

**LEGAL FRAMEWORK AND OVERVIEW OF CASE LAW ON  
DISCIPLINARY RESPONSIBILITY OF JUDGES**

---

**Author: Tatjana Papić, PhD**

May 2016

The views herein expressed are solely those of the author and contributors and do not necessarily reflect the official position of the OSCE Mission to Serbia.

## Table of Contents

Introduction.....	4
<b>1. International Standards .....</b>	<b>5</b>
<b>1.1. International Documents .....</b>	<b>6</b>
1.1.1. UN Documents .....	6
1.1.2. CoE Documents .....	7
<b>1.2. International Practice.....</b>	<b>9</b>
<b>2. National Legal Framework.....</b>	<b>10</b>
<b>2.1. Disciplinary Bodies.....</b>	<b>11</b>
<b>2.2. Disciplinary Offences .....</b>	<b>12</b>
<b>2.3. Disciplinary Sanctions .....</b>	<b>14</b>
<b>2.4. Disciplinary Proceedings.....</b>	<b>15</b>
2.4.1. Initiation of Disciplinary Proceedings .....	15
2.4.2. First-Instance Disciplinary Proceedings .....	16
2.4.3. Second-Instance Disciplinary Proceedings.....	18
2.4.4. Dismissal Procedure .....	19
<b>2.5. Costs of Disciplinary Proceedings.....</b>	<b>20</b>
<b>2.6. 2015 Rulebook: Introducing Disciplinary Responsibility for Court Presidents.....</b>	<b>21</b>
<b>3. Practice .....</b>	<b>22</b>
3.1 Most Common Disciplinary Offences .....	23
3.1.1. Responsibility for Qualified Form of Disciplinary Offences .....	28
3.2 Interpretation of Relevant Regulations and Standards in the Practice of Disciplinary Bodies ...	29
3.2.1. Interpretation of Procedural Guarantees.....	29
3.2.2. Interpretation of Provisions on Disciplinary Offences .....	30
3.2.3. Application of Other Regulations and Legal Standards in Disciplinary Proceedings.....	36
3.3 Sentencing Policy .....	37
3.3.1. Evaluation of Sentencing Policy .....	39
3.4 Quality of Decisions.....	42
<b>4. Conclusion.....</b>	<b>42</b>
4.1 Legal Framework.....	42
4.2 Practice.....	44

5. Recommendations.....	46
APPENDIX 1.....	48
<b>APPENDIX 2</b> .....	<b>52</b>

## Introduction

The concept of responsibility is inherent in the rule of law. Namely, the rule of law, *inter alia*, involves mechanisms and procedures prescribed by law regulating the establishment of responsibility, enhancing the transparency, fairness, integrity and predictability of conduct of the state and the institutions thereof.<sup>1</sup> Thus, the issue of accountability of judicial office holders is often mentioned in the context of democratic and / or judicial reforms.<sup>2</sup> The establishment of an efficient judiciary guarantees the independence of judges, as well as mechanisms for their accountability. However, it does happen that invoking responsibility of judiciary is simply an excuse for an attack on the independence of the judiciary. So the central issue pertaining to the creation of an efficient judicial system is how to establish accountability mechanisms for judicial office holders while at the same time respecting their independence.<sup>3</sup>

Judicial independence guarantees exist to protect individuals, allowing a fair and impartial trial before a court of law and protecting the individual against the abuse of power. Accordingly, judges shall not arbitrarily decide on cases, but have a duty to adjudicate fairly and impartially according to the law. Consequently, judges should be responsible for their actions in order to ensure full public confidence in the judiciary by maintaining independence and impartiality in exercising their duties.<sup>4</sup> Hence, this may be considered to be the origin of the need for adopting a code of judicial ethics - as a rule of conscientious and dignified conduct in performing the judicial office - and establishment of disciplinary accountability of judges.

This study focuses on disciplinary accountability of judges in Serbia. In the **first section** it provides an overview of international standards in this area, based on international instruments that have been adopted both at the universal (United Nations) and at the regional level (Council of Europe). In the **second section** it deals with the legal framework of disciplinary accountability of judges in Serbia, analyzing provisions of relevant laws and bylaws pertaining to disciplinary offences, appointment of disciplinary bodies, conducting proceedings and determining disciplinary sanctions. In the **third section**, the study analyzes the practices in establishing disciplinary accountability of judges in Serbia in order to identify the most common disciplinary offences, the manner in which disciplinary bodies interpret relevant provisions on disciplinary accountability of judges and the sentencing policy applied. The analysis of the disciplinary bodies case-law is conducted on the basis of 87 decisions of the High Judicial Council (HJC) submitted to the OSCE Mission for the purpose of this study report, which were delivered over the period from the end of October 2013 to the end of January 2016.<sup>5</sup> The reports on the work of the HJC over the period from 2013 to 2016, submitted to the National Assembly, have been used as

---

<sup>1</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, UN Doc. A/HRC/6/32 (28 April 2014), p. 5, para. 19.

<sup>2</sup> *Ibid*, para. 20.

<sup>3</sup> *Ibid*, para. 23.

<sup>4</sup> *Ibid*, p. 11, para. 59.

<sup>5</sup> This does not include all decisions passed by disciplinary bodies within this period, but represents a significant sample. For additional information, please refer to section 3.1.

well. In addition, other relevant information on specific cases <sup>6</sup> submitted by the HJC to the OSCE Mission, as well as the HJC response to the inquiries submitted by the OSCE Mission, referring to the information about specific cases in which there was no second-instance decision were used. In the **fourth section**, the study provides a conclusion regarding the compliance of the domestic legal framework and practice with the international standards, while the **fifth section** outlines the specific recommendations for improving the legal practice in the field of disciplinary accountability of judges in Serbia.

## 1. International Standards

International agreements do not explicitly mention the issue of accountability of judges, but rather deal with the need to ensure the independence thereof.<sup>7</sup> Thus, the international human rights agreements guaranteeing the right to a fair trial require the existence of an independent and impartial court which would decide on the rights and obligations of an individual (e.g. Article 14 on the International Covenant on Civil and Political Rights (hereinafter referred to as the: ICCPR)<sup>8</sup> and Article 6 of the European Convention on Human Rights (hereinafter referred to as the: ECHR<sup>9</sup>).

However, the question of accountability of public officials is provided indirectly under certain international agreements. In view of the aforementioned, the UN Convention against corruption specifies promotion of "integrity, accountability and proper management of public affairs [...]" as one of the objectives mentioned thereunder (Article 1 (c)).<sup>10</sup> The Convention requires each State Party to promote "integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system"(Article 8 (1)), requiring them to endeavor to "apply, within [their respective] institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions" (Article 8 (2)) as well. The specific obligation relating to the prevention of corruption in the judiciary requires each State Party to undertake measures for strengthening the integrity of the judges that would have no impact on their independence, which may include adoption of the rules with respect to the conduct of members of the judiciary (Article 11).

In addition to the aforementioned international agreements, there are a number of international documents providing guidelines for the states on how to regulate accountability of judges. They were adopted at both the universal (within the United Nations (hereinafter referred to as the: UN)) and the regional levels. As far as the documents adopted at the regional level are concerned, this study shall focus on the ones adopted at the European level (within the Council of Europe (hereinafter referred to as the: CoE), since they are relevant in the context of Serbia.

---

<sup>6</sup> These include the information concerning the outcome of the proceedings for dismissal on the grounds of the qualified form of disciplinary offence established, and those related to the issues of the specific cases for which only the first- instance decision of the Commission has been furnished. The latter referred to the HJC advising whether such a decision has been appealed in a timely manner, that is, whether there was a second-instance decision-making.

<sup>7</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, *see supra note 1*, p. 6, para. 25

<sup>8</sup> *Official Journal of SFRY - International Agreements*, No. 7/71.

<sup>9</sup> *Official Journal of SCG - International Agreements*, No. 9/03.

<sup>10</sup> *Official Journal of SCG - International Agreements*, No. 12/05.

Contribution to the improvement of the standards governing accountability of judges is made by the Special Rapporteur on the independence of judges and lawyers of the UN, appointed in 1994.<sup>11</sup> The Special Rapporteur, *inter alia*, dedicated the entire 2014 report to the issues of judicial accountability.<sup>12</sup> It is based on an analysis of the rules established at the international level and the implementation thereof in the practice of international bodies. Based on the aforementioned findings, the recommendations have been drafted, providing additional guidance for the states in adopting and implementing efficient mechanisms of judicial accountability in compliance with the principles of judicial independence.<sup>13</sup>

## 1.1. International Documents

### 1.1.1. UN Documents

**Basic Principles on the Independence of the Judiciary** (hereinafter referred to as the: UN Basic Principles)<sup>14</sup> adopted in the framework of the UN are the first international document relevant to disciplinary accountability of judges. This document sets forth that judges shall "always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary" (Principle 8). Accordingly, the UN Basic Principles provide for the existence of an appropriate procedure which would enable a most prompt and fair consideration of any allegations and complaints against judges "referring to the judicial and professional capabilities", with respect for the principle of the right to a fair trial and confidentiality in the initial stage of consideration, unless otherwise required by the judge (Principle 17).

In addition, it has been established that "judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties" (Principle 18). Furthermore, the UN Basic Principles provide that decisions in all disciplinary proceedings and proceedings for the discharge from office or dismissal shall be passed in accordance with the established rules of conduct of judges (Principle 19), and that they should be subject to an independent review (Principle 20). It may be possible to deviate from the principle of an independent review in the case of any "decision of the highest court and those of the legislature in impeachment or similar proceedings" (Principle 20).

In addition, the international professional association of judges, the *Judicial Group on Strengthening Judicial Integrity*,<sup>15</sup> has developed standards to govern ethical conduct of judges in **the Bangalore**

---

<sup>11</sup> Commission on Human Rights, Resolution 1994/41 on independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. E/CN.4/1994/132 (4 March 1994).

<sup>12</sup> Please refer to *supra* note 1.

<sup>13</sup> Please refer to *supra* note 1, p. 20, para. 110-130.

<sup>14</sup> Adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985. This document has been approved by the General Assembly in the resolutions thereof 40/32 and 40/146, UN doc A / RES / 40/32 (29 November 1985), and A / RES / 40/146 (13 December 1985). This document is not subject to ratification because it does not fall within the scope of international agreements.

<sup>15</sup> Non-governmental organization consisting of high-level judicial officials from various countries. Please refer to <http://www.judicialintegritygroup.org/an-innovative-experiment> (10.02.2016).

**principles of judicial conduct** (hereafter: the Bangalore Principles).<sup>16</sup> This document was approved by the UN<sup>17</sup> in order to provide guidance for the states in adopting the codes of ethics for judges, which contribute to the protection of their integrity as well.<sup>18</sup> As such, the Bangalore principles are an important step in filling the legal vacuum addressing the lacunae within the international legal framework of the accountability of judges.<sup>19</sup> The respective principles are based on the assumption that "judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge".<sup>20</sup> The Bangalore Principles envisage six values the judicial conduct should be based on: (a) independence, (b) impartiality, (c) integrity, (d) propriety, (e) equality [of parties] and (f) competence and diligence. For each of these values, there is an underlying principle of judicial conduct and the guidelines for the application thereof in practice.<sup>21</sup>

### 1.1.2. CoE Documents

At the regional level, within the Council of Europe, the documents dealing with issues of accountability of judges have also been adopted. First, the Council of Ministers of the Organization adopted the Recommendation 94 (12) on the independence, efficiency and the role of judges (1994).<sup>22</sup> The principles of this recommendation were updated in 2010, under the **Recommendation 2010 (12) on the independence, efficiency and role of judges** (hereinafter referred to as the: Recommendation 2010 (12)),<sup>23</sup> and is therefore considered to be a relevant document on this issue available nowadays. This Recommendation, *inter alia*, determines general and specific duties of judges, which are mainly related to conducting court proceedings efficiently and diligently (Chapter VII, items 59-64). In addition, it provides that a disciplinary proceeding against a judge may be conducted in case of any failure to perform his/her duties in an efficient and proper manner (Chapter VII, item 69). The Recommendation 2010 (12) contains an explicit provision stipulating that the application of the law, assessment of facts and weighing the evidence conducted by judges in deciding the case cannot serve as the grounds for any disciplinary action, except in the case of malice or gross negligence (Chapter VII, item 66).

---

<sup>16</sup> Economic and Social Council, *Resolution 2006/23, Strengthening Basic Principles of Judicial Conduct*, UN Doc. E / RES / 2006/23 (27 July 2006), Annex.

<sup>17</sup> UN Economic and Social Council in 2006 adopted the resolution that marked the Bangalore Principles complementary to the Basic Principles of Independence of the Judiciary, and urged the countries to encourage their judiciaries to take these principles into account upon consideration and development of the rules governing their professional and ethical conduct. Please refer to *ibid*, Item 1.

<sup>18</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, *See supra note 1*, p. 6, para. 29.

<sup>19</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, *See supra note 1*, p. 6, para. 29.

<sup>20</sup> Preamble, Bangalore Principles of Judicial Conduct, *see supra note 16*.

<sup>21</sup> Thus, for example, this document defines the "competence and diligence" as one of the values of judicial conduct prescribing the corresponding principle that "competence and diligence are the prerequisites to the due performance of judicial office" (principle 6), and that the application of this principle in practice, *inter alia*, stipulates that "the judicial duties take precedence over all other activities" (6.1), that the judge shall perform his/her duties "efficiently, fairly and with reasonable promptness" (6.5), and that the judge shall not "engage in conduct incompatible with the diligent discharge of judicial duties" (6.7).

<sup>22</sup> Council of Europe Committee of Ministers, Recommendation No. R (94) 12 of the Committee of Ministers on the Independence, Efficiency and the Role of Judges, CM / Rec (1994) 12 (13 October 1994).

<sup>23</sup> Council of Europe Committee of Ministers, Recommendation No. R (2010) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges, CM / Rec (2010) 12 (17 November 2010).



As far as disciplinary proceedings are concerned, according to the Recommendation 2010 (12), they shall be conducted by independent bodies or the courts, ensuring full observance of the guarantees of a fair trial. In addition, judges must be granted the right to appeal the decision of the disciplinary body. The types of sanctions that may be imposed in disciplinary proceedings are not prescribed,<sup>24</sup> but, as set forth thereunder, it is only required that the sanctions must be proportionate to the offence committed (Chapter VII, item 69).

An important novelty introduced under the Recommendation 2010 (12)<sup>25</sup> is that the document contains a chapter dealing with judicial ethics. As envisaged thereunder, judges shall be guided by ethical principles of professional conduct, which not only contain their obligations violation of which may be disciplinary sanctioned, but provide the judges with guidelines instructing them how to conduct themselves (Chapter VIII, item 72). These principles should be prescribed under the codes of judicial ethics, which should inspire public confidence in judges and courts; in development of the rules of the code of ethics judges should play a leading role (Chapter VIII, item 73).<sup>26</sup>

In addition to the recommendations of the Council of Ministers, under the auspices of the CoE the **European Charter on the Statute for Judges** (1998) (hereinafter referred to as the: Charter) was drafted as well.<sup>27</sup> It contains, *inter alia*, special provisions on disciplinary responsibility of judges. In this context, first of all, the Charter stipulates the obligations of judges - in discharging their duties, judges shall be fully available (implying time, care and attention required to deliver an appropriate judgment in the particular case),<sup>28</sup> shall show respect for the participants in court proceedings<sup>29</sup> and vigilance in maintaining a high level of competence in a trial. Judges are also obliged to respect the secrecy of information obtained in the course of the proceedings (item 1.5).

In the event a judge violates any of the duties prescribed by the law, the Charter provides for the possibility of disciplinary proceedings before the competent authority, which includes at least half of the members appointed from among judges. During the course of these proceedings, the right to a fair trial shall be fully respected, and the judge whose conduct is the subject of the disciplinary proceeding shall be granted the right to representation. The sanctions imposed must be prescribed by the law and

---

<sup>24</sup> Earlier Recommendation No. 94 (12) contained examples of the measures that can be undertaken: (a) withdrawal of a case from a judge; (b) appointment of a judge to another judicial duty within the court; (c) economic sanctions, such as a temporary reduction in salary; and (d) suspension (Principle VI.1), whereas the measure of dismissal in disciplinary proceedings has been allowed only for a cause precisely defined under the law in the event of a gross breach of Disciplinary Rulebook (Principle VI.2).

<sup>25</sup> In relation to the Recommendation 94 (12).

<sup>26</sup> In addition, judges should be able to seek advice on ethical issues from a body within the judiciary (Chapter VIII, item 74).

<sup>27</sup> European Charter on the Statute for Judges and Explanatory Memorandum, DAJ / DOC (98) 23 (8-10 July 1998) (European Charter on the Statute for Judges and Explanatory Memorandum). Work on the text of the Charter began after the meeting of the 13 states of the Western, Central and Eastern Europe and the representatives of the *European Association of Judges* and the *European Association of Judges for Democracy and Freedom*, where the need for the adoption thereof was expressed, as well as the willingness of the Council of Europe to provide assistance in drafting thereof. Thus, the Directorate for Legal Affairs of the Council of Europe engaged three experts, who drawn up the draft Charter. With certain amendments, the draft was adopted at the next meeting, as well as the text of the European Charter on the Statute for Judges. Please refer to [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf) (17.2.2016).

<sup>28</sup> This term is also limited by the Explanatory Memorandum. Please refer to *ibid*, p. 12.

<sup>29</sup> Please refer to *ibid*, p. 12.

proportionate with the offence committed. The decision of the disciplinary body must be subject to a higher-instance judicial authority review (item 5.1).

The Charter sets forth that everyone shall be granted the right to appeal, without any specific formalities, to an independent body for any *miscarriage of justice* observed in the particular case. In case the respective body, on the basis of a careful and thorough analysis, determines that the violation has been undoubtedly caused by a judge, the complaint must be forwarded to the disciplinary authority, or referred to another competent body (item 5.3).

In addition to the provisions regulating disciplinary accountability of judges, the Charter contains an additional specific provision. Namely, it provides that the state must guarantee compensation for damages incurred as a result of any decision or conduct of a judge (item 5.2). Therefore, this guarantee exists only if the damage occurred due to actions of a judge.<sup>30</sup> The Charter also allows the state, if prescribed by the law, to initiate the proceedings for reimbursement from the judge, within the fixed limit, in case of *gross and inexcusable breach* of the rules governing the performance of judicial duties (item 5.2).<sup>31</sup>

Within the CoE, the Consultative Council of European Judges<sup>32</sup> adopted a relevant document in 2010 - the Magna Carta of Judges (hereinafter referred to as the: Magna Carta).<sup>33</sup> This document contains the part that deals with ethics and responsibility of judges. As provided thereunder, "deontological principles [in addition to] disciplinary rules shall guide the actions of judges". They should be drafted by the judges themselves and included into their training programmes (para. 18). Furthermore, the Magna Carta prescribes that states shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure (para. 19). Judges may be held criminally liable for offences committed outside their judicial office, whereas no such liability shall be imposed on judges for unintentional failings in the exercise of their functions (para. 20). Magna Carta allows that only in case of deliberate failings (willful default) in the performance of judicial duty, the judge shall be held personally responsible (para. 22).

## 1.2. International Practice

In practice of the relevant international bodies responsible for protection of human rights, in particular the Human Rights Committee<sup>34</sup> and the European Court of Human Rights,<sup>35</sup> the issue of compliance of mechanisms for the establishment of disciplinary accountability in the State parties with the specific provisions set forth under the underlying contract on the right to a fair trial (Art. 14 of the ICCPR, Art. 6

---

<sup>30</sup> Please refer to *ibid*, p. 17.

<sup>31</sup> In order to initiate the proceeding, the state is required to obtain the approval of an independent body which has the authority to ensure the independence and autonomy of courts.

<sup>32</sup> Advisory Committee established by the Committee of Ministers, in order to strengthen the role of judges in Europe. This body adopts opinions concerning the status of judges and the performance of judicial office, furnishing the Committee of Ministers therewith accordingly. For additional information, please refer to [http://www.coe.int/t/DGHL/cooperation/ccje/default\\_en.asp](http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp) (12/02/2016).

<sup>33</sup> Council of Europe, Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)*, CCJE (2010) 3 Final (17 November 2010).

<sup>34</sup> The body in charge of monitoring the enforcement of the ICCPR.

<sup>35</sup> The court in charge of monitoring the enforcement of the ECHR.

of the ECHR) has been addressed. The practice of these international bodies reflects some of the above-mentioned principles set forth under the international documents regulating the establishment and conduct of proceedings for disciplinary accountability of judges.

Thus, for example, the Human Rights Committee has repeatedly emphasized that the states must establish clear procedures and objective criteria governing suspension, dismissal and disciplinary sanctions imposed on judges,<sup>36</sup> which should be applied by an independent disciplinary body.<sup>37</sup> These standards have been confirmed in the jurisprudence of the European Court of Human Rights.<sup>38</sup> The same view is shared by the Special Rapporteur on the independence of judges and lawyers of the UN.<sup>39</sup>

In addition, the Special Rapporteur of the UN sets more precise standards pertaining to the composition of bodies deciding on disciplinary accountability of judges, which, according to the international standards, should be independent. The Special Rapporteur requests that the authorities deciding on disciplinary accountability of judges shall have no political representatives among the members thereof (that is, representatives of executive and legislative branches of government). According to the Special Rapporteur, disciplinary bodies shall be exclusively composed of judges (active or retired), with a recommendation that the membership thereof shall include representatives of other legal professions or professors.<sup>40</sup>

## 2. National Legal Framework

The legal framework for the establishment of disciplinary responsibility of judges in Serbia consists of several laws. First of all, these imply legislative acts - **the Law on Judges**<sup>41</sup> and the **Law on the Judicial Council**<sup>42</sup> - and then, the by-law of the High Judicial Council (hereinafter HJC) – the **Rulebook governing the proceedings for determination of disciplinary accountability of judges and courts presidents** (hereinafter referred to as the: Disciplinary Rulebook).<sup>43</sup> They regulate disciplinary bodies, proceedings, offences and sanctions.

It is noteworthy that the Disciplinary Rulebook from 2015 regulates disciplinary accountability of court presidents, which is a novelty in relation to the Rulebook from 2010.<sup>44</sup>

---

<sup>36</sup> Human Rights Committee, *Cedeño. Bolivarian Republic of Venezuela*, UN Doc. CCPR/C/106/D/1940/2010 (4 December 2012), para. 7.3. Please refer to UN Doc. CCPR/C/ARM/CO/2-3, para. 21.

<sup>37</sup> Human Rights Committee, Consideration of reports submitted by State parties under article 40 of the Covenant, *Concluding observations of the Human Rights Committee on the Republic of Moldova*, UN Doc. CCPR / CO / 75 / MDA (5 August 2002) p. 4, para. 12.

<sup>38</sup> Please refer to *Harabin v. Slovakia*, App. No. 58688/11 (20 February 2013), para. 132-133; *Oleksandr Volkov v. Ukraine*, App. No. 21722/11 (09 January 2013), para. 199 and 205; *Olujić v. Croatia*, App. No. 22330/05 (05 May 2009), para. 37-38.

<sup>39</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, *See supra note 1*, p. 14, para. 78.

<sup>40</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, *See supra note 1*, p. 17, para. 93

<sup>41</sup> *Official Gazette of RS*, No. 116/08, 58/09 - Decision of the CCS, 104/09, 101/10, 8/12 - Decision of the CCS, 121/12, 124/12 - Decision of the CCS, 101/13, 111/14 - Decision of the CCS 117/14, 40/15, 63/15 – Decision of the CCS, and 106/15.

<sup>42</sup> *Official Gazette of RS*, No. 116/08, 101/10, 88/11 and 106/15.

<sup>43</sup> *Official Gazette of RS*, No. 41/15.

<sup>44</sup> *Official Gazette of RS*, No. 71/10.

In addition, there are other laws that are important for disciplinary accountability of judges, both in substantive and procedural sense.

First of all, the HJC has adopted the **Code of Ethics**,<sup>45</sup> which is relevant in the substantive sense, since it lays down the principles and rules of conduct of judges the Law on Judges relies upon in prescribing disciplinary offences under Article 90 (1).

In procedural terms, the **Criminal Procedure Code** (hereinafter referred to as the: CPC) is relevant,<sup>46</sup> as the Disciplinary Rulebook stipulates its subsidiary application in determining disciplinary accountability of judges, , in case of any issues which are not regulated under the Rulebook or under the Law on Judges (Article 2).

Finally, the Criminal Code may be relevant in disciplinary proceedings as well,<sup>47</sup> with the institutes that may be significant because of the close relation between the disciplinary proceedings and the criminal matter.<sup>48</sup> Therefore, rightfully, some experts believe that the Disciplinary Rulebook should be amended by introducing a subsidiary application of the Criminal Code.<sup>49</sup> However, the aforementioned was not introduced upon the amendment of the Rulebook.

## **2.1. Disciplinary Bodies**

The Law on Judges determines disciplinary bodies - the **Disciplinary Prosecutor** and the **Disciplinary Commission** (Art. 93 (1)). These bodies shall be established by the HJC, appointing members from among judges (Art. 93 (1) and (2)). In addition, the HJC determines the requirements for appointment, terms of office and the manner of termination of the office of disciplinary bodies (Art. 93 (3) of the Law on Judges and Art. 13 of the Law on HJC). Their *modus operandi* and the manner of decision-making are governed by the HJC Disciplinary Rulebook, in accordance with the Law on Judges and the Law on HJC (corresponding Article 93 (3) and Article 13). The term of office envisaged for disciplinary bodies is four years (Art. 5 (2) and 9 (4) of the Disciplinary Rulebook). The **HJC** has a role in the second-instance disciplinary proceedings (Art. 97 (2) of the Law on Judges, Art. 13 of Law on HJC and Art. 36 of the Disciplinary Rulebook).

Disciplinary Prosecutor decides on the initiation of a disciplinary proceeding, acting on the basis of a disciplinary report (Art. 5 (1) of the Disciplinary Rulebook). S/he performs the duties directly or through on of the three deputies (Art. 6 (1) and 7 (1) of the Disciplinary Rulebook).

The Disciplinary Commission conducts disciplinary proceedings and decides on the proposal of the Disciplinary Prosecutor to initiate the proceedings (Art. 9 (3) of the Disciplinary Rulebook). The

---

<sup>45</sup> *Official Gazette of RS*, No. 96/10.

<sup>46</sup> *Official Gazette of RS*, No. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14.

<sup>47</sup> *Official Gazette of RS*, No. 85/05, 88/05 - rev., 107/05 - rev., 72/09, 111/09, 121/12, 104/13 and 108/14.

<sup>48</sup> Smilja Spasojevic, "Disciplinary responsibility of judges in the Republic of Serbia in regulation and practice - analysis of legislation, the most common reasons of responsibility, and the circumstances that led to an increased number of cases processing disciplinary offences", Public Law Centre Foundation, available at [http://www.fcjp.ba/templates/ja\\_avian\\_ii\\_d/images/green/Smilja\\_Spasojevic1.pdf](http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Smilja_Spasojevic1.pdf) (15.02.2016), p. 2.

<sup>49</sup> *Ibid*, p. 3.

Commission is composed of a Chairman and two members, who have deputies (Art. 9 (1) of the Disciplinary Rulebook).

Judges who have been in office for at least fifteen years and have a clear disciplinary record may be appointed as members of disciplinary bodies (Art. 11 (2) and (4) of the Disciplinary Rulebook). The same requirements are set forth by the Rulebook for deputy members of the Disciplinary Commission (Art. 11 (4)), except that for the Deputy Disciplinary Prosecutor a shorter period in office is required (ten-year term) (Art. 11 (3)). Members of disciplinary bodies cannot be appointed from among court presidents (Art. 11 (5) of the Disciplinary Rulebook).<sup>50</sup>

Disciplinary Rulebook contains provisions governing recusal (Art. 13), suspension (Art. 14), discharge from duty (Art. 15) and dismissal (Art. 16-20) thereof.

## **2.2. Disciplinary Offences**

The Law on Judges defines a disciplinary offence as a "negligent performance of judicial office, or behavior of a judge unworthy of judicial office", which has been prescribed by the law as an offence (Art. 89).

Guidelines on how judges should behave are contained in the Code of Ethics.<sup>51</sup> It is based on seven principles governing judges' behavior both in the exercise of their judicial duties, and elsewhere. These are: (1) independence, (2) impartiality, (3) competence and responsibility, (4) dignity, (5) commitment, (6) freedom of association and (7) commitment to the principles of the Code of Ethics. For each of these principles there are corresponding rules of conduct prescribed for judges. As shown in the text below, the Law on Judges relies on this Code of Ethics in prescribing disciplinary offences as well.

This Law determines disciplinary offences as follows:

- (1) breach of impartiality principle;
- (2) failure of a judge to request recusal in cases where there is a reason for recusal prescribed under the law;
- (3) unjustifiable delays in drafting of decisions;
- (4) processing cases in an order contrary to the order of registration thereof;
- (5) unjustifiable failure to schedule hearings or trials;
- (6) repeated tardiness for scheduled hearings;
- (7) unreasonable prolonging of the proceedings;
- (8) unjustifiable failure to notify the court president on the cases with prolonged proceedings;
- (9) manifestly unfair treatment of participants in court proceedings and court staff;

---

<sup>50</sup> HJC announces a public invitation for submission of applications for appointment of judges to the disciplinary bodies (Art. 12 (1) of the Disciplinary Rulebook). Upon passing the decision on the appointment thereof, the HJC takes into account all data from the personal and professional background resume, the type of professional experience, opinion on the candidate expressed by the Judges Session, that is, the General Session of the Supreme Court of Cassation (Art. 12 (2) of the Disciplinary Rulebook).

<sup>51</sup> Please refer to *supra* note 45.

- (10) non-observance of the working hours;
- (11) accepting gifts contrary to the rules regulating the conflict of interest;
- (12) engaging in inappropriate relations with parties or their legal representatives during the proceedings;
- (13) making public statements and commenting on court decisions, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure ;
- (14) engaging in the activities defined under the law as incompatible with the judicial office;
- (15) unjustifiable non-attendance of mandatory training programs;
- (16) provision of incomplete or inaccurate information relevant to the work and decision-making of the High Judicial Council;
- (17) unjustifiable shifts in the court's annual schedule of judges' activities, and the violation of the principle of natural judge contrary to the provisions stipulated under the law and
- (18) violation of the provisions of the Code of Ethics to a great extent (Art. 90 (1)).

The basic forms of a disciplinary offence, as defined under the Law on Judges, can be roughly divided into several groups.<sup>52</sup> *The first* group would be composed of offences involving particular actions which are *by default* classified as a disciplinary offence.<sup>53</sup> *The second* group comprises the *blanket-type* offences, whose existence is conditioned by identifying violations of other regulations.<sup>54</sup> *The third* and the largest group consists of offences that require that *the legal standard* set for the existence of a disciplinary offence is applied to specific actions of a judge, for example, "unjustifiable", "repeated", "obvious" and "to a great extent."<sup>55</sup> One of the defined offences implies a *mixed type* offence featuring the characteristics of the second and the third group offences. This is the offence set forth under the last paragraph of Article 90 (1), defined as a violation of the "Code of Ethics to a great extent" (subparagraph 18).

When it comes to violations of the Code of Ethics as a disciplinary offence, the standard "to a great extent" does not give any clear guidelines to a reasonable observer which specifies the provision, clearly marking the point where the violation of the Code turns from "lesser" or "medium" degree offence to a "to a great extent" offence.

In addition to the basic form of a disciplinary offence, the Law on Judges envisages its more severe (qualified) form. It occurs in case the commission of a disciplinary offence results in a "serious disruption in the exercise of judicial power or regular duties at the court or a severe damage to the dignity of the court or and public trust in the judiciary, and in particular if it results in the statute of limitations causing serious damages to the property of the party in proceedings, as well as in the case of repeated disciplinary offence " (Art. 90 (2) that is, when the judge was found responsible for a disciplinary offence

---

<sup>52</sup> Please refer to Spasojevic for more details, *see supra note* 48, p. 4.

<sup>53</sup> Such is the case with non-observance of working hours (a. 10) and submission of incomplete or incorrect information relevant to the work and decision-making of the HJC (a. 16).

<sup>54</sup> These include the ones referring to the principle of impartiality (a. 1) recusal of a judge (a. 2), conflict of interest (a. 11), making statements in the media (a. 13), engaging in the activities defined under the law as incompatible with the judicial office (a. 14), violation of the principle of natural judge (a. 17) or the Code of Ethics to a great extent (a. 18).

<sup>55</sup> Subparagraphs 3-5, 7-9, 12, 15, 17 and 18.

three times (Art. 90 (3)). This provision appears to be rather vague. As a matter of fact, the issue arises whether the consequences set forth by the law must be proven also in cases of the statute of limitations or in case of the significant damage to the property of the parties, which are emphasized under this provision using the word "particularly". It seems that the legislator wanted to say that when these conditions are undoubtedly fulfilled, they result in consequences required to establish a qualified offence. Otherwise, there can be no reason why they would be singled out. In addition, it is not clear whether the existence of these conditions is associated only with a severe damage to the reputation and public confidence in the judiciary as a result, or it relates to two or three consequences required under the respective provision to prove the existence of a qualified form of disciplinary offence.

Furthermore, since the legislator uses the linking word "and" between the special circumstances of the statute of limitations and the significant damage to the property of the parties, the question is whether they are set forth cumulatively. If this is the case, then how a "significant damage to property of the party" is to be proved when the statute of limitations is applied on criminal prosecutions which were initiated *ex officio* (e.g. first degree murder or genocide)? In addition, it raises the question of what happens in civil cases in which the malpractice of a judge causes the significant damage to property of the parties, since there is no possibility of applying the statute of limitation once the court proceedings are initiated within the specified deadline. Third, do the three above referenced final decisions on a disciplinary offence lead to determination of the qualified disciplinary offence by default?

All of the aforementioned point to the weaknesses of this provision, which can be overcome by its interpretation in practice.

### **2.3. Disciplinary Sanctions**

The Law on Judges provides for the following disciplinary sanctions for the basic offences: (1) public reprimand; (2) reduction in salary not exceeding 50% for up to one year, and (3) prohibition of promotion for up to three years (Art. 91).

The Law stipulates that the disciplinary sanction has to be proportionate to the severity of the disciplinary offence (Art. 91 (2)), as prescribed under Art. 3 (1) of the Disciplinary Rulebook. In determination of the sanction, it shall be taken into account whether the judge, and/or the court president, has any earlier disciplinary records, his/her behavior in disciplinary proceedings and other circumstances that may affect determination of the sanction imposed (Art. 3 (2) of the Disciplinary Rulebook).

The mildest sanction - a public reprimand - may be imposed only if a disciplinary accountability of a judge is being established for the first time (Art. 91 (3) of the Law on Judges). The other two - salary reduction of up to 50% and the prohibition of promotion for up to three years - may be imposed cumulatively (Art. 91 (4) of the Law on Judges).

In case of a grave disciplinary offence, the procedure for dismissal before the HJC shall be initiated (Art. 92 of the Law on Judges). Initiation of the proceeding itself is not a sanction in the legal sense of the

word,<sup>56</sup> but, in the context of this study report, dismissal of a judge due to the involvement thereof in a qualified offence shall be considered to be the sanction.

## **2.4. Disciplinary Proceedings**

Disciplinary proceedings are conducted by the Disciplinary Commission, upon the motion of the Disciplinary Prosecutor made on the basis of the disciplinary report (Art. 94 (1) and (2) of the Law on Judges).

The proceedings are urgent and closed to the public unless the judge whose conduct is the subject of the disciplinary proceeding requests that they are public (Art. 94 (3) of the Law on Judges and Art. 4 of the Disciplinary Rulebook). In addition, the judge whose conduct is the subject of the disciplinary proceeding has the right to be heard, the right to representation (Art. 96 of the Law on Judges and Art. 27 (4) of the Disciplinary Rulebook), the right to appeal before the second-instance, that is the HJC (Art. 97 (2) of the Law on Judges and Art. 36 (1) of the Disciplinary Rulebook) and the right to initiate an administrative dispute if the HJC has imposed a disciplinary sanction (Art. 98 (4) of the Law on Judges and Art. 38 (5) of the Disciplinary Rulebook).

The Law prescribes the objective statute of limitations for disciplinary proceedings implying a two-year period from the date the disciplinary offence was committed (Art. 94 (4) of the Law on Judges).

### **2. 4. 1. Initiation of Disciplinary Proceedings**

Disciplinary report against a judge and/or the court president may be filed in writing by any person (Art. 21 (1) and (2) of the Disciplinary Rulebook).<sup>57</sup> The court president has the obligation to file a disciplinary report against a judge, in the event a judge performs a duty, action or other procedures that are incompatible with the judicial office (Art. 31 (3) of the Law on Judges).

Disciplinary Prosecutor creates a separate case file for each disciplinary report (Art. 22 (1) of the Disciplinary Rulebook).<sup>58</sup> In addition, s/he may request the judge against whom the report has been filed to comment on the allegations, but the judge is not obliged to respond thereto (Art. 23 (1) and (2) of the Disciplinary Rulebook). The Disciplinary Prosecutor shall warn the judge and/or the court president that any statement made in the disciplinary proceedings may be used as evidence against him/her (Art.

---

<sup>56</sup> For additional information, please refer to in Spasojevic, *see supra note 48*, p. 5.

<sup>57</sup> It must contain the full name of the judge, the name of the court the respective judge performs his/her judicial office at, a brief description of the actions undertaken by the judge, the name of the applicant, the address and signature thereof (Art. 19 (2) of the Disciplinary Rulebook).

<sup>58</sup> He may collect evidence and information from (a) natural persons and (2) the court, other state authorities and public institutions that are obliged to cooperate therewith (Art. 22 (2) of the Disciplinary Rulebook).



23 (3) of the Disciplinary Rulebook). The judge shall have the right to representation from the moment the Commission serves him the Prosecutor's motion (Art. 27 (4) of the Disciplinary Rulebook).

If the disciplinary report is incomprehensible or incomplete, it shall be returned to the applicant by the Disciplinary Prosecutor within eight days to remove the shortcomings thereof (Art. 21 (4) of the Disciplinary Rulebook), warning him/her of the consequences of any failure to do so (Art. 21 (5) of the Disciplinary Rulebook). If the applicant fails to do so, the application shall be *rejected* (Art. 24, subparagraph 1 of the Disciplinary Rulebook). The disciplinary report shall also be rejected in case it is anonymous or in case the statute of limitation has expired (Art. 24, subparagraphs 2 and 3 of the Disciplinary Rulebook).

If the Disciplinary Prosecutor considers the evidence is insufficient to initiate a disciplinary proceeding, the disciplinary report shall be *dismissed* as ill-founded (Art. 25 of the Disciplinary Rulebook)<sup>59</sup> and the applicant shall be notified in writing (Art. 26 of the Disciplinary Rulebook). In case the Disciplinary Prosecutor believes that there is a reasonable doubt that a disciplinary offence has been committed, s/he shall submit a proposal for conducting a disciplinary proceeding to the Disciplinary Commission, which shall mark the initiation of the disciplinary proceeding (Art. 27 (2) of the Disciplinary Rulebook).

The motion proposing a disciplinary proceeding, in addition to (1) personal details of the judge and/or the court president,<sup>60</sup> shall contain (2) the statement of facts and legal qualification of the disciplinary offence and (3) the proposed evidence to be presented at the disciplinary hearing and the proposed disciplinary sanctions<sup>61</sup> (Art. 27 (3) of the Disciplinary Rulebook).

## 2.4.2. First-Instance Disciplinary Proceedings

First-instance disciplinary proceedings shall take place before the Disciplinary Commission. Once the proposal for disciplinary action is complete,<sup>62</sup> it shall be forwarded to the judge and /or the court president subject to the disciplinary proceedings by the Commission along with the evidence of the Disciplinary Prosecutor. In addition, the judge and /or the court president shall be warned about his/her right to engage a counselor and that s/he may respond to the allegations himself/herself, or through his/her counselor within eight days from receiving the proposal to conduct a disciplinary procedure (Art. 96 (1) Law on Judges; Art. 28 (2) of the Disciplinary Rulebook). Upon expiration of this period, or upon receipt of the statement from the judge and /or the court president, the Disciplinary Commission shall schedule a disciplinary hearing (Art. 28 (3) of the Disciplinary Rulebook). The Disciplinary Prosecutor shall be furnished, along with the summons to the hearing, the statement from the judge and /or the

---

<sup>59</sup> Art. 95 of the Law on Judges stipulates that ill-founded reports shall be "rejected". This is an obvious weakness thereof caused by the legislator, given that "the rejection" may occur in the event of formal deficiencies in the particular motion, which definitely does not fall within the scope of the issue of its merits. 2010 Rulebook (Official Gazette of RS, No. 71/10) also contained the provision prescribing that ill-founded disciplinary reports shall be rejected (please refer to Art. 22 (1), subparagraph 2).

<sup>60</sup> The respective personal data shall include: full name, date of birth and address, the court the respective judge performs his/her judicial office at, and/or acts as a Court President (Art. 27 (3) a. 1 of the Disciplinary Rulebook).

<sup>61</sup> This is a novelty compared to the Rulebook 2010, which does not provide that the Disciplinary Prosecutor shall include the motion instituting the disciplinary action into the disciplinary sanction proposal. Please refer to the Rulebook 2010, Art. 23 (2), a. 3.

<sup>62</sup> It may return the proposal for disciplinary proceedings to the prosecutor for further development or amendment (Art. 28 (1) of the Disciplinary Rulebook).

court president (Art. 28 (4) of the Disciplinary Rulebook). The hearing may be scheduled only upon expiration of the eight-day period from the submission of the summons to the parties (Art. 28 (5) of the Disciplinary Rulebook).

If the Disciplinary Prosecutor during the course of the proceedings withdraws the proposal for disciplinary proceedings, the Disciplinary Commission shall suspend the proceedings (Art. 29 (1) of the Disciplinary Rulebook). In accordance with the *ne bis in idem* principle, it is not allowed to submit a new proposal for a disciplinary proceeding based on the same facts (Art. 29 (2) of the Disciplinary Rulebook).

The hearing shall be held in case the judge and /or the court president or the counselor thereof have been duly summoned but failed to attend the hearing without justifiable reasons (Art. 30 (1) of the Disciplinary Rulebook). Should the aforementioned non-appearance refer to the Disciplinary Prosecutor, it shall be considered as withdrawal of the proposal for the disciplinary proceeding (Art. 30 (2) of the Disciplinary Rulebook).

In the presentation of evidence the Disciplinary Commission shall not be limited by the evidentiary motions of the parties, but may consider any evidence it deems relevant to correct and full establishment of the facts (Art. 31 of the Disciplinary Rulebook). According to the Law on Judges, a judge shall have the right to present his/her oral statements before the Disciplinary Commission (Art. 96 (2) of the Law on Judges) and provide explanations and propose the evidence either directly or through his/her counselor (Art. 96 (1) of the Law on Judges).

The hearing shall be presided by the Chairman of the Disciplinary Commission (Art. 32 (1) of the Disciplinary Rulebook), who shall be in charge of warning the judge and /or the court president of his/her rights, which are regulated in detail under the Disciplinary Rulebook (Art. 32 (2)) and include the following:

- o the right to enter a plea (either personally or through the counselor thereof) and the right not to enter a plea,
- o the right to a denial of response to the particular question,
- o the right to freely state the allegations,
- o the right to admit or not admit responsibility for a disciplinary offence,
- o the right to present facts and propose evidence, question other participants in the proceeding, make objections and provide explanations referring to the evidence presented.

Following completion of the hearing, the Disciplinary Commission shall retire for deliberation and voting (Art. 33 of the Disciplinary Rulebook).<sup>63</sup> The new Rulebook has failed to regulate the manner of the decision-making of the Disciplinary Commission, while the old Rulebook provided for the adoption of decisions by majority vote.<sup>64</sup> This indicates a weakness that has to be corrected.

The Disciplinary Commission may (1) reject or (2) approve the proposal to conduct a disciplinary proceeding submitted by the Disciplinary Prosecutor and thereby pronounce the judge responsible for the disciplinary offence and impose an appropriate sanction thereupon (Art. 97 (1) of the Law on Judges and Art. 34 (1) of the Disciplinary Rulebook). Such a decision shall be taken in the form of a decision (Art. 34 (1) of the Disciplinary Rulebook), comprising, *inter alia*,<sup>65</sup> the rationale and the legal qualification of

---

<sup>63</sup> A special record shall be required on deliberation and voting duly signed by the members of the Disciplinary Commission and the record clerk in charge (Art. 33 (2) of the Disciplinary Rulebook).

<sup>64</sup> Please refer to Art. 26 (1) of the Disciplinary Rulebook, 2010.

<sup>65</sup> Pursuant to Art. 35 (1) of the Disciplinary Rulebook, the decision of the commission shall contain: 1) full name of the Chairman and the members of the Disciplinary Commission and the record clerk in charge; 2) the names of the

the disciplinary offence, along with the sanction and the legal remedy (Art. 35 (1) of the Disciplinary Rulebook).

The Disciplinary Commission shall be obliged, within eight days from the publication of the decision thereof, to draft a copy of the written decision and deliver it, without any delay, to the Disciplinary Prosecutor, the judge and /or the court president, and the counselor thereof (Art. 35 (2) of the Disciplinary Rulebook).

If the Disciplinary Commission establishes the responsibility of the judge for a grave disciplinary offence, it shall submit a proposal for the dismissal thereof to the HJC (Art. 64 and 92 of the Law on Judges). For additional details, please refer to the section 2.4.4.

#### **2.4.2.1. Right to Appeal**

The right to appeal the decision of the Disciplinary Commission shall be granted to the Disciplinary Prosecutor and to the judge. It shall be filed with the HJC within eight days from the receipt of the decision of the Commission (Art. 97 (2) of the Law on Judges and Art. 36 (1) of the Disciplinary Rulebook). In case of any failure to comply with the aforementioned, the decision of the Commission shall become final.

The appeal<sup>66</sup> may be filed because of: (1) violation of the rules governing the proceeding that could have affected making a lawful and proper decision; (2) erroneous or incomplete establishment of the facts; (3) any misapplication of the law; and (4) decision on the imposed disciplinary sanction (Art. 36 (2) of the Disciplinary Rulebook). New facts and new evidence may be presented and /or proposed within the appeal "only if the appellant makes it credible that without the guilt thereof, s/he could not express, that is, present them during the first-instance disciplinary proceeding" (Art. 36 (4) of the Disciplinary Rulebook).

The appeal, comprising the proposals, shall be submitted to the other party, which shall submit the response thereto within three days following the submission thereof; untimely responses shall not be taken into consideration (Art. 36 (5) of the Disciplinary Rulebook). The Disciplinary Commission shall, immediately upon receipt of the response to the appeal or upon expiration of the deadline for responding thereto, submit the case file to the HJC (Art. 36 (6) of the Disciplinary Rulebook).

#### **2.4.3. Second-Instance Disciplinary Proceedings**

As a rule, the HJC decides on the appeal without a hearing (Art. 37 (1) of the Disciplinary Rulebook).<sup>67</sup> Only in the case when it is considered that for the sake of a "proper establishment of the facts or in order to eliminate the violations of the rules governing the proceeding", it shall be necessary to initiate a

---

parties and the representatives thereof; 3) place and date of the decision; 4) decision rejecting the motion instituting disciplinary proceedings, and /or the decision pronouncing the judge responsible for having committed a disciplinary offense, legal qualification of the disciplinary offence and the disciplinary sanction imposed thereon; 5) a rationale; 6) decision on the costs of the proceedings; 7) the signature of the Chairman of the Disciplinary Commission; and 8) legal remedy.

<sup>66</sup> Pursuant to Art. 36 (3) of the Disciplinary Rulebook, an appeal shall contain: (1) reference to the decision being appealed; (2) a statement that the decision is contested in its entirety or in the particular section thereof; (3) the reasons for the appeal; and (4) the signature of the person lodging the appeal.

<sup>67</sup> The Rapporteur, appointed from among judges, shall provide a brief overview of the proceeding and the facts upon which the HJC passes the decision (Art. 37 (2) of the Disciplinary Rulebook).

rollback of evidence or presentation of evidence specified under the appeal, the HJC shall schedule a hearing (Art. 37 (3) of the Disciplinary Rulebook).<sup>68</sup>

The HJC is obliged to pass the required decision within 30 days following submission of the appeal (Art. 98 (2) of the Law on Judges), by majority vote (Art. 38 (1) of the Disciplinary Rulebook).<sup>69</sup>

The HJC may (1) reject the appeal as untimely or inadmissible; (2) dismiss the appeal as unfounded, and affirm the decision of the Disciplinary Commission; and (3) approve the appeal and revoke the decision of the Disciplinary Commission (Art. 98 (1) of the Law on Judges and Art. 38 (2) of the Disciplinary Rulebook).

The HJC decision shall contain, *inter alia*,<sup>70</sup> the elements fully consistent with the contents of the decision of the Disciplinary Commission appealed thereby and the decision on the appeal (Art. 38 (3) of the Disciplinary Rulebook). In the event the decision of the Disciplinary Commission has been revoked, the HJC decision must "include (1) the facts and legal elements of the disciplinary offence the judge has been pronounced responsible for and the disciplinary sanction imposed thereon; (2) establishment of a new disciplinary sanction; and (3) refusal of the Disciplinary Prosecutor's proposal " (Art. 38 (4) of the Disciplinary Rulebook).

The HJC shall be obliged to prepare the written copy of the decision within eight days, and submit a copy of the respective decision along with the case file back to the Disciplinary Commission, which shall promptly deliver a copy of the decision to the Disciplinary Prosecutor, the judge and/or the court president, and the counselor thereof (Art. 39 Disciplinary Rulebook).

The HJC decision shall be final (Art. 98 (3) of the Law on Judges and Art. 38 (5) of the Disciplinary Rulebook). No extraordinary legal remedies nor reopening of the proceedings shall be allowed (Art. 47 of the Disciplinary Rulebook), however, against the final decision of the HJC an administrative dispute may be initiated (Art. 38 (5) of the Disciplinary Rulebook does not contain any limitations in this regard, however, the superior legal act, the Law on Judges, under Art. 98 (4) grants this possibility to judges only).

The final decision imposing a disciplinary sanction shall be entered in the personal record of the judge (Art. 98 (5) of the Law on Judges and Art. 46 of the Disciplinary Rulebook).

#### **2.4.4. Dismissal Procedure**

Once the Disciplinary Commission has established the responsibility for a grave disciplinary offence, it shall submit a substantiated *proposal for the dismissal of the judge* to the HJC based on that decision (Art. 64 and 92 of the Law on Judges and Art. 40 of the Disciplinary Rulebook), whereas, in case of the court president, this shall imply *a proposal for establishing the grounds for dismissal of the Court President* (Art. 43 of the Disciplinary Rulebook), furnishing the HJC with the complete case file (Art. 40 and 43 of the Disciplinary Rulebook). The judge dismissal procedure or the procedure for establishing the grounds for dismissal of the Court President, shall be deemed initiated upon submission of the proposal by the Commission (Art. 41 (1) and 44 (1) of the Disciplinary Rulebook). Such a proposal shall

---

<sup>68</sup> In this case, first of all, the Rapporteur gives a brief overview of the proceeding, presenting the facts, without expressing any opinion on the merits of the appeal, proceeding further to the parties presenting their arguments (Art. 37 (3) of the Disciplinary Rulebook).

<sup>69</sup> A special record shall be required on deliberation and voting duly signed by the members of the Council and the record clerk in charge.

<sup>70</sup> Other elements of the decision passed by the HJC include: the membership of the Council; the names of the parties; place and date of the decision; and the signature of the President of the Council.

be submitted by the HJC without any delay to the judge and /or the court president, who can express his/hers views thereon within eight days (Art. 41 (2) and 44 (2) of the Disciplinary Rulebook).

The HJC may accept or reject the respective proposals (Art. 42 and 45 of the Disciplinary Rulebook). In the event the proposal has been accepted the HJC shall take a decision on the dismissal of the judge (Art. 42 (1), subparagraph 1 of the Disciplinary Rulebook), that is, the decision proposing to the National Assembly to proceed to the dismissal of the court president (Art. 45 (1), subparagraph 1 of the Disciplinary Rulebook). In case of rejection of the proposal the HJC shall be allowed to (a) revoke the decision of the Commission, revising the section pronouncing the judge and/or the court president, responsible for a grave disciplinary offence and pronounce him/her responsible for the basic form of disciplinary offence instead, imposing a new disciplinary sanction or (b) release the judge and/or the court president from the disciplinary responsibility (Art. 42 (1), subparagraphs 2 and 3 and 45 (1), subparagraphs 2 and 3 of the Disciplinary Rulebook).

Hence, the new Disciplinary Rulebook changes the earlier decision in case of rejection of the proposal for dismissal of a judge returned the case file to the Disciplinary Commission for further action.<sup>71</sup> This will contribute to a faster completion of disciplinary proceedings and reduce the possibility of the expiry of the statute of limitation.

The judge may lodge the complaint to the HJC decision on dismissal within 15 days from receiving the decision (Art. 42 (2) of the Disciplinary Rulebook). Such an option is not granted in case the HJC takes the decision to initiate the procedure for establishment of the grounds for dismissal of the court president.

In case the HJC passes the decision on the dismissal of a judge the judge shall have the right to appeal before the Constitutional Court of Serbia (hereinafter referred to as the: CCS) (Art. 29 (1), subparagraph 12 of the Law on CCS<sup>72</sup>) within 30 days from the receipt of the decision (Art. 67 (1) of the Law on Judges). The CCS may reject the appeal or adopt it and annul the decision on the termination of office (Art. 67 (2) of the Law on Judges). The decision of the CCS shall be final (Art. 67 (2) and (3) of the Law on Judges). The option allowing the appeal to the CCS in case of dismissal of the court president has not been provided.

If, however, the HJC rejects the motion for the dismissal of a judge and establishes the responsibility thereof for the basic form of disciplinary offence and determines the sanction accordingly, the judge may initiate an administrative dispute (Art. 42 (2) of the Disciplinary Rulebook). In case that the HJC rejects the proposal for establishing the grounds for the dismissal of the court president, while at the same time establishing the liability for the basic form of disciplinary offence and imposing the sanctions, there is no such an option under the Rulebook. For additional information thereon, please refer to the section 2.6. below.

## **2.5. Costs of Disciplinary Proceedings**

---

<sup>71</sup> Please refer to Art. 28 (4) of the Rulebook, 2010.

<sup>72</sup> *Official Gazette of RS, No. 109/07, 99/11, 18/13* - Constitutional Court Decision, 40/15 and 103/15.

As far as the costs of a disciplinary proceeding are concerned, each party shall bear its own expenses, including costs of witnesses and experts proposed (Art. 48 (1) of the Disciplinary Rulebook). If the disciplinary proceeding is completed by the suspension of the procedure or rejection of the proposal for conducting the proceeding, the judge and/or the court president may require compensation of justified costs arising out of the proceeding, including the counselor fee, at the expense of the HJC (Art. 48 (2) of the Disciplinary Rulebook ). The decision on costs shall be taken by the Disciplinary Commission and it may be appealed to the HJC within eight days following the receipt of the decision (Art. 48 (3) and (4) of the Disciplinary Rulebook).

## **2.6. 2015 Rulebook: Introducing Disciplinary Responsibility for Court Presidents**

In view of the aforementioned, the new Disciplinary Rulebook provides for a disciplinary accountability of the court presidents and has envisaged that the rules governing the proceedings and decision-making in disciplinary proceedings against judges shall be applied *mutatis mutandis*.

Upon consideration of the issue of disciplinary accountability of the court presidents, first of all, it must be borne in mind that s/he performs a judicial duty in the court s/he is the president of (Art. 71 (2) of the Law on Judges). Therefore, with regard to the performance of the judicial office thereof, s/he is subject to the rules on the disciplinary accountability of *judges*, whereas according to the new Disciplinary Rulebook s/he is subject to the rules on disciplinary accountability in the exercise of *the duty of the court president*.

The novelties introduced under the new Rulebook regarding the disciplinary accountability of presidents opened certain questions.

*Firstly*, the Law itself expressly provides disciplinary accountability of judges only, for the negligent performance of *judicial duty* or behavior that is unworthy of *judicial office* (Art. 89 of the Law on Judges). Therefore, disciplinary offences are associated with *judicial duties*, and not with any other duties that may be performed by a judge in the organization of court administration. However, the Law on Judges indirectly provides for disciplinary accountability for the performance of the court president duty. Firstly, the Law stipulates that a judge shall be discharged from duty of the court president if s/he, *inter alia*, commits a grave disciplinary offence in the exercise of the duty of the court president (Art. 75 (1) of the Law on Judges). Then, in terms of disciplinary offences prescribed under the Law on Judges, in addition to those exclusively associated with the performance of judicial office (either in terms of his/her relationship with the parties<sup>73</sup> or in regard to conducting the proceeding),<sup>74</sup> there

---

<sup>73</sup> For instance, breach of impartiality principle, engaging in inappropriate relations with parties or their legal representatives during the proceedings, manifestly unfair treatment of participants in the proceedings, failure to request recusal.

<sup>74</sup> For instance, unreasonable prolonging of the proceedings, unjustifiable delays in decision drafting, unjustifiable failure to schedule hearings or trials, failure to notify the President of the Court on the cases with prolonged proceedings.

are offences that can only be committed while performing the office of the court president,<sup>75</sup> as well as those that may be committed also while performing the office of the court president.<sup>76</sup>

*Secondly*, the Disciplinary Rulebook expressly provides for the possibility to initiate an administrative dispute in the case of the court president for whom the HJC rejected a proposal to institute proceedings determining the grounds for the dismissal thereof, and determined responsibility for the basic form of disciplinary offence, having imposed the sanctions accordingly. This option is expressly stipulated under the Rulebook, under the same circumstances, applying to judges found responsible (Art. 42 (2)). It seems that there is no reason why the court president would not have the possibility to initiate an administrative dispute in case of being found responsible by the HJC for a basic form of disciplinary offence. Moreover, the Rulebook itself states that the second-instance disciplinary decisions issued by the HJC shall be subject to review by the Administrative Court (Art. 38 (5) Disciplinary Rulebook), therefore, such a possibility should be prescribed in case of changing of a decision of the Disciplinary Commission on the grave disciplinary offence committed by the court president, pursuant to which the proposal was submitted for determining the grounds for the dismissal of the court president.

### 3. Practice

Disciplinary bodies envisaged under the Law on Judges were appointed in late 2010 and began to work on January 2011.<sup>77</sup> Each year there is a growing number of disciplinary reports and initiating proceedings for establishing disciplinary responsibility.

As far as the number of disciplinary reports is concerned, the figures are as follows: in 2011 there were 168 reports filed with the Disciplinary Prosecutor,<sup>78</sup> in 2012 - 476 reports,<sup>79</sup> in 2013 - 540,<sup>80</sup> in 2014 – 944,<sup>81</sup> whereas in 2015 956 reports were filed in total,<sup>82</sup> but according to unofficial data, the number of disciplinary reports doubled in 2015 compared to 2014.<sup>83</sup>

---

<sup>75</sup> For instance, provision of incomplete or inaccurate information relevant to the work and decision-making of the High Judicial Council, unjustifiable shifts in in the court's annual schedule of judges' activities, and the violation of the principle of natural judge contrary to the provisions stipulated under the law.

<sup>76</sup> For instance, manifestly unfair treatment of the court staff, non-observance of the working hours, accepting gifts contrary to the rules regulating the conflict of interest, making public statements and commenting on court decisions, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure, engaging in the activities defined under the law as incompatible with the judicial office; unjustifiable non-attendance of the training programs, violation of the Code of Ethics to a great extent.

<sup>77</sup> Report of the work of the High Judicial Council, 2011, No. 021-05-19/2012-01 (29 March 2012), available at <http://www.HJC.sud.rs/sites/default/files/attachments/lzvestaj-o-rad-u-HJC-2011.pdf> (28.03.2016) (hereinafter referred to as the: HJC Report 2011), p. 32

<sup>78</sup> *Ibid*, p. 33. Cf. Report on the work of the High Judicial Council, 2012, No. 021-02-37/2013-01 (12 March 2013), (hereinafter referred to as the: HJC Report 2012), p. 39, which states that there were 175 reports filed in in 2011.

<sup>79</sup> *Ibid*, p. 39.

<sup>80</sup> Report on the work of the High Judicial Council, 2013, No. 400-00-5/2014-01 (24 March 2014), (hereinafter referred to as the: HJC Report 2013), p. 37.

<sup>81</sup> Report on the work of the High Judicial Council, 2014, No. 021-02-00034/2015-01 (17 March 2015), available at <http://HJC.sud.rs> (28 March 2016) (hereinafter referred to as the: HJC Report 2014), p. 42.

Data on the number of initiated disciplinary proceedings indicate that the number of disciplinary proceedings initiated in 2011 is 1,<sup>84</sup> in 2012 there were 5 proceedings in total,<sup>85</sup> whereas in 2013 this number had risen to 8 proceedings.<sup>86</sup> In 2014 42 disciplinary proceedings were initiated.<sup>87</sup> In 2015, the Disciplinary Commission conducted 33 disciplinary proceedings. Thirteen proceedings were conducted based on reports from 2014, and 20 proceedings based on reports from 2015. In 2015 the Disciplinary Prosecutor made 18 proposals for taking disciplinary action. As already mentioned in the introductory section, this study shall analyze the practice of the Disciplinary Commission and the HJC over the period from the end of 2013 to January 2016, based on 87 decisions taken by the HJC submitted to the OSCE Mission.<sup>88</sup> During the research conducted thereon, it has been noted that these do not cover all decisions taken by the disciplinary bodies within the specified period, but they certainly represent the majority sample thereof.<sup>89</sup> 87 decisions submitted for reference refer to 58 disciplinary proceedings.<sup>90</sup>

Hereinafter, for the sake of conciseness and presentation, the term "decision" shall be used to denote all kinds of decisions passed during disciplinary proceedings by the Disciplinary Commission and the HJC, in the same manner the provisions set forth under the Law on Judges (Art. 97 and 98) prescribe. In addition, for the same reason, hereinafter the term "decisions of disciplinary bodies" shall refer to the aforementioned decisions accordingly.

The notes specified under footnotes herein shall refer to specific decisions by indicating the acronym of the body the respective decisions were passed by (DC, HJC), followed by the official reference number of the case and the date of the decision in parentheses. In the event of any decision submitted with a case reference number tinted, the number in the note shall be specified as "\*\*\*\*".

### **3.1 Most Common Disciplinary Offences**

Based on the 58 case files submitted, disciplinary proceedings against judges have been initiated for the following offences as set forth under Article 90 of the Law on Judges:

---

<sup>82</sup> Report on the work of the High Judicial Council, 2015, No. 021-02-00032/2016-01 (8 March 2016), available at: <http://www.HJC.sud.rs/sites/default/files/attachments/Izvestaj%20o%20radu%20HJC%202015.pdf>. Unlike previous reports on the HJC, this one does not contain this information.

<sup>83</sup> HJC Report 2015\*\*\*\*.

<sup>84</sup> HJC Report 2011, *See supra note 77*, p. 33.

<sup>85</sup> HJC Report 2012, *See supra note 78*, p. 39.

<sup>86</sup> HJC Report 2013, *See supra note 80*, p. 37.

<sup>87</sup> HJC Report 2014, *See supra note 81*, p. 38. Instituted 19 in total for a grave disciplinary offense.

<sup>88</sup> For some of the disciplinary proceedings initiated, the first and second-instance decisions have been submitted, others are missing the first-instance decisions (for instance, in case No. HJC 116-04-00265/2013-01 (16.7.2013)), whereas in a number of cases there was no second-instance decision, which was confirmed by the response received by the OSCE Mission from the HJC (see correspondence dated 11 April 2016).

<sup>89</sup> This has been determined by comparing the number of the cases submitted and the information on the number of proceedings initiated obtained from the Report on the work of the HJC for 2013 and 2014. Thus, for example, according to the Report on the work of the HJC, 2013, 8 decisions were issued, whereas the OSCE Mission was furnished with 6.

<sup>90</sup> See note 88 for an explanation of the difference in the number of cases and the number of decisions submitted.



- breach of impartiality principle (a.1) (1 case);
- failure of a judge to request recusal in cases where there is a reason for recusal prescribed under the law (a.2) (1 case);
- unjustifiable delays in drafting of decisions (a.3) (21 cases);
- unjustifiable failure to schedule hearings or trials (a.5) (12 cases);
- unreasonable prolonging of the proceedings (A7) (18 cases);
- manifestly unfair treatment of participants in court proceedings and court staff (A.9) (7 cases);
- non-observance of the working hours (a.10) (1 case);
- engaging in inappropriate relations with parties or their legal representatives during the proceedings (A.12) (2 cases);
- making public statements and commenting on court decisions, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure (a.13) (1 case);
- engaging in the activities defined under the law as incompatible with the judicial office (a.14) (1 case); and
- violation of the provisions of the Code of Ethics to a great extent (a.18) (9 cases).

During the reporting period there have been no disciplinary proceedings concerning the following offences: (4) processing cases in an order contrary to the order of registration thereof;(6) repeated tardiness for scheduled hearings; (8) unjustifiable failure to notify the court president on the cases in which the procedure takes longer; (10) accepting gifts contrary to the rules governing the conflict of interest; (15) unjustifiable non-attendance of mandatory training programs; (16) provision of incomplete or inaccurate information relevant to the work and decision-making of the High Judicial Council; (17) unjustifiable shifts in in the court's annual schedule of judges' activities, and the violation of the principle of natural judge contrary to the provisions stipulated under the law. These are also the offences for which no disciplinary proceedings have been instituted since the establishment of disciplinary bodies.<sup>91</sup>

Therefore, out of 18 disciplinary offences provided under the Law on Judges,<sup>92</sup> within the reporting period, disciplinary actions were taken against 10 offences listed above. It should be noted that the aggregate number of offences per case (91) does not correspond to the total number of cases (58), since there were cases observed when the judge was charged with two or more offences under one case.

---

<sup>91</sup> Based on the information from the article of Spasojevic, *See supra note 48*, p. 18, footnote 71.

<sup>92</sup> See section 2.2.

In regard to each of these disciplinary offences, except those relating to a breach of impartiality principle<sup>93</sup> and failure to comply with working hours,<sup>94</sup> the responsibility of judges was established in at least one case.

Based on the available decisions and responses submitted by the HJC to the OSCE Mission, in regard to the alleged disciplinary offences judges were found responsible for committing 42 offences in 34 cases. Here as well the number of cases does not match the number of offences because in some cases the judges were found responsible for having committed more than one offence. For more details, please refer to Appendix 1, Part II.

Overview of the responsibilities of judges established in regard to specific offence is as follows:

- failure of a judge to request recusal in cases where there is a reason for recusal prescribed under the law (1 case);
- unjustifiable delays in issuing decisions (11 cases<sup>95</sup>);
- unjustifiable failure to schedule hearings or the trials (7 cases<sup>96</sup>);
- unreasonable prolonging of the proceedings (11 cases<sup>97</sup>);
- manifestly unfair treatment of participants in court proceedings and court staff (4 cases<sup>98</sup>);
- engaging in inappropriate relations with parties or their legal representatives during the proceedings (1 case);

---

<sup>93</sup> See case DC 116-04-00466/2013-05 (15.4.2014), however, it has clearly established the responsibility for the unfair treatment of participants in court proceedings. The Commission Decision upheld on appeal, see HJC 116-04-401/2014-01 (17.7.2014).

<sup>94</sup> See case DC 116-04/00281/2013/05 (25.10.2013); the judge has been dismissed upon his/her own request, followed by the rejection of the motion instituting disciplinary action.

<sup>95</sup> In another case (DC 116-04-00419/2014-05 (18.9.2014)), following establishment of the responsibility for grave disciplinary offense before the Commission, the judgeship was in the meantime terminated upon his/her own request. See letter from the HJC, dated 11 April 2016.

<sup>96</sup> In another two cases, the statute of limitation has been determined during the appeal proceedings, and therefore, the decision of the Disciplinary Commission, which established responsibility, have been reversed, rejecting thus the motions for the conduct of the proceedings (see HJC 116-04-660/2014-01 (09/23/2014) and the HJC 116 -04-659/2014-01 (23.9.2014)), while in another case (DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015)), following establishment of responsibility for a grave disciplinary offense before the Commission, the judgeship was in the meantime terminated upon his/her own request. See letter from the HJC, dated 11 April 2016.

<sup>97</sup> In another case, the statute of limitation has been determined during the appeal process (DC \*\*\* (06/11/2015)), while in another one, after the establishment of responsibility for a grave disciplinary offense before the Commission, the judgeship was in the meantime terminated upon his/her own request (DC 116-04 -00392/2014-05, 116-04-00489/2014-05 (13.2.2015)). See letter from the HJC, dated 11 April 2016.

<sup>98</sup> In one of the cases, the statute of limitation has been expired (DC 116-04-00424/2014-05 (21.7.2014)).

- making public statements and commenting on court decisions, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure (1 case);
- engaging in the activities defined under the law as incompatible with the judicial office (1 case); and
- violation of the provisions of the Code of Ethics to a great extent (5 cases).

**Figure 1:** Numerical overview of disciplinary proceedings initiated specifying the number of decisions on the establishment of responsibility per specific offence

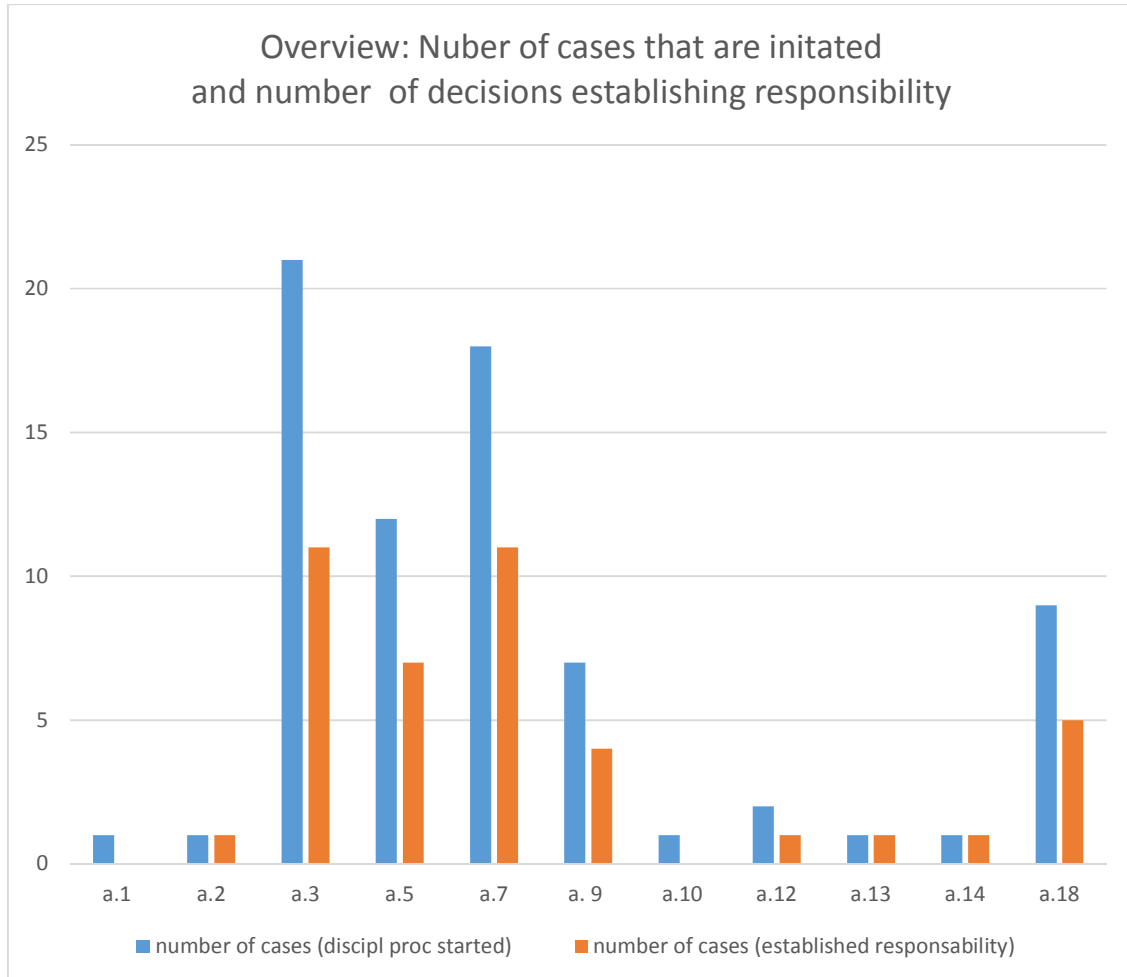
Number Alinea	Description	number of cases (Disciple. Proc. started)	number of cases (established responsibility)	% of cases where resp. was established
a.1	breach of impartiality	1	0	0%
a.2	failure of a judge to req. recusal[...]	1	1	100%
a.3	unjustifiable delays in drafting dec.	21	11	52%
a.5	unjustifiable failure to schedule hearings	12	7	58%
a.7	unjustifiable prolonging of proceedings	18	11	61%
a.9	unfair treatment of participants in proceedings [...]	7	4	57%
a.10	incompliance with working hours	1	0	0%
a.12	engaging in inappropriate relations with parties [...]	2	1	50%
a.13	commenting court's decisions [...]	1	1	100%
a.14	engaging in activities [...] incompatible with judge's function	1	1	100%
a.18	violations of the provisions of the Code of Ethics to a great extent	9	5	56%

For a graphical representation of the number of initiated disciplinary proceedings and the number of decisions on the established responsibilities per specific offence, see Appendix 2.

As outlined in the present overview, the most common disciplinary offences for which judges have been found responsible are those relating to negligent behavior in the performance of judicial office related

to the conduct of, and/or the completion of legal proceedings, manifestly unreasonable prolonging of the proceedings, delays in decision-making and the failure to schedule a hearing or a trial.

**Figure 2:** Comparative overview of the number of proceedings initiated and the number of decisions on the responsibility determined



### Legend

- a.1** Breach of impartiality principle
- a.2** Failure to request recusal [...]
- a.3** Unjustifiable delays in decision drafting
- a.5** Unjustifiable failure to schedule hearings or trials
- a.7** Unreasonable prolonging of the proceedings
- a.9** Manifestly unfair treatment of the participants [...]
- a.10** Non-observance of working hours
- a.12** Engaging in inappropriate relations with parties [...]
- a.13** Making public statements and commenting on court decisions [...]

a.14 Engaging in the activities defined under the law [...] as incompatible with the judicial office

a.18 violation of the provisions of the Code of Ethics to a great extent

\* symbols referring to the actual offences committed correspond to the reference number of the subparagraph of Art. 90 of the Law on Judges

### 3.1.1. Responsibility for Qualified Form of Disciplinary Offences

Within the reporting period, the Disciplinary Prosecutor, on the basis of disciplinary reports filed, submitted proposals for conducting disciplinary proceedings for a grave disciplinary offence in 17 cases.

Responsibility for a grave disciplinary offence was established in eight cases and, based thereupon, the HJC passed 7 decisions on the judge dismissal.<sup>99</sup> In these cases the responsibility for a qualified form of the following disciplinary offences was determined: (3) unjustifiable delay in decision drafting (5 cases<sup>100</sup>); (5) unjustifiable failure to schedule hearings or trials (3 cases<sup>101</sup>); (7) unreasonable prolonging of the proceedings (2 cases<sup>102</sup>); (12) engaging in inappropriate relations with parties or their legal representatives during the proceedings (1 case<sup>103</sup>); (18) violation of the provisions set forth under the Code of Ethics to a great extent (1 case<sup>104</sup>). Cumulative number of offences (12) does not correspond to the number of proceedings (8) having determined responsibility for a qualified disciplinary offence due to the fact that in 4 proceedings the judges were pronounced responsible for having committed two offences.<sup>105</sup>

In 5 cases regarding a grave disciplinary offence the subject judges have ceased to hold office upon their own request.<sup>106</sup> In 2 of these 5 cases, the Disciplinary Commission determined the responsibility and filed a motion for dismissal thereof, but before the decision on the dismissal was passed by the HJC, the judges had already been discharged from duty upon personal request.<sup>107</sup>

Thus, the 12 judges whose actions were the subject of disciplinary proceedings ceased to perform the judicial office.

<sup>99</sup> DC 116-04-00356/2013-05 (22.10.2013); DC 116-04-00233/2014-05 (15.5.2014); DC 116-04-00268/2014-05 (03/09/2014); DC 116-04-00520/2014-05 (18.9.2014); DC 116-04-00389/2014-05 (22.10.2014); DC 116-04-00487/2014-05 (10/10/2014); DC 116-04-00472/2014-05 (17/04/2015). In one of the cases, although found responsible for a grave disciplinary offence, the judge could not be dismissed bearing in mind the provisions of the Labor Law, because she was on maternity leave, and/or the child care leave, and dismissal entails the employment termination. See DC 116-04-00616/2014-05 (04/02/2015) and HJC 116-04-149/2015-01 (28.4.2015).

<sup>100</sup> DC 116-04-00233/2014-05 (15.5.2014); DC 116-04-00268/2014-05 (03/09/2014); DC 116-04-00520/2014-05 (18.9.2014); DC 116-04-00487/2014-05 (10/10/2014) and DC 116-04-00616/2014-05 (4.2.2015).

<sup>101</sup> DC 116-04-00389/2014-05 (22.10.2014); DC 116-04-00487/2014-05 (10/10/2014) and DC 116-04-00616/2014-05 (4.2.2015).

<sup>102</sup> DC 116-04-00389/2014-05 (22.10.2014) and DC 116-04-00472/2014-05 (17.4.2015).

<sup>103</sup> DC 116-04-00356/2013-05 (22.10.2013).

<sup>104</sup> DC 116-04-00356/2013-05 (22.10.2013).

<sup>105</sup> This was the case in DC 116-04-00356/2013-05 (22.10.2013); DC 116-04-00389/2014-05 (22.10.2014); DC 116-04-00487/2014-05 (10/10/2014) and DC 116-04-00616 / 2014-05 (4.2.2015).

<sup>106</sup> DC 116-04/00281/2013/05 (25.10.2013); DC 116-04-00418/2014-05 (21.7.2014); DC 116-04-00488/2014-05 (03/09/2014); HJC 119-01-313/2014-01 (23.12.2014) relating to DC 116-04-00419/2014-05 (18.9.2014); HJC 119-00-49/2015-01 (13.03.2015) relating to DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>107</sup> See HJC 119-01-313/2014-01 (23.12.2014) relating to DC 116-04-00419/2014-05 (18.9.2014); HJC 119-00-49/2015-01 (13.03.2015) relating to DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

In 4 of the cases which which resulted in a motion for dismissal by HJC, no dismissal has been made. In 2 cases the responsibility for the basic form of disciplinary offence was established,<sup>108</sup> whereas in one case the judge was released from disciplinary sanctions although declared responsible for a grave disciplinary offence (due to application of other relevant regulations),<sup>109</sup> whereas 1 of these proceedings initiated was suspended due to the death of a judge.<sup>110</sup>

In terms of the most common disciplinary offences which instrumented determination of a qualified form of specific offence/s, the same conclusion as the one reached in determination of the responsibility for the basic form of offence remains. The most common disciplinary offences include those relating to negligent behavior in the performance of judicial office implying the conduct of, or the completion of legal proceedings, in particular for unjustifiable delays in issuing decisions (5), scheduling hearings or the trial, (3) and delays in the proceedings (2).

### **3.2. Interpretation of Relevant Regulations and Standards in the Practice of Disciplinary Bodies**

#### **3.2.1. Interpretation of Procedural Guarantees**

In the analysis of the practice of disciplinary bodies no failure in compliance with or restrictive interpretation of procedural guarantees has been observed. Moreover, a teleological interpretation of the specific procedural guarantees has been observed.

Namely, in one of the cases, a question was raised that touches on the procedural guarantees, concerning the interpretation of who can be the legal representative of a judge in a disciplinary proceeding. Namely, in the specific case,<sup>111</sup> the Disciplinary Prosecutor challenged the capacity of the person who is the President of the Association of Judges of Serbia and the judge of the Appellate Court to act as the counsel for the judge. This challenge has been based on the argument that the President of the Association has no authority to represent individual interests of the members thereof, and that the interpretation of the term "counsel" referred to hereunder is to be made pursuant to the CPC, as the analogous application thereof has been provided under the Disciplinary Rulebook. However, the disciplinary bodies considered this statement was without merit and allowed the judge to be represented by the person s/he has chosen in disciplinary proceedings.<sup>112</sup> According to the disciplinary body, it can be a person who is not a lawyer, and especially the president of the professional association

---

<sup>108</sup> See DC 116-04-00617/2014-05 (30.1.2015) and DC 116-04-00266/2014-05 (4.7.2014), HJC 116-04-670/2014-01 (30.9.2014).

<sup>109</sup> DC 116-04-00534/2014-05 (4.2.2015), HJC 116-04-175/2015-01 (29.5.2015). See *infra* note 163.

<sup>110</sup> See DC 116-04-00585/2014-05 (17.4.2015).

<sup>111</sup> See DC 116-04-00441/2014-05 (28.10.2014).

<sup>112</sup> Disciplinary Commission in the first-instance (DC 116-04-00441/2014-05 (28.10.2014), p. 5), this position confirmed by the HJC in the second-instance decision-making (HJC 116-04-935/2014-01 (24/6/2015, p. 10).

of judges, since the statute of the Association does not prohibit it, and one of its goals is to preserve the independence and autonomy of judges.

To be more specific, the Disciplinary Commission based its position on the application of procedural laws regulating the issue of representation (that is, the Civil Procedure Code, although the Disciplinary Rulebook does not expressly provide for analogous application of this law, but the Criminal Procedure Code instead. The Civil Procedure Code allows any employee in a labor dispute to be represented by a trade union representative he himself is the member of. According to the disciplinary bodies, having in mind the procedural status of a judge in a disciplinary proceeding, where he is under no obligation to attend and to comment on the allegations of the prosecutor, and shall be entitled to communicate through a counsel, indicates that his counsel has broader powers compared to a counsel under the CPC.<sup>113</sup>

Based on this case, it can be concluded that disciplinary bodies do not adhere to the textual interpretation of the Rulebook only, but rather resort to teleological interpretation of specific provisions.

## **3.2.2. Interpretation of Provisions on Disciplinary Offences**

### ***3.2.2.1. Interpretation of Specific Disciplinary Offences and the Provision on the Statute of Limitation***

In practice, it has been observed that there is a tendency in the disciplinary body actions to determine more closely the meaning of the broader concepts that make the essence of specific disciplinary offences, as is the case with "breach of impartiality principle" and "unfair treatment of participants in the proceedings". This approach is important because it makes an important contribution to creating a consistent interpretation of specific disciplinary offences in practice.

Thus, the specific meaning implied under the 'breach of impartiality principle' has been defined as a treatment that is "the result of prejudice, bias, political, economic or other interests or personal knowledge of disputed facts."<sup>114</sup> However, there seems to be no explanation as to what the "personal knowledge of disputed facts" would represent.

In addition, in terms of "incorrect treatment of participants in the proceedings" offence, the disciplinary bodies specified that it is not enough to be a participant of the legal proceedings" and subjectively feel disadvantaged [...], it is rather necessary that the conduct of a judge objectively has the character of a negligent and improper procedure when, for example in the form of a spoken word, it threatens or violates certain standards of behavior expected in relations between a judge and the courtroom attendants".<sup>115</sup> In addition, it has been established without a doubt that a "fair treatment" is not required during the proceedings only, but also in decision-making.<sup>116</sup> In addition, the HJC believes that

---

<sup>113</sup> DC 116-04-00441/2014-05 (28.10.2014), p. 6, approved by the HJC (HJC 116-04-935/2014-01 (24/06/2015), p. 10.

<sup>114</sup> See DC 116-04-00466 / 2013-05 (15.4.2014) and HJC (appeal DP) 116-04-401/2014-01 (17.7.2014).

<sup>115</sup> DC 116-04-00420/2014-05 (30.1.2015).

<sup>116</sup> DC 116-04-00466/2013-05 (15.4.2014).

unfair treatment of participants in the process is evident when a judge takes actions that are not prescribed by law, the Court Rules of Procedure or any other relevant regulatory document and are not aimed at resolving a procedural situation.<sup>117</sup>

In addition, disciplinary bodies, interpreting the statutory provision of the disciplinary offence "unjustifiable delays in drafting decisions", have determined that in order to establish responsibility, the judge shall be found to be late in drafting more than one decision,<sup>118</sup> as the subject of a disciplinary offence is legally defined in plural.

As for deadlines and statutes of limitation in disciplinary proceedings, it has been noted correctly that when it comes to disciplinary offences committed by failure to perform a duty (such as unreasonable prolonging of the proceedings, unjustifiable delays in drafting decisions or unjustifiable failure to schedule hearings or trials), "the statute of limitation of a disciplinary offence shall apply from the moment of termination of the unlawful situation".<sup>119</sup> Namely, this failure implies the action is missing on a permanent basis, which creates unlawful situation that lasts until the action is taken. Thus, the statute of limitation for these offences shall apply from the moment the last action has been undertaken.<sup>120</sup> On the basis of the aforementioned, for the offences such as "unreasonable prolonging of the proceedings,"<sup>121</sup> "unjustifiable delays in decision drafting,"<sup>122</sup> and "unjustifiable failure to schedule hearings or trial"<sup>123</sup> it was determined when exactly the statute of limitation shall apply from.

### **3.2.2.2. Interpretation of Standards governing Determination of Disciplinary Offence**

As already mentioned hereinabove, the majority of offences provided under the Law on Judges are of such a nature that they need to be subsumed under the *legal standard set* for the existence of a disciplinary offence, for example "unjustifiable", "obvious" and "to a great extent."<sup>124</sup>

*Standard "unjustifiable".* – In practice of the disciplinary bodies, in one of the cases the term "unjustifiable" has been used to denote "the result of negligent behavior of a judge in the performance of judicial duty rather than of any objective or subjective excusing circumstances."<sup>125</sup>

*Standard "obvious".* – Disciplinary bodies determined in their practice the standard "obvious" as an action "which is readily noticeable [...], either from a professional standpoint or by an average person judging such a procedure, as it represents a gross violation of the specific rule".<sup>126</sup>

*Standard "to a great extent."* – A special attention is drawn to the offence defined as "violation of the provisions of the Code of Ethics to a great extent" (Art. 90 (1) item 18). Disciplinary body interpretation

---

<sup>117</sup> HJC \*\*\* (09/04/2015).

<sup>118</sup> See, for instance, DC 116-04-00139/2014-05 (22.5.2014); DC 116-04-00426/2014-05 (08/09/2014).

<sup>119</sup> DC 116-04-00485/2014-05 (25.2.2015).

<sup>120</sup> See HJC 116-04-660/2014-01 (23.9.2014).

<sup>121</sup> See DC 116-04-00439/2014-05 (18.9.2014); DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>122</sup> See DC 116-04-00485/2014-05 (25.2.2015).

<sup>123</sup> See HJC 116-04-660/2014-01 (23.9.2014), DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>124</sup> Subparagraphs 3-5, 7-9, 12, 15, 17 and 18.

<sup>125</sup> DC \*\*\* (08/31/2015).

<sup>126</sup> DC 116-04-00420/2014-05 (30.1.2015).



of this atypical standard specified as a violation of the Code "to a great extent" is of a great significance since it does not provide clear guidelines which would mark the point of perceiving the violation of the Code turning from "lesser" or "high" degree violation into a violation of a "great extent". However, based on the decisions analyzed, it follows that the disciplinary bodies have not paid particular attention to the clear determination of standards in specific cases.<sup>127</sup> In most cases decisions contain a reference to the provisions of the Code of Ethics that was violated only, without indicating why it is considered that they have been breached "to a great extent". There is only one case which demonstrates an attempt to define the standard "to a great extent", albeit indirectly. In that case the Disciplinary Commission, in determining disciplinary accountability for the offence "violation of the provisions of the Code of Ethics to a great extent", has taken into account the following: (a) repeated unlawful actions, (b) effect on the actual likelihood of any damage to the reputation of the court and the judge, to the extent that it is likely to undermine and undermines the trust in the court and judges, (c) continuity in time of illegal activities that have been carried out, and (d) the actual consequence resulting therefrom.<sup>128</sup> Although the decision itself does not state explicitly that these are the elements based on which it has been concluded that there was a violation of the Code of Ethics "to a great extent", it undoubtedly represents an implicit example of an attempt to have the standard "to a great extent" applied to specific actions.

In addition, it has been observed that some cases have not received enough attention in terms of determination of the specific provisions laid down under the Code of Ethics that were violated,<sup>129</sup> or, as observed, one and the same procedure has been interpreted as not constituting a violation of the Code of Ethics to a great extent, but from a further explanation it follows that it actually does not breach the Code at all.<sup>130</sup>

It is essential that disciplinary bodies determine whether an action constitutes a violation of the Code of Ethics, and then provide a more thorough explanation for the violation of the Code of Ethics to a great extent.

### **3.2.2.3. Interpretation of Qualified Form of Disciplinary Offence**

In the section dealing with the analysis of the legal framework, as already mentioned hereinabove, the Article 90 (2) of the Law on Judges (which regulates the qualified form of disciplinary offences) is found to be unclear. In addition, the practice of disciplinary bodies has not developed an interpretation that would overcome the challenges stemming from this provision.

Namely, in reference to Article 90 (2) it has been observed that there are two important matters relating to the interpretation thereof: (1) review of the necessary consequences resulting from a qualified

---

<sup>127</sup> See, for instance, cases DC 116-04-00373/2013-05 (4.11.2013), HJC 116-04-00265/2013-01 (16.7.2013), DC 116-04-00908/2014-15 (13.2.2015), DC 116-04-00356/2013-05 (22.10.2013).

<sup>128</sup> The actual consequence implied having two different decisions expedited under the same reference number. See case DC 116-04-00310/2013-05 (21/11/2013).

<sup>129</sup> See DC 116-04-00908/2014-15 (13.2.2015). Here we have only the general principle concerning the dignity in judicial conduct (Art. 4) mentioned, and then, out of the provisions which determine the application thereof, the documents mentions only those referred to under subparagraph 4.2 (which provides that a judge shall preserve the reputation of the court and the judicial duty through written and spoken word), and subparagraph 4.1, which provides that judges should refrain from improper methods, and procedures that may undermine public confidence in the court, although it does not mention that the judge was found to have acted improperly, even though it has been confirmed by the Disciplinary Commission.

<sup>130</sup> HJC 116-04/00747/2014-03 (9/12/2014).

disciplinary offence, and (2) the manner of treatment of the statute of limitations, in this context, resulting from negligence of a judge.

(1) The practice shows that the Disciplinary Commission does not distinguish between different consequences that are likely to occur - (1) a serious disruption in the exercise of judicial power, or (2) the performance of tasks in the court, or (3) serious damage to the reputation and public trust in the judiciary – in order to determine the qualified form of a disciplinary offence. The Commission has in practice faced the challenges that had to do with the matters that may be considered to be the actual result necessary for the existence of a qualified form of the offence.

Thus, in one of the disciplinary proceedings for an unjustifiable delay in decision drafting, entailing a number of decisions not passed within a reasonable time and long time-frames exceeding the legally defined or reasonable deadlines, the existence of a qualified form of offence has been perceived as the existence of the consequences in the form of a severe damage to the reputation and public trust in the judiciary.<sup>131</sup> As there have been no complaints from the parties on specific subjects covered by the disciplinary proceedings, the Disciplinary Commission considered that no severe damage was done to the reputation and public trust in the judiciary<sup>132</sup> and has thus not taken into consideration the existence of any other consequences specified under Art. 90 (2). This decision taken by the Commission was reversed before the HJC.<sup>133</sup> *First, the HJC reckoned that the negligence of the judge resulted in a gross disruption in the exercise of judicial power and performance of duties in the court, but also a severe damage to reputation and public trust in the judiciary, since the fact of delay in such a great number of cases could not have remained unknown,*<sup>134</sup> although there have been no media reports thereon. However, it has not been shown that the public was, in fact, informed about the conduct of the judge, which raises the question of observance of the rules on the burden of proof in such cases. *Second, the HJC emphasized that the number of written complaints shall not be the standard used to determine whether the reputation and public confidence in the judiciary is disrupted, and, that the term "public" shall not be limited to the position and the response of the participants in the proceedings and the representatives thereof, but that this term shall imply "the entire professional and general public who came to the knowledge of the subject case".*<sup>135</sup> In another case, where it has been deliberated on the offence of unjustifiable tardiness of the proceeding, as known to the public, the HJC introduced the term 'broader public sector' under the concept of public referred to thereunder.<sup>136</sup>

Therefore, the HJC at first took the standpoint that the delays in decision drafting observed in a number of cases, with a significant time frame exceeding the specified deadlines, in addition to other consequences, caused a serious disruption in the exercise of judicial power and performance of regular duties at the court, and that in the present case in particular, it led to severe damage to the reputation and public trust in the judiciary. In addition, the HJC believes that the resulting consequence causing a severe damage to the reputation and public trust in the judiciary cannot be determined solely on the basis of the complaints filed by the participants in the proceedings. However, they failed to determine the manner this consequence is to be established in case of no media coverage thereon.

---

<sup>131</sup> DC 116-04-00233/2014-05 (15.5.2014).

<sup>132</sup> DC 116-04-00233/2014-05 (15.5.2014).

<sup>133</sup> HJC 116-04-517/2014-01 (31.7.2014).

<sup>134</sup> HJC 116-04-517/2014-01 (31.7.2014).

<sup>135</sup> HJC 116-04-517/2014-01 (31.7.2014).

<sup>136</sup> HJC \*\*\* (22/09/2015).

The Commission's practice on the present issue has, therefore, been changed in later cases with similar factual circumstances (with no complaints from the parties involved). However, this has been carried out without a precise consideration of any potential consequences arising out of the judge's negligent behavior. Specifically, the Commission, in the proceedings regarding unjustifiable delays in issuing decisions, reckoned that a large number of cases and the timeframe exceeding the deadlines appear to have resulted in the severe damage to the reputation and public trust in the judiciary,<sup>137</sup> but failed to explain the reason why they consider this particular consequence to have occurred rather than, for example, the one regarding serious disruption in the exercise of judicial power. On the other hand, regarding the offence of unreasonable prolonging of the proceedings, due to a large number of cases in which the judge failed to take any action in the long term (exceeding 4-year period), the existence of parties' interventions and petitions to expedite the proceedings was used as an evidence for the consequences implying severe damage to the reputation and public trust in the judiciary.<sup>138</sup> However, the lack of complaints or requests of the parties does not imply that such a consequence has not occurred, but that this must be determined on a case to case basis, taking into account circumstances of each case. If there has been any media coverage on the inappropriate conduct of a judge, this was used as evidence confirming the consequence resulting in a severe damage to the reputation and public trust in the judiciary accordingly.<sup>139</sup> However, in cases lacking media coverage, the basis for reaching such a conclusion has not been demonstrated to point out to the actual consequence, but, it was only concluded that such delays observed in so many cases could not have remained unknown to the public.<sup>140</sup> The most expedient and correct way would be to have such cases – reflecting a great number of cases with a serious delay in the proceedings or long delays in decision drafting - viewed through the prism of the consequences of a serious disruption in the exercise of judicial power or the performance of regular duties at the court.

(2) Another question that has been observed in practice regarding the qualified form of disciplinary offences, is the manner of interpreting the fact that the statute of limitations has expired in cases conducted by the judge who is the subject of the disciplinary action taken. As already mentioned hereinabove, relying upon the respective legal provisions it could be concluded that the statute of limitation in the subject cases occurred due to the negligence of the judge in charge, set as an example, which certainly leads to a severe damage to the reputation and public confidence in the judiciary or a serious disruption in the exercise of judicial power and performance of regular duties at the court.

That was the attitude expressed by the Disciplinary Commission in two cases, having taken the standpoint that an absolute statute of limitation in the criminal prosecution which is due to the negligent behavior of a judge is to be regarded as a "qualifying circumstance of the existence of a grave disciplinary offence".<sup>141</sup> In one of these cases the Commission emphasized that a serious damage to the reputation and public confidence in the judiciary "is reflected in the fact that the statute of limitation has been reported in criminal prosecution in several cases."<sup>142</sup> As the office of the judge, the respective decision pertained to, was terminated upon his personal request,<sup>143</sup> the HJC never had the chance to decide on the motion for dismissal proposed by the Disciplinary Commission for having committed the

---

<sup>137</sup> DC 116-04-00268/2014-05 (3.9.2014).

<sup>138</sup> DC 116-04-00584/2014-05 (22.10.2014).

<sup>139</sup> HJC \*\*\* (22/09/2015).

<sup>140</sup> HJC 116-04-517/2014-01 (31.7.2014).

<sup>141</sup> DC 116-04-00617/2014-05 (17.10.2014); DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>142</sup> DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>143</sup> HJC 119-00-49/2015-01 (13.03.2015).

disciplinary offence referred to under this paragraph.<sup>144</sup> Nevertheless, the attitude of the Commission on the absolute statute of limitation having occurred in the prosecution to be regarded as a "qualifying circumstance of the existence of a grave disciplinary offence, has been revoked in another case in the second-instance proceedings before the HJC.<sup>145</sup>

The HJC's interpretation of the Article 90 (2) of the Law on Judges implies that for the existence of a grave disciplinary offence it is not sufficient that the statute of limitation expires, but it is necessary to identify that there is a serious disruption in the exercise of judicial power or the performance of regular duties at the court, or a severe damage to the reputation and public confidence in the judiciary have occurred as a consequence.<sup>146</sup> Therefore it may be concluded that, according to the HJC, the expiration of the statute of limitation due to negligent performance of judicial function and a significant damage to the property of the party to the proceedings shall not be necessarily viewed as an example of a serious disruption in the exercise of judicial power or the performance of regular duties at the court or a severe damage to the reputation and public trust in the judiciary.

Since the case was remitted to the Commission for reconsideration (according to the old Rulebook), upon determination of disciplinary accountability for the basic offence, the expiry of the statute of limitation of the criminal case has been taken as an aggravating circumstance in the imposition of disciplinary sanctions.<sup>147</sup> Expiry of the statute of limitation in 61 misdemeanor cases in the disciplinary proceedings against a misdemeanor judge for failure to schedule trials and the delay in the proceeding was treated in the same way.<sup>148</sup>

Therefore, the HJC's point of view indicates that in each specific case in which there has been a statute of limitation resulting from the negligent behavior of the judge in charge, it shall be taken into consideration whether any of the required consequences for the existence of a grave disciplinary offence has been identified or not. So, in case of the statute of limitation in a single case of a criminal offence prosecuted *ex officio*, which is known to the public and which received media coverage,<sup>149</sup> as expressed from the HJC's point of view, the negligent behavior of the judge in charge, which resulted in a statute of limitation, caused a severe damage to the reputation and public trust in the judiciary.<sup>150</sup> On the other hand, in the proceedings initiated due to the statute of limitation that occurred in three criminal cases, two of which were initiated against private lawsuits, the HJC noted that the respective private lawsuits "have not received any public interest" and that they refer to light bodily injury and insult offences, so there has been "no significant damage to the property of the parties thereto". Therefore, it has been concluded that "based on the number of interests involved, no consequences causing a severe damage to the reputation and public trust in the judiciary have been identified, nor has there been a serious disruption in the exercise of judicial power or performing regular duties at the court."<sup>151</sup> It remains questionable why it was relevant that private interests and the due protection thereof, which resulted in filing of a private criminal complaint, were at stake when the statute of limitation has expired due to the negligent behavior of the judge in charge.

---

<sup>144</sup> DC 116-04-00392/2014-05, 116-04-00489/2014-05 (13.2.2015).

<sup>145</sup> HJC 116-04-798/2014-01 (28.11.2014), p. 5.

<sup>146</sup> HJC 116-04-798/2014-01 (28.11.2014), p. 5.

<sup>147</sup> DC 116-04-00617/2014-05 (30.1.2015); DC 116-04-00485/2013-05 (24.2.2014).

<sup>148</sup> DC 116-04-00485/2013-05 (24.2.2014).

<sup>149</sup> See DC 116-04-00472/2014-05 (17.4.2015) and the decision on the appeal, HJC \*\*\* (22/09/2015).

<sup>150</sup> HJC \*\*\* (22/09/2015).

<sup>151</sup> HJC 116-04-798/2014-01 (28.11.2014).

There is no doubt that not every statute of limitation expiration results in the same consequences, but it seems that the statute of limitation that expires due to the negligent behavior of the judge in charge is itself a serious disruption in the exercise of judicial power and performance of regular duties at the court, and that the disciplinary bodies, especially the HJC, should work on their practice development in this direction.

### **3.2.3. Application of Other Regulations and Legal Standards in Disciplinary Proceedings**

As already mentioned hereinabove, in disciplinary proceedings the disciplinary bodies firstly apply and interpret the Law on Judges and the Disciplinary Rulebook. In cases which deal with responsibility for a disciplinary offence related to the violation of the Code of Ethics to a great extent, the Code of Ethics is interpreted and applied accordingly.

The Disciplinary Rulebook expressly provides for the subsidiary application of the Code of Criminal Procedure.<sup>152</sup> The disciplinary bodies in addition apply the Criminal Code institutes, although they did not expressly refer to it.<sup>153</sup>

In addition, in deciding on disciplinary responsibility of a judge, the disciplinary bodies take into account other regulations relevant to the decision in the present case as well.<sup>154</sup> As already mentioned hereinabove, this was the case in determining the notion of the judge's legal representatives in disciplinary proceedings,<sup>155</sup> where the Disciplinary Commission relied upon the provisions of the Civil Procedure Code. In cases concerning disciplinary offences involving unreasonable prolonging of the proceedings, the disciplinary bodies take into account relevant legal provisions on deadlines for specific actions in court proceedings, to assess whether the judge acted negligently and unduly in delaying the proceedings.<sup>156</sup>

In practice of the disciplinary bodies, in one case the application of the legal standards of the European Court of Human Rights has been observed as well. Such a practice is certainly to be welcomed. However, it seems that the HJC failed to apply and interpret the standard accordingly.

Namely, in the context of the responsibility for the disciplinary offence involving "making public statements and commenting on court decisions, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure", the HJC stated that the judge should have "shown a greater degree of tolerance to [...] newspaper headlines [which referred to the

---

<sup>152</sup> See section 2.

<sup>153</sup> See for instance DC 116-04-00441/2014-05 (28.10.2014), p. 17. In the appeal lodged with the HJC, the Disciplinary Prosecutor opposed the application of the Criminal Code in the disciplinary proceeding, since the Disciplinary Rulebook does not provide for the analogous application thereof. HJC's decision does not contain any comments on these allegations.

<sup>154</sup> See for instance HJC \*\*\* (09/04/2015).

<sup>155</sup> See above 3.2.1.

<sup>156</sup> See for instance case DC \*\*\* (23.10.2015), which taken into account the deadline provided by the Law on Security and Enforcement, which expressly provides that the failure to act against the complaint within 5 days, shall be deemed negligent.

decision thereof on the request of the accused to have his passport temporarily returned], and refrained from commenting thereon, because he is a public office holder and as such, his work is exposed to public criticism [...].<sup>157</sup> Then, the HJC referred to the 2008 legal opinion of the Supreme Court of Serbia<sup>158</sup> regarding Article 10 of the [European] Convention [on human rights]: the right to freedom of expression and libel and defamation offences.<sup>159</sup> In this opinion, following the practice of the European Court, the Supreme Court took the standpoint that in cases involving insult, slander and libel offences, the limits of acceptable criticism are wider when it comes to public figures, and thus the public figures must show a higher degree of tolerance to criticism by journalists and the public.<sup>160</sup>

The application of this standard of the European Court (so-called public figure doctrine) is not appropriate in the context of deciding on a disciplinary responsibility of a judge for giving statements to the media. In fact, this doctrine is applied in order to protect freedom of expression and allow for public discussion on the proceedings involving public figures, in the context of court proceedings initiated by public figures due to the statements and allegations in the media to protect their honor and reputation. In addition, in the application of this doctrine, the HJC equated the performance of judicial duty (as a public office) with the status of a public figure, which is not in accordance with the practice of the ECHR. Namely, the performance of a public office itself does not make one a public figure.<sup>161</sup> There is no doubt that all judges do hold a public office, but not all judges are public figures.

### **3.3 Sentencing Policy**

As already mentioned hereinabove, the Law on Judges provides the following disciplinary sanctions for the basic offences: (1) public reprimand; (2) a reduction in salary up to 50% for one year, and (3) prohibition of promotion for up to three years (Art. 91 (1)); (2) and (3) may be imposed cumulatively (Art. 91 (4) of the Law on Judges). In case of the qualified form of disciplinary offence the procedure for dismissal before the HJC is instituted (Art. 92 of the Law on Judges).

This section shall focus on the sanctions imposed for disciplinary responsibility established by final decisions which were submitted to the OSCE Mission. Dismissal on the grounds of having committed a qualified form of the disciplinary offence shall be considered a sanction for the purpose of the analysis of the sentencing policy applied by disciplinary bodies.

Out of the 58 disciplinary cases analyzed hereunder, in 34 cases the judges were found responsible for committing 42 disciplinary offences. In 33 cases (40 disciplinary offences) the sanction was imposed. This number of the sanctions imposed does not correspond to the number of cases of established disciplinary responsibility for two reasons. First of all, in 7 cases the responsibility has been established for more than one offence. Then, in the case in which the judge was found for having

---

<sup>157</sup> HJC 116-04-935/2014-01 (24.6.2015), p. 7.

<sup>158</sup> Adopted at the session of the Criminal Division, on 25.11.2008 <http://www.bgcentar.org.rs/praksa-drzavnih-organa/> (28/04/2016), on the occasion of two judgments of the European Court of Human Rights against Serbia which established a violation of freedom of expression under the Convention due to criminal conviction of a journalists for defamation and subsequent civil judgments.

<sup>159</sup> HJC 116-04-935/2014-01 (24.6.2015), p. 7.

<sup>160</sup> See the legal position of the Supreme Court of Serbia, Criminal Division, 25.11.2008 <http://www.bgcentar.org.rs/praksa-drzavnih-organa/>

<sup>161</sup> *Nikula v. Finland*, App. No. [31611/96](http://www.echr.coe.int/tk1/p60/p60s001.aspx?i=00000031611), judgment dated 21 March 2002, p. 48.

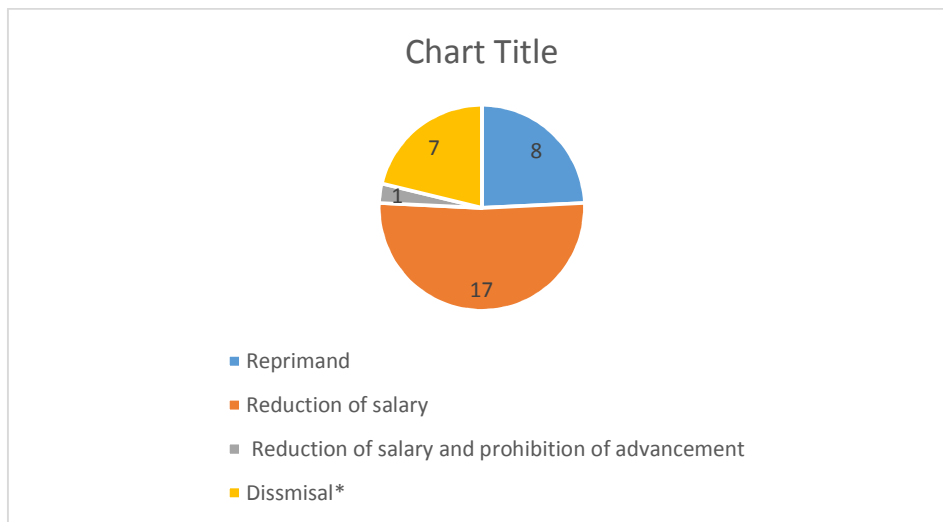
committed a grave disciplinary offence for two offences,<sup>162</sup> she had to be released from punishment, according to the provisions of the Labour Law.<sup>163</sup>

One of the most common sanctions imposed for the established disciplinary responsibility is the salary reduction (17 times), followed by public reprimand (8 times), whereas the cumulative sanction, implying salary reduction and promotion prohibition, appears to be extremely rare (1 time). The epilogue of disciplinary proceedings in the form of orders instituting dismissal has been observed in 7 cases.<sup>164</sup> For an overview of the actual sanctions imposed for specific offences, please refer to Appendix 1.

**Figure 3:** Fact Sheet of the sanctions imposed

Sanction	Number	Percentage
Public Reprimand	8	24%
Salary Reduction	17	52%
Cumulative (salary reduction and promotion prohibition)	1	3%
Dismissal* <sup>165</sup>	7	21%
TOTAL	33	100%

**Figure 4:** Graphic display of the sanctions imposed



<sup>162</sup> Unjustifiable delays in issuing decisions and unjustified failure to schedule hearings.

<sup>163</sup> Specifically, since the dismissal entails the termination of employment, taking into account the provisions of the Labour Law, the respective judge could not be dismissed because she was on maternity leave, and/or child care leave. See DC 116-04-00616/2014-05 (04/02/2015) and HJC 116-04-149/2015-01 (28.4.2015).

<sup>164</sup> DC 116-04-00356/2013-05 (22.10.2013); DC 116-04-00233/2014-05 (15.5.2014); DC 116-04-00268/2014-05 (03/09/2014); DC 116-04-00520/2014-05 (18.9.2014); DC 116-04-00389/2014-05 (22.10.2014); DC 116-04-00487/2014-05 (10/10/2014); DC 116-04-00472/2014-05 (17/04/2015).

<sup>165</sup> See section 2.3.

In the cases covered by this analysis, it has been observed that the Disciplinary Prosecutor mostly did not propose specific sanctions when instituting proceedings against judges. In one of the rare cases in which the Disciplinary Prosecutor (that is, his deputy in the closing argument) proposed the specific sanction,<sup>166</sup> following the decision of the Commission which had imposed the required sanction, the decision on the sanction was contested in the appeal of the Disciplinary Prosecutor as too lenient.<sup>167</sup>

The 2010 Rulebook<sup>168</sup> did not require the Prosecutor to propose specific sanctions, whereas the new Rulebook (2015) now sets forth that the motion instituting disciplinary proceedings must, *inter alia*, contain the proposed disciplinary sanctions (Art. 27 (3) of the Disciplinary Rulebook). This amendment requires a greater commitment from the Disciplinary Prosecutor in preparing the motion instituting disciplinary proceedings, and should enable a greater efficiency in the work of the Disciplinary Commission and the HJC.

### 3.3.1. Evaluation of Sentencing Policy

Evaluation of the sentencing policy applied by disciplinary bodies in the decisions submitted to the OSCE Mission has been carried out on the basis of three criteria: (1) number and type of sanctions imposed; (2) number and type of reversal decisions of the Disciplinary Commission by the HJC and (2) consideration of mitigating and aggravating circumstances in determination of the sanctions, both by the Disciplinary Commission, and by the HJC.

(1) Over the reporting period covered by the decisions analyzed (end of 2013 - beginning of 2016), it has been observed that the disciplinary bodies have improved the sentencing policy compared to the one applied over the previous period (2011 to 2014), insofar as it is no longer based "on the two opposite poles", as the earlier analyses have shown.<sup>169</sup> Namely, the above referenced earlier analyses showed that "in case of any major shortcomings identified, strictest sanction instituting a dismissal proceeding is imposed non-restrictively [...] [while], for all other offences, extremely lenient sanctions are being imposed."<sup>170</sup> At this point, the sanction implying salary reduction – positioned in the middle of the two poles – is the one imposed in most cases.

In addition, in the analyzed decisions submitted to the OSCE Mission it has not been observed that the Disciplinary Commission and the HJC used to impose disproportionate sanctions or have imposed substantially different sanctions in the same or similar cases.

(2) In about the same number of cases the HJC, on the one hand, revoked the decisions of the Disciplinary Commission and found the judge responsible for a disciplinary offence or imposed a more severe sanctions (8 cases) and, on the other hand revoked the decision of the Disciplinary Commission and acquitted judges or imposed less severe sanctions (6 cases). Therefore, in view of the aforementioned, no conclusion may be reached as to whether the HJC applies a more lenient, and/or a

---

<sup>166</sup> See DC 116-04-00139/2014-05 (22.5.2014).

<sup>167</sup> HJC 116-04-659/2014-01 (23.9.2014). In this particular case, meanwhile, the statute of limitation was determined, granting the judge's acquittal.

<sup>168</sup> See *supra* note 61.

<sup>169</sup> Spasojevic, *See supra* note 48, p. 20.

<sup>170</sup> Spasojevic, *See supra* note 48, p. 20.



stricter sentencing policy compared to the Disciplinary Commission. Specifically, in 7 cases the HJC reversed the decisions on the responsibility taken by the Disciplinary Commission (in 3 cases the acquittal decision was reversed into the decision on disciplinary responsibility,<sup>171</sup> whereas in 4 cases the decision on disciplinary responsibility was reversed into the acquittal decision<sup>172</sup>). With regard to the revision of the sanctions imposed, reversal has been observed in 5 cases (in 3 cases the HJC imposed stricter sanctions,<sup>173</sup> whereas in 2 cases the sanctions imposed were more lenient<sup>174</sup>), whereas in 3 cases the HJC took a different view from the Disciplinary Commission regarding determination of a disciplinary offence as qualified (in 2 cases the HJC considered the offence to be qualified,<sup>175</sup> while in one case it considered that it was a basic form of disciplinary offence, rather than a qualified one<sup>176</sup>).

In 2 cases the HJC rejected a motion for dismissal of the Disciplinary Commission. As already mentioned hereinabove, in one of these cases it was not possible because of to the relevant provisions of the Labour Law to dismiss the judge who was found responsible for a grave disciplinary offence, whereas in the second one the HJC reckoned that a basic form of disciplinary offence was committed, rather than a qualified one.<sup>177</sup>

(2) The disciplinary bodies determine the specific sanction based on the existence of mitigating and aggravating circumstances in cases where responsibility is established for the basic form of disciplinary offence, seeking to establish a sanction that would be proportionate to the offence committed, as required under the Law on Judges and the Disciplinary Rulebook (Art. 91 (2) and Art. 3 (1)). The Rulebook further specifies that in determining the sanctions, it shall be taken into account whether a judge has any earlier disciplinary records, his behavior in disciplinary proceedings and other relevant circumstances (Art. 3 (2)).

In practice, disciplinary bodies take the following circumstances as mitigating: (a) that the judge has not previously been found responsible in disciplinary proceedings;<sup>178</sup> (b) his/her conduct during the disciplinary proceeding,<sup>179</sup> including (partially or completely) admission of the offence;<sup>180</sup> (c) the results achieved during the performance thereof;<sup>181</sup> (d) years of service;<sup>182</sup> (e) caseload;<sup>183</sup> (f) personal (including health)<sup>184</sup> conditions and circumstances of the judge and his/her family;<sup>185</sup> and (g)

---

<sup>171</sup> HJC 116-04-935/2014-01 (24.6.2015); HJC \*\*\* (09/04/2015) and HJC 116-04-01020/2014-01 (17.3.2015).

<sup>172</sup> HJC 116-04-805/2014-01 (13.11.2014); HJC \*\*\* (27 1.2016); HJC \*\*\* (20. 1.2016); HJC 116-04/00747/2014-03 (9/12/2014).

<sup>173</sup> HJC 116-04-91/2014-01 (25.2.2014); HJC 116-04-786/2014-01 (21.10.2014); HJC 116-04-518/2014-01 (22.7.2014).

<sup>174</sup> HJC \*\*\* (11/17/2015); HJC 116-04-00265/2013-01 (16.7.2013).

<sup>175</sup> HJC 116-04-517/2014-01 (31.7.2014); HJC \*\*\* (22/09/2015).

<sup>176</sup> HJC 116-04-798/2014-01 (28.11.2014).

<sup>177</sup> HJC 116-04-798/2014-01 (28.11.2014).

<sup>178</sup> See, for instance, DC 116-04-00971/2014-05 (03/11/2015); DC 116-04-00466/2013-05 (15.4.2014).

<sup>179</sup> See, for instance, DC 116-04-00485/2014-05 (02/25/2015); DC 116-04-00617/2014-05 (30.1.2015); DC 116-04-00787/2014-05 (9/12/2014); DC 116-04-00224/2014-05 (22.5.2014).

<sup>180</sup> See, for instance, DC 116-04-00485/2014-05 (02/25/2015); DC 116-04-00617/2014-05 (30.1.2015); DC 116-04-00233/2014-05 (15.5.2014).

<sup>181</sup> See, for instance, DC 116-04-00485/2013-05 (24.2.2014); DC 116-04-00387/2014-05 (26.8.2014); HJC 116-04-01020/2014-01 (17/03/2015); DC 116-04-00224/2014-05 (22.5.2014).

<sup>182</sup> See, for instance, DC 116-04-00485/2013-05 (24.2.2014); DC 116-04-00363/2013-05 (29.11.2013).

<sup>183</sup> See, for instance, DC \*\*\* (12/06/2015); DC \*\*\* (08/04/2015).

<sup>184</sup> See, for instance, DC 116-04-00269/2014-05 (03/09/2014); DC 116-04-00439/2014-05 (18.9.2014); DC 116-04-00472/2014-05 (17/04/2015).

circumstances relating to the specific case in regard to which the disciplinary proceeding was instituted (for instance, that the disciplinary action was taken because of unjustifiable delays in a case, and that case has been completed in the meantime)<sup>186</sup> and others.

In a number of cases, the disciplinary bodies found that there were no aggravating circumstances affecting the performance of judicial duty. In cases where aggravating circumstances were identified, these implied the following : (a) the judge has previously been sanctioned in a disciplinary proceeding,<sup>187</sup> (b) numerous cases in which the judge acted negligently,<sup>188</sup> (c) duration of the period the judge acted negligently, that is, continued negligent behavior<sup>189</sup> (d) numerous complaints from the parties,<sup>190</sup> and (f) the circumstances relating to the specific case for which a disciplinary action was taken (for instance, the statute of limitation expired in a criminal case).<sup>191</sup>

In some cases, the disciplinary bodies considered that the circumstances that could be deemed aggravating had already been absorbed within the offence itself,<sup>192</sup> therefore, they have not been taken into account when imposing the sanction.

Upon reversing the decisions on the sanctions imposed by the Disciplinary Commission, the HJC drew attention to the fact that in some cases, the importance given to the properly established mitigating circumstances was exaggerated,<sup>193</sup> whereas in one of the cases the circumstance deemed mitigating by the Commission was considered by the HJC to be aggravating.<sup>194</sup> Specifically, the issue was a longtime judgeship. However, in another case, this longtime judicial career was taken by the HJC as a mitigating circumstance.<sup>195</sup> In addition, in some final decisions issued by the Disciplinary Commission (with no appeals filed), a longtime judgeship was taken as a mitigating circumstance upon imposing the sanction.<sup>196</sup> In addition, in these cases a longtime judgeship was used to show that there is a subjective element in the specific disciplinary offence, and then taken as a mitigating circumstance in determining the sanction for the same offence.<sup>197</sup>

In one of the cases before the Commission, a short-time judgeship was taken as a mitigating circumstance.<sup>198</sup> The HJC, however, did not have any chance to comment thereon, since the decision on the responsibility, taken by the Disciplinary Commission, was reversed on other grounds.

---

<sup>185</sup> See, for instance, DC 116-04-00617/2014-05 (30.1.2015); DC 116-04-00233/2014-05 (15.5.2014); DC \*\*\* (06/11/2015), age (see for instance DC \*\*\* (23.10.2015)).

<sup>186</sup> See, for instance, DC \*\*\* (6/12/2015) HJC \*\*\* (11/17/2015); DC \*\*\* (08/04/2015), HJC \*\*\* (12/01/2015); DC \*\*\* (09/11/2015).

<sup>187</sup> Either for the same one (see for instance HJC 116-04-00265/2013-01 (16.7.2013) or any other disciplinary offense (see for instance DC 116-04-00472/2014-05 (17.4.2015)).

<sup>188</sup> See, for instance, DC 116-04-00485/2013-05 (24.2.2014); DC 116-04-00233/2014-05 (15.5.2014).

<sup>189</sup> See, for instance, DC \*\*\* (08/04/2015); DC \*\*\* (23.10.2015); DC 116-04-00485/2013-05 (24.2.2014); DC 116-04-00003/2014-05 (03/20/2014); DC 116-04-00233/2014-05 (15.5.2014).

<sup>190</sup> See, for instance, DC 116-04-00494/2014-05 (22/10/2014).

<sup>191</sup> DC 116-04-00617/2014-05 (30.1.2015).

<sup>192</sup> DC \*\*\* (04/08/2015), HJC \*\*\* (01/12/2015).

<sup>193</sup> HJC 116-04-786/2014-01 (21.10.2014).

<sup>194</sup> HJC 116-04-91/2014-01 (25.2.2014)

<sup>195</sup> HJC \*\*\* (04/09/2015).

<sup>196</sup> DC 116-04-00310/2013-05 (21.11.2013); DC 116-04-00485/2013-05 (24.2.2014).

<sup>197</sup> See, for instance, DC 116-04-00310/2013-05 (21/11/2013); DC 116-04-00485/2013-05 (24.2.2014).

<sup>198</sup> DC \*\*\* (23.10.2015).

The main question is why a longtime judgeship would be considered to be a mitigating circumstance. One could rather opt for the view taking the inexperience of a judge as a mitigating circumstance in the offence committed. Otherwise, this may lead to more lenient sentencing policy applying to the more experienced judges, which has no objective and reasonable justification. The circumstance that could be taken into account as a mitigating one is that, for example, the judge has not previously been involved in the disciplinary action followed by the sanction imposed during the course of his longtime judgeship.

These findings indicate that disciplinary bodies should keep making efforts in order to establish the criteria governing the sentencing policy defining them in more detail, as well as on the objectification of the respective criteria. One thing that could contribute thereto is the practice of a more thorough consideration and a more specific application of the aggravating and/or mitigating circumstances established in presenting the statement of the facts of the case instead of just listing them. For now, this disadvantage does not prejudice the judge subject to the sanction imposed and has no negative impact on the sentencing policy, but affects the quality of the decisions passed by disciplinary bodies.

### **3.4 Quality of Decisions**

Quality of the decisions passed by disciplinary bodies may be scrutinized in the substantive and the formal sense. As questions relating to the substantive aspects of the decision, in terms of interpretation of the relevant regulations and specific standards, have already been dealt with, in this section the attention shall be drawn to the quality of decisions in the formal sense.

On the basis of the decisions of the disciplinary bodies submitted to the OSCE Mission, it may be concluded that the progress has been made in the methodology governing decision drafting. Namely, there is a striking difference observed between certain decisions which established the responsibility of judges from 2013, which include  $\frac{1}{4}$  page of reasoning,<sup>199</sup> and the decisions passed in 2014. In the latter, it has been noted that the Disciplinary Commission has been striving to systematically review each case for the existence of the specific disciplinary offence and demonstrate it through argument of the existence of objective and subjective elements of specific offences, thus contributing to a better visibility and understanding of their attitudes. Decisions generally contain several pages, depending on the complexity of the circumstances that led to the initiation of disciplinary proceedings. However, the techniques of legal writing and reasoning of judgments could be additionally improved, especially in terms of presenting and explaining their views regarding the coherent and consistent interpretation of the regulations, standards and sentencing.

## **4. Conclusion**

### **4.1 Legal Framework**

---

<sup>199</sup> DC 116-04-00373/2013-05 (4.11.2013).

The legal framework governing the disciplinary accountability of judges in Serbia conforms to the international standards, except for the composition of the second-instance disciplinary body (this shall be discussed herein below).

First of all, the Law on Judges determines disciplinary offences as acts of negligent and unworthy performance of judicial duties, prescribing eighteen disciplinary offences which correspond to the principles of judicial conduct specified under the international documents as impermissible conduct. In addition, the Law and the Disciplinary Rulebook guarantee a series of rights to the judges whose conduct is the subject of the disciplinary action taken: the right to counsel, the right to present statements, to submit evidence, confidentiality and urgency of the proceeding, the right to appeal, that is, two levels of decision-making, and ultimately, the right to institute an administrative dispute before the Administrative Court following the final decision passed by the disciplinary body. In addition, as stipulated under the international standards, these acts require application of the principle of proportionality in determination of disciplinary sanctions.

As already mentioned hereinabove, the only objection that could be made to the legal framework of disciplinary accountability of judges in Serbia from the standpoint of international standards is the one relating to the composition of the second-instance disciplinary body. Namely, the international standards prescribe that the disciplinary responsibility of judges should be decided by an independent body. Since the membership of the HJC, which acts as the second-instance disciplinary body, includes two representatives from the executive and the legislative authorities (the Minister of Justice and the President of the competent committee of the National Assembly),<sup>200</sup> the question of the independence thereof remains open.

Although the European Charter for Judges from 1998 requires the disciplinary bodies composed by a majority of judges<sup>201</sup> - which is certainly the case when it comes to the HJC composition (7 out of 11 members are judges)<sup>202</sup> - the latest trends in the international scene show their tendency to go one step further. The UN Special Rapporteur concluded in 2014 that political representatives have no place in the bodies that decide on disciplinary responsibility of judges, while it is recommended to include the representatives from other legal professionals and professors in the membership of disciplinary bodies, sitting next to judges. Therefore, the solution offered by the Serbian legislator, in respect of the second-instance disciplinary body, appears to be in disharmony with the respective "improved" standard of the Special Rapporteur. On the other hand, the recommendation laying down that disciplinary bodies should include representatives from other legal professionals and professors has been observed and adhered to, considering the fact that the membership of the HJC includes one attorney<sup>203</sup> and one law professor.

In addition to the changes required in the composition of the second-instance disciplinary body, it shall be necessary to introduce certain changes into the legal framework governing the disciplinary accountability of judges in Serbia, which would contribute to the consistency and coherence thereof accordingly.

*First*, the Law on Judges should contain an explicit provision on disciplinary accountability of court presidents. It seems that it would be good to consider the introduction of a special disciplinary offence for court presidents, which would include cases of negligent behavior concerning the non-

---

<sup>200</sup> Art. 153 (3) of the Constitution, *Official Gazette of RS*, No. 98/06.

<sup>201</sup> See, for instance. European Charter for Judges, section 1.1.2.

<sup>202</sup> Art. 153 (3) and (4) of the Constitution.

<sup>203</sup> Although the current membership of the HJC does not include any attorneys.

implementation or failure to implement the relevant rules and regulations falling under the jurisdiction thereof. *Secondly*, it would be necessary to amend a rather vague provision referring to the existence of a grave disciplinary offence (Art. 90 (2)), which has led to numerous problems due to the interpretation thereof in practice. For additional information on the aforementioned, please refer to the section herein below.

In addition to these changes required to amend the Law on Judges, it is necessary to introduce certain changes into the new Disciplinary Rulebook (2015), as it contains some incoherent solutions. In fact, it expressly provides for the option allowing the court president, who had his/her proposal to institute proceedings determining the grounds for dismissal rejected by the HJC, and has been pronounced responsible for the basic form of a disciplinary offence, to initiate an administrative dispute. Such an option has not been expressly prescribed under the Rulebook for judges who are found responsible for the basic offence under the same circumstances.

Finally, it has been observed that the Law on Judges and the Disciplinary Rulebook contain apparent omissions and deviations. Thus, the Law on Judges stipulates that unfounded disciplinary reports shall be "rejected", while the Disciplinary Rulebook does not regulate the decision-making of the Disciplinary Commission.<sup>204</sup> It shall be necessary to introduce appropriate amendments to address these issues.

## **4.2 Practice**

Data show that since the establishment of disciplinary bodies in 2011 there has been a steady exponential rising trend in disciplinary proceedings against judges. Decisions analysis showed that the most common disciplinary offences for which judges have been found responsible by final decisions are those relating to negligent performance of judicial duties related to the conduct or the completion of the legal proceeding, in particular: unreasonable prolonging of the proceedings, the delay in decision drafting and failure to schedule hearings or trials. The same conclusion holds true for disciplinary offences which have been determined to constitute a qualified form of the specific offence/s. This only underscores the endemic problems of the Serbian judiciary concerning the efficiency thereof.

Disciplinary bodies comply with all procedural guarantees in the disciplinary proceedings. Moreover, in practice, it has been observed that upon interpretation of the procedural guarantees, disciplinary bodies do not hold only to the textual interpretation of the Rulebook, but they correctly resort to teleological interpretation of other legal provisions.

In addition, the analysis has shown that the Disciplinary Commission and the HJC have contributed to a closer determination of the meaning of broader concepts that constitute the essence of specific disciplinary offences.<sup>205</sup> Also, their contribution in terms of establishing the legal standards governing determination of the existence of specific disciplinary offences is quite obvious.<sup>206</sup> However, in the proceedings referring to the allegations of a disciplinary offence involving the "violation of the Code of Ethics to a great extent", these bodies do not pay particular attention to benchmarking of the standard "to a great extent". Such an approach has been observed in one case only. In addition, it has been observed that in some cases the disciplinary bodies did not pay enough attention when it comes to

---

<sup>204</sup> See 2.4.2.

<sup>205</sup> As is the case with the offenses such as "breach of impartiality principle" and "unfair treatment of participants in the proceedings" See 3.2.2.2.

<sup>206</sup> For instance, "unjustifiable" and "manifested". See 3.2.2.1. The same holds true for determination of the term "public" relevant in terms of the qualified form of offense. See 3.2.2.3.

determination of the specific provisions laid down under the Code of Ethics that were violated. It is therefore essential to ensure the Commission and the HJC have precisely defined the provision of the Code of Ethics breached as a result of the specific negligent action of the judge in charge, for each particular case in the future, followed by a more thorough explanation of the violation of the Code of Ethics to a great extent.

There are also certain issues observed in the application of the vague provision of the Law on Judges referring to grave disciplinary offences.<sup>207</sup> *First of all*, it appears that the wording of this provision set forth under the Law on Judges specifies certain circumstances (statute of limitation of the case, and significant damage to the property of the party) which have been used as a basis for identifying the consequences that are required to determine a qualified form of offence with no doubt (serious disruption in the exercise of judicial power or the performance of regular duties at the court or serious damage to the reputation and public trust in the judiciary). However, the practice of the HJC demonstrates that expiry of the statute of limitation in the cases (even criminal) is not itself a qualifying circumstance, and the occurrence of the consequences prescribed under the law has to be proved separately. There is no doubt that not every statute of limitation shall entail the same consequences, however, it seems that expiry of the statute of limitation due to the negligent action of the judge in charge represents in itself a serious disruption in the exercise of judicial power and performance of regular duties at the court, and that it is this direction that the disciplinary bodies, especially the HJC, should develop their practice towards. *Secondly*, the analysis of the practice shows that the disciplinary bodies, especially the Disciplinary Commission, do not pay enough attention to make a difference between the consequences required to establish in order to prove the existence of a qualified form of disciplinary offence. The Commission takes all cases into consideration under the umbrella of the consequences involving "a serious damage to the reputation and public trust in the judiciary".

As far as sentencing policy is concerned, over the period covered by the decisions analyzed (end of 2013 - beginning of 2016) a progress has been observed. Specifically, this policy is no longer based on the "two opposite poles" as was the case in the previous period (2011 to 2014), but in most cases, the sanctions imposed are somewhere in the middle of these two poles (salary reduction).<sup>208</sup> Moreover, based on the analyzed decisions that were submitted to the OSCE Mission, no disproportionate imposition of sanctions was evidently observed, and there were no cases evidencing imposition of substantially different sanctions in the same or similar cases.

Moreover, it was observed that these bodies in practice tend to specify the relevant circumstances for establishing the sanctions, in terms of identifying both mitigating and aggravating circumstances. However, it has been noted that the relevant circumstances are often listed only, rather than specified within the context of the particular case. For the time being, this weakness does not prejudice the judges subject to the sanction imposed and has no negative impact on the sentencing policy applied, nor does it affect the quality of the decisions issued by the disciplinary bodies.

These findings indicate that the disciplinary bodies should keep making efforts towards establishing a more precisely defined criteria governing imposition of the sanctions, as well as the objectification thereof.

As for the quality of the decisions of the Disciplinary Commission and the HJC submitted to the OSCE Mission, it may be concluded that the disciplinary bodies are working on improving the methodology of

---

<sup>207</sup> See 3.2.2.3.

<sup>208</sup> See 3.3.1.

decision drafting.<sup>209</sup> Namely, in the decisions from 2014 it has been observed that there is a tendency of the Disciplinary Commission to systematically consider the existence of the specific disciplinary offence for each case in particular, presenting it through argumentative analysis of objective and subjective elements identified in the specific offence, which contributes to a better transparency of the reasoning for the decision and a better understanding of the attitude expressed therein.

## 5. Recommendations

This section shall outline the recommendations based on the conclusions of the analysis performed on the decisions submitted by the HJC to the OSCE Mission. The aforementioned include a summary of both the interventions in legal regulations, as well as the measures for improving the practice of the bodies in charge of deciding on disciplinary responsibility of judges.

### **I Amendments to the Legal Framework**

#### A. *Law on Judges*

##### Membership of the second-instance disciplinary body

1. Adapt the composition of the second-instance disciplinary body to the international standards striving to exclude any representatives from other branches of government from the membership in the bodies in charge of decision-making on the responsibility of judges;

(Example: when the HJC acts as a second-instance disciplinary body, it shall perform the duty free from any interference from any executive and legislative government officials. In that case, the HJC would be deciding with 9 instead of 11 members, which still enables majority decision-making).

##### Disciplinary Accountability of Court Presidents

2. The Law on Judges shall be amended to include the provisions that would explicitly provide disciplinary accountability of court presidents;
3. In this sense, it shall be necessary to take into consideration introducing a special disciplinary offence for court presidents, which would include cases involving negligent behavior relating to non-implementation or failure to implement the relevant provisions within the jurisdiction thereof;

##### Disciplinary Offence “Violation of the provisions of the Code of Ethics to a Great Extent”

1. Amend the Law on Judges to define more precisely what is considered to be violation of the Code of Ethics *to a great extent*.

---

<sup>209</sup> See 3.4.

### Grave Disciplinary Offence

4. Amend the provision regulating the grave disciplinary offence to include more precisely defined criteria governing the establishment thereof;

### Other

5. Revise the Law on Judges, addressing the obvious weaknesses observed in Article 95, which provides that unfounded disciplinary reports shall be "rejected";

#### B. *Disciplinary Rulebook*

6. Adapt the Rulebook to the recommendation set forth under I.A.1 ensuring full compliance therewith;
7. Amend the Disciplinary Rulebook to include the provision on the Disciplinary Commission decision-making by a majority vote of the members thereof;
8. Amend the Disciplinary Rulebook so that it gives the possibility to initiate an administrative dispute in cases involving court presidents who were found responsible for having committed a disciplinary offence in the capacity thereof.

## **II Improvement of Practice**

### Disciplinary offence "violation of the Code of Ethics to a great extent"

1. Work on precisely defining the standard "to a great extent."
2. For each case relating to this particular offence, ensure specifying the specific provisions of the Code of Ethics breached

### Grave Disciplinary Offence

3. Work on consistent, and coherent development of the practice of establishing grave disciplinary offences, in particular
  - a. Identify the specific consequence which has occurred in the circumstances of the particular case (referring to the ones required under the Law on Judges to prove the existence of a grave disciplinary offence);
  - b. Develop the practice pertaining to the offences related to negligent behavior in conducting and/or completion of court proceedings (unreasonable prolonging of the proceedings, the delay in decision drafting and failure to schedule hearings or trials), in case of no complaints from the parties thereto and in case the public has not been informed about the conduct of a judge – implying that caseloads and/or significant deadline extensions are likely to



cause the consequences resulting in a serious disruption in the exercise of judicial power or performing regular duties at the court;

- c. Reconsider the attitude implying that the statute of limitation as a consequence resulting from the negligent behavior of a judge itself does not lead to a serious disruption in the exercise of judicial power or performing regular duties at the court.

#### Sentencing policy

4. Work on precisely defining the criteria governing determination of the sanctions imposed as well as on objectification thereof, in particular:
  - a. Interconnecting actual circumstances relevant to the determination of the sanction with the circumstances of the specific case; and
  - b. change the practice of taking a longtime judicial service as a mitigating circumstance.

## APPENDIX 1

### I Overview of specific sanctions for the responsibility established by the final decision for specific disciplinary offences committed

- (2) **failure of the judge to request recusal** in cases where there is reason for recusal prescribed by law (1 case)
  - 1 public reprimand (HJC,<sup>210</sup> decision of the Disciplinary Commission (hereinafter referred to as the: DC) by which the judge was acquitted reversed<sup>211</sup>);
- (3) **unjustifiable delay in decision drafting** (9 cases);
  - 6 salary reduction (20% of the salary for 3 months,<sup>212</sup> 20% of the salary for 4 months (HJC<sup>213</sup> reversed the decision on sanction imposed by the DC (20% for 3 months),<sup>214</sup> 20% of the salary for 6 months,<sup>215</sup> 30% of

---

<sup>210</sup> HJC 116-04-01020 / 2014-01 (17.3.2015).

<sup>211</sup> DC 116-04-00802/2014-05 (27.11.2014)

<sup>212</sup> DC 116-04-00270/2014-05 (4.7.2014).

<sup>213</sup> HJC 116-04-518/2014-01 (22.7.2014).

<sup>214</sup> DC 116-04-00224/2014-05 (22.5.2014)

<sup>215</sup> DC 116-04-00003/2014-05 (20.3.2014).

the salary for 8 months,<sup>216</sup> two decisions ordered 40% salary reduction for the period of 1 year<sup>217</sup>) and

- 3 dismissals<sup>218</sup> (in one of the cases, the HJC<sup>219</sup> reversed the decision of the DC which found the judge responsible for the basic offence (imposing the sanction implying 20% salary reduction for the period of 4 months)).<sup>220</sup>
- (5) **unjustifiable failure to schedule hearings or trials** (1 case)
  - 1 cumulative sanction in the form of salary reduction and promotion prohibition (20% of the salary for 4 months and the ban on promotion for 1 year<sup>221</sup> (previously motion for dismissal by DC rejected by the HJC<sup>222</sup>))
- (7) **unreasonable prolonging of the proceedings** (7 cases)
  - 3 public reprimands<sup>223</sup>
  - 3 salary reductions (10% for 3 months (HJC<sup>224</sup> reversed the DC decision on the sanction imposed (20% for 6 months)),<sup>225</sup> 20% for 4 months<sup>226</sup> and 20% for 6 months<sup>227</sup>)
  - 1 dismissal<sup>228</sup> (HJC reversed the decision taken by the DC which found the judge responsible for having committed the basic form of the offence by imposing the sanction of 50% reduction in salary for one year and a ban on promotion for 2 years<sup>229</sup>).
  - In 3 cases, the judge was acquitted by the HJC,<sup>230</sup> while he/she was found responsible for having committed the offence by the DC

---

<sup>216</sup> DC 116-04-00269/2014-05 (3.9.2014).

<sup>217</sup> DC 116-04-00266/2014-05 (4.7.2014), HJC 116-04-670/2014-01 (30.9.2014); DC 116-04-00485/2014-05 (02/25/2015), HJC 116-04-235/2015-01 (29.5.2015);

<sup>218</sup> DC 116-04-00268/2014-05 (3.9.2014); HJC 116-04-517/2014-01 (31.7.2014); DC 116-04-00520/2014-05 (18.9.2014).

<sup>219</sup> Following Decision HJC 116-04-517 / 2014-01 (31.7.2014).

<sup>220</sup> DC 116-04-00233/ 014-05 (15.5.2014).

<sup>221</sup> DC 116-04-00617/2014-05 (30.1.2015).

<sup>222</sup> HJC 116-04-798/2014-01 (28.11.2014).

<sup>223</sup> HJC 116-04-795/2014-01 (13.11.2014); DC 116-04-00787/2014-05 (9/12/2014); DC 116-04-00387/2014-05 (26.8.2014), HJC 116-04-792/2014-05 (13.11.2014).

<sup>224</sup> HJC \*\*\* (11/17/2015).

<sup>225</sup> DC \*\*\* (12/06/2015).

<sup>226</sup> DC \*\*\* (04/08/2015), HJC \*\*\* (01/12/2015).

<sup>227</sup> DC 116-04-00494/2014-05 (22.10.2014).

<sup>228</sup> HJC \*\*\* (22/09/2015).

<sup>229</sup> DC 116-04-00472/2014-05 (17.4.2015).

<sup>230</sup> HJC 116-04-805/2014-01 (13.11.2014); HJC \*\*\* (27 1.2016); HJC \*\*\* (20. 1.2016).

having imposed the sanction in the form of a public reprimand,<sup>231</sup> or 20% salary reduction for 5 months<sup>232</sup>;

- (9) **manifestly unfair treatment** of participants in court proceedings and court staff (3 cases)
  - 2 public reprimands<sup>233</sup>
  - 1 salary reduction (10% for 6 months (HJC<sup>234</sup> reversed the decision of the DC which acquitted the<sup>235</sup>))
- (13) **making public statements and commenting on court decisions**, actions or cases in the media in a manner contrary to the rules prescribed under the law and the Court Rules of Procedure (1 case)
  - 1 public reprimand (HJC<sup>236</sup> reversed the decision of the DC which acquitted the judge<sup>237</sup>);
- (14) **engaging in the activities defined under the law as incompatible with the judicial office** (1 case)
  - 1 salary reduction (20% for 6 months (HJC<sup>238</sup> reversed the decision of the DC on the sanction imposed (15% for 3 months))<sup>239</sup>
- (18) **violation of the provisions of the Code of Ethics to a great extent** (3 cases)
  - 3 salary reductions (two implying 20% for 6 months<sup>240</sup> and one 40% for one year (HJC,<sup>241</sup> reversed the decision of the DC on the sentence (50% for one year<sup>242</sup>))
  - HJC acquitted the judge<sup>243</sup> found responsible by the DC having imposed the sanction implying 20% reduction in salary and the prohibition of promotion for 3 years<sup>244</sup>

## **II Sanctions in cases establishing responsibility for *more than one disciplinary offence***

<sup>231</sup> DC 116-04-00439/2014-05 (18.9.2014); DC \*\*\* (23.10.2015); DC \*\*\* (13. 11.2015).

<sup>232</sup> DC \*\*\* (09/11/2015).

<sup>233</sup> In cases DC 116-04-00971/2014-05 (11.3.2015), HJC 116-04-309/2014-05 (29.5.2015); DC 116-04-00466/2013-05 (15.4.2014), HJC 116-04-401/2014-01 (17.7.2014);

<sup>234</sup> HJC \*\*\* (04/09/2015).

<sup>235</sup> DC \*\*\* (25/03/2015).

<sup>236</sup> HJC 116-04-935/2014-01 (24.6.2015).

<sup>237</sup> DC 116-04-00441/2014-05 (28.10.2014).

<sup>238</sup> HJC 116-04-91/2014-01 (25.2.2014).

<sup>239</sup> DC 116-04-00363/2013-05 (29.11.2013).

<sup>240</sup> DC 116-04-00373/2013-05 (4.11.2013) and DC 116-04-00310/2013-05 (21.11.2013).

<sup>241</sup> HJC 116-04-00265/2013-01 (16.7.2013).

<sup>242</sup> According to HJC 116-04-00265/2013-01 (16.7.2013).

<sup>243</sup> HJC 116-04/00747/2014-03 (9/12/2014).

<sup>244</sup> DC 116-04-00186/2014-05 (16.6.2014).

- **unjustifiable delays in decision drafting and unjustifiable failure to schedule hearings or trials** (1 case) - 1 dismissal;<sup>245</sup>
- **unreasonable prolonging of the proceedings and unjustifiable failure to schedule hearings or trials** (4 cases) - 1 public reprimand,<sup>246</sup> 2 salary reductions (10% for 3 months<sup>247</sup> (HJC reversed the decision on the sanction imposed by DC (public reprimand))<sup>248</sup> and 30 % for one year<sup>249</sup>) and 1 dismissal;<sup>250</sup>
  - **engaging in inappropriate relations with parties** or their legal representatives in the proceedings and **violation of the Code of Ethics to a great extent** (1 case) - 1 dismissal;<sup>251</sup>
- **manifestly unfair treatment of participants in court proceedings and court staff and violation of the Code of Ethics to a great extent** (1 case) - 1 salary reduction (10% for 3 months<sup>252</sup>).

---

<sup>245</sup> DC 116-04-00487/2014-05 (10.10.2014). In one of the cases, the judge was found responsible for a qualified form of the disciplinary offense regarding these specific violations, but with no sanctions imposed, see DC 116-04-00616/2014-05 (17/10/2014), DC 116-04-00616/2014-05 (02/04/2015) and HJC 116-04-149/2015-01 (28.4.2015).

<sup>246</sup> DC 116-04-00389/2014-05 (8.9.2014)

<sup>247</sup> HJC \*\*\* (11/17/2015); HJC 116-04-786/2014-01 (21.10.2014).

<sup>248</sup> DC 116-04-00389/2014-05 (8.9.2014).

<sup>249</sup> DC 116-04-00485/2013-05 (24.2.2014).

<sup>250</sup> HJC 116-04-786/2014-01 (21.10.2014), DC 116-04-584/2014-05 (22.10.2014).

<sup>251</sup> DC 116-04-00356 / 2013-05 (22.10.2013).

<sup>252</sup> DC 116-04-00908 / 2014-15 (13.2.2015).

## APPENDIX 2

