by the Disciplinary Board

Under art. 7 para. (2) of Law no. 178 disciplinary sanctions shall be applied proportionate to the seriousness of the disciplinary offence committed by the judge and his/her personal circumstances. The seriousness of the committed disciplinary offence is determined by the nature of the committed act and involved consequences. Involved consequences are evaluated considering both the effects on people involved in the judicial process, within which the offence was committed, and the effects on the image and prestige of the judiciary.

Thus, out of 14 analysed judgements, four are from 2015 and ten are from 2016[48]. In nine cases out of 14 judgements the applied sanction was a warning and in five cases the applied sanction was a reprimand. Out of all analysed judgements, the Disciplinary Board tried to provide reasoning for the application of sanctions only in seven cases, but usually this reasoning is a blanket one, and is not correlated with the circumstances of cases. For example, **in case no. 21/8 as of 29 May, 2015** the Disciplinary Board applied a warning to a judge for breaching the deadline for drafting of reasoned decision with the delay of 96 days. When reasoning the sanction, the Disciplinary Board confined itself to the fact that „the judge is sanctioned for the first time". An identical reasoning for the sanction of warning was used in case no. 28/15 as of 6 November 2015, where the judge examined and ordered additional handwriting expertise in a process that was terminated at that moment.

In **case no. 36/17 as of 14 December 2015**, the Disciplinary Board applied the sanction of warning for breaching the deadline of the file submission for examination of the application for recusal. The file was submitted more than two months later after the application for recusal had been filed. The Disciplinary Board reasoned the sanction as follows „the nature of the disciplinary offences, consequences and their seriousness, personality of the judge, his/her degree of guilt and other circumstances that require attention". In this case, although several reasons that would justify the application of the most lenient sanctions are listed, the Disciplinary Board does not explain the use of these reasons, and how they are applied

[47] As regards 2015, only the decisions issued under the procedure established by Law no. 178 were analysed.

[48] Disciplinary Board, decisions: no. 21/8 as of 29 May 2015, no. 23/10 as of 19 June 2015, no. 28/15 as of 6 November 2015, no. 37/17 as of 14 December 2015, no. 1/1 as of 22 January 2016, no. 9/3 as of 5 February 2016, no. 10/4 as of 19 February 2016, no. 20/7 as of 28 March 2016, no. 22/9 as of 22 April 2016, no. 26/9 as of 22 April 2016, no. 32/10 as of 27 May 2016 and no. 42/13 as of 9 September 2016.

in this particular case. For example, it does not explain what is meant by the nature of the disciplinary offence (is it less serious or more serious), what were the consequences and are they serious or not, what is meant by the personality of the judge, or what is his/her degree of guilt. Moreover, the Disciplinary Board indicated as the reasoning for the sanction „other circumstances that require attention", which raises more questions than provides answers. In other words, the reasoning of sanction in the given decision makes the reader guess the reasons for the application of this sanction, which is inadmissible in a decision on holding disciplinary liable. Such a decision neither fulfils the instructive purpose, nor allows the Disciplinary Board to establish a coherent practice.

In the context of cases, in which the offence of breaching procedural deadlines is found, the examining body should consider the nature of the case, especially if it is a case which had to be examined as a priority (for example, cases under Law no. 87, labour disputes, disputes involving children, etc.). Another aspect to be taken into account and expressly stated in such cases is the period of delay alleged to the judge. For example, in **case no. 21/8 as of 29 May 2015** the Judicial Inspection invoked breaching of a deadline by the judge, but the Disciplinary Board did not indicate it in the reasoning, although it is the basis and explanation for holding disciplinary liable. In **case no. 37/17 as of December 14, 2015** neither the Judicial Inspection, nor the Disciplinary Board indicate the period of delay, but indicate only the dates when procedural actions have been done. A positive example is **case no. 42/13 as of 9 September 2016** in which the Disciplinary Board indicates in the reasoning the delay of the period provided by law. In all decisions by the Disciplinary Board or the SCM, especially those in which sanctions are applied, the reasoning should clearly state what the term provided by law was and the period of delay. These details will help both disciplinary bodies to establish uniform practice, and judges to adjust their conduct in the future.

In another decision issued **in case no. 10/4 as of 19 February 2016**, the Disciplinary Board sanctioned a judge with a reprimand for recognising of the birth of a child "in Simferopol, the Autonomous Republic of Crimea, the Russian Federation", thus implicitly recognizing the annexation of the Crimea by the Russian Federation. When justifying her decision, the judge made reference to the Decree of the President of the Russian Federation by which the Crimea was annexed. Since the Republic of Moldova, with more than 100 other countries have condemned the annexation of the Crimea, the act of the judge was appreciated critically by the disciplinary bodies. The Disciplinary Board reasoned the application of a sanction taking into account „the nature of the disciplinary offence" and „harmful consequences that followed". But the Disciplinary Board did not clarify the nature of the disciplinary offence or what were harmful consequences that followed.

In another case, the Disciplinary Board invoked harmful consequences that followed, but, apparently, did not consider them when applying the sanction. Thus, in **case no. 45/14 as of 23 September 2016** a judge was sanctioned with a warning for not submitting for execution of a sentence of guilty to perform community service to the execution body for a period of 17 months. The Disciplinary Board indicated that as a consequence of the judge's inaction, the sentence of guilty could not be fully executed. But subsequently, the Disciplinary Board used a blanket wording for sanctioning in the form of a warning „based on the nature of the found disciplinary offence and harmful consequences that followed as a result of failure to execute the sentence of guilty".

By **decision no. 1/1 as of 22 January 2016**, the Disciplinary Board applied sanctioning with a warning. The judge applied the measure for security suspending a decision by the Board of Administration of the National Bureau of Motor Insurers (BNAA) and banned it and the Executive Director to take action, without legal proceedings being initiated and without examining the suspended decision. When applying the sanction, the Disciplinary Board took into account the fact that the judge „have not been previously sanctioned" and had a „low percentage of untried cases". Although the fact that the judge had a low percentage of untried cases could suggest the efficiency of a judge, it is not always a reason to apply a more lenient sanction. This reason could be invoked when the efficiency of a judge is questioned, but not for the violation of a mandatory rule. On the other hand, in the given case it was important to indicate the consequences of the judge's actions that have been highlighted in the dissenting opinion of the Disciplinary Board member [49] and the decision by the SCM by which the judge was subsequently dismissed from office[50]. Thus, the Disciplinary Board did not take into account that the measure for security of a claim applied by the judge led to misappropriation of funds worth 20 million MDL from the banking accounts of BNAA and led to the recommendation that the Republic of Moldova should be suspended from the insurance system „Green Card".

It is not the authors' task to indicate what sanction was the most appropriate for that act, but we notice a clear difference in approaching this case by the disciplinary bodies. In particular, we draw attention to the fact that initially the complaint filed in the given case was dismissed by the Admissibility Panel on the grounds of absence of a reasoned suspicion of having been committed a disciplinary offence[51], then, upon examination of the complaint, the Disciplinary Board applied the sanction of warning, and the SCM, in its turn, suggested the dismissal of the judge from office upon examination of the appeal against the decision by the Disciplinary Board. The difference in approaching the given case is even more evident taking into account that the other two complaints, which referred to the same acts committed by the same judge were dismissed as manifestly unfounded by the Judicial Inspection, and later by the Admissibility Panel upon examination of appeals[52]. In the first decision that dismissed one of these complaints, issued on 20 March 2015, it was stated that the decision on applying the measure for security was still pending before the Court of Appeal and, respectively, it could not be examined whether by that act a disciplinary offence was committed, although the Court of Appeals annulled the decision on applying the measure for security as far back as on 12 March, 2015[53]. Such a discrepancy in examination of one and the same case by the disciplinary bodies of judges could be caused by inconsistent practice, in particular, as regards qualification of disciplinary acts, finding reasoned suspicion and establishing proportionate sanction.

In one of the last decisions published on the website of the SCM, the Disciplinary Board provided more detailed reasoning for application of a sanction, but failed to examine its

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[49] Dissenting opinion signed by deputy chairperson of the Disciplinary Board, Domnica MANOLE available at: http://csm.md/files/Hotarirele_CDisciplinar/2016/1-1-opinia.pdf.

[50] SCM, Decision no. 327/15 as of 17 May 2016, available at: http://csm.md/files/Hotaririle/2016/15/327-15.pdf.

[51] Admissibility Panel no. 2, Decision no. 94/16 as of 18 September 2015, available at: http://csm.md/files/Hotarirele_CDisciplinar/2015/CA2/03/94-16.PDF.

[52] Admissibility Panel no. 2, Decision no. 17/4 as of 20 March 2015, available at: http://csm.md/files/Hotarirele_CDisciplinar/2015/CA2/03/17-4.pdf and Decision no. 10/4 as of 3 April 2015, available at: http://csm.md/files/Hotarirele_CDisciplinar/2015/CA2/03/10-4.PDF.

[53] The Court of Appeal Chisinau, Decision as of 12 March 2015, case no. 2rc-71-15.

proportionality towards the circumstances of the case. Thus, **in case no. 47/14 as of 23 September 2016,** a judge has been sanctioned with warning because on 8 May 2015 applied criminal sentence of imprisonment for a term of 5 years suspending the sentence for a term of 4 years of probation for committing the crime under art. 201[1] para. (3) letter a) of the Criminal Code (domestic violence), that at the moment of examination of the case was a particularly serious crime, and under art. 90 para. (4) of the Criminal Code, persons who have committed particularly serious crimes shall not be applied suspension of punishment. In the reasoning for the sanction, the Disciplinary Board invoked that the judge has not been previously sanctioned, that the error was corrected by the Court of Appeal (by sentencing to the real term in a closed prison) and that, according to some amendments to the legislation as of July 2016, the gravity of the crime committed by the convicted was reduced from a particularly serious crime to a serious crime and the suspension of sentence was yet possible. Although the first two grounds seem reasonable for the individualization of disciplinary sanction, it is not clear how can amendment to the legislation that has occurred over more than a year after the offence influence positively or negatively on application of the sanction.

These are examples of cases where the Disciplinary Board at least indicated some of elements justifying the applied sanctions. Out of those 14 examined cases where sanctions have been applied, **in seven cases the Disciplinary Board did not show the connection between the issue of proportionality of sanction and the circumstances of cases.** Therefore, the Disciplinary Board does not apply provisions on proportionality of the sanction under art. 7 para. (2) of Law no. 178 sufficiently, and when applying them, does not always makes the connection between them and circumstances of cases.

Also, we find that so far the Disciplinary Board never applied the sanction of salary reduction. Although this sanction is in line with international standards, it seems that the Disciplinary Board has certain reticence to apply pecuniary sanctions. This could be due to both being unaccustomed to apply sanctions that modify the judge's salary, and the absence of the consistent practice of individualizing disciplinary sanctions. The existence of multiple types of sanctions is desirable and necessary in order to differentiate acts of judges by severity. The Disciplinary Board should take into account that this sanction allows a fairly broad range of sanctioning, given the discretion of the Disciplinary Board to decrease the salary by 15% -30% for the period from 3 months to a year. Such a sanction as salary reduction by 15% for a period of 3 months could be a rather lenient sanction in comparison with the effects of a warning or reprimand that have effects during one and two years, respectively. Such a lenient sanction could be applied for minor offences.

2.7.2 Qualification of an act as several disciplinary offences or several acts as one disciplinary offence

Another issue that can affect the establishment of a coherent and instructive practice by the Disciplinary Board refers to the **qualification of an act as several disciplinary offences or several acts as one disciplinary offence.** This could be confusing for judges and litigants, especially when the Disciplinary Board does not explain the reasons for such qualification. For example, in **case no. 1/1 as of 22 January 2016**, the sanctioned judge committed two offences by one procedural act. By applying the measure for security the judge committed the

offence of applying the measure for security in a proceeding that was not initiated under the law and offence of suspending certain documents which were not examined by the court. The Admissibility Panel examined these offences under art. 4 para. (1) letter c), i) and p) of Law no. 178. The Disciplinary Board has decided to apply for these offences a single norm and namely, under letter i) violation of mandatory rules. However, the Disciplinary Board did not indicate what mandatory rules were violated, and here the question is, whether both offences fell, in fact, under letter i) or each offence should to be qualified under different norms under art. 4 (see more details in section 2.9.2 below).

Another problematic issue of the Disciplinary Board practice results from qualification of one act as several disciplinary offences. For example, in **case no. 10/4 as of 19 February 2016**, a judge was sanctioned for implicit recognising in her decision of the annexation of the Crimea by the Russian Federation. The Disciplinary Board qualified this act as two disciplinary offences, namely, letter c) serious and obvious professional incompetence and letter o) use of inappropriate expressions in the judgements or reasoning of judgements obviously contrary to judicial rationale that may affect the prestige of justice or dignity of the position of a judge. In **case no. 20/7 as of 28 March 2016** a judge was sanctioned for not considering the application to secure action within the term prescribed by law, which led to the sale of goods by the party to the detriment of which that measure should have been applied. The Disciplinary Board found that the judge had committed the offence of breaching of terms for performing procedural actions (art. 4 letter g)) and the offence of violation of mandatory rules (art. 4 letter i)). In **case no. 22/9 as of 22 April 2016** a panel of judges issued a decision that upheld the decision by the first instance court, which validated a works contract between a company and state authorities while the written form of the contract was not complying with formalities, public procurement procedure was not respected and the contract was not registered with the State Treasury. For this offence, the Disciplinary Board found violation of mandatory rules under (letter i), art. 4 of Law no. 178) and reasoning of judgements obviously contrary to judicial rationale, that may affect the prestige of justice or dignity of the position of a judge (letter o), art. 4 of Law no. 178). In **case no. 42/13 as of 9 September 2016**, a judge was sanctioned for breaching the deadline for drafting of decisions in several cases. These acts were qualified by the Disciplinary Board as offences of breaching of terms for performing procedural actions (letter g), art. 4 of Law no. 178) and failure or delay in fulfilment of service obligations (letter j), art. 4 of Law no. 178).

Several questions arise while analysing these decisions. First, the reason for qualification of one act as several offences is unclear, and whether this means that the act is more serious or the judge simply committed two offences by one act. Secondly, the situation in which in two different decisions, the judges who have committed apparently similar act are accused of different disciplinary offences seems confusing. For example, in **case no. 10/4 as of 19 February 2016**, the judge was late to perform a procedural act and was sanctioned under the offence of breaching of terms for performing procedural actions and offence of violation of mandatory rules and, in **case no. 42/13 as of 9 September 2016** for delay in drafting of a judgement, the judge was sanctioned for breaching of terms for performing procedural actions and failure or delay in fulfilment of service obligations. Although there are two different types of delays in these two cases, in both cases the Disciplinary Board did not consider sufficient finding of offence of breaching of terms for performing procedural actions and added one more offence that apparently seems more serious. Thirdly, it is confusing when in a case of breaching of terms

for drafting court decisions only one disciplinary offence is found (e.g. case no. 21/8 as of 29 May 2015 case no. 36/17 as of 14 December 2015, case no. 32/10 as of 27 May 2016), and in other cases for the same breaching of terms for drafting court decisions two disciplinary offences are found (e.g. case no. 10/4 as of 19 February 2016, case no. 43/13 as of 9 September 2016).

To conclude, if it is found that for one act two or more offences are applicable that were declared admissible by the Admissibility Panel, the Disciplinary Board could, in order to have more predictable practice, apply the offence which is more serious, this absorbing more lenient offence. If it is decided to apply two offences for the same act, the Disciplinary Board should explain this qualification in the decision and constantly maintain this practice.

We reiterate that these findings do not mean that decisions on disciplinary issues are unfounded. We also would like to draw attention to the fact that application of one disciplinary offence for two acts and application of two disciplinary offences for one act could be confusing in terms of uniform practice and educational nature of decisions.

2.7.3 Structure of the decisions by the Disciplinary Board and reasoning on each disciplinary offence

In some decisions issued by the Disciplinary Board it does not make a separate analysis for each disciplinary offence admitted by the Admissibility Panels. For example, in **case no. 22/10 as of 19 June 2015,** the Admissibility Panel found reasoned suspicion of having been committed the offence stipulated under letter b) (uniform practice) and i) (mandatory rules). In the reasoning of the decision the Disciplinary Board indicated that the acts alleged to the judge „are reduced solely to the interpretation and application of provisions of art. 174-175 of the Code of Civil Procedure". This phrase seems to indicate the offence referred to under letter i). On the other hand, in the reasoning the Plenary continued analysis of the acts of the judge in terms of violation of uniform judicial practice, i.e. letter b). In the operative part of the decision it is indicated only that the disciplinary procedure was terminated on the ground that „disciplinary offence was not found." Thus, the Disciplinary Board did not explain the reasons for dismissal of each offence separately.

In **case no. 17/3 as of 27 March 2015** the reasoning of the Disciplinary Board states the analysis of the disciplinary offence under art. 4 para. (1) letter b) which stipulates „intentional application, or application with bad faith, or repeated gross negligence of legislation contrary to uniform judicial practice", although the authors of the complaint invoked the offence under letter i), which stipulates „violation of mandatory rules of law in the administration of justice". Judicial Inspection did not re-qualified the charges. There is no explanation in the decision why the Disciplinary Board examined another offence or why it used the elements of an offence to analyse another offence. Also, the fact whether the norms invoked by the author of the complaint are mandatory rules or not has not been examined. Probably the Disciplinary Board did not consider rules indicated by the authors mandatory and analysed the case from the perspective of offence stipulated under letter b). However, this should be explicitly mentioned in the decision.

In some decisions the disciplinary offence alleged to the judge is not clearly indicated in compliance with the decision by the Admissibility Panel[54]. In such cases, the Plenary should return

[54] For instance, Admissibility Panel, Decision no. 1/1 as of 11 January 2016, no. 11/4 as of 19 February 2016, no. 15/6 as of 18 March 2016.

the case materials requiring the panel to indicate the disciplinary offence expressly in the decision on admissibility. Otherwise, even the reasoning of the Plenary is not clear, given that it should examine the case within the limits of the decision on admissibility (art. 34 para. (5) Law no. 178). Also, in several cases it was observed such a structure of the decisions by the Disciplinary Board that includes arguments of the author of the complaint, the position of the Judicial Inspection, the position of the Admissibility Panel, the position of the judge concerned and assessment of the Plenary of the Disciplinary Board. However, this structure is not followed in all decisions.

To conclude, in 2016, the number of sanctions applied by the Disciplinary Board has increased as compared with 2015. At the same time, the Disciplinary Board does not apply in every case provisions of art. 7 para. (2) of Law no. 178 regarding individualization of disciplinary sanctions, and when it applies them, it does not always make the connection between the invoked grounds and case circumstances. The Disciplinary Board is reluctant to apply the sanction of salary reduction, but this could change with the improvement of practice of individualisation of sanctions in all cases in which they are applied. Also, the Disciplinary Board does not have a consistent practice as regards qualification of acts in disciplinary offences, sometimes applying one disciplinary offence for two violations, but in other cases applying two disciplinary offences for a single violation. It is also found in the practice of the Disciplinary Board failure to provide separate analysis for each invoked and admitted by the Admissibility Panel disciplinary offence. The Disciplinary Board should undertake measures to redress these inconsistencies.

Recommendations:

1. The Disciplinary Board should devote a part of reasoning to the individualization of sanction according to art. 7 para. (2) of Law no. 178 in each case where a disciplinary sanction is applied. The Disciplinary Board should avoid declarative wording and indicate concrete circumstances of the case which lead to the application of one or another ground for individualization of the sanction;
2. Drafting of internal guidelines to unify the practice in terms of qualification of violations/acts in disciplinary offences with the view to avoid inconsistency in practice and avoid confusing decisions as regards qualification of acts as one or several disciplinary offences;
3. In its decisions the Plenary of the Board should analyse separately each offence alleged to the judge and in case of disciplinary procedure termination, it should be expressly stated what offence was not found. This will ensure better understanding of its decisions and uniform practice in disciplinary cases and, possibly, a decreased number of violations committed by judges;
4. If the decision by the Admissibility Panel does not state expressly disciplinary offences alleged to the judge, the Plenary of the Disciplinary Board should return the decision and case materials requesting for explicit indication of offences alleged to the judge;
5. Use of a uniform structure in all decisions by the Disciplinary Board;
6. Drafting of guidelines for litigants explaining specific issues/criteria for the application of complicated disciplinary offences, such as violation of mandatory rules, application of legislation contrary to the uniform practice, violation of procedural deadlines etc .

2.8 The SCM and the SCJ - are both ways of appeal necessary?

According to the procedure established by Law no. 178, a complaint on disciplinary offences of judges can go through five bodies[55], each of which, at one stage or another, can annul the decision by the body, which has previously examined the disciplinary case. The Disciplinary Board decisions can be appealed before the SCM. If the SCM decides to change the solution of the Disciplinary Board, it has to follow the procedure and the contents of the decision provided for the Disciplinary Board (art. 39 para. (4) letter 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 five judges (art. 40 para. (2) of Law no.178).

15 decisions issued in 2015, in which appeals against the decisions by the Disciplinary Board were examined, are published on the website of the SCM. Out of these, in 10 cases the appeals were dismissed, and in five cases were admitted. There were admitted appeals in cases of Boris BIRCA, judge of Chisinau Court of Appeal, (sanction of warning was applied), Iurie DIACONU, Liliana CATANA and Ion GUZUN, judges of the SCJ (sanction of warning was applied), Ion DRUTA, judge of the SCJ (sanction of reprimand was cancelled), Ion COTEA, judge of Cahul District Court (sanction of warning was applied) and Mihail CIUGUREANU, judge of Chisinau Court of Appeal (the offence was found, but he was not sanctioned on the ground that the limitation period of holding him disciplinary liable has passed).

In late November 2016, 16 decisions on examination of disciplinary appeals issued in 2016 were published on the SCM website. Out of these, appeals were dismissed by 12 decisions, and were admitted by four decisions. There were admitted appeals in the cases of Ion COTEA, judge of Cahul Court (sanction of reprimand cancelled because the limitation period for holding him disciplinary liable had expired), Daria SUSCHEVICI, judge of the Centre District Court (no sanctions were applied, but it was recommended to make an extraordinary assessment), Adela ANDRONIC, judge of the Centre District Court (dismissal of the judge was proposed), Iulia SARCU, Galina STRATULAT, Iuliana OPREA and Ion DRUTA, the SCJ judges (sanction of reprimand was cancelled).

Thus, we can observe that in 2015 and within the first nine months of 2016 the SCM usually upholds the decisions by the Disciplinary Board, and in case of their overturning either applies sanctions or applies tougher sanctions. Only in a few cases the SCM has cancelled the sanction applied by the Disciplinary Board. In particular, it happened in the case of a judge of the first instance where the sanction was cancelled because the limitation period for holding him disciplinary liable had expired and in two cases involving the judges of the SCJ. The last two mentioned cases were of high-profile for the society and involved sums of millions charged, in a dubious manner, from the state budget through the decisions/conclusions issued by judges of the SCJ[56].

In the Analysis of Law no. 178 by the LRCM the authors found that in disciplinary cases the SCJ also applies the provision of Law no. 947, under which the examination of the SCM decisions is limited only to the procedure of issuing/adopting of the decision (art. 25 para.

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

[56] One of the cases is the case of „Aroma Floris", where the collection from the state budget of a sum in the amount of 4.3 million MDL as fees for a lawyer was ordered, but later the decision was cancelled later after readjudication. The other case is the case of „Basconslux" in which 14 mln. MDL were received from the state budget to demolish the Republican Stadium.

(1))[57], although Law no. 178 does not provide for such an exception. According to the recent practice, since November 2016, the SCJ continues to examine appeals lodged against the decisions by the SCM only in the part that refers to the procedure of issuing/adopting the decision[58].

Apparently, the SCJ interpreted the absence of an expressly stated norm in Law no. 178, which would overturn the exception under art. 25, as the intention of the legislator to keep the exception of Law no. 947 also for the disciplinary cases. We consider that namely by not introducing an exception in the special law on disciplinary liability, the legislator has overturned the exception of Law no. 178[59]. According to the analysis of Law no. 178 by the LRCM, 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[60]. The negative effect of this practice is that the SCM does not re-examine 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 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. The examination by the SCJ of disciplinary cases limited to procedural issues could be contrary to the guarantees under art. 6 of the ECHR.

Another problematic aspect of the SCJ practice is selective publication of reasoned decisions upon examining the appeals submitted against decisions by the SCM in disciplinary cases. According to the website of the SCJ, in 2015, out of seven cases for which operative parts of the decisions were published, reasoned decisions were subsequently published only for two cases. In 2016, out of nine cases, in which decisions were published, the reasoned decision was published only in one case. Thus, in 2015, reasoned decisions were published only in cases against judges of the SCJ, Iurie DIACONU, Liliana CATANA and Ion GUZUN, and Svetlana GARSTEA-BRIA, judge of Buiucani District Court. In 2016, the reasoned decision was published only with regard to Ion TURCAN, judge of the Centre District Court. First of all, it is unclear what served as grounds for appearance of such a practice to publish operative parts of the decisions without publishing reasoned decisions. Secondly, it is not clear what criteria the SCJ uses to decide on publishing of reasoned decisions in some cases and not publishing them in other cases.

The expediency of providing of two ways to appeal against the decision by the Disciplinary Board, i.e. the SCM and the SCJ, is questionable. In this context, in March 2014 the Venice Commission raised the question whether the provision of art. 8 of Law no. 178, which provides for the creation of the Disciplinary Board as an independent body is compatible with art. 123 of the Constitution which states the following: „The Superior Council of Magistracy shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary

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

[58] SCJ, Decision no. 3d-8/2016 as of 11 October 2016.

[59] Analysis of Law no. 178 by the LRCM, pp. 20.

[60] SCJ, Decision 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; Decision no. 3d-3/15 as of 30 April 2015.

sentences against judges"[61]. So if the SCM ensures the application of disciplinary measures, can the Disciplinary Board apply sanctions without their being appealed against before the SCM? In a study as of June 2015, 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 Disciplinary Board the right to decide on disciplinary matters without involving the SCM[62]. In Romania, for example, the decisions by 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[63].

In December 2015 the LRCM released results of a survey that assessed the perception of judges, prosecutors and lawyers on judicial reform and combating corruption. According to the survey, 64% of judges-respondents argued that both ways of appeal were required in the disciplinary procedure, the SCM and the SCJ, 18.1% of judges-respondents supported the option that decisions by the Disciplinary Board could be appealed against directly before the SCJ without the involvement of the SCM and 11.9% of respondents argued that the examination of appeal by the SCM was sufficient[64]. At the same time, according to the survey, 50% of judges-respondents supported the statement that disciplinary procedure included too many ways of appeal.

Thus, we observe the necessity to clarify the issue of examining a disciplinary case by both the Disciplinary Board and the SCM, both being similar in the mode of establishment. We also observe inconsistency in the opinion of judges in terms of the number of stages for a disciplinary procedure. The judges understand that the current mechanism has too many ways of appeal, but are not sure which ones should be excluded, or whether any should be excluded in general. However, since the implementation of Law no. 178, which stipulates that the Disciplinary Board is an independent body, the tendency to reduce the influence of the SCM on the activity of the Disciplinary Board is observed, which is indeed natural in the opinion of the authors of the study. But this is to be done not only by declarative norms, but also by assigning a separate budget to the Disciplinary Board, separate secretariat, by annual reporting on the activity directly to the General Assembly of Judges and by appealing against the decisions by the Disciplinary Board directly before the SCJ. Appealing against the decisions by the Disciplinary Board directly before the SCJ should take place both in substance and procedure. Also, article 7 of Law no. 947 under which the Disciplinary Board is subordinate to the SCM should be amended.

As regards the provisions of the Constitution, a draft law on amendment of the Constitution, endorsed by the Constitutional Court, was registered in the Parliament on 3 May 2016. It stipulates the amendment of art. 123 of the Constitution, where para. (1) shall be supplemented with the following phrase: „The Superior Council of Magistracy shall exercise its powers directly or through its specialised bodies"[65]. Following this amendment, the activity

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[61] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014, p. 6-7.

[62] Study „Inspecția Judiciară și procedura disciplinară cu privire la judecători în Republica Moldova"(„Judicial Inspection and disciplinary procedure regarding judges in the Republic of Moldova"), Cristi DANILET, judge, PhD in Law, international expert, June 2015, p. 20.

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

[64] LRCM, Survey „Perception of judges, prosecutors and lawyers on judicial reform and combating corruption", December 2015, pp. 43-44, available at: http://crjm.org/wp-content/uploads/2016/01/CRJM-Percepts-reformelor-just.pdf.

[65] The Parliament, draft law no. 187 on amendment and supplement of the Constitution of the Republic of Moldova (art. 116, 121, 121[1] 122 123), registered on 3 May, 2016, available at: http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/3216/language/ro-RO/Default.aspx.

of the SCM could be decentralized and specialized bodies within the SCM could have greater autonomy. Thus, it will not be necessary any more that each issue examined by the Specialised Boards should pass through the SCM. However, it will be necessary to amend the organic legislation in the field, including the express provision in Law no. 947 of the Disciplinary Board independence from the SCM. This will simplify the mechanism of disciplinary liability and assign responsibilities within the SCM more clearly. We consider that the SCM should not be regarded as a body composed of 12 members, but as a public authority consisting of several specialized bodies, each of which has specific responsibilities, such as discipline, evaluation, selection. Assigning of responsibilities to the SCM bodies, being authorised to issue final decisions (with the right to be appealed directly before the court), would reduce the concentration of power in the judiciary in a single body and reduce the risk of control over administration of the justice system by a small number of people[66].

To conclude, during the reference period, the SCM usually upholds the decisions by the Disciplinary Board, and in case of cancellation either applies sanctions, or applies tougher sanctions. On the other hand, the SCM is more lenient in cases concerning the SCJ judges, overturning disciplinary sanctions in their regard. When examining disciplinary appeals, the SCJ continues to apply, unjustifiably, the provisions of law on the SCM that limits the competence of the latter to examine the procedure of issuing/adopting the decision. Also unjustifiably, the SCJ does not publish on its website reasoned decisions on the decisions issued with regard to disciplinary appeals. The expediency of existence of two ways to appeal against decisions by the Disciplinary Board is questionable. The SCM and the Disciplinary Board are very similar in their composition and way of operation as quasi-judicial bodies. Moreover, the SCM members can submit complaints regarding disciplinary acts and appoint the Judicial Inspection. On the other hand, international standards require granting of a full judicial appeal in disciplinary proceedings.

Recommendations:

1. The SCJ should abandon the practice of examination of disciplinary complaints only in the part that concerns the procedure of adoption issuance of the decision, given that Law no. 178 does not provide for such an exception;
2. The SCJ should publish all reasoned judgements of all decisions issued based on disciplinary appeals;
3. Adoption of the draft law on amendment of the Constitution, registered in the Parliament on 3 May 2016 under no. 187;
4. Amendment of Laws no. 178 and 947 in order to increase the independence of the Disciplinary Board and simplify the disciplinary procedure regarding judges, especially

[66] Such position is in line with OSCE/ ODIHR Kyiv Recommendations, para. 2, which stipulates the following: 2. Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection (*see paras 3-4, 8*), promotion and training of judges, discipline (*see paras 5, 9, 14, 25-26*), professional evaluation (*see paras 27-28*) and budget (*see para 6*). A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree.

by excluding the phrase *body subordinated to the SCM* from Law no. 947 and the appeal procedure against the decisions by the Disciplinary Board before the SCM, providing for their appeal directly before the SCJ in substance and procedure.

2.9 Implementation practice regarding some disciplinary offences

2.9.1 General specifications

Law no. 178 provides for a detailed list of 16 disciplinary offences. Some judges have expressed concern regarding the existence of a too detailed list of disciplinary offences. We consider that providing a detailed list of offences is necessary and useful, especially with the view to delimit clearly the domain of disciplinary liability and to protect judges from potential abuses. The text concerning some of the disciplinary offences could be improved (see recommendations below), but as an approach, we consider that a detailed list is more preferable than general provisions serving as grounds for disciplinary liability. This approach is also suggested by some international recommendations. For example, the Consultative Council of European Judges (CCJE) considers that „it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area"[67]. The advantage of a comprehensive detailed list of disciplinary offence consists both in predictable application of law provisions and also in the prevention of abuses of interpretation by the relevant bodies. The disadvantage of this approach is the possibility of existence of some acts that cannot be classified as one of the offences provided by law.

Law no. 178 amended the list of disciplinary offences, taking a series of offences from the previous system (art. 22 of Law no. 544). We consider that Law no. 178 presents a clearer framework on disciplinary offences, than it was stipulated in Law no. 544. There have been introduced five new disciplinary offences[68]. Some disciplinary offences were reworded and have more successful wording in terms of the protection of independence of judges and reduce the risk of application of disciplinary liability for minor offences[69]. To cover the entire range of

[67] See, for example, Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and tenure of judges, Strasbourg, 23 November 2001, p.60.

[68] See: art. 4 para. (1) of Law no. 178, the following points: c) actions of the judge in the process of administration of justice that prove serious and obvious professional incompetence; m) committing an act with elements of a crime or offence that was detrimental to the prestige of justice; n) hindering the activity of inspectors-judges by any means, judges; o) use of inappropriate expressions in the judgements or reasoning of judgements obviously contrary to judicial rationale, that may affect the prestige of justice or dignity of the position of a judge; p) other actions and manifestations affecting the honour or professional integrity or prestige of justice committed while performing service duties or outside them.

[69] For example, in the version of Law no. 544, art. 22 para. (1) the following two offences were stipulated: „f¹) breaching, on alleged reasons, of terms for examination of cases under proceedings and h¹) breaching of terms for drafting court decisions and submission of their copies to the participants in the proceedings". The offence regarding the breaching of terms for drafting decisions did not provide classification of the offence depending on the fact whether or not it was alleged to the judge. Law no. 178, under art. 4 para. (1) p. g) combined those two offences, providing for both of them a condition of being alleged to the judge: „g) breaching, ***on reasons alleged to the judge***, of terms for performing procedural actions, including deadlines for drafting court decisions and submission of their copies to the participants in the proceedings". Another example is the wording for the offence regarding groundless absences. And namely, Law no. 178, art. 4 para. (1) p. h) stipulates the following offence: „h) groundless absences from work, coming to work late or leaving without grounded reasons, ***if it affected the activity of the court instance***". In the version of Law no. 544, art. 22 para. (1) provided for „ i) groundless absences from work, coming to work late or leaving during working hours", without including the qualifier on the consequence of absence.

possible situations, art. 4 para. (1) p. p) of Law no. 178 stipulates as disciplinary offence „other actions and manifestations affecting the honour or professional integrity or prestige of justice committed while performing service duties or outside them". This offence allows the bodies responsible for application of the disciplinary liability for judges to qualify as an offence and other acts that affect the prestige of the judiciary, but that cannot be expressly listed because it would mean over-regulation and would be contrary to the legislative technique.

Several disciplinary offences that have either been invoked more frequently in practice, or provoked discussions at the workshops on disciplinary liability of judges or have been criticized in the Opinion of the Venice Commission and ODIHR, but were not improved when adopting the law will be examined below.

2.9.2 Violation of mandatory rules of legislation by judges

Law no. 178 stipulates under art. 4 para. (1) letter i) that the judge can be sanctioned for violation of mandatory rules of law in the process of administration of justice. Previously, Law no. 544 provided under art. 22 para. (1) letter f[1]) a similar wording for this offence, and namely „violation of mandatory rules of law". The disciplinary offence concerning violation of mandatory rules by judges, although not a new norm, is one of the most controversial disciplinary offences, because sometimes it refers to the merits of the case or concerns the freedom of judges to apply or interpret legal norms. At the same time, this offence is invoked by petitioners most often, and most sanctions applied by the Disciplinary Board concern namely the violation of mandatory rules[70]. Therefore, it is important to consider both the necessity of existence of this disciplinary offence in the national law and its importance in the context of the Republic of Moldova.

The first question that arises while analysing this offence refers to the **limits of the judge's discretion in application or interpretation of legal norms.** When disciplinary bodies examine the merits of a complaint regarding the violation by a judge of mandatory rules, they analyse whether sanctioning of the judge does not affect the independence and/or the discretion of the judge. For the purposes of the ECHR, independence of the judge refers to independence from other powers (executive and legislative)[71] and from the participants in the proceedings[72]. The judge needs independence to examine the case without any influence, i.e. the decision taken must come from the conscience of the judge. But the judge's discretion is not unlimited and the national legislation indicates the principles that must guide the judge when examining a case and what are the limits of the judge's discretion.

Civil procedure legislation defines the independence of judges, firstly by separation from the legislative and executive power, and secondly, by the fact that **judges are governed only by the law** (art. 20 para. (1) and (2) of the CCP). As regards the discretion of judges to examine civil cases, art. 130 para. (1) of the CCP provides that the **court considers the evidence by inner conviction** based on multidimensional, complete, unbiased and direct investigation of all evidence of the file as a whole and their interconnection, **being guided**

[70] Out of 14 analysed decisions where the Disciplinary Board applied sanctions, the offence of violation of mandatory rules of law was found in eight decisions.

[71] ECtHR, Judgement in the case of ***Beaumartin v. France***, 24 November 1994, § 38.

[72] ECtHR, Judgement in the case of ***Sramek v. Austria***, 22 October 1984, § 42.

by the law. The CCP also uses the phrase „inner conviction" in the context of assessing the weight of evidence of a certified copy of a document (art. 138 para. (5)) and when assessing the weight of evidence of a damaged document or other inscription (art. 139 para. (6)).

Criminal procedure law also provides that **judges are independent, governed only by the law and judging criminal cases based on the law** and in conditions that exclude any pressure on them (art. 26 para. (1) of the CPC). Further on, the CPC stipulates that the **judge tries the materials and criminal cases under the law and one's own conviction based on evidence** examined in the respective court proceedings (art. 26 para. (2)). Also, based on one's own conviction, the judge assesses the evidence, and this conviction shall be formed on the investigation of all administered evidence (art. 27 para. (1) of the CPC) and guided by the law (art. 101 para. (2) of the CPC).

We observe two basic principles pertaining to the examination of the case by the judge. The first one is that when examining the case, both in civil procedure and criminal procedure, the judge is governed only by the law. The second one is that the assessment of the evidence takes place based on the inner/own conviction of the judge, guided by the law. Accordingly, upon assessment of the evidence based on inner conviction, or general examination of the case, the limit for the judge is always the law. At the same time, we should draw attention that none of the above provisions grants unlimited discretion to judges when applying the norms, or application of norms is not within the discretion of the judge, but involves a clear set of interpretation rules stipulated by the legislation, such as art. 2, 3, 12, 13 of the CCP, art. 2, 3, 4, 5, 7 of the CPC, art. 6, 7, 46, 47, 48, 49 of Law no. 780 on legislative acts etc. Moreover, the national legislation stipulates a number of procedural sanctions for erroneous application or misinterpretation of the law (e.g. art. 386, 387, 388, 432 of the CCP, art. 427, 444, 453 of the CPC). Thus, we can conclude that the judge must be guided by law in the application and/or interpretation of legal norms, and the judge's discretion in this regard is limited.

Another issue that arises while assessing, qualifying or finding of the offence of violation of mandatory rules of the legislation is related to the **notion of mandatory rule.** Some rules, although mandatory, are permissive, and could have several alternatives that grant certain discretion to the court. The word „mandatory" in the respective offence is used to distinguish, on the one hand, rules where such phrases like „the court instance can", „at the discretion of the court instance" are used and the rules where phrases like „the court will", „the court must" or other categorical formulations are used, indicating that the judge has no choice but to act or not to act in a certain way. Violation of rules of the last category is more difficult to justify given the obligation of the judge to be guided only by the law, and, therefore, the legislator stipulated this violation as disciplinary offence.

Yet, even violation of a mandatory rule should not automatically lead to sanctioning of the judge, the other circumstances of the case should be also considered, such as the gravity of the violation, the consequences for the parties of the process, the impact of the violation on the image of justice in the society etc. Also, if a rule is confusing or runs counter another rule, a judge cannot be held disciplinary liable, even if the higher court cancelled his/her decision on the grounds of violation of that rule. It would be helpful, if the Disciplinary Board and other disciplinary bodies provide more detailed reasoning for the aspects concerning mandatory rules, so that their concept becomes more clear for the future and why their violation is sanctioned.

Another problematic issue related to the application of offence regarding the mandatory rules of the law refers to the **inconsistency of practice of disciplinary bodies concerning the requirement to have a court decision that found violations that are the subject of the disciplinary complaints.**

For example, **in case no. 36/8 as of 24 October 2014** the Disciplinary Board dismissed the proposal to sanction a judge. In that case, the author of the complaint invoked that a judge put a court complaint pending before the court contrary to art. 40 para. (6) of the CCP, and denied access to justice by applying a security measure suspending all contracts on supplementary pensions concluded between JSC „Asito" and the insured persons, who were not involved in the proceedings. Given the big number of insured people, who could not be coordinated, there started a series of appeals against the decision on the security measure applied by the court, but each time the appeals were dismissed on the grounds that people, who appeal against the security measure, are not participants of the proceedings. From the reasoning of the decision it results that all appeals lodged against the decision on the security measure were dismissed and the issue of violation of competence has not been even invoked by the insured persons. Thus, the Disciplinary Board grounded the decision not to apply sanctions on the fact that appealed decisions have not been cancelled, although violations appear to be obvious in one case and in another.

In another decision issued against the same judge, **no. 9/1 as of 30 January 2015**, the Disciplinary Board sanctioned the judge for violation of mandatory rules by issuing three consecutive conclusions, after their cancelling by the Court of Appeal, where an identical measure was ordered, and namely, to prohibit importing to the country of some products by the defendant, a requirement which coincided with the merits of the case. The Court of Appeal mentioned that by application of the security measure, the trial court ruled on the merits. The Disciplinary Board found that the judge by issuing repeatedly the same freezing injunction, after it was cancelled by the Court of Appeal, violated the norm under art. 16 para. (1) of the CCP stipulating the binding force of judicial acts, i.e. decisions by the Court of Appeal „were final and binding even for the trial court".

On the other hand, there are situations when violations committed by judges were found by the decision of the higher court, but disciplinary bodies state that this is not enough, and it is required that the higher court finds **intention or gross negligence of a judge.** For example, based on the **Decision by the Admissibility Panel no.31/5 as of 6 April 2015**, the author of the complaint alleged that the judge had committed a number of disciplinary offences, in particular, modified the object of action without any request by the party to a case, applied absolute nullity contrary to the law, collected from the representative of the contracting party amounts due under the contract based on the effect *restitutio in integrum* etc. The author of the complaint alleged that the judge's decision was cancelled by a higher court because of procedural irregularities committed by him, that decision remained final and irrevocable. The Judicial Inspection mentioned that cancellation or modification of the judicial decision does not incur any liability, if the judge who delivered it did not violate the law intentionally. The Admissibility Panel also referred to the fact that the court of appeal, which cancelled the decision by the judge, did not find intention or negligence in the actions of the court instance. Finally, the Admissibility Panel upheld the decision by the Judicial Inspection to dismiss that complaint as manifestly unfounded.

In another **case no. 22/10 as of 19 June 2015,** the Disciplinary Board examined whether a mandatory rule had been violated by the application of security measure that actually coincided with the subject of the action, thus ruling on the subject of the action until examining the merits of the case. In this case, the applicant has addressed to the court to correct a point in an order by the Minister of Education on reinstatement of the applicant in a job as well as to cancel two orders regarding the organization of the employee investigation. The judge of the first instance suspended, by the determination, the first order in full and the second – partially until the examination of the case on the merits. The court of appeal cancelled both conclusions. The Disciplinary Board found no offence in the judge's actions, largely because the court of appeal did not find intention, bad faith or serious negligence in the actions of the judge while applying the norms of procedural law. The Disciplinary Board referred to the Decision by the Constitutional Court no. 12 as of 7 June 2011, which stipulates that cancellation or modification of the court decision is not the decisive ground for sanctioning of the judge.

Thus, we see a diverse practice, and even selective one, in terms of invoking the necessity of judicial control before the violation of mandatory rules could be considered a disciplinary offence. In some cases, the Disciplinary Board does not find the violation of mandatory rules unless there is a decision by the higher court on cancelling, even if violations are obvious. In other cases, the existence of an act, which cancels the appealed decision/determination, is sufficient to sanction a judge. In others, the existence of a decision that finds violations is not sufficient, and it is required that intention, bad faith or serious negligence is found by the higher court decision.

In these circumstances it is necessary to note, firstly, that for to find a disciplinary offence of violation of mandatory rules, as stipulated by Law no. 178, there is no need to prove the intention of the judge, but it is enough to show that the judge was negligent in applying the rule. The judge is presumed to know the law, so intention does not matter when applying mandatory rules. Secondly, application of the mandatory rules does not represent opinion, discretion or inner conviction of the judge. Application of mandatory rules should to be done based on the rules stipulated by the law. If a norm is not clear or allowing the discretion of the judge, then it could be classified as a mandatory rule, and respectively, disciplinary liability could not be invoked. Thirdly, the courts never find that the violation of a norm occurred due to intention, bad faith or gross negligence within the framework of judicial control. **The task of finding the subjective side for the offence rests with the Disciplinary Board as the competent body to examine disciplinary cases against judges and apply disciplinary sanctions.** Fourthly, the application of the offence of violation of mandatory rules only if there is a court decision that finds this offence, excludes judges issuing irrevocable decisions, especially judges of the SCJ, from the scope of this offence. This is dangerous for the judiciary as it limits the disciplinary liability of the SCJ judges and is unfair towards the judges of the first instance courts and courts of appeal.

Despite all the controversies related to the disciplinary offence of violation of mandatory rules of law, the Disciplinary Board found this offence in a number of cases. Within the period of 2015-2016 the Disciplinary Board applied under Law no. 178 disciplinary sanctions for violation of mandatory rules in eight cases out of 14 cases in which sanctions were applied.

By **decision no. 23/10 as of 19 June 2015,** the Disciplinary Board found violation of mandatory rules in case of a judge who ruled a freezing injunction mentioning that it is not

subject to appeal against, and when the injunction was appealed against, the judge did not submit the case to the Court of Appeal for examination of the appeal. The judge in that case issued a decision to correct the error only after the involvement of the Judicial Inspection. The violated mandatory rule specified by the Disciplinary Board was art. 181 of the CCP, stipulating that the freezing injunction for the action can be appealed against.

By **decision no. 1/1 as of 22 January 2016,** the Disciplinary Board found violation of mandatory rules in the case of a judge, who applied a freezing injunction in proceedings that were not initiated under the law (the determination on pending the case to the court was not signed), and without examining documents that have been suspended. The Disciplinary Board did not expressly state in the reasoning what mandatory rules have been violated by the judge, referring only to the findings of the Court of Appeal mentioning that under art. 174, 177, 178 and 185 of the CCP, the court is entitled to apply measures to secure an action only in a proceeding that is pending. At the same time, no body, either judicial or disciplinary, found what mandatory rules were violated by suspending an act without examining it. In the absence of a mandatory rule that was violated by this error, the Disciplinary Board could apply other disciplinary offences, if they were declared admissible by the Admissibility Panel. In the respective case the Disciplinary Board had at its disposal also disciplinary offences under art. 4 para. (1) letter c), and p) of Law no. 178.

By **decision no. 9/3 as of 5 February 2016,** the Disciplinary Board found violation of mandatory rules as the judge announced in the court hearing that a complaint regarding cancelling of the order on refusal to initiate criminal proceedings is fully dismissed, and then in the drafted determination ordered partial admission of the complaint and declared void orders on refusal to initiate criminal proceedings, thus modifying the solution declared in the court hearing in the determination. It is not clear from the decision by the Disciplinary Board what mandatory rule was violated. The Disciplinary Board refers to art. 300 para. (2), (3), art. 313 para. (1) – (6) and art. 437 para. (1) of the CPC, but does not specify which rule was violated by the judge. These articles cover complaints against actions and unlawful acts of the criminal prosecution body and the body that carries out special investigation activity, as well as decisions that are subjects to appeal.

By **decision no. 20/7 as of 28 March 2016,** the Disciplinary Board found violation of mandatory rules because the judge did not examine for a long time application on security measures for an action concerning sequestration of the defendant's assets, which led to the sale of these goods. The Disciplinary Board invoked violation of art. 177 of the CCP, which at the moment of case examination stipulated that application on security measures for an action shall be examined within one day since being filed.

By **decision no. 22/9 as of 22 April 2016,** the Disciplinary Board found violation of mandatory rules on the grounds that the SCJ judges have upheld a decision that validated a works contract under which the state had to pay a company a sum of 14 million MDL, based on the Government Decision and deed of the work acceptance, while the written form of the contract was not complying with formalities, public procurement procedure was not respected and the contract was not registered with the State Treasury. The Disciplinary Board invoked that there were violated norms under art. 25 para. (4) of Law no. 1166 on procurement of goods, works and services for the state needs (law repealed on 22 October 2007) and therefore, procurement contracts that were not registered with the State Treasury are null,

and art. 12 para. (2) of the CCP under which the court is bound to apply the norms of the enactment that has higher legal effect.

Subsequently, by **Decision no. 463/20 as of 5 July 2016** the SCM cancelled **Decision no. 22/9 as of 22 April 2016** issued by the Disciplinary Board. The SCM stated that by examining a complaint regarding an irrevocable judicial act the Disciplinary Board had exceeded its powers. The SCM mentioned that as there was no act that would have found the intentional application, or application with gross negligence of legislation contrary to uniform judicial practice, the constituent elements of the alleged offences were missing. Bizarrely, the SCM invoked that in this case the judges cannot be held liable for breaching of uniform practice, whereas the Disciplinary Board even did not apply this disciplinary offence. At the same time, the SCM did not at all examine the applicability of the offence of violation of mandatory rule that actually was applied by the Disciplinary Board. This is very strange, especially considering that finding of offence of applying the legislation contrary to uniform judicial practice requires finding qualifiers, such as „intentionally, with bad faith or repeated application due to gross negligence", conditions that are not required by law when finding the violation of mandatory rules of law. This confusion has created the impression that an act that would find these qualifiers is required, though for finding of violation of mandatory rules this is not necessary.

In another **Decision by the Disciplinary Board, no. 26/9 as of 22 April 2016**, violation of mandatory rules was found because the judge, by determination explaining the decision, found facts that were not found in the initial decision, and namely, instead of acceptance of succession found acquisition of ownership of the succession assets. Decision by the Disciplinary Board does not state what mandatory rule was violated.

In Decision no. 45/14 as of 23 September 2016, the Disciplinary Board found violation of mandatory rules because the judge did not submit to the probation body a sentence of guilty to perform free of charge community services for a period of 17 months. This inaction has led to the impossibility of full execution of the punishment. The Disciplinary Board invoked violation of norm under art. 468 para. (1) of the CPC which stipulates that the order for execution of a sentence of guilty shall be submitted to the execution body within 10 days from the date it remained final.

In **Decision no. 47/14 as of 23 September 2016**, the Disciplinary Board found the offence of violation of mandatory rules by a judge who applied a suspended sentence of imprisonment for an infringement that at the moment of sentencing was a particularly serious crime. The mandatory rule invoked by the Disciplinary Board was art. 90 para. (4) of the Criminal Code, which stipulates that the suspension of punishment for particularly serious crimes is not allowed.

Thus, out of eight decisions by the Disciplinary Board referred to above, the violated mandatory rule was not expressly indicated in three decisions. In one of them the mandatory rule was apparent only from the findings of the court of appeal[73], in another one a number of rules were indicated, but it was not clear which of them was violated mandatory rule[74] and in another one the mandatory rule was not indicated at all[75]. Taking into account the sensitivity of issue when sanctioning a judge for violation of mandatory rules, the Disciplinary Board should pay special attention to the reasoning of decisions, if it finds this offence. Upon

[73] Disciplinary Board, Decision no. 1/1 as of 22 January 2016.

[74] Disciplinary Board, Decision no. 9/3 as of 05 February 2016.

[75] Disciplinary Board, Decision no. 26/9 as of 22 April 2016.

finding the offence of mandatory rules violation, the violated mandatory rule must be clearly indicated, and if possible also the paragraph of the rule which stipulates conduct, action or inaction which the judge did not comply with;

To conclude, the practice of the Disciplinary Board shows that the majority of sanctions applied within the last two years are for the violation of mandatory rules. This shows that in the Republic of Moldova there is a serious issue in terms of compliance with legal norms even by the courts, and this justifies the continued existence of such offence in Law no. 178. However, the Disciplinary Board does not have a consistent practice regarding the interpretation of elements of such disciplinary offence as violation of mandatory rules and does not always clearly states the mandatory rule violated by the judge when sanctioning for this offence.

Recommendations:

1. Upon finding the offence of mandatory rules violation the violated mandatory rule should be clearly indicated, and namely, article of the law, and if possible also the paragraph of the rule which stipulates conduct, action or inaction which the judge did not comply with;
2. Finding of the offence of mandatory rules violation should not be conditioned by the decision of the superior court stating the violation of the mandatory rule;
3. The Disciplinary Board should establish the subjective side of the disciplinary offence, without transmitting this responsibility to the courts.

2.9.3 Intentional application, or application with bad faith or repeated gross negligence of legislation contrary to the uniform judicial practice

Law no. 178 stipulates that intentional application or application with bad faith, or repeated gross negligence of legislation contrary to uniform judicial practice is a disciplinary offence (art. 4 para. (1) letter b)). In the Opinion of the Venice Commission[76] on the draft law on disciplinary liability of judges it was noted that this article could be interpreted, in concrete situations, in such a way as to weaken the independence of judges instead of guaranteeing it. The fact that, „A judge may not be limited to applying the existing case-law" is also underlined in the Opinion. The essence of the function of a judge is to independently interpret legal regulations. Sometimes judges may have an obligation to apply and interpret legislation contrary to "uniform national judicial practice". Such situations can occur, for instance, in light of international conventions, and where decisions by international courts supervising the compliance with international conventions can modify the current national judicial practice[77]. However, in case when the judge applies legislation contrary to uniform national judicial practice with bad faith, or repeated gross negligence, it can serve as the reason for the liability of the judge.

We consider that the wording of p. b) is a successful one, since it involves disciplinary liability of judges acting contrary to uniform national judicial practice only when s/he applies the law intentionally, with bad faith or gross negligence. So the norm includes sufficient safeguards against its abusive application. Law no. 178 could be supplemented with the view

[76] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014.

[77] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014, para. 20-21.

to define terms of „bad faith" and „gross negligence", which would be useful for guiding of the disciplinary bodies[78]. Also, given that a uniform judicial practice is a challenge for the judiciary system in the Republic of Moldova, the mere existence of such offence, even being applied in a limited way, could contribute to establishing of a uniform judicial practice.

Based on the wording of the disciplinary offence under letter b) and international standards listed above, we consider that two elements regarding the objective side of this offence are essential: 1) the existence of a clear uniform judicial practice, which results either from decisions by higher courts or recommendations, opinions, explanatory decisions of the Supreme Court of Justice or other tools to standardize judicial practice; and 2) absence of the judge's argumentation on ignoring uniform judicial practice and adoption of another decision. Such analysis of the norm under letter b) will not affect the independence of the judge to interpret and apply the law in each particular case.

The practice of the disciplinary bodies yet reveals a very cautious approach to such offences. Thus, in 2015, the offence regarding application of legislation contrary to uniform judicial practice was invoked before the Plenary of the Disciplinary Board in eight cases, of which only in one case the judge was sanctioned and the rest of the proceedings were discontinued. Within the first 9 months of 2016 this offence was invoked in nine disciplinary cases and all of them were terminated.

In **case no. 28-15 as of 6 November 2015,** the Disciplinary Board found disciplinary offence under p. b) and applied the sanction of warning. This decision was upheld by the SCM and the SCJ. The offence alleged to the judge consisted in the fact that the judge issued a determination by which ordered additional handwriting expertise in a process that was terminated, the order on termination of criminal prosecution being upheld by the earlier decision of the court investigator and irrevocable decision by Balti Court of Appeal.

On the other hand, in **case no. 22-10 as of 19 June 2015,** the majority of the Plenary of the Disciplinary Board did not find the offence under letter b) and i) in the actions of a judge who applied the security measure that actually coincided with the subject of the action, thus ruling on the subject of the action until examining the merits of the case. In this case, the applicant has addressed to the court to correct a point in an order by the Minister of Education on reinstatement of the applicant in a job, as well as to cancel two orders regarding the organization of the employee investigation. The judge of the first instance suspended, by the determination, the first order in full and the second – partially until the examination of the case on the merits. The court of appeal cancelled both conclusions. The Admissibility Panel determined that there is reasoned suspicion that the judge committed offences under letters b) and i), the cited mandatory rule being art. 174-175 of the Code of Civil Procedure. The majority of the Plenary of the Disciplinary Board did not find any disciplinary offence in the actions of the judge. The decision does not provide clear reasoning, if the analysis refers to letter b) or i), but implicitly it results that the Plenary of the Disciplinary Board examined the case in the view of letter b) given the emphasis on the intention of the judge, the element stipulated only for the offence under letter b). As regards not finding the offence,

[78] For example, Law no. 303 on the Statute of Judges and Prosecutors in Romania, art. 99[1] defines these two terms as follows: „(1) There is bad faith when the judge or prosecutor knowingly violates the rules of substantive or procedural law, pursuing and accepting prejudice to a person. (2) There is gross negligence when the judge or prosecutor disregards the rules of substantive or procedural law by fault, seriously, undoubtedly and inexcusably."

the Disciplinary Board invoked mainly the fact that the Court of Appeal found as unfounded and erroneous court conclusions on the application of security measures for the action, but did not find in the actions of the judge either intention or bad faith or gross negligence in application of procedural law norms and the intentional application, or application with bad faith of legislation contrary to uniform judicial practice can be established only by the court.

The reasoning of the Disciplinary Board in **case no. 22-10 as of 19 June 2015** is questionable. We consider that the role of the disciplinary procedure cannot be limited only to the existence of a finding of courts in judgements on appeal or cassation regarding the subjective side of the offence under letter b) i.e. intention, bad faith or gross negligence. The courts rule on the merits of the examined case, finding correct or wrong application of the norms by the lower courts, but they do not refer to the conduct of judges. The conduct of judges, including the subjective side, refers exactly to the disciplinary procedures. Moreover, if disciplinary bodies rely only on the findings of the courts of appeal or cassation regarding the case, it means that only judges who do not take final and irrevocable decisions can be subjects of disciplinary liability. Thus, if the judicial practice is clear enough and the judge issues a different decision without sufficient argumentation, the Disciplinary Board should find the subjective side for the judge, based on the provided explanations and the materials of the case. Moreover, four members of the Disciplinary Board had dissenting opinion in this case. The authors of the opinion argued the existence of bad faith of the judge, in particular by: 1) absence of argumentation for the need to apply security measures in terms of the possibility of further executing of the decision, 2) application of security measures when they coincide with the subject of the action, providing no arguments for neglecting recommendations in this regard provided by the recommendation and decision by the Plenary of the Supreme Court of Justice on this subject and 3) application of the same security measure in the same case twice.

To conclude, we consider that the wording provided for the offence under art. 4 para. (1) p. b) of Law no. 178 is a successful one and necessary for contributing both to the establishment of a uniform judicial practice in the country and improvement of the quality of reasoning of court decisions. The practice of the disciplinary bodies yet reveals a very cautious approach to sanctioning for such an offence, so we did not find any abusive application of this provision yet.

Recommendation:

1. When analysing disciplinary offence under art. 4 para. (1) letter b) of Law no. 178 – intentional application, or application with bad faith or repeated gross negligence of legislation contrary to the uniform judicial practice – disciplinary bodies, in particular the Disciplinary Board, should not invoke the absence of finding of intent, bad faith or gross negligence in judgements on appeal or cassation, because setting of the subjective side for disciplinary offences committed by judges is the competence of the disciplinary bodies and not of the courts while considering the merits, appeal or cassation.

2.9.4 Actions of the judge in the process of justice administration that prove serious and obvious professional incompetence

Law no. 178 under article 4 para. (1) c) stipulates as a disciplinary offence actions of a judge in the process of justice administration that prove serious and obvious professional

incompetence. This offence is new for the Republic of Moldova, being introduced for the first time by Law no. 178. The professional competence of judges is determined upon their appointment to the office and, later on during their career, upon performance evaluation. These evaluations are carried out by overall analysis of the candidate/judge's activity , and not just based on a single case. Accordingly, the aim of the offence stipulated under letter c) should not be evaluation of the judge's competence, which is carried out by other bodies, but providing a mechanism to sanction serious and obvious conduct contrary to the competences requested from the judge manifested in the case/cases invoked in the complaint. Thus, performance evaluation results should not be relevant for the finding of this offence. The wording for the offence in the law is clear and sufficiently foreseeable, being punishable by sanctions only actions that demonstrate serious and obvious incompetence.

At the moment the practice of the disciplinary bodies reveals a cautious approach to this offence. The Disciplinary Board applies this offence rarely. According to the report of the Disciplinary Board for 2015, offences with regard to serious and obvious professional incompetence were not notified before the Plenary of the Disciplinary Board in 2015. Until September 2016 the disciplinary offence under letter c) was found just in one case no. 10/4 as of 19 February 2016, alongside with the offence under letter o) – the use of inappropriate expressions in the judgements or reasoning of judgements obviously contrary to judicial rationale, that may affect the prestige of justice or dignity of the position of a judge.

In **case no. 10/4 as of 19 February 2016,** the judge found the fact of the birth of a child in „Simferopol city, the Autonomous Republic of Crimea, the Russian Federation", and ordered to Edinet Civil Registry Office to transcribe the birth certificate of that child. Moreover, the judge dismissed the applicant's request to correct the decision by excluding the phrase „Russian Federation". The judge mentioned in the decision that the Autonomous Republic of Crimea is a recognized state and providing reasoning referred to acts issued by the President of the Russian Federation regarding the Republic of Crimea. The Disciplinary Board found offence because, among other things, no state authority can refer to a normative act of another state, given that it contravenes the international obligations assumed by their own state. Also, the judge could not qualify the Crimean peninsula, the Autonomous Republic of Crimea, as a recognized state, so long as, on 27 March 2014, the UN General Assembly by a vote of 100 UN member states, including the Republic of Moldova, confirmed that the Crimean peninsula is a part of the Ukraine, ignoring the results of so-called „referendum" in the region, which was organised immediately after the occupation. The SCM and the SCJ upheld the decision by the Disciplinary Board.

In **case no. 45-14 as of 23 September**, the Disciplinary Board did not find the offence under letter c). The judge submitted for execution a sentence of guilty to perform community service to the Probation Office only 17 months later since the adoption of the decision, although the law provides for a term of 10 days for submission and the maximum term within which that unpaid work can be performed is 18 months. The term remaining for the execution was too short, making it impossible to execute the punishment. The Plenary sanctioned the judge for the offence provided under letter i), i.e. violation of mandatory rules and as regards letter c) found that the circumstances have not been established. We are not going to discuss the solution of the Plenary, but we find that it did not give reasons why offence under letter c) was not applied, just mentioning that „upon examination of the case the circumstances that would confirm committing of this disciplinary offence have not established". For to establish a

uniform practice it would be useful to provide reasoning for not finding of offence under letter c). For example, the Plenary could give reasoning that the acts of the judge were examined within the limits of letter i), and the seriousness of those alleged to the judge is not sufficient for the application of letter c).

In **case no. 43-13 as of 9 September 2016,** the Admissibility Panel no. 1 did not admit the complaint under the letter c), but admitted the complaint under the letter i). In this case, the judge reinstated in terms of a person who has missed the deadline for appeal before the court against the bailiff's acts, the decision subsequently cancelled by the appeal court decision. The Admissibility Panel did not provide any reasoning why the offence under letter c) is not applicable in this case. Although we do not dispute the correctness of the decision by the Admissibility Panel, we consider, that for the establishment of practice regarding this offence, it would be useful to explain the reason why the complaint was dismissed as regards letter c), for example, the seriousness of the committed offence.

To conclude, the offence stipulated under art. 4 letter c) should be applied only in circumstances where the judge demonstrates a serious and obvious incompetence. We consider that the practice of the Plenary of the Disciplinary Board does not raise questions about the application of offence provided under letter c), the Board applies this provision with a certain precaution.

2.9.5 The use of inappropriate expressions in the judgements or reasoning of judgements obviously contrary to judicial rationale, that may affect the prestige of justice or dignity of the position of a judge

Art. 4 para. (1) p. o) of Law no. 178 stipulates the offence – the use of inappropriate expressions in the judgements or reasoning of judgements obviously contrary to judicial rationale, that may affect the prestige of justice or dignity of the position of a judge. The offence under letter o) was introduced by Law no. 178[79]. The concern about the potential problems in application of this offence because the wording is too broad was expressed in the Joint Opinion of the Venice Commission and ODIHR. In this context the Venice Commission recalled the Recommendation CM/REC(2010)12 p. 66, which states that "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence". It was recommended to re-draft and clarify this offence or exclude it.

The practice of the disciplinary bodies does not show yet the problematic application of this norm. For example, until September 2016, two judges were sanctioned under this offence, of which one sanction has been upheld and another was cancelled by the SCM. The sanction was upheld in **case no. 10/4 as of 19 February 2016** where the SCM made an important distinction regarding the offence under letter o), finding the following: „The judge cannot be held liable for the quality or sufficiency of the reasoning of a decision that refers to the administration of justice and can be examined only by a higher court. However, the judge cannot completely neglect the requirements of the law regarding the reasoning, by complete absence of reasoning or use of judgements obviously contrary to judicial rationale. A decision that includes only solution, without analysing the arguments that led to the adopted solution, is a decision that is obviously contrary to judicial rationale". On the other hand, the

[79] Similar offence is stipulated under art. 99 letter s) of Law no. 303 on the Statute of Judges and Prosecutors in Romania.

Disciplinary Board Decision no. 22/9 as of 22 April 2016 in which the offence provided under letter o) was also found has been cancelled by the SCM. In that case, the SCM focused primarily on the absence of finding of that offence by a court. According to the SCM, the decision issued by the SCJ judges is final, so those judges could not be disciplinary sanctioned.

To conclude, the existence of offence stipulated under art. 4 para. (o) of Law no. 178 is justified by a systemic problem regarding the poor quality of the reasoning of court decisions in the Republic of Moldova. Disciplinary bodies are reluctant to find this offence, especially based on the principle that only the courts can find violations related to the merits of the case. This principle results both from national legislation and international standards. However, in case of complete absence of reasoning for a solution of the court decision, the Disciplinary Board could find disciplinary offence under letter o).

2.9.6 Breaching, on reasons alleged to the judge, of terms for performing procedural actions, including deadlines for drafting court decisions and submission of their copies to the participants in the proceedings

Law no. 178 stipulates under art. 4 para. (1) letter g) a disciplinary offence of breaching, on reasons alleged to the judge, of terms for performing procedural actions, including deadlines for drafting court decisions and submission of their copies to the participants in the proceedings. The offence stipulated under letter g) is one of the most often invoked violations in the disciplinary complaints. For example, in 2015, this offence was invoked in 11 disciplinary cases and two sanctions were applied (warnings). Within the first 9 months of 2016 three disciplinary sanctions were applied for this offence.

It is important to note that offence provides for sanctioning of a judge only if breaching of terms is alleged to him/her. This is a guarantee against abusive sanctioning. We also consider it is important that sanctions for this offence are applied after thorough analysis of the circumstances of each disciplinary case, taking into consideration the nature of the case, the consequences incurred as a result of violation of terms by the judge and/or his/her workload. In other words, minor violations of the terms, without consequences for litigants or society (especially in criminal cases) should not be disciplinary sanctioned, especially if the workload of the judge justifies a minor delay. The same approach is in the spirit of OSCE/ ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, where in paragraph 25 it is recommended that disciplinary proceedings against judges shall deal with alleged instances of professional offence that are gross and inexcusable and that also bring the judiciary into disrepute.

In most cases where the offence under letter g) was invoked there were analysed circumstances of the case and the workload or the consequences incurred, or both factors, were taken into consideration[80]. However, in some cases upon the application of a sanction such factors as „personality of the judge" and „other circumstances that require attention" were indicated[81]. We consider that such factors should not be used either in finding of offence or while establishing the sanction. The judge's personality can be assessed too subjective and the role of disciplinary procedure concerns not the personality, but the conduct of judges.

[80] See, for example, Disciplinary Board, Decision no. 45/14 as of 23 September 2016, Decision no. 20/7 as of 28 March 2016.

[81] See, for example, Disciplinary Board, Decision no. 36/17 as of 14 December 2015.

One aspect that should be improved while examining complaints about violation of terms is related to the indication by disciplinary bodies of the exact term of delay by the judge[82]. This will ensure a better understanding of judges regarding the limits of application of the offence stipulated under letter g).

Recommendation:

1. When examining complaints related to the failure to meet the deadline by judges, the disciplinary bodies should consider thoroughly the nature of the case, the consequences incurred as a result of failure to meet the deadline by the judge and/or his/her workload. This offence should not be found in case of minor delays that did not produce serious consequences.

2.9.7 Other disciplinary offences that require improvement of wording

In this section we shall refer to disciplinary offences under art. 4 para. (1) letter d), m) and p) of Law no. 178. Art. 4 para. (1) letter d) of Law no. 178 stipulates „interference in the judicial activity of another judge". This offence could be interpreted too broadly in practice and, therefore, it is recommended to supplement it with the term „undue", thus, the offence will be the following: „undue interference in the judicial activity of another judge". This suggestion is given in the Joint Opinion of the Venice Commission and ODIHR as of 24 March 2014 on the draft law on disciplinary liability of judges[83].

Article 4 para.(1) letter m) of Law no. 178 stipulates „committing an act with elements of a crime or offence that was detrimental to the prestige of justice". This offence can create confusion between disciplinary liability and criminal liability because of the wording, as it seems to introduces criminal liability elements in the application of disciplinary liability. On the other hand, disciplinary liability might be imposed on a judge even after an acquittal before a criminal court or where the criminal proceedings against him or her have been discontinued, observing the principle of the presumption of innocence. Disciplinary bodies applying disciplinary liability to judges should have competence and possibility of establishing the facts of the cases before them[84]. Respectively, the offence can be reworded as follows: „committing an action that affected the prestige of justice" and it can be merged with the offence under letter p) art. 4 para.(1) of Law no. 178 that can be supplemented with the word „action" and drafted as follows: „other actions and manifestations affecting the honour or professional integrity or prestige of justice committed while performing service duties or outside them".

Recommendations:

1. Amendment of art. 4 para. 1 letter d) as follows: „**undue** interference in the activity on administration of justice of another judge";
2. Merging of the offence under art. 4 para. (1) letter m) and p), with the following wording: „other **actions and** manifestations affecting the honour or professional integrity or prestige of justice committed while performing service duties or outside them".

[82] See, for example, Disciplinary Board, Decision no. 21/8 as of 29 May 2015, Decision no. 36/17 as of 14 December 2015.

[83] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014.

[84] The Venice Commission, Joint Opinion on the draft law on disciplinary liability of judges, 2014, pp. 26–28 and ECtHR Judgement in the case of ***Allen v. The United Kingdom*** (MC), 12 July 2013.

Chapter 3

Recommendations

Recommendations for the Ministry of Justice and the Parliament on amendment of the legislation

1. Amendment of Law no. 178, and namely, exclusion from the law of the institution of dismissal of a complaint as manifestly unfounded within 10 days, as well as exclusion of the stage of complaint admissibility examination. Verification of complaints should be divided into two stages: preliminary verification and disciplinary investigation.

2. We recommend the following model for the stage of preliminary verification and disciplinary investigation.

   a. 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:

      I. 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;

      II. The order on initiation of a disciplinary procedure (Judicial Inspection can qualify the disciplinary offence alleged to the judge) – proceed with the disciplinary investigation.

   b. 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:

      I. The order by the Judicial Inspection on dismissal of the disciplinary procedure, if the investigation fails to find reasoned suspicion 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;

      II. Disciplinary report, if there is a reasoned suspicion that a disciplinary offence has been committed – is submitted directly to the Plenary of the Disciplinary Board for examination.

3. To exclude the stage of admissibility and assign to the Judicial Inspection the competence to initiate disciplinary procedure. It is recommended to use the following models, according to which orders/decisions by the Judicial Inspection can be appealed against before:
   a. Appeal Panels formed of three members of the Disciplinary Board;
   b. Appeal Panels formed of three members, who are not a part of the Disciplinary Board, selected under the same procedure as the members of the Disciplinary Board;
   c. Panels of judges of the Court of Appeal Chisinau;

From these three models, we recommend reorganizing current Admissibility Panels into Appeal Panels formed of three members of the Disciplinary Board.

4. Enhancement of the role and accountability of the Judicial Inspection by:
   a. Express provision of the law granting the Judicial Inspection a 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 and guarantees for independent performance of the competences;
   b. Strengthening the independence and impartiality of the Judiciary Inspection by organizing objective and public contests on selection of members of the Judicial Inspection. The SCM should appoint the Chief Inspector-judge 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;
   c. The Judicial Inspection should have a separate legal personality, separate budget and should directly receive complaints related to disciplinary liability of judges;
   d. Establishing of a mechanism to notify the superior organs on cases of inaction of the Judicial Inspection in order to oblige it to carry out the duty on verification of disciplinary complaints diligently;
   e. The number of inspector-judges and staff, who assist them, should be increased (for the sake of economy, a part of the Judicial Inspection staff can be assigned from the SCM Secretariat);
   f. If the Admissibility panels are excluded, and only the Appeal Panels are preserved, the legal classification of acts in a disciplinary complaint should be done exclusively by the Judicial Inspection. This should be expressly stated by the law;
   g. Establishing of the legal framework for recusal/ abstention of inspectors-judges. Applications for recusal/abstention of inspectors-judges could be examined by the Admissibility/Appeal Panel of the Disciplinary Board, or if the case has been examined on the merits, by the Plenary the Disciplinary Board.

5. Other amendments to Law no. 178;
   a. Express provision of the right of the Plenary of the Board to return the disciplinary case to the Judicial Inspection for proper classification and bringing of new charges for the judge, if at the meeting of the Plenary of the Disciplinary Board new circumstances that change the classification of disciplinary offence are found;

b. Express provision specifying the individual mandate of 6 years for the members of the Disciplinary Board. This option would allow maintaining of the institutional memory and uniform practice in disciplinary cases;

c. Establishing of a mechanism for replacement of recused/abstained members of the Disciplinary Board or Admissibility Panels by a substitute member (ad hoc member), if the deliberative status of the meeting cannot be ensured;

d. Amendment of art. 4 para. 1 letter d) as follows: „undue interference in the activity on administration of justice of another judge";

e. Merging of the offence under art. 4 para. (1) letter m) and p), with the following wording: „other actions and manifestations affecting the honour or professional integrity or prestige of justice committed while performing service duties or outside them".

6. Adoption of the draft law on amendment of the Constitution, registered in the Parliament on 3 May 2016 under no. 187.

7. Amendment of Laws no. 178 and 947 in order to increase the independence of the Disciplinary Board and simplify the disciplinary procedure regarding judges, especially by excluding the phrase *body subordinated to the SCM* from Law no. 947 and the appeal procedure against the decisions by the Disciplinary Board before the SCM, providing for their appeal directly before the SCJ in substance and procedure.

8. Members of the Disciplinary Board, who are also members of Admissibility/Appeal Panels, should receive higher remuneration as compared to members who do not participate in such Panels.

Recommendations concerning the practice of the Judicial Inspection

1. Until amendment of Law no. 178, the Judicial Inspection should dismiss as manifestly unfounded only those complaints that are stipulated by law. Cases that contain elements of disciplinary offence should be verified and dismissed by the Admissibility Panels after examination of the report of the Judicial Inspection;

2. Carrying out thorough and impartial verifications by the Judicial Inspection in all disciplinary cases regardless of the status of the accused judge. The Judicial Inspection should reflect in the report or in the decision on dismissal all violations invoked in the complaint;

3. In case of admission of the appeal against the decision to dismiss the complaint by the Admissibility Panel, it would be appropriate that the Judicial Inspection be represented before the Disciplinary Board by a different inspector-judge than that who issued the decision on dismissal;

4. If the Admissibility Panels are preserved, the report of the Judicial Inspection submitted to the Admissibility Panel should contain qualification of each act invoked in the complaint;

5. The Judicial Inspection, similarly to the criminal prosecution body, should qualify acts when notifying the judge on the lodged complaint (similarly to the indictment), for a judge to be informed about the disciplinary charges alleged to him/her and can defend against it.

Recommendations concerning the practice of the Admissibility Panels

1. If the Admissibility Panels are preserved, they, similarly to a prosecutor should present accusation to the court and ensure proper qualification of each disciplinary offence. It could be done on their own or they can submit the case to the Judicial Inspection for making additions and legal classification of the acts alleged to the judge. The Admissibility Panels should have the right to re-qualify offences that were wrongly qualified, because in the end the Panels initiate disciplinary procedure and should take responsibility for proper legal classification.

Recommendations concerning the practice of the Disciplinary Board

1. The Disciplinary Board should devote a part of reasoning to the individualization of sanction according to art. 7 para. (2) of Law no. 178 in each case where a disciplinary sanction is applied. The Disciplinary Board should avoid declarative wording and indicate concrete circumstances of the case which lead to the application of one or another ground for individualization of the sanction;

2. Drafting of internal guidelines to unify the practice in terms of qualification of violations/ acts in disciplinary offences with the view to avoid inconsistency in practice and avoid confusing decisions as regards qualification of acts as one or several disciplinary offences;

3. In its decisions the Plenary of the Board should analyse separately each offence alleged to the judge and in case of disciplinary procedure termination, it should be expressly stated what offence was not found. This will ensure better understanding of its decisions and uniform practice in disciplinary cases and, possibly, a decreased number of violations committed by judges;

4. If the decision by the Admissibility Panel does not state expressly disciplinary offences alleged to the judge, the Plenary of the Disciplinary Board should return the decision and case materials requesting for explicit indication of offences alleged to the judge;

5. Use of a uniform structure in all decisions by the Disciplinary Board;

6. Drafting of guidelines for litigants explaining specific issues/criteria for the application of complicated disciplinary offences, such as violation of mandatory rules, application of legislation contrary to the uniform practice, violation of procedural deadlines etc.;

7. Upon finding the offence of mandatory rules violation the violated mandatory rule should be clearly indicated, and namely, article of the law, and if possible also the paragraph of the rule which stipulates conduct, action or inaction which the judge did not comply with;

8. Finding of the offence of mandatory rules violation should not be conditioned by the decision of the superior court stating the violation of the mandatory rule;

9. The Disciplinary Board should establish the subjective side of the disciplinary offence, without transmitting this responsibility to the courts;

10. When analysing disciplinary offence under art. 4 para. (1) letter b) of Law no. 178 – intentional application, or application with bad faith or repeated gross negligence of legislation contrary to the uniform judicial practice – disciplinary bodies, in particular the Disciplinary Board, should not invoke the absence of finding of intent, bad faith or gross negligence in judgements on appeal or cassation, because setting of the subjective side for disciplinary offences committed by judges is the competence of the disciplinary bodies and not of the courts while considering the merits, appeal or cassation.

11. When examining complaints related to the failure to meet the deadline by judges, the disciplinary bodies should consider thoroughly the nature of the case, the consequences incurred as a result of failure to meet the deadline by the judge and/or his/her workload. This offence should not be found in case of minor delays that did not produce serious consequences.

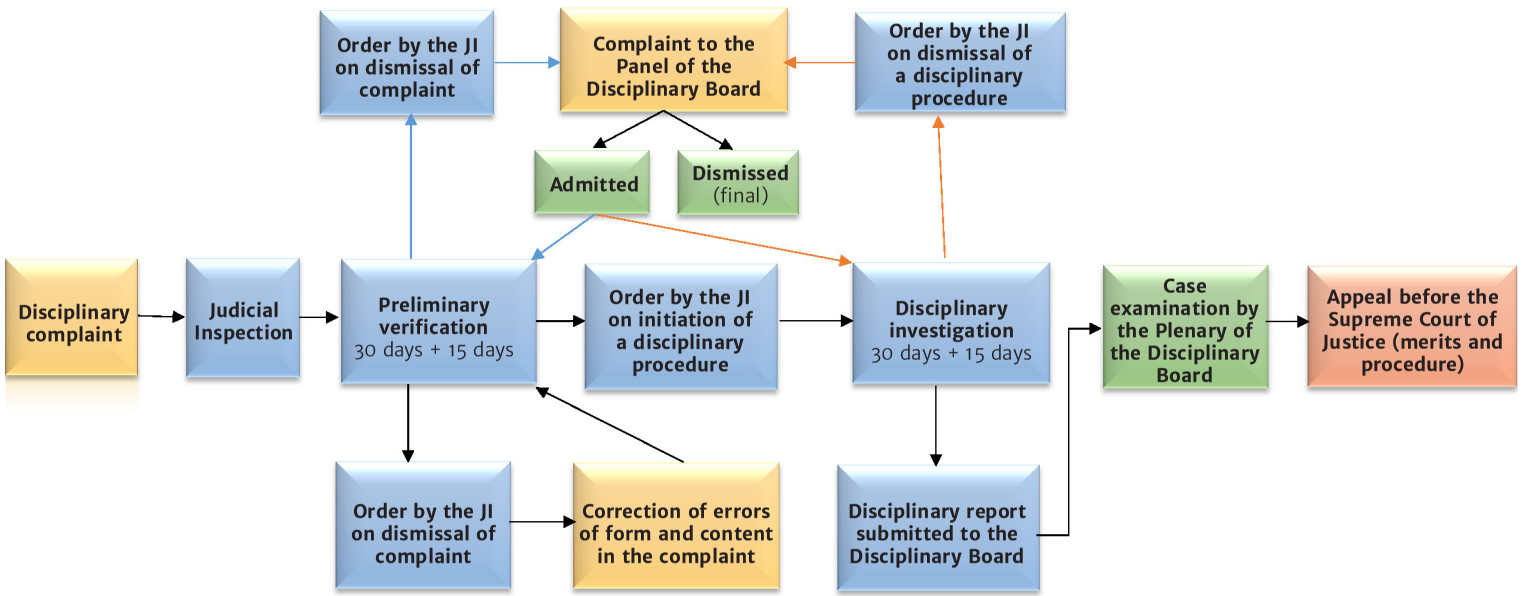
Recommendations concerning the practice of the Supreme Court of Justice

1. The SCJ should abandon the practice of examination of disciplinary complaints only in the part that concerns the procedure of adoption issuance of the decision, given that Law no. 178 does not provide for such an exception;

2. The SCJ should publish all reasoned judgements of all decisions issued based on disciplinary appeals.

Annex no. 1

MODEL OF THE MECHANISM OF DISCIPLINARY LIABILITY OF JUDGES proposed by the Legal Resources Centre from Moldova[85]



[85] For the first time the model was proposed in the public policy document „Assessment of Needs to Improve the Legal Framework on the Disciplinary Liability of Judges" as of February 2016.

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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