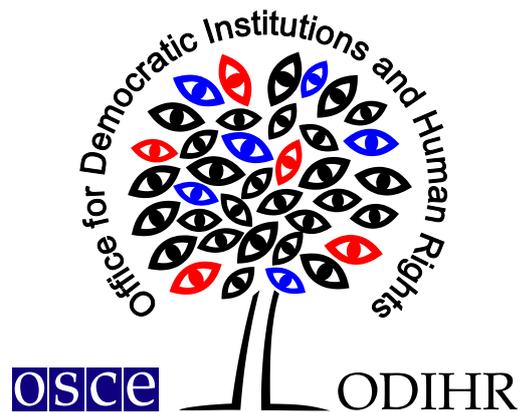


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**NOTE
ON INTERNATIONAL STANDARDS
AND GOOD PRACTICES
OF DISCIPLINARY PROCEEDINGS
AGAINST JUDGES**

This Note was prepared by Ms. Alice Thomas, International Human Rights Law Expert, and has benefited from contributions made by Professor Karoly Bard, Chair of the Human Rights Program, Legal Studies Department, Central European University, and Professor George Papuashvili, Ilia State University (Tbilisi), former President of the Constitutional Court of Georgia.

OSCE Office for Democratic Institutions and Human Rights

Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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I. INTRODUCTION

1. *On 30 November 2018, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the Chairman of the High Council of Judges of Kazakhstan to provide an overview of international standards and good practice examples of key aspects of disciplinary proceedings against judges, with a particular focus on:*
 - *Institutions that deal with disciplinary cases against judges, including how they are established and composed;*
 - *Types of disciplinary actions to be taken against judges;*
 - *The impact of disciplinary proceedings on the careers of judges;*
 - *Appeals against disciplinary sanctions.*
2. *On 7 December 2018, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a note on the above aspects of disciplinary proceedings against judges.*
3. *This Note was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

4. This Note focuses mainly on responding to the questions posed by the High Council of Judges of Kazakhstan. Thus limited in scope and time, the Note does not constitute a full and comprehensive overview of all matters pertaining to the independence of the judiciary in general, or disciplinary proceedings against judges in particular.
5. The Note includes references to key international human rights standards and relevant OSCE commitments. The Note also highlights, as appropriate and to the extent possible, good practices from OSCE participating States in the field of disciplinary proceedings against judges. Case law of regional bodies such as the European Court of Human Rights (hereinafter “ECtHR”), while not binding on states outside the Council of Europe, is referred to as a form of guidance, also due to the worldwide attention that this Court and its judgments and decisions have gained, which are frequently referred to as authority by the United Nations Human Rights Committee. References to relevant documents from the Council of Europe and related European bodies have also been included, insofar as they reflect and expand on international standards, and may be used as guidance on key issues.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women¹ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, research has also sought to

¹ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Switzerland ratified this Convention on 27 March 1997.

look at whether relevant legislation tries to include a gender perspective in key provisions pertaining to disciplinary proceedings against judges.²

7. This Note is based on official and unofficial English translations of relevant country legislation. Errors from translation may result.
8. In view of the above, the OSCE/ODIHR would like to make mention that this Note does not prevent the OSCE/ODIHR from formulating written or oral recommendations or comments on any existing or future legal acts or related legislation regulating disciplinary proceedings against judges.

III. OVERVIEW OF INTERNATIONAL STANDARDS AND GOOD PRACTICE

1. International Standards Relating to the Independence of the Judiciary

9. The judiciary is one of the three main powers in a democratic state, and thus one of the cornerstones of democracy. To ensure the functioning of the checks and balances that mark every democratic system, it is indispensable to promote and protect the independence and impartiality of individual judges, and of the judiciary as a whole. In this context, it is important to recall that independence is not a prerogative or privilege of judges but a guarantee of everyone's right to a fair trial.
10. This principle is reflected in numerous international instruments and documents. Thus, both Article 14 of the International Covenant on Civil and Political Rights,³ and Article 6 of the European Convention on Human Rights⁴ stress the need for 'an independent and impartial tribunal established by law' in order to ensure a fair and public hearing for individuals taken to court.
11. Similarly, OSCE commitments also prominently feature 'the independence of judges and the impartial operation of the public judicial service', which OSCE participating States have undertaken to protect in the 1990 Copenhagen Document (par 5.12).⁵
12. Over the years, a number of elements have been developed that help safeguard the independence and impartiality of judges and prohibit or avoid undue influence on judges.⁶ These include ensuring that appointments and dismissals are conducted by bodies that are neither too corporatist nor too heavily influenced by the executive or legislature, protecting the tenure⁷ and irremovability of judges from the executive,⁸ and

² See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

³ The International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966) entered into force on 23 March 1976.

⁴ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953.

⁵ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990.

⁶ See par 19.2 i of the OSCE's 1991 Moscow Document (Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE of 4 October 1991).

⁷ See par 19.2 v of the OSCE's 1991 Moscow Document.

seeing to it that if judges need to be disciplined and sanctioned for wrongdoing, this happens in a way that does not unduly impinge on the independent and impartial manner of their work.

13. As far as disciplinary matters are concerned, such proceedings may exceptionally lead to the removal of judges and are thus seen as a permissible exception to the principle of irremovability of judges.⁹ The same applies with regard to the mandatory transfer of judge, which is also a possible disciplinary sanction in most countries. It follows, however, that disciplinary proceedings need to contain sufficient safeguards to prevent interference with judiciary independence. These need to be set out in law in a detailed manner.¹⁰ Thus, in the OSCE's 1991 Moscow Document, participating States committed to ensure that the disciplining, suspension and removal of judges are determined according to law (par 19.2 vii).¹¹
14. Moreover, as specified in other international documents, legislation on disciplinary proceedings needs to set out a range of offences and penalties for such offences,¹² and the procedures themselves need to be conducted by an independent authority or court,¹³ and adhere to key fair trial ground rules and provide the right to appeal.¹⁴ Sanctions need to be proportionate to the determined offences,¹⁵ and the dismissal of a judge should only be possible in the gravest of circumstances, and under no condition for

⁸ See European Court of Human Rights (ECtHR), *Urban and Urban v. Poland* (application no. 23614/08, judgment of 30 November 2010), par 45, where the irremovability of judges is seen as a 'corollary of their independence'.

⁹ See Council of Europe: European Charter on the statute for judges, adopted during a multilateral meeting of European judges and judges' associations that took place in Strasbourg on 8-10 July 1998, par 3.4. See also Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, 24 March 2009, par 57.

¹⁰ Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, 24 March 2009, par 57.

¹¹ *Op cit* footnote 6.

¹² See European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted during a multilateral meeting of European judges and judges' associations that took place in Strasbourg on 8-10 July 1998, par 5.1; see also Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, 24 March 2009, par 57.

¹³ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 69. See also the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence (hereinafter "the Kyiv Recommendations"), par 26.

¹⁴ See the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, pars 17 and 20. See also Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 69, and the European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe, [DAJ/DOC (98)23], par 5.1. See further the Kyiv Recommendations, par 26 (*op cit* footnote 13).

¹⁵ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 69. See also European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe, [DAJ/DOC (98)23], par 5.1.

simple errors in judgments.¹⁶ In general, disciplinary provisions need to be formulated with sufficient precision, so that the respective judges will know how to comport themselves, and foresee the given consequences that a given action may entail, but also to avoid arbitrary application of the law.¹⁷

2. Disciplinary Proceedings Against Judges

15. Generally, disciplinary systems within the realm of the judiciary guarantee the professional conduct of individual judges. However, not every failure to observe professional conduct will lead to the initiation of disciplinary procedure - only flagrantly serious behaviour that is likely to jeopardize the reputation of the judiciary and potentially harmful to those subject to trial justifies disciplinary proceedings.¹⁸ Codes of conduct, and the principles underlying them, shall guide actions of judges,¹⁹ and aim to prevent misconduct. Such codes need to be distinguished from disciplinary rules, which aim to sanction actions and misconduct that have already taken place, although they may serve as authoritative source for interpretation for unethical or unprofessional behaviour leading to disciplinary sanctions.²⁰
16. Disciplinary proceedings should also be distinguished from criminal proceedings. At the same time, a particular act may be serious enough to constitute a disciplinary offence and a criminal offence at the same time. On the whole, however, both types of liability should be used sparingly, so as not to create a chilling effect within the judiciary.²¹
17. The following sub-sections will look at key elements of disciplinary procedure against judges, always following the main questions asked in the request of 30 November, 2018 and noting key international standards in this regard, and relevant good practice of OSCE participating States. The focus of the ensuing sub-sections will thus be on disciplinary bodies, initiation of and grounds for instituting disciplinary procedures, safeguarding key human rights principles during disciplinary proceedings (including the right to appeal), disciplinary sanctions, and the impact of disciplinary sanctions on judges' careers.

¹⁶ See the UN Human Rights Committee, General Comment 32 on Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), par 20. See also Report of the UN Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, 24 March 2009, pars 58-59 and, on a more general note, the Kyiv Recommendations, par 25 (*op cit* footnote 13).

¹⁷ UN Human Rights Committee: Larry James Pinkney v. Canada, Communication No. 27/1978, U.N. Doc. CCPR/C/OP/1 at 95 (1985) par 34. See also ECtHR: *Sunday Times v United Kingdom (No. 1)*, application no. 6538/74, judgment of 26 April 1979, par 49.

¹⁸ See Acquaviva Naïs, Castagnet Florence and Evanghelou Morgane: *A Comparative Analysis of Disciplinary Systems for European Judges and Prosecutors*, prepared for the 7th edition of the European Judicial Training Network's THEMIS Competition, 2012, pp. 2-3.

¹⁹ See CCJE: *Magna Carta of Judges*, adopted on 17 November 2010, par 18.

²⁰ See Acquaviva Naïs, Castagnet Florence and Evanghelou Morgane: *A Comparative Analysis of Disciplinary Systems for European Judges and Prosecutors*, prepared for the 7th edition of the European Judicial Training Network's THEMIS Competition, 2012, pp. 2-3.

²¹ Venice Commission, *Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges*, (CDL-AD(2017)002) par 18.: "If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt."

2.1 Disciplinary Proceedings Against Judges

18. As with regular court proceedings, the nature of disciplinary proceedings and especially their fairness depend, at least in part, on the type of body that conducts such proceedings. Based on key international instruments and documents, such bodies need to be independent.²² The 2010 *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (hereinafter “the Kyiv Recommendations”) note that a disciplinary body may be a commission, court or council.²³
19. To ensure inviolability of the judiciary, avoid undue interference from executive and subordination to political exigencies, as well as address dangers of corporatism, disciplinary matter should be dealt by independent institutions with a balanced composition. The manner in which such bodies are established and composed has direct consequences for their independence. Independent bodies or disciplinary courts should have a decisive influence in disciplinary proceedings, with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanctions.²⁴
20. It is essential that the work of collegiate bodies deciding on disciplinary matters (and possibly even removing judges from office) is not dominated by the members of the executive or legislative branch and that such bodies are outside any form of political influence.²⁵ At the same time, to avoid allegations of corporatism, disciplinary bodies should not be exclusively composed of judges, but should rather also have members from outside the judicial profession,²⁶ provided that such other persons are not members of the legislature, government or administration.²⁷ Also, to ensure representation of the judiciary at large, such bodies should not be dominated by appellate court judges, and chairpersons of courts should resign from their positions as chairpersons once appointed or elected to sit on a disciplinary body.²⁸ In general, members of all levels of the judiciary, including the lowest level, should constitute the majority of such bodies,²⁹ or,

²² See Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 69. See also the Kyiv Recommendations, par 26.

²³ Kyiv Recommendations, par 26 (*op cit* footnote 13).

²⁴ See also Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

²⁵ See Kyiv Recommendations, par 9 (*op cit* footnote 13) and European Network of Councils for the Judiciary (hereinafter “ENCJ”): *Councils for the Judiciary Report 2010-2011*, par 3.11. See also International Association of Judicial Independence and World Peace: Mount Scopus International Standards of Judicial Independence, approved 19 March 2008 and consolidated in 2015, par 2.7. The International Association of Judicial Independence and World Peace is an association made up of legal experts (including judges) from across the world, which aims to, among others, promote, research and develop standards on judicial independence.

²⁶ Kyiv Recommendations par 9 (*op cit* footnote 13). See also CCJE, Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, 19 November 2002, par 71.

²⁷ See, for European countries, CCJE, Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, 19 November 2002, par 71. See also CCJE: Opinion No. 10 (2007) of 23 November 2007, par 63.

²⁸ See Kyiv Recommendations, par 7, *op cit*. footnote 13.

²⁹ See the 1988 *Draft Universal Declaration on the Independence of Justice* (“*Singhvi Declaration*”), par 26 b). This Draft Declaration was prepared by a Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Economic and Social Council, which the UN Commission on Human Rights, by resolution 1989/32, invited governments to take into account when

at a minimum, disciplinary bodies should be composed of a substantial representation of judges elected by their peers.³⁰

21. Across the OSCE area, there are various different types of disciplinary bodies, including national judicial councils or specific disciplinary committees or departments within them, independent national or regional disciplinary boards or committees, heads of courts or the head of the judiciary.³¹ In Europe, national legislation largely follows three major and distinct systems:³²

1) the National Council for the Judiciary (or a special committee or other body within it) is the body primarily responsible for instituting disciplinary actions, however, their decisions may be subject to appeal to special disciplinary panels or courts (e.g. Albania, Bulgaria, Croatia, France, Georgia, Italy, and Spain with respect to major or very serious disciplinary sanctions, Ukraine);³³

2) disciplinary matters are decided by an independent panel or committee outside the National Council for the Judiciary, or on the basis of recommendations from such independent bodies by the head of the state or legislature via an impeachment process for disciplinary liability of holders of high office, or with

implementing the UN Basic Principles on the Independence of the Judiciary. See also the Mount Scopus International Standards of Judicial Independence, *op cit* footnote 25, par 5.6.

³⁰ See International Association of Judges: The Universal Charter of the Judge, approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei on 17 November 1999 and updated in Santiago de Chile on 14 November 2017, Article 2-3. See also CCJE: Opinion No. 10 (2007) of 23 November 2007, par 64, stating also that in case the disciplinary body is a commission under a National Council for the Judiciary, then the judge members of the disciplinary commission should not be the same as those sitting on the National Council for the Judiciary.

³¹ See European Network of Councils for the Judiciary (hereinafter “ENCJ”): Development of Minimum Judicial Standards III – Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary, Report 2012-2013, p. 20.

³² As identified in ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, pp. 32-33.

³³ See, e.g., **Albania**, Article 2 ç) of the Law on the Organization and Functioning of the High Council of Justice of 17 May 2001, last amended in 2014; **Bulgaria**, Article 30 par 5 (3) of the Legal Systems Act of 7 August 2007, last amended in 2018 (where a special Judges’ Chamber situated within the Supreme Judicial Council is responsible for disciplinary matters); **Croatia**, Article 12 of the Law on the State Judicial Council of 2 June 1993, last amended in 2005; **France**, Section 2 of the Organic Law on the High Council of Magistrates of 5 February 1994, consolidated version of 2018; **Georgia**, Article 49 par 1 g) of the Organic Law on Common Courts of 4 December 2009, last amended in 2018, which provides for an Independent Inspector established at the High Council of Justice to investigate complaints. Following the disciplinary case investigation, the High Council of Justice by two-thirds majority can impose disciplinary liability on a judge, which is then considered by a Disciplinary Board whose members are elected by the Conference of Judges and Parliament; **Italy**, Article 105 of the Constitution of 27 December 1947, last amended 2012, and Article 4 of the Law on the Functioning of the High Council of Magistrates of 24 March 1958, last amended in 2002, specifying that a special disciplinary division within the High Council deals with disciplinary matters; **Spain**: Here, disciplinary competence is shared by the General Council of the Judiciary, the Government Chambers of the Courts and the Presidents of the Courts. See in particular Article 22 of the Constitution of 29 December 1978, last amended in 2011, and Article 421 par 1 c) and d) of the Organic Law on the Judiciary of 1 July 1985, last amended in 2016 (specifying that in Spain, the disciplinary commission of the General Council of the Judiciary is responsible for imposing sanctions on judges for major offences, while the Plenary meeting of the General Council is competent only for imposing sanctions on judges for very serious offences; lighter sanctions may be imposed by presidents of the supreme, state and higher courts and boards of governance of supreme and state courts); **Serbia**, Articles 93-94 of the Law on Judges of 2008, which foresees the establishment of a special disciplinary commission by the High Council of Justice; Article 108 of the **Ukrainian** Law on Judiciary and Status of Judges, where disciplinary proceedings against a judge shall be conducted by disciplinary chambers of the High Council of Justice.

the involvement of the head of the judiciary / the president of a court (e.g. in Lithuania, which has Judicial Ethics and Discipline Commission responsible for investigation an autonomous Judicial Court of Honour to decide on disciplinary matters, Norway with separate supervisory committee for disciplinary case or, England and Wales where decisions on disciplinary matters are made by the Lord Chief Justice of England and Wales with the agreement of the Lord Chancellor.);³⁴

3) the adjudication of disciplinary matters is done by courts of justice (including by disciplinary panels within such courts, or by special disciplinary courts), supreme courts (for example, in Austria regional courts of appeal are usually responsible for disciplinary cases; in Germany there is a special senate within the German Federal Court of Justice for cases against federal judges, while special tribunals exist in the Länder for other judges.);³⁵

22. The composition of the disciplinary bodies mentioned under 1) and 2) (i.e. those bodies that are not courts) varies, as does the manner of their appointment. The members of these bodies are usually, to a large or at least significant amount judges, but may also be prosecutors (especially in cases when prosecutors are part of judicial branch or where unified Judicial and Prosecutorial Councils exist), or from other legal professions (e.g. lawyers or academics).³⁶ A number of laws bar members of the executive or

³⁴ In **Lithuania**, there are two institutions dealing with judicial discipline: the Judicial Ethics and Discipline Commission and the Judicial Court of Honour. The Judicial Ethics and Discipline Commission has the right to institute disciplinary action, which shall then be transferred to the Judicial Court of Honour, see the Law on Courts of 31 May 1994, as amended in 2008, Article 122. The Judicial Court of Honour may, by its judgment, suggest that the President of the Republic or the Seimas dismisses from office / impeaches a judge according to the procedure established by law; **England and Wales**, Article 108 of the Constitutional Reform Act of 24 March 2005, stressing that decisions on disciplinary matters shall be taken by the Lord Chief Justice of England and Wales (i.e. the head of the judiciary of England and Wales), but only with the agreement of the Lord Chancellor (who is part of the executive and responsible for the independence and functioning of courts). The Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline are supported by the Judicial Conduct Investigations Office (JCIO). According to Section 4 of the Judicial Discipline (Prescribed Procedures) Regulations 2014, JCIO officials are designated by the Lord Chancellor with the agreement of the Lord Chief Justice, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland. Furthermore, the Judicial Appointments and Conduct Ombudsman investigates the handling of complaints on the judicial conduct process and may look at possible maladministration in the process; See also **Northern Ireland**, Articles 7 and 16 of the Justice (Northern Ireland) Act of 24 April 2002, last amended in 2014; **Norway**, Section 235 of the Act Relating to Courts of Justice of 13 August 1915, last amended in 2013 (according to which a separate supervisory committee for judges assesses and decides on disciplinary cases); **Scotland**, Section 2 of the Judiciary and Courts (Scotland) Act of 29 October 2008, last amended in 2014;

³⁵ See **Austria**, Section 111 of the Judges' and Prosecutors' Service Law of 14 December 1961, last amended in 2018 (specifying which courts (usually regional courts of appeal) are responsible for disciplinary cases against which judges); **Germany**, Section 77 of the Judges Act of 19 April 1972, last amended in 2017, according to which the *Länder* (federal states) have their own special tribunals (*Dienstgerichte*) for the supervision of judges of common courts of the *Länder* (such tribunals are usually attached to regional courts). Such a tribunal also exists at the federal level for federal judges, as a special senate within the German Federal Court of Justice.

³⁶ See **Bulgaria**, Judicial Systems Act, *op cit* footnote 33, according to which the National Assembly elects its members separately by two-thirds majority from among judges, prosecutors, investigating magistrates, legal scholars, lawyers and other jurists, while the assembly of judges elects its members from among the judiciary. See also **Croatia**: Article 4 of the Law on the State Judiciary Council, *op cit* footnote 33, according to which the Council is made up of eight judges (including the Council President), four prosecutors, one attorney and two law professors; **France**: Article 65 of the Constitution of 4 October 1958, last amended in 2008, which states that the High Council of the Judiciary's Section with jurisdiction over judges shall be presided over by the Chief President of the Cassation Court, and shall additionally comprise five judges and one prosecutor, one member of the Council of State and one practicing lawyer, as well as six qualified, prominent citizens, of whom the

legislature³⁷ from being elected as members of the respective bodies, and some even extend this ban to business owners or managers, and others whose independence and impartiality may potentially be called into question.³⁸

23. Members of disciplinary bodies may be appointed, or they may be elected by parliament,³⁹ judicial councils or by judges' assemblies or associations, or by both.⁴⁰ Some procedures involving elections are set out in detail in the relevant legislation and contain numerous elements that ensure their transparency and the representativeness and plurality of the process.⁴¹ Transparent and fair appointment or election procedures are important for all members of disciplinary bodies, including civil society representatives.⁴² Certain laws reviewed contain key provisions to ensure an equal representation of women and men in disciplinary bodies.⁴³

President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two. When sitting as a disciplinary tribunal, the Section shall also comprise the one judge member of the High Council of the Judiciary's Section with jurisdiction over prosecutors; **Georgia**: The Disciplinary Board shall consist of 5 members. Three of them are judges of General Courts of Georgia elected by the Conference of Judges and two of them are persons who are not judges elected the Parliament. See Article 47 of the Organic Law on Common Courts, *op cit* footnote 33, stipulating that the High Council of Justice is made up of the Chairperson of the Supreme Court and eight common court judges elected by a self-governing body of Georgian common court judges, five members elected by the Parliament of Georgia from among higher academics, members of the Bar Association or candidates nominated by non-commercial legal entities (any citizen with higher education and ten years of experience as a legal specialist is eligible) and one member appointed by the President of Georgia (who fulfils the same criteria as the members elected by Parliament); See **Lithuania**, where according to the Law on Courts, the Judicial Ethics and Discipline Commission is composed of seven members. Two members of the Commission shall be appointed by the President of the Republic, one by the Speaker of the Seimas, and four candidates by the Judicial Council. The Judicial Council shall also appoint the Chairperson of the Commission from the appointed members of the Judicial Ethics and Discipline Commission; **Spain**: The General Council of the Judiciary elects the members of the Disciplinary Commission;

³⁷ See **Croatia**: Article 4 of the Law on the State Judiciary Council, *op cit* footnote 33; France: Article 65 of the Constitution, *op cit* footnote 33, which states that the citizens appointed to the High Council of the Judiciary's Section with jurisdiction over judges may also not be judges; **Georgia**: Article 47 of the Organic Law on Common Courts, *op cit* footnote 33, which also specifies that judges or prosecutors may not be appointed to the High Council of Justice by the Parliament or President.

³⁸ See **Bulgaria**, Article 18 of the Judicial Systems Act, *op cit* footnote 33, stating that, among others, national assembly deputies, mayors, municipal counsellors, persons in managing functions in businesses, or who have public or private service contracts, are in liberal professions, conduct a political activity, are in a non-judicial trade union, or are related to a member of the Supreme Judicial Council or have some other conflict of interests may not be elected as members of the Supreme Judicial Council.

³⁹ See **Croatia**, Article 4 of the Law on the State Judiciary Council, *op cit* footnote 33, stating that the President and members of the Council shall be elected by the Lower House of Parliament.

⁴⁰ See **Bulgaria**, Croatia, France, Georgia, Lithuania, and Georgia, *op cit* footnote 36, .

⁴¹ See **Bulgaria**, Article 19 of the Judicial Systems Act, *op cit* footnote 33, according to which the National Assembly elects its members separately by two-thirds majority following nominations and a transparent process outlined in detail in the Act. The national assembly of judges elects its members by secret ballot, following a transparent voting procedure that takes place at an assembly convened specifically for this purpose (see Article 29 of the Act). See also **Georgia**: Article 47 of the Organic Law on Common Courts, *op cit* footnote 33.

⁴² See OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges, 16 June 2014, par 80.

⁴³ See, e.g., **France**: Article 5.2 of the Organic Law on the High Council of Magistrates, *op cit* footnote 33.

2.2 Initiation of and Grounds for Disciplinary Proceedings

2.2.1 Initiation of Disciplinary Proceedings

24. There are only few clear international standards providing guidance on the initiation of disciplinary proceedings against judges. When looking at this question, it is important to distinguish between the right to complain against judges' behaviour and ask for the initiation of disciplinary proceedings, and the task of actually commencing investigations into a judge. With respect to the former, a potentially wide array of offices, bodies and individuals may have the right to complain. Depending on the individual country, these may be heads of courts (e.g. in Belgium, Bulgaria, Croatia),⁴⁴ Judicial Councils or special judicial commissions or inspectors (e.g. in Bulgaria, Croatia, Italy, Lithuania, Spain, Georgia, Ukraine), the Minister of Justice (e.g. in Croatia or Latvia), and/or individuals (e.g. Lithuania, France, England and Wales, Ukraine or Romania, etc.)⁴⁵.
25. Investigations will usually be undertaken by some sort of separate body, board or other institution that will be responsible for accepting and examining complaints about judges, will review evidence and will then decide whether there is a case against a judge; they may even have the power to initiate disciplinary proceedings against judges *ex officio*. At the initial stage, such examinations should be kept confidential, unless otherwise requested by a judge (see par 42 *infra*). Some states have special independent bodies established by judiciary that undertake this task, which in certain countries may even summarily dismiss vexatious or unsubstantiated claims.⁴⁶ At times, the

⁴⁴ E.g. in **Belgium**: Article 412 of the Judicial Code of 10 October 1967, last amended in 2018, where, for the most part, proceedings are initiated by the heads of courts of the judge in question; **Bulgaria**: Article 312 of the Judicial Systems Act (heads of administration and superior heads of administration), *op cit* footnote 33; **Croatia**, Article 23 of the Law on the State Judicial Council (*op cit* footnote 33), where proceedings may be initiated by heads of the respective court, heads of superior courts, the Chief Justice of the Supreme Court and the Minister of Justice.

⁴⁵ See **Bulgaria**: Article 312 of the Judicial Systems Act, *op cit* footnote 33, where the same right is given to administrative heads or superior administrative heads, and the Judicial Inspectorate with the Supreme Judicial Council; **Croatia**: Article 23 of the Law on the State Judicial Council (*op cit* footnote 33), where proceedings may be initiated by heads of the respective court, heads of superior courts, the Chief Justice of the Supreme Court and the Minister of Justice; and **Italy**: Article 14 of the Law on the Functioning of the High Council of Magistrates, *op cit* footnote 33; **England and Wales**: where the Judicial Appointments and Conduct Ombudsman can investigate complaints from members of the public or judges, about how their complaint was handled by the Office for Judicial Complaints (OJC), a Tribunal President or a Magistrates' Advisory Committee (the Constitutional Reform Act 2005, 17 January 2005, Bill No 18 of 2004-05); See **Lithuania**, where according to Article 83 of the Lithuanian Law on Courts, a reasoned proposal to initiate disciplinary case against a judge may be made to the Judicial Ethics and Discipline Commission by the Judicial Council, the president of the court employing the judge; the president of any court of a higher instance; or any person who is informed about an offence prescribed by the Law on Courts; See **Ukraine**, Article 107 of the Ukrainian Law on Judiciary and Status of Judges, which states that any person shall have the right to submit a complaint against the disciplinary offence of a judge (disciplinary complaint); See **Latvia**, where according to the Judicial Disciplinary Liability Law, a disciplinary complaint may be filed by: the Chief Justice of the Supreme Court, the Minister for Justice; the Chief Judges of district (city) courts regarding judges of district (city) courts in all cases; and the Commission of Judicial Ethics.

⁴⁶ See, e.g., **Scotland**: A Judicial Office established by the Scottish Court Service to support the Lord President in his/her non-judicial functions according to Rules 7 and 8 of the Complaints about the Judiciary (Scotland) Rules of 2017, carries out an initial assessment and shall dismiss certain allegations, for instance, due to insufficient information or failure to respect time limits. If a complaint is not dismissed at this stage, it will be referred to the Disciplinary Judge, who will review the complaint and will decide whether the complaint should

investigation of complaints may also be conducted by a special panel, investigator, rapporteur or committee of inquiry appointed by the body responsible for the administration of disciplinary proceedings (e.g. in Austria, England and Wales, Lithuania or Scotland).⁴⁷ In other countries, a disciplinary committee or the judicial inspection unit of the Council for the Judiciary accepts and examines complaints (e.g. in Albania, Bulgaria, Croatia, France, Georgia or Spain).⁴⁸

26. Generally, according to the *Kyiv Recommendations*, the independent body initiating the investigation into a judge should be separate from the independent body that eventually takes the final decision on the matter, to ensure independence of the latter.⁴⁹ The European Commission for Democracy through Law of the Council of Europe (hereinafter “Venice Commission”) takes a similar stance, but notes that it may not be necessary to create a separate institution for this purpose. Rather, it should suffice to ensure that members who were involved at the initial stage of the disciplinary proceedings as “accusers” or “investigators” do not participate in the adjudication of disciplinary cases as “judges”.⁵⁰ In the recent case of *Kamenos v. Cyprus*, the ECtHR found that because the same body, or at least the same judges brought charges against a judge, conducted disciplinary proceedings and ultimately decided to remove the judge from office, the impartiality of the disciplinary body was capable of appearing open to doubt, thus resulting in a violation of Article 6 of the ECHR.⁵¹ This principle is reflected in certain state laws, which prohibit members of disciplinary committees, or

be further investigated by a judge nominated to do this. The Disciplinary Judge may also decide to dismiss the case if the complaint is vexatious, would not require disciplinary action to be taken, etc.

⁴⁷ **Austria:** Section 112 of the Judges’ and Prosecutors’ Service Law, *op cit* footnote 35; **England and Wales:** Regulation 10 of the 2014 Judicial Discipline Regulations No. 1919, which speaks of investigating judges appointed by the Lord Chief Justice; **Scotland:** Section 28 of the Judiciary and Courts (Scotland) Act, *op cit* footnote 34, specifying that the Lord President of the Court of Session may adopt rules that, among others, nominate a person to conduct investigations into disciplinary procedures, or parts of such procedures; in **Lithuania**, *op cit* footnote 34, a Judicial Ethics and Discipline Commission decides whether there are grounds for disciplinary action.

⁴⁸ See **Albania:** Articles 14-15 of the Law on the Organization and Functioning of the High Council of Justice, *op cit* footnote 33, on the Inspectorate of the High Council of Justice; **Bulgaria:** Article 54 of the Legal Systems Act, *op cit* footnote 33, on the powers of the Inspectorate of the Supreme Judicial Council; **Croatia:** Article 22 of the Law on the State Judicial Council (*op cit* footnote 33), where a disciplinary committee made up of three members of the State Judicial Council appointed by the President of the Council conducts proceedings; **France:** Article 18 of the Organic Law on the High Council of Magistrates, *op cit* footnote 33; **Spain:** Article 423 of the Organic Law on the Judiciary, *op cit* footnote 33; **Georgia**, *op cit* footnote 33, where the law provides for an Independent Inspector established at the High Council of Judges to investigate complaints.

⁴⁹ *Kyiv Recommendations*, par 9, *op cit* footnote 13, and also Council of Europe: Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies), par 69. See also CCJE, Opinion No. 3 (2002) on the Principles and Rules Governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, 19 November 2002, pars 68, 69 and 77. See further CCJE, Opinion No. 10 on Council for the judiciary in the service of society, which recommends to entrust disciplinary cases in the first instances to special disciplinary commissions, with the substantial representation of judges elected by their peers and “different from the members of the Council of the Judiciary”, 23 November 2007, par 64.

⁵⁰ Venice Commission Opinion on the Laws on Disciplinary Liability and Evaluation of Judges of the Former Yugoslav Republic of Macedonia, CDL-AD(2015)042, 21 December 2015, par 78.

⁵¹ ECtHR, *Kamenos v. Cyprus*, application no. 147/07, judgment of 31 October 2017, pars 102-110.

- who have otherwise been appointed to conduct investigations into a judge from sitting on the case once it has been referred to the disciplinary body.⁵²
27. The Consultative Council of European Judges (CCJE) noted, in its Opinion No. 3, issued in 2002, that individuals professing to have suffered due to a judge's professional error or misconduct should be able to submit a complaint, which could then lead to the initiation of disciplinary proceedings.⁵³
 28. Usually, such individual complaints against judges are submitted by identifiable complainants who are also parties to a case that the respective judge is sitting on. Especially in cases where a complaint may be made by persons who are not directly affected by alleged wrongdoing of a judge, possibly even anonymous complainants, a filtering mechanism should be in place.⁵⁴
 29. Allowing individual complaints against judges does not mean that there is an individual right to initiate or insist on disciplinary action – rather, the above-mentioned filtering mechanism will assess the circumstances of the case, to avoid situations where judges become embroiled in disciplinary procedures initiated by disappointed litigants⁵⁵ and dismiss manifestly unfounded, frivolous or vexatious complaints as early as possible.⁵⁶ The body receiving and administering complaints against judges will also receive responses of the judge to the complaints, and will then, in light of all documentation at its disposal, decide whether or not there is a sufficient *prima facie* disciplinary case against the judge to call for the initiation of disciplinary action.⁵⁷ If so, it will refer the matter to the disciplinary body.
 30. As stated above, the function of filtering or accepting such complaints should not be taken by the same body – or at least the same persons - that is/are responsible for taking decisions in the respective disciplinary matter.⁵⁸
 31. The question has been raised whether court presidents should have the power to initiate disciplinary proceedings against individual judges. The Venice Commission has stated

⁵² See, e.g. **Austria**: Section 112 of the Judges' and Prosecutors' Service Law, *op cit* footnote 33; France: Article 18 of the Organic Law on the High Council of Magistrates, *op cit* footnote 33.

⁵³ See also Measures for the Effective Implementation of the Bangalore Principles, adopted by the Judicial Integrity Group at its meeting held in Lusaka, Zambia, on 21-22 January 2010, par 15.2. The Judicial Integrity Group is an independent, autonomous, non-profit and voluntary group made up of heads of the judiciary or senior judges from across the globe, aiming to, among others, enhance accountability and strengthen integrity within the judiciary. See also European Charter on the Statute for Judges, adopted during a multilateral meeting of European judges and judges' associations that took place in Strasbourg on 8-10 July 1998, par 5.3.

⁵⁴ ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, p. 25.

⁵⁵ Consultative Council of European Judges (CCJE), Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, of 19 November 2002, par 67.

⁵⁶ See ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, p. 18.

⁵⁷ Measures for the Effective Implementation of the Bangalore Principles, adopted by the Judicial Integrity Group at its meeting held in Lusaka, Zambia, on 21-22 January 2010, par 15.3.

⁵⁸ See the Kyiv Recommendations, par 9, *op cit* footnote 13, which also state that judicial members involved in disciplinary cases should not be dealing with "administration, budgeting, or judicial selection". See also, instead of others, *Poposki and Duma v. "the former Yugoslav Republic of Macedonia"*, nos. 69916/10, 36531/11, 7 January 2016, pars 48-49, concluding that persons who played the role of an "prosecutor" in the disciplinary proceedings against a judge cannot participate in the process of taking decision on the merits.

that this should not always be the case,⁵⁹ and supports this statement with the fact that a court president is seen not as the hierarchical supervisor of other judges,⁶⁰ but rather as a *primus inter pares*.⁶¹ However, when looking at the legitimacy of such initiation powers, it is also important to examine other competencies that the president of a court has, and how he/she is appointed (whether by vote of his/her fellow judges, or by the legislature or executive).⁶² The *Kiev Recommendations* stress that a court president may file a complaint to the body that is competent to receive complaints and conduct disciplinary procedures but should not have the power to initiate such procedures or adopt a disciplinary measure.⁶³ The nature of the body or person complaining about a judge is thus not always considered to be of vital importance, as long as the bodies conducting investigations into the judge, and the bodies ultimately imposing disciplinary sanctions are independent.

32. Bearing in mind the need to maintain and safeguard the independence of the judiciary from the executive, there have also been debates as to whether members of the executive, e.g. the Minister of Justice, should have the power to initiate disciplinary procedures against judges.⁶⁴ Generally, for the reasons outlined in the previous paragraph, it would not be considered unreasonable to provide members of the executive with the right to ask for the initiation of investigations to be undertaken by the independent body responsible for doing so, as long as the executive does not have the

⁵⁹ Venice Commission, Bulgaria - Opinion on the Judicial System Act, CDL-AD(2017)018, 9 October 2017, pars 84-85 and 113.

⁶⁰ Venice Commission, Bulgaria - Opinion on the Judicial System Act, CDL-AD(2017)018, 9 October 2017, par 83.

⁶¹ Venice Commission, “The Former Yugoslav Republic of Macedonia” – Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for the Establishment of Facts and Initiation of Proceedings for Determination of the Accountability for Judges, on the Draft Law Amending the Law on the Judicial Council, and on the Draft Law Amending the Draft Law on Witness Protection, CDL-AD(2017)033, 11 December 2017, par 26.

⁶² Venice Commission, “The Former Yugoslav Republic of Macedonia” – Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for the Establishment of Facts and Initiation of Proceedings for Determination of the Accountability for Judges, on the Draft Law Amending the Law on the Judicial Council, and on the Draft Law Amending the Draft Law on Witness Protection, CDL-AD(2017)033, 11 December 2017, pars 27, noting that if too many competencies are concentrated in the hands of a court president, this may be detrimental to the internal independence of judges, even if each such competency, taken in isolation, is not dangerous per se. As regards the method of appointment, the Venice Commission stresses that “presidents elected by their fellow judges are less of a danger for judicial independence than presidents appointed by/or with significant participation of the executive or legislative branches.”

⁶³ *Kyiv Recommendations*, par 14, *op cit* footnote 13.

⁶⁴ See Venice Commission, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, CDL-AD(2014)038, 15 December 2014, par 68, where the Venice Commission also raised the question of whether such powers were in harmony with the independence of the judiciary and the separation of powers. See also, however, Venice Commission, “The Former Yugoslav Republic of Macedonia” – Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for the Establishment of Facts and Initiation of Proceedings for Determination of the Accountability for Judges, on the Draft Law Amending the Law on the Judicial Council, and on the Draft Law Amending the Draft Law on Witness Protection, CDL-AD(2017)033, 11 December 2017, par 29, where the Venice Commission noted that as the Minister had no right of vote on the Judicial Council, such powers did not pose a danger to the independence of the judiciary. Moreover, since he/she was not the only one who may initiate disciplinary procedures, the Venice Commission noted that Minister’s role in the process could even be useful, as it helped avoid a corporatist disposition within the judiciary in disciplinary matters. See in this context the Mount Scopus International Standards of Judicial Independence, *op cit* footnote 25, par 2.6, stating that the Executive may participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings (but not by the adjudication of such matters).

right to order, and is not otherwise involved in such investigations or in deciding on disciplinary matters and imposing sanctions.

2.2.2. Grounds for Initiating Disciplinary Procedures

33. Disciplinary proceedings are initiated in cases where judges are accused or suspected of misconduct, in line with the offences set out in the respective national law. Generally, as stated above, such proceedings should be initiated in cases of grave misconduct. Given the aim and (usually) more general formulations of codes of judicial ethics, the violation of such codes should not be a ground for instituting disciplinary proceedings (on this debate, see also par 15 *supra*).
34. According to Recommendation CM/Rec(2010)12 of the Council of Europe's Committee of Ministers, judges should not be held criminally or disciplinarily liable for interpreting the law, assessing facts or weighing evidence in the context of determining cases, except in cases of malice and gross negligence.⁶⁵ Moreover, judges shall not be held personally accountable for decisions that are overturned or modified on appeal.⁶⁶
35. At the national level, most states have codified lists of prohibited behaviour for judges. The degree of precision by which conduct that may result in disciplinary action, as well as the list of conduct that entails liability, varies from jurisdiction to jurisdiction even in regions with similar political and legal traditions. Legislation of some European countries, for example, aiming to provide guidance to judges and to avoid vague norms, which may potentially lead to an overbroad application of disciplinary measures, offer detailed provisions on what constitutes a disciplinary offense. Often, laws distinguish between minor and serious infractions (in some cases even between minor, major and very serious infractions⁶⁷). Minor misconduct would be cases involving, e.g., disrespectful conduct to superiors or other court staff, not following orders or notices, or short, but unjustified terms of absence.⁶⁸ Acts such as violations of the Constitution, or the failure to recuse oneself in cases of bias, failure to disclose assets, violations of provisions on incompatibilities, extensive absences from work or length delays in procedures, abuse of power, or the disclosure of confidential data or professional secrets would constitute more serious misconduct,⁶⁹ which will be sanctioned accordingly.

⁶⁵ Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 66.

⁶⁶ Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), par 70. See also Republic of Moldova - Amicus Curia Brief of the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") for the Constitutional Court on the criminal liability of judges, CDL-AD(2017)002, 13 March 2017, par 33: "A judge's legal interpretation, which may not be in line with the established case-law, should not in itself become a ground to impose disciplinary sanctions, unless it is done in bad faith, with intent to benefit or harm a party to the proceedings or as a result of gross negligence."

⁶⁷ See, e.g., **Spain**: Article 416 of the Organic Law on the Judiciary, *op cit* footnote 33, there are three main types of judicial disciplinary misconduct in Spain: very serious infractions, major and minor infractions (<https://www.legislationline.org/legislation/section/legislation/topic/9/country/2>).

⁶⁸ See, e.g., **Spain**: Article 419 of the Organic Law on the Judiciary, *op cit* footnote 33.

⁶⁹ See, e.g., **Croatia**: Article 20 of the Law on the State Judicial Council, *op cit* footnote 33; **Spain**: Article 417 of the Organic Law on the Judiciary, *op cit* footnote 33, which provides a long list of very serious misconduct, such as: breach of duty of loyalty to the Spanish Constitution when such breach has been established in a final judgment; affiliation to political parties or trade unions, or performing duties or services for them; unwarranted

36. It should be noted, however, that the inescapable vagueness of some of the disciplinary offenses carries with it the risk of arbitrary application and violation of judges' independence (e.g. by sanctioning judges based on vague terms such as "political activity", "un-dignifying attitude" or „non-professional behaviour"). The risk of abuse and arbitrariness can be reduced first by applying prophylactic measures, such as explanatory memoranda on the provisions on disciplinary offenses and by appointing judicial bodies or officers whom judges can contact for guidance on whether a given conduct is permissible or not.
37. However, even if condemnable conduct is defined with sufficient clarity and precision, disciplinary action should be instituted only in case of malice or gross negligence on the part of the judge.⁷⁰ In this context it should be noted that national legislators and decision-makers frequently ignore the difference between malice and intent. The term „malice" is narrower than „intentional" as it implies more than mere intent. It presupposes, in addition to purposive action, also the specific intent to inflict harm or injury.

2.3 Safeguarding Key Human Rights Principles During Disciplinary Proceedings

38. As with other persons accused of wrongdoing, in disciplinary proceedings the judges suspected of having violated disciplinary offences also have certain rights.
39. First and foremost, judges need to be informed about the fact that a formal investigation against them has been initiated. This does not mean that judges need to be informed of every complaint immediately, especially if these are later dismissed as ill-founded or manifestly inadmissible.⁷¹ However, once a complaint is accepted and transferred for further investigation, judges need to be informed so as to be able to respond adequately to the complaint.⁷²
40. From an international law point of view, such cases also involve the right to fair trial, set out in Article 14 of the ICCPR and Article 6 of the ECHR, including the right to be heard and the principle of equality of arms. In its case law, the European Court of Human Rights (hereinafter "ECtHR") has concluded that cases involving disciplinary proceedings against judges fall within the ambit of Article 6 of the ECHR on fair trial,

interference by means of orders or pressure in any sense in the exercise of the judicial functions of any other Judge or Magistrate; if the Judge or Magistrate does not provide for his own recusation in spite of being aware that he is under any of the legal circumstances that bar his cognizance of the suit; unjustified and repeated delay or disregard in initiating, conducting or deciding on any proceedings or suits or in the exercise of any of his judicial functions, etc..

⁷⁰ See International Association of Judges: *The Universal Charter of the Judge*, approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei on 17 November 1999 and updated in Santiago de Chile on 14 November 2017, Article 7-1.

⁷¹ The ENCJ, in *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, p. 37, noted that the rationale of not informing judges of initial complaints immediately was "to protect the judge against the possibility of being unnecessarily troubled, or to avoid the impartiality and independence of the judge being compromised, or the public perception being that it may be compromised".

⁷² ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, pp. 36-37.

depending on the relevant circumstances of the case and related state law.⁷³ This means that various rights subsumed within this provision are also relevant during disciplinary proceedings, i.e. the right to be heard by independent and impartial judges, the right to a public hearing, the right to be heard within a reasonable time, as well as adherence to the principle of the equality of arms.

41. Thus, disciplinary proceedings need to include public hearings, and contain relevant provisions allowing the respective judge to be heard, and to present witnesses and receive all relevant information pertaining to his/her case.⁷⁴ Moreover, such proceedings shall be processed not only fairly, but also expeditiously, and the respondent judge should have the opportunity to comment on the complaint against him/her at an early stage.⁷⁵ The examination of the case at the initial stage shall be kept confidential, unless requested by the judge.⁷⁶
42. The procedure may contain exceptions to the rule of public hearings, but only if important rights and interests are at stake, such as morals, public order or national security in a democratic society. Similar considerations apply where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, or where this relates to the nature of the issues.⁷⁷ Decisions to exclude the public from disciplinary hearings will need to be justified by the body holding the hearings; given the importance of public scrutiny in such cases, the failure to justify closed hearings may amount to a violation of the ECHR.⁷⁸ Regardless

⁷³ See ECtHR, *Oleksandr Volkov v. Ukraine*, application no. 21722/11, 9 January 2013, pars 87- 91, where the Court noted that an exclusion from the scope of Article 6 (civil head) is only possible in the case of civil servants if the country in question has expressly excluded access to courts for the post or category of civil servants in question, and if such exclusion is objectively justified in the State's interest (see also the referenced ECtHR case of *Vilho Eskelinen and Others v. Finland*, application no. 63235/00, Grand Chamber judgment of 19 April 2007, pars 43-62). In ECtHR, *Pitkevich v. Russia*, application no. 47936, admissibility decision of 8 February 2001 (in which the application of Article 6 was rejected), the Court found that the judiciary, while not being part of the ordinary civil service, was nonetheless part of typical public service. The Court further noted that due to their role in the administration of justice (a sphere in which states exercised sovereign powers), judges participated directly in the exercise of powers conferred by public law and performed duties designed to safeguard the general interests of the State. See also ECtHR, *Olujic v. Croatia*, application no. 22330/05, judgment of 5 February 2009, pars 34-44.

⁷⁴ See the 1988 *Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration")*, par 28, which speaks of "fairness to the judge" and "a full hearing". This Draft Declaration was prepared by a Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Economic and Social Council, which the UN Commission on Human Rights, by resolution 1989/32, invited governments to take into account when implementing the UN Basic Principles on the Independence of the Judiciary.

⁷⁵ See the 1988 *Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration")*, par 26 a), *op cit* footnote 73.

⁷⁶ See the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, pars 17 and 20. See also the 1988 *Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration")*, par 26 a), *op cit*, footnote 73.

⁷⁷ See ECtHR, *Olujic v. Croatia*, application no. 22330/05, judgment of 5 February 2009, pars 71-72, with references to other case law.

⁷⁸ In the case of *Olujic v. Croatia*, application no. 22330/05, judgment of 5 February 2009, the Court found a violation of the applicant's rights due to the fact that the public had been unjustifiably excluded from attending the hearing, despite the applicant's request for publicity, and considerable public interest in the case (pars 74-76).

- of whether the hearing was open or closed, decisions taken at the end of disciplinary procedure need to be published.⁷⁹
43. Many national laws on disciplinary proceedings contain specific mention of the fact that disciplinary procedures should include hearings, and of the public nature of such hearings.⁸⁰ Additionally, some laws specify that decisions on disciplinary cases shall be published.⁸¹
 44. To ensure the disciplinary procedures are processed in a fair and expedient manner, most countries have time limits for submitting complaints against judges.⁸² Generally, it is good practice to have time limits for all relevant aspects of disciplinary proceedings, including the conclusion of investigations, issuing final decisions, and the imposition of sanctions (which should take place immediately and without undue delay after the decision on the merits).⁸³ Time limits should only be extended in exceptional circumstances, e.g. if an investigation is quite complex, or due to the illness of a judge or an ongoing criminal investigation, provided that the outcome of criminal proceedings are relevant for the disciplinary investigation.⁸⁴
 45. With respect to the equality of arms, this implies that the judge accused of a disciplinary offence must be afforded a reasonable opportunity to present his or her case - including his or her evidence - under conditions that do not place him or her at a substantial disadvantage vis-à-vis the authorities bringing those proceedings against a judge.⁸⁵ Relevant provisions on the disciplinary procedure will thus need to ensure that rules on the taking and submission of evidence are fair.⁸⁶
 46. Thus, most laws outlining disciplinary proceedings allow for the respective judge to be heard, examine witnesses and evidence,⁸⁷ and be represented by a lawyer.⁸⁸

⁷⁹ See the 1988 *Draft Universal Declaration on the Independence of Justice* (“Singhvi Declaration”), par 29, *op cit*, footnote 73.

⁸⁰ See, e.g., **Austria**: Section 133 of the Judges’ and Prosecutors’ Service Law, *op cit* footnote 35; **Bulgaria**: Article 33 par 6 of the Judicial Systems Act (which states that hearings shall also be live-streamed in the Internet), *op cit* footnote 33.

⁸¹ See **Austria**: Section 133a of the Judges’ and Prosecutors’ Service Law, *op cit* footnote 35; **Bulgaria**: Article 324 of the Judicial Systems Act, *op cit* footnote 33.

⁸² **Bulgaria**: Article 310 of the Judicial Systems Act (disciplinary proceedings shall be instituted within six months of discovery of the act, and three years after its commission), *op cit* footnote 33; **Croatia**: Article 24 of the Law on the State Judicial Council, *op cit* footnote 33, stating that the disciplinary procedure shall begin six months after discovery of the alleged act, and at the latest two years after commission of the act.

⁸³ ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, p. 29. Time limits for issuing decisions can be found in the following laws: **Bulgaria**: Article 310, par 2 of the Judicial Systems Act (three months), *op cit* footnote 33; **Croatia**: Article 24 of the Law on the State Judicial Council (one year), *op cit* footnote 33; **Spain**: Article 425 par 6 of the Organic Law on the Judiciary (six months, with the possibility of extension), *op cit* footnote 33.

⁸⁴ ENCJ: *Minimum Judicial Standards V – Disciplinary proceedings and liability of judges*, Report 2014-2015, p. 29. See **Bulgaria**: Article 310 of the Judicial Systems Act, *op cit* footnote 33, which allows for an extension of this time period where procedures are particularly complex (factually and/or legally);

⁸⁵ See ECtHR, *Olujić v. Croatia*, application no. 22330/05, judgment of 5 February 2009, par 78.

⁸⁶ See ECtHR, *Olujić v. Croatia*, application no. 22330/05, judgment of 5 February 2009, par 77, with references to other case law.

⁸⁷ See, e.g., **Austria**, Sections 129 and 134-135 of the Judges’ and Prosecutors’ Service Law, *op cit* footnote 35; **Bulgaria**: Article 313 of the Judicial Systems Act, *op cit* footnote 33.

⁸⁸ **Albania**: Article 33 of the Law on the Organization and Functioning of the High Council of Justice, *op cit* footnote 33; **Croatia**: Article 22 of the Law on the State Judicial Council, *op cit* footnote 33.

47. In addition to the above rights, disciplinary procedures also need to foresee the possibility of appealing a decision taken by the first-instance disciplinary body (be it an authority, tribunal or court) to a court.⁸⁹ In most countries, such appeals may be made to a higher court, or to the supreme court.⁹⁰

2.4 *Disciplinary Sanctions*

48. Provisions on disciplinary sanctions need to clearly describe which behaviour shall entail which types of sanctions. Moreover, a wide array of sanctions needs to be available, starting from minor ones such as warnings, through to sanctions involving serious consequences, such as suspension, transfer, or dismissal of a judge. Sanctions need to be proportionate to the extent of wrongdoing.
49. Given how important it is to maintain the independence of the judiciary and the related irremovability of individual judges, judges shall only be removed from office for disciplinary reasons in rare cases, involving serious disciplinary breaches, including conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary. Similar considerations, though to a lesser degree, apply with regard to the mandatory transfer of a judge as a result of a disciplinary procedure.
50. Most countries foresee a range of sanctions in their respective legislation on disciplinary proceedings, including warnings, fines, demotion, reduction of salaries, mandatory transfers, suspension, and removal from office. A number of state laws also specify which types of offences shall lead to which levels of sanctions; e.g., minor sanctions will lead to warnings and minor fines, while serious misdemeanours should lead to heavy fines, and very serious acts of misconduct to suspension, mandatory transfers or removal from office. Generally, the extent of the sanction will depend on a number of factors, including, e.g., the extent of the damage or consequences, the circumstances in which the act occurred, and the judge's prior record of conduct and work. In exceptional and serious circumstances, a respondent judge may be suspended from work during the investigation phase – this is less of a disciplinary, and more of a temporary, precautionary measure. Such measures will only be justified by the nature and gravity of the alleged offence and/or if not suspending the judge could compromise his/her integrity or independence. Such suspensions should in no way prejudice the outcome of proceedings; thus, while suspended, judges should still receive full pay, unless they unreasonably delay proceedings or do not cooperate with the investigation. A number of European countries foresee this type of suspension but allow it only in rare and

⁸⁹ Consultative Council of European Judges (CCJE), Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, of 19 November 2002, paras 72 and 77 v. The Committee of Ministers in its Recommendation CM/Rec(2010)12, par 69, also states that judges should be able to challenge the decision in a disciplinary case (without specifying, however, whether this means an appeal to a court of law or to another body). See also Venice Commission, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, CDL-AD(2014)008, 24 March 2014, par 92 and Opinion on the Draft Law on Judges and Prosecutors of Turkey, CDL-AD(2011)004, paras 75-76, stating that an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc.

⁹⁰ See, e.g., **Albania**: Article 34 of the Law on the Organization and Functioning of the High Council of Justice, *op cit* footnote 33; **Austria**: Section 139 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35; **Georgia**: Article 19 of the Organic Law of Georgia on Common Courts, *op cit* footnote 33.

exceptional cases concerning serious disciplinary offences, or where it is considered necessary to maintain public confidence in the judiciary or judicial system, or where a criminal case is pending against the judge. Others expressly prohibit such suspensions.

2.5 *Impact of Disciplinary Sanctions*

51. The initiation of disciplinary proceedings against a judge will undoubtedly have a considerable effect on his/her work and reputation. While disciplinary proceedings are pending, advancements into higher pay grades may be postponed.⁹¹
52. At the same time, certain laws specify that while disciplinary procedures are ongoing, judges may not be dismissed.⁹² Some laws even contain safeguards protecting judges from dismissal if the disciplinary procedures against them were discontinued or resulted in an acquittal.⁹³
53. If investigations lead to a confirmation of wrongdoing and result in the imposition of sanctions, the extent of the sanction will have direct consequences for a judge's financial situation, case load, position at a certain court and, in the worst possible case, will lead to the (temporary or permanent) end of his/her career.
54. Even if disciplinary judges are not dismissed, findings of misconduct that amount to a disciplinary offence may have other far-reaching consequences. Thus, a number of laws state that judges that have been sanctioned in this manner may not apply for or be appointed or elected to positions of judge or prosecutor,⁹⁴ administrative heads or deputy heads of courts,⁹⁵ public enforcement agents,⁹⁶ internal court panels or commissions,⁹⁷ including disciplinary boards,⁹⁸ or to national judicial councils.⁹⁹ Such bans may be lifted once the imposition of disciplinary sanctions has been expunged from judges' records,¹⁰⁰ but this will depend on each country's rules in that respect.¹⁰¹

⁹¹ See **Austria**: Section 66 par 5 of the Judges' and Prosecutors' Service Law (the advancement will, however, take place retroactively as soon as disciplinary proceedings are over, see par 6), *op cit* footnote 35; **Spain**: Article 420 par 1 of the Organic Law on the Judiciary (here, judges are barred from taking advancement exams), *op cit* footnote 33.

⁹² See **Austria**: Section 7 of the Judges' and Prosecutors' Service Law, *op cit* footnote 33; **Bulgaria**: Article 166 of the Judicial Systems Act, *op cit* footnote 33.

⁹³ See **Austria**: Section 7 par 3 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35.

⁹⁴ See **Bulgaria**: Article 162 par 5 of the Judicial Systems Act, *op cit* footnote 33; In **Spain**, the judge or the Magistrate who has been sanctioned with mandatory transfer may not take part in any advancement exams for a period of one to three years. Article 333 of the Organic Law on Judiciary further states that judges who have been sanctioned in the course of disciplinary proceedings for a serious or very serious offence cannot be appointed as Chief Justices, unless their sanction has been cancelled out from their record.

⁹⁵ See **Bulgaria**: Article 169 of the Judicial Systems Act (if any disciplinary sanctions were imposed for the last five years), *op cit* footnote 33.

⁹⁶ See **Bulgaria**: Article 269 of the Judicial Systems Act, *op cit* footnote 33.

⁹⁷ See **Austria**: Section 37 par 2 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35, stating that judges against whom disciplinary sanctions have been imposed may not be elected as members of courts' employment; **Bulgaria**: Articles 183 par 5 and 189 par 9 (with respect to competition commissions responsible for holding competitions for certain judge or prosecutor positions) and Article 204 par 5 for appraisal commissions of the Judicial Systems Act, *op cit* footnote 33.

⁹⁸ See **Georgia**: Article 75(19) par. 5 of the Organic Law of Georgia on Common Courts, 2009;

⁹⁹ See **Bulgaria**: Article 18 par 10 of the Judicial Systems Act, *op cit* footnote 33.

¹⁰⁰ See **Austria**, Section 37 par 2 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35.

55. Moreover, if a judge is suspended or dismissed for disciplinary reasons, his or her usually more or less automatic advancement to a higher pay grade or receipt of a certain compensation or remuneration may be suspended or stopped.¹⁰² Dismissal will also mean that in case a judge is reappointed at a later stage, the rank that he/she held before will not be retained.¹⁰³
56. Thus, the extent of the impact of disciplinary procedures on judges' careers will depend on the nature of the disciplinary offence and the ensuing gravity of the sanction. Minor examples of misconduct may temporarily limit a judge's career choices or slow down his/her chances of promotion. Serious cases of misconduct will, on the other hand, have more serious effects and may even result in dismissal, in other words in the ending of a judge's career.

[END OF TEXT]

¹⁰¹ See **Austria**, Section 145 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35, according to which disciplinary sanctions may be expunged from a judge's record after three years upon judicial order, if the judge has served his/her punishment, and his/her conduct has been irreproachable throughout.

¹⁰² See **Austria**: Section 66 pars 5-8 of the Judges' and Prosecutors' Service Law, *op cit* footnote 35; **Bulgaria**: Article 225 par 3 of the Judicial Systems Act, *op cit* footnote 33; **Georgia**: Article 75(77) of the Organic Law of Georgia on Common Courts stating that judges may not be promoted until the disciplinary sanction against them has been lifted.

¹⁰³ See **Bulgaria**: Article 236 of the Judicial Systems Act, *op cit* footnote 33.