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"Strengthening the Capacities of Law Enforcement and Judiciary in the Fight against Corruption in Serbia" (PACS)

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Technical Paper

EXPERT OPINION ON THE RULES ON DISCIPLINARY PROCEEDINGS AND DISCIPLINARY LIABILITY OF PUBLIC PROSECUTORS AND DEPUTY PUBLIC PROSECUTORS OF THE REPUBLIC OF SERBIA AND THE RULEBOOK ON DISCIPLINARY PROCEEDINGS AND DISCIPLINARY RESPONSIBILITY OF JUDGES OF THE REPUBLIC OF SERBIA

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1. Introduction

This Technical Paper focuses on the compatibility of the of the Rules on Disciplinary Proceedings and Disciplinary Liability of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia and of the Rulebook on Disciplinary Proceedings and Disciplinary Responsibility of Judges of the Republic of Serbia with relevant standards in this area. In this respect, this paper pays special attention to the aforementioned rules compliance with the relevant international standards in the field of criminal and anti-corruption legislation; to the conformity of the said rules with the national legal system and constitutional order; and to the rule's compliance with the multiple recommendations and other legally bindings acts of the Council of Europe - its Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System1 (which *a similie* applies to the disciplinary systems for judges) and the Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities2.

The aim of this paper is to provide legal opinion and advice to the High Judicial Council and the State Prosecutors Council with regard to disciplinary rules and measures against ethical violations by judges and prosecutors when construed as corruptive practises/allegations and to assist the implementation of these rules. The provision of this paper presents one of the actions of the Joint Project of the European Union and the Council of Europe "Strengthening the Capacities of Law Enforcement and Judiciary in the Fight against Corruption in Serbia - (PACS)".

This paper provides comments to the aforementioned rules on an article-by-article basis. If no specific comment was made in this opinion means that the rules are essentially consistent with the international standard and good practice.

1 https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM

2 https://wcd.coe.int/ViewDoc.jsp?id=1707137

2. General observations

The rule of law represents one of the most fundamental and important components in a democratic society. Its implications are broad in their range and are a necessary prerequisite for a functioning state which complies — in the highest manner possible — with respecting human rights of individuals, and thus enables the establishing of a truly democratic and legitimate state and society.

The judicial system and the public prosecution are an important part in this mosaic of multiple institutions and legal acts, which all together enable the execution of the rule of law in its most complete form. There is to be noted however, that the judiciary and the public prosecution are a part of a global state system which ensures that the doctrine of rule of law is being applied correctly. With that being established it is imperative that the judicial system and the public prosecution are regulated by numerous legal acts and laws. In this respect The Rules on Disciplinary Proceedings and Disciplinary Liability of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia (hereinafter "The Rules") and the Rulebook on Disciplinary Proceedings and Disciplinary Responsibility of Judges of the Republic of Serbia (hereinafter "the Judges Rules"), which are the subject of this Technical Paper are just one of the components of the complex legal system. On the other hand such rules, objectively, do not represent a major and most important legal act, such as the constitution or the law, but are nevertheless extremely important for the proper functioning of the rule of law doctrine. The latter is illustratively explained in the case of the European Court of Human Rights (hereinafter "ECtHR") M. v. Germany3 where the court reiterated that the basic principle of the rule of law is not just manifested in existence of a certain law, rule, guideline or other legal act - instead it is manifested in its application through multiple individual cases where it is ascertained if the human rights of the individuals have been respected or not.

On one hand, the ECtHR, with its authority in the field of the European criminal and civil law, does not demand the existence of a certain type of a legal act nor it prescribes its content. Instead it has a very case oriented approach in finding out if a person's human rights have been violated or not. This gives the Republic of Serbia a very broad and wide frame in passing The Rules and The Judges Rules. Such a fact is further supported by the position of the Council of Europe, that "all national systems within the Council of Europe enjoy full legitimacy: no single public prosecution model can be defined, even as a preference or guideline"4. On the other hand, this fact is a considerable advantage as it gives the Republic of Serbia a 'room to

3 ECHR, M v. Germany, Application no. 19359/04, 17.12.2009.

4 Council of Europe Standards on Public Prosecutors, 18th IAP Conference, 12.9.2013.

manoeuvre' with the specific provisions in The Rules and The Judges Rules, but also generates a certain amount of risk, as the absence of strict guidelines means that there is — by definition — a greater probability or possibility for occurrence of deficiencies in The Rules and the Judges Rules.

The judicial system and the prosecution system are namely one of the most fundamental parts of the state institutions which most directly embody the rule of law and not only in its contextual form, but also in the eyes of public. The latter must have a sense of trust in the judicial institutions (including the Prosecution), because "trust is embodied by hope which ensures a feeling of safety." The Republic of Serbia has already taken numerous steps in order to return the trust of the public in the state institutions, including the justice sector, but the fact remains that there is still much to be done. Accepting of The Rules and The Judges Rules in this context shows, that the Republic of Serbia is paying attention even to some of the (objectively looking) minor legal acts, but in a broader sense this means much more. A state is truly functioning when there is not only a good constitutional and legal base, but when there is attention to detail, which is then the final and key factor that ensures that the rule of law is embodied in practice. The constitution and legal acts are namely very abstract in their nature and in turn do not resolve specific dilemmas and problems which occur in everyday functioning of the state institutions. Accepting of The Rules and The Judges Rules will, in this manner, enable the judicial system and the Public Prosecution to have a very defined and detailed level of guidelines and rules, which will enable its proper functioning in the utmost compliance with the rule of law.

The offences committed in the line of work of the Public Prosecution may not mean that the rule of law is being eroded, especially if they occur in a small amount of cases. But in the eyes of the public and their sense of trust in the Justice, such minor offences may diminish their belief in the legal system. The latter is especially fragile in the former republics of Yugoslavia, as they are all burdened with the doubt of corruption, which rises from the specific circumstances dating back into history. Same can be said for the judicial system, even more, in this case violations gain even greater extent, not only in the eyes of the public, but also objectively looking from the viewpoint of the rule of law doctrine and the functioning of the state. When reviewing the proposed Rules and the Judges Rules in this context it becomes apparent, that they play a very important, if not crucial part not only in restoring the trust in the eyes of the public but also in the practical implementation of the rule of law, which is by definition a very abstract principle.

In sense of what has been elaborated above, the Public Prosecution has a very difficult task in balancing the rights of the individuals in the criminal procedures while, on the other hand, also needs to manage and be exposed to pressure of public for being non effective in its work. A similar dilemma is, as well, present in the judicial system, especially when dealing with cases which have a higher public resonance and attention. In this respect The Rules and the Judges Rules themselves will have to strive to strike the perfect balance between control over the Public Prosecution and the judicial system and their responsibility and autonomy, which is of the utmost importance in guaranteeing a functioning judicial and Public Prosecution system. If the control is too rigorous and diminishes the autonomy, then the judicial system and the Public Prosecution cannot function as they are supposed to. On the other hand, if the control is too lenient, then there is greater risk for corruption and other deficiencies in their work. With the aim to standardise the possible solutions in this complex matter, the Council of Europe (hereinafter 'CoE') Committee of Ministers developed and adopted the Recommendation Rec(2000)19 to the member states on the Role of Public Prosecution in the Criminal Justice System (October 2000), which were further expanded with the European Guidelines on Ethics and Conduct for Public Prosecutors5 (hereinafter "The Budapest Guidelines" from May 2005). The mentioned recommendations contain numerous fundamental and broad principles which provide guidelines and advice in resolving the previously mentioned conflicts.

5 http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2005/CPGE_2005_05LignesDirectrices_en.pdf

3. Compliance of the Rules

The following chapter examines the compliance of the Rules with the Council of Europe Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system ("The Recommendation") and the European guidelines on ethics and conduct for public prosecutors ("The Budapest Guidelines"). Also comparisons with numerous other system of Public Prosecution control in other European states, such as France, Germany and Italy will be made especially in the areas which are not covered by the aforementioned standards.

3.1. Analysis and observations on Article 1, 2 and 3

Article 1
These Rules regulate disciplinary liability of public prosecutors and deputy public prosecutors (hereinafter: the prosecutors), disciplinary offenses, disciplinary sanctions, method of work and organization of disciplinary bodies and disciplinary proceedings.

Article 2 - Congruent application of the Law on General Administrative Procedure
(1) Disciplinary proceedings against prosecutors shall be executed in accordance with the Law on Public Prosecution and these Rules.
(2) For matters not regulated by the provisions from paragraph 1 of this article, the Law on General Administrative Procedure shall apply accordingly.

Article 3 - Official language and script
In disciplinary proceedings before disciplinary bodies and the State Prosecutorial Council (hereinafter: the Council), the Serbian language and Cyrillic script shall be in official use.

The Article 1 sufficiently defines the scope of the Rules and what they regulate. However, the Article 2, in its second paragraph, should refer to the Criminal Procedure Code for matters not regulated by the Rules and the Law on Public Prosecution. The fact is, that a disciplinary procedure against a prosecutor is, in its core, more 'associated' to the rules and doctrine of a criminal procedure, rather than the general administrative procedure. As it can be seen from the following provisions of the Rules, the prosecutor against whom the procedure has been taken, has numerous rights, including the right to state his arguments, suggest evidence etc. On the other hand — the prosecutor is a subject of an investigation, which could cover only

his/her work duties in the context of work efficiency, or a more serious offence which could implicate deliberate non-performance of his/her duties, a corruptive action or other.

In this sense the General Administrative act is insufficient in the amount of rights that it offers, so if a certain question is not regulated by the Rules or the Law on Public Prosecution, the defendant (investigated prosecutor) would benefit more from the Criminal Procedure Code. The latter is namely a legal act which is intended for protecting the weaker party in a criminal procedure (e.g. the suspect – in this case the accused prosecutor in a disciplinary proceeding - enjoys a higher level of protection in comparison with the state as the prosecuting party, which has an array of possibilities that vastly outnumber the ones of the defendant. Same can be said for the disciplinary procedure).

The potential prosecutor who is being investigated or against whom a procedure has been launched, is nevertheless only a suspect. His/her guilt or offence which he might have committed is therefore not ascertained beyond reasonable doubt and is only being investigated if such an occurrence has in fact occurred. Such a prosecutor is in this context entitled to additional safeguard and guarantees, which will ensure that the whole procedure is transparent and legitimate. With that being established the reference to the General Administrative act is insufficient, and the reference to the Criminal Procedure Code would be more appropriate. This would also be in line with points e. and f. of the 5. paragraph of the Recommendation which state that "disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review" and also that "public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected".

However, even if the legal terminology remains as it is and if the mentioned legal safeguards are applied in practice, for matters not regulated by the provisions from paragraph 1 of this article, the Law on General Administrative Procedure can also be applied.

3.2. Analysis and observations on Article 4, 5, 6

Article 4 - Duty to deliver documents and information
Public prosecutions, courts, other state authorities, as well as other organizations and legal persons are required to promptly deliver to the Disciplinary Prosecutor and the Council, at its request, documents and other information required for undertaking actions in disciplinary proceedings for which it is competent.

Article 5 - Informing the public
The Council may inform the public on the disciplinary proceedings in which it acts, while taking care of the interests of the proceedings, and the protection of privacy of the participants in the proceedings.

Article 6 - Parties in the proceedings
Parties in disciplinary proceedings are the following: the Disciplinary Prosecutor and prosecutor whose disciplinary responsibility is determined.

The Article 4 is deemed to be clear enough, the only potential problem which could arise is the fact that the Rules, which are the subject of this technical paper, are in their nature a regulatory provision and not the law. Therefore the obligation of other state authorities (as well as of the prosecution and the courts) to deliver documents and other information to the Disciplinary Prosecutor and the Council could present a hierarchical problem in relation to the subordinate nature of the Rules versus the law. Namely the prosecution and other state authorities are institutions whose organisation, structure, operation etc. is mandated and regulated by the law. The Rules, being a regulatory provision, could therefore interfere with the law, as both would regulate the same matter –e.g. the delivery of documents and information. Obligation of state authorities should be regulated only by the law. Rules should only operationalise the obligations stipulated in the law.

In this aspect it is recommended that an obligation to extradite relevant documents is placed in the corresponding legislation, i.e. the Law on Public Prosecution. However, and as stated above, this is merely a legislation related problem and concerns the hierarchical relation between the Rules as the regulatory provision and the law. In terms of content and

compliance with the Recommendation and the Budapest Guidelines, such a provision is nevertheless completely adequate.

The Article 5 is in accordance with the Recommendation, the Budapest Guidelines, as well as the general concept of the rule of law. The prosecutor who is the subject of a disciplinary procedure must be regarded innocent until proven guilty. In this respect it is appropriate that Article 5 contains a safeguard for protection of the privacy of the individuals that is a part of such procedures. However, the Council of Europe Criminal Law Convention on Corruption6, stipulates that all procedures concerned with the public institutions are to be as transparent as possible - transparency should always be a first and foremost principle of disciplinary procedures, while any kind of secrecy should represent a strictly defined exception.

In this context it is recommended that perhaps the final judgement of a disciplinary procedure is mandatory made public.

3.3. Analysis and observations on Article 7, 8

II DISCIPLINARY RESPONSIBILITY

Article 7 - Definition
Disciplinary offense is unconscientious performance of prosecutorial office or conduct of the prosecutor which is unworthy of the prosecutorial office.

Article 8 - Disciplinary offenses
The prosecutor is committing a disciplinary offense if s/he:
- fails to draw up prosecutorial decisions and to file ordinary and extraordinary legal remedies within stipulated time limits;
- frequently misses, or is late for scheduled trials, hearings, and other procedural actions in the cases assigned to him/her;
- fails to request recusal in cases where legal grounds exist;
- refuses to perform assigned duties and tasks;
- fails to comply with the written instructions of the superior public prosecutor;
- manifestly violates rules of proper dealing with the judges in the proceedings, parties, their

[6] http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm

legal council, witnesses, staff, or colleagues;
- engages in inappropriate relations with parties or their legal council in the proceedings;
- provides incomplete or inaccurate information relevant for the work of the State Prosecutorial Council in procedures for the appointment or dismissal of public prosecutors and deputy public prosecutors, procedure for determining disciplinary liability and other matters within his/her competence;
- violates the principle of impartiality and jeopardizes public trust in public prosecution;
- engages in activities that are set forth by the law as incompatible with the office of a public prosecutor, such as: a function in regulatory and executive power authorities, public services and authorities and organs of provincial autonomy or local self-government; membership in a political party; engagement in a public or private paid profession; provision of legal services or legal advice for a fee, as well as other functions, jobs or private interests which are in conflict with the dignity and independence of public prosecution or can cause harm to its reputation;
- accepts gifts contrary to the regulations governing conflict of interest;
- fails to observe working hours determined by law or specified by the Public Prosecutor in charge;
- significantly violates provisions of the Code of Ethics;
- fails to attend mandatory training without justification.

It is noted that the list of the disciplinary offences is (almost entirely) sufficient in the sense of its content, meaning that the offences listed are adequately described. The definition of the disciplinary offence in the Article 7 is sufficient and in accordance with the Recommendation, the Budapest Guidelines, and as such, exists in most of the European legal systems.

However, it needs to be noted that the second disciplinary offence is perhaps a bit too broad. The common practice in European legal systems dictates that there has to be a continuous breach of duties that are entrusted to a certain prosecutor. The term “frequently” which is used in the second point of the Article 8 is too broad. It is therefore recommended that an offence is committed if a public prosecutor, e.g. in the last three/six/nine months, frequently misses or is late for scheduled trials and does not fulfil his/her duties in the contextual, timely or qualitative manner required from him/her, without an excusable reason.

The third and fourth points of the Article 8 should be amended as well, in the sense that a prosecutor commits a disciplinary offence if he refuses to perform assigned duties and tasks

or fails to comply with the written instructions of the superior public prosecutor. However, if the latter was done in light of an excusable reason, prescribed by the law, the public prosecutor cannot be punished for acting in such a way.

The autonomy of the Public Prosecutor is one of the most fundamental aspects of the rule of law and also guarantees that the prosecutors are able to perform their tasks and profession with the utmost due diligence. In this manner it is possible that, in certain cases or legal procedures, a situation will arise, where the task assigned to a prosecutor or delegated to him/her by a superior prosecutor will be illegitimate or even unlawful. In this case the prosecutor should not comply with such a request and should promptly inform the appropriate institutions of such a violation. An unconditional request, as suggested in the Rules, where a prosecutor must comply without excuse with a task or a delegated instruction, is by definition opposing the rule of law standards, the CoE Recommendation and the Criminal Law Convention on Corruption.

Concerning the list of the disciplinary offences, it is noted that, according to other disciplinary procedures in other European states, the list of offences should also include the following:

- illegally or uneconomically distributes financial or other material sources, entrusted to him/her;
- discloses an official or any other secret defined by the law or through Public Prosecutor's order;
- misuses or oversteps official powers entrusted to him/her;
- unduly, untimely, inappropriately or lackingly performs the Public Prosecutor's duties;
- commits an act which fulfils all the components of a criminal act done while performing the Public Prosecutor duties;
- fails to notify the Public Prosecutor in charge if a certain case will take a longer time to be solved than it is usually estimated;
- fails to notify the Public Prosecutor in charge of especially grave criminal offences, of matters which have a specific importance for public, and of questions which are relevant and important for the judicial and the Public Prosecution case law;
- fails to notify the Public Prosecutor in charge of accepting other work related matter which is incompatible with the Public Prosecution function;

- fails to notify the Public Prosecutor in charge that reasons for his/her exculpation from a certain case exist or does not exculpate himself under such conditions;
- expresses his/her opinions about a certain case where a viewpoint has not yet been taken in the Public Prosecution office or of the judgement of a certain case which does not yet have a legal effect;
- impairs the functioning of the Public Prosecution office because of his/her own personal interests;
- fails or untimely reports his/her financial assets;
- neglects or does not perform his/her mentor duties;
- does not respect a decision which transfers him/her to another Public Prosecution district.

3.4. Analysis and observations on Article 9

Article 9 - Grave disciplinary offense
(1) Grave disciplinary offense shall exist if a disciplinary offense referred to in Article 8 of these Rules of procedure resulted in a serious disruption in the performance of prosecutorial office, or in the performance of tasks in the Public Prosecutor's Office, or in grave damage to the reputation of, and trust in the Public Prosecutor's Office, and in particular, in the statute of limitations for criminal prosecution, as well as in cases of repeated disciplinary offense.
(2) Repeated disciplinary offense referred to in paragraph 1 of this article shall exist in cases where disciplinary liability of a prosecutor for the same disciplinary offence was finally and bindingly determined on three occasions.
(3) After the decision on disciplinary liability of a prosecutor for a grave disciplinary offense has become final, the Disciplinary Commission shall file a motion for dismissal to the State Prosecutorial Council.

It is noted that the Article 9 is in accordance with all relevant recommendations of the CoE, and the European legal practice. However, the article's description of a grave disciplinary offence through the reference to the disciplinary offences stipulated in the Article 8 could be a potential problem in practical implementation of the Rules. Such reference is not specific enough and does not constitute a probable, reliable and consistent measure for determining grave a disciplinary offence(s). The current formation of the Article 9 means, that a grave disciplinary offence would be ascertained on a case to case basis.

In this manner it is recommend that an exemplary list is made where certain types of offences de facto represent a grave offence. The latter could be committed e.g. when the prosecutor:

- commits an act which fulfils all the signs of a criminal act done while performing the Public Prosecutor's duties;
- refuses to perform assigned duties and tasks without a legally justifiable cause;
- unduly, untimely, inappropriately or lackingly performs the prosecutors' duties;
- discloses an official or any other secret defined by law or through the Public Prosecutor's order;
- misuses or oversteps his/her official powers;
- in the last three months frequently misses or is late for scheduled trials and does not fulfil his/her duties in the contextual, timely or qualitative manner, without an excusable reason;
- engages in activities that are set forth by the law as incompatible with the office of a public prosecutor;
- fails to notify the Public Prosecutor in charge that reasons for his/her exculpation from a certain case exists or does not exculpate him/herself under such conditions;
- expresses publicly the opinion about a certain case where a viewpoint has not yet been taken by the Public Prosecutor's office or the judgement of a certain case does not yet have a legal effect;
- accepts gifts contrary to the regulations governing conflict of interest;
- fails or untimely reports his/her financial assets;
- does not respect a decree which transfers him/her to another Public Prosecution district;
- provides incomplete or inaccurate information relevant for the work of the State Prosecutorial Council in procedures for the appointment or dismissal of public prosecutors and deputy public prosecutors, procedure for determining disciplinary liability and other matters within his/her competence.

3.5. Analysis and observations on Article 10, 11

Article 10 - Disciplinary sanctions
(1) Disciplinary sanctions are the following:
- public reprimand,
- salary reduction up to 50% for a period not exceeding one year and
- ban on promotion for a period up to three years.
(2) Public reprimand may be pronounced only the first time a prosecutor is found liable for a

disciplinary offense referred to in Article 8 hereof.

Article 11 - Proportionality in the imposition of disciplinary measures
(1) Disciplinary measure must be proportionate to the gravity of the disciplinary offense committed in performing office.
(2) In imposing disciplinary measures, the following will be particularly taken into account:
- gravity of the committed offense and its consequences and in particular the degree of disciplinary liability of the offender and the circumstances of the offense;
- previous work and conduct of the prosecutor, and particularly whether s/he has been disciplinary liable multiple times.

The list of sanctions that can be imposed is satisfactory. One possible option that could be added is the transfer to another district, and of course (if the offence is grave enough) the dismissal from the function of a Public Prosecutor. It must be stressed that the latter is a measure of last resort and in this context the Article 11 is extremely important, where proportionality is considered extensively when imposing disciplinary sanctions. It is also noticed that the reduction of salary is a breach of the prosecutor's labour rights, therefore necessary compliance with the relevant labour legislation needs to be confirmed in this respect. In other European legal systems there is also a substantially lower percentage of salary reduction, i.e. 20%, so in this context the existing 50% could be decreased. The autonomy of a public prosecutor and his/her responsibilities and the control that is exerted over him/her, must be properly balanced. A salary reduction in the amount of 50% is a relatively severe measure in the context of labour rights and the principle of proportionality. It could correlate to a diminished autonomy of a prosecutor where labour is the legal relationship between the employee and the employer, where the employee willingly submits himself to the organised working process of the employer, where the work is being done personally, continually and under the instructions and supervision of the employer in exchange for payment. Imposing disciplinary sanctions in salary reduction can be deemed as unjust if not regulated by the law (not in the Rules). The principle of proportionality mandates that all punitive measures should be applied incrementally, whereas a default reduction of salary in the amount of 50% does not entail such a principle in the context of prosecutor's labour rights. There are even some constitutional court rulings in EU countries where this is stressed out. In this light reducing this penalty is an option that should be considered. On the other hand, the period of one year reduction, and the ban on promotion for three years are in

accordance with the European legal standards. It is also recommended that the second paragraph of the Article 10 is amended so that a public prosecutor can be publicly reprimanded if the nature of the offence is not serious or grave. The first time condition is satisfactory.

3.6. Analysis and observations on Article 12, 13

III DISCIPLINARY BODIES

Article 12 - Types
Disciplinary bodies are the following:
- Disciplinary prosecutor and his/her deputies;
- Disciplinary Commission and deputy members of Disciplinary Commission;
- Council as the second instance disciplinary body.

Article 13 - Recusal
(1) The parties in the disciplinary proceedings may request recusal of the Disciplinary prosecutor, deputy Disciplinary prosecutor, president of the Disciplinary Commission, member of the Disciplinary Commission, deputy President of the Disciplinary Commission, deputy member of the Disciplinary Commission and member of the Council if they believe there are some of the following grounds for recusal:
- existence of a marital or extramarital union, kinship in a direct line to any degree, in the lateral line to the fourth degree, or a relative by marriage to the
degree without regard whether marriage ceased to exist or not;
- participation in decision making in the first instance disciplinary body;
- existence of the circumstances that raise doubts about impartiality.
(2) Disciplinary prosecutor, deputy Disciplinary prosecutor, president of the Disciplinary Commission, member of the Disciplinary Commission, deputy president of Disciplinary Commission, deputy member of the Disciplinary Commission and member of Council shall request their own recusal in the cases specified in par. 1. indent 1 to 3 of this article, and in case they believe there are circumstances that raise doubt about impartiality, they shall inform the Council.
(3) Request on recusal may be lodged to the State Prosecutorial Council until the completion of the Disciplinary Procedure.
(4) The president of the Council decides on recusal of the Disciplinary prosecutor, deputy Disciplinary prosecutor, deputy president of the Disciplinary Commission, member of the Disciplinary Commission and deputy member of the Disciplinary commission, while the Council decides on the recusal of the president of the Disciplinary Commission or member of

the Council.
(5) The president of the Council, that is, the Council decides on recusal within eight days from the moment the request was received.

The types of disciplinary bodies which are authorised institutions in the disciplinary proceedings is a substance that is not specifically regulated in the Recommendations and the Budapest Guidelines. As already mentioned in General Observations of this technical paper, the ECtHR case-law does not demand the existence of certain legal regulation/definition of a type of procedure or institutional set up to run them. Instead, a broad spectrum of principles is set that must be enshrined in practice where the procedures then take place.

However with regard to "the internal organisation of prosecution service departments, the prevailing model at European level is definitely that of a hierarchical structure, which many countries prefer for reason primarily connected with ensuring the effectiveness and consistency of prosecutions."[7] In this manner no significant comments are made concerning the Article 12, as it lays out a nice hierarchical structure with a first and a second instance body.

The Article 13 deals with the recusal in the disciplinary proceedings. It is considered sufficient and in accordance with the modern European legislation. The only comment there regards the first paragraph, where recusal reasons are listed. It is recommended that the following sub-paragraphs are added:

- participation in the disciplinary proceeding at hand as an advocate, legal representative or an authorised party of the prosecutor whose disciplinary responsibility is determined;
- participation in the disciplinary proceeding at hand as a witness or an expert opinion maker;
- being an injured party in the disciplinary proceeding at hand.

The paragraph 3 of the Article 13 is in line with other European legal systems, however, in the practice there can be an abuse of this article in the sense that the party which feels that it will

[7] Council of Europe Standards on Public Prosecutors, 18th IAP Conference, 12.9.2013.

lose the case may, anytime during the proceeding, request a recusal. The latter can then become an actual problem if that party goes on to proceed with such a motion and requests a recusal solely because they feel they will lose the case, while the actual attempt of such an action is to gain another chance in before the different council.

On the other hand it must also be acknowledged that the reasons for recusal can actually not show until the proceedings are well under way. In these cases such a provision is naturally a necessity and must be upheld.

3.7. Analysis and observation on Article 14, 15, 16, 16, 17, 18

Article 14 - Disciplinary prosecutor
(1) The Council appoints and dismisses the Disciplinary prosecutor and his/her deputies from among prosecutors.
(2) The Council adopts the decision on appointment of the Disciplinary prosecutor and deputy Disciplinary prosecutor by electing, from the list of candidates who voluntarily applied and from the list of candidates who were proposed by the public prosecutor's office collegium, the candidate who enjoys the highest reputation in the professional environment.
(3) A prosecutor who has been performing prosecutorial office for at least eight years may be appointed as the Disciplinary prosecutor or deputy prosecutor.
(4) Disciplinary prosecutor has two deputies.
(5) The term of office of the Disciplinary prosecutor and his/her deputies shall last for three years, and they may be reappointed.
(6) The State Prosecutorial Council may increase the number of Deputy Disciplinary Prosecutors due to increased case flow, following a well-reasoned proposal of the Disciplinary Prosecutor to the Council.
(7) During the disciplinary proceedings, the Disciplinary Prosecutor and Deputies have the right to a decrease of their regular workload in their original Public Prosecution Office, which is approved under a separate decision of the State Prosecutors' council upon the proposal of the Disciplinary Prosecutor.
(8) Disciplinary Prosecutor has the right to a complete decrease of regular workload, while Deputies of Disciplinary Prosecutor have the right to at least 50% decrease and this may further be increased based on a reasoned decision of the Disciplinary Prosecutor.
(9) Disciplinary Prosecutor has the obligation to notify both the State Prosecutorial Council and originating Public Prosecution about the allowed decrease of workload for the purpose of organization of work.

Article 15 - Disciplinary Commission

(1) The Council appoints and dismisses the president, two members of the Disciplinary Commission and their deputies from among prosecutors.

(2) The Council adopts the decision on appointment of the president, two members of the Disciplinary Commission and their deputies by electing, from the list of candidates who voluntarily applied and from the list of candidates who were proposed by the public prosecutor's office collegium, the candidate who enjoys the highest reputation in professional environment.

(3) A prosecutor who has been performing prosecutorial office for at least eight years may be appointed as president, member of the Disciplinary Commission or their deputies.

(4) The term of office of the president, members and deputy members of the Disciplinary Commission shall last for three years and they may be reappointed.

(5) In case of absence or prolonged incapacity of the president or members of the Disciplinary Commission, they shall be replaced by their deputies.

(6) During the disciplinary proceedings, president and members of the Disciplinary Commission have the right to a decrease of their regular workload in their original Public Prosecution Office, which is approved under a separate decision of the State Prosecutors' Council upon the proposal of the president of the Disciplinary Panel.

Article 16 - Termination of office

The term of office of the Disciplinary prosecutor, president, members of the Disciplinary Commission and their deputies shall cease by expiry of the term or on grounds and reasons for the termination of prosecutor's office specified in Article 87 of the Law on Public Prosecution.

Article 17 - Dismissal

(1) The Council dismisses the Disciplinary prosecutor, president, members of the Disciplinary Commission as well as their deputies, in case of unconscientious performance of duties in disciplinary proceedings.

(2) Decision of dismissal shall be adopted by the Council, within 15 days from the day of initiation of the dismissal proceedings.

Article 18 - Council as a second instance disciplinary body

The term of office of the members of the Council as a second instance disciplinary body shall cease in accordance with the Law on State Prosecutorial Council („Official Gazette RS", no. 116/08 and 101/10 and 88/11).

The Articles 14-18 reflect the practice of other European legal systems. The only difference in certain systems is the composition of the Disciplinary Commission. It is recommended that a judge is a member of the Commission, so that the objectivity of the proceedings is achieved at the highest level possible. The current system envisages 3 prosecutors while it is recommended to add 2 judges in the Commission, so that there can never be a tie when reaching a decision. The incorporation of an outside party into the Disciplinary Commission, i.e. judges, means that the rule of law is entailed in the utmost manner possible. Such a measure will also gain public trust in the prosecution system. Although the persons that are included in these proceedings are professionals in the highest regard, the connotation to the proceedings as a whole is completely different if there is a 'semi-outside party' which is included in the decision making process. Such a measure will also affect the prosecutors themselves, as the inclusion of judges in a disciplinary process would mean that their rights will be respected without a shroud of doubt.

The Article 17 contains a somewhat too broad definition when a member of the Disciplinary Commission or the Disciplinary Prosecutor may be dismissed. Possibly a more strict definition should be in effect, i.e. that a person may be dismissed only when he/she has been issued a disciplinary sanction that entered into force.

Finally it is important to note that, according to the Article 18, the structure of the Council as the second instance disciplinary body should include maybe more representatives from the judiciary.

It is recommended that the second instance disciplinary body should have 3 judges and 2 prosecutors or any other combination where the ratio stays around 2:1 in favour of the representative from the judicial system. The fact is that the second instance body is the last body to which a person/prosecutor may turn in order to secure his/her rights. The rule of law dictates that objectivity should be uplifted to the highest standards, if not before, than at the end of the procedure, i.e. at the last instance disciplinary body. Such a composition of the disciplinary body, where the ratio between the representatives from the judicial system and the prosecutors is around 1:2, is in accordance with the European good practice, it provides the most objective results, satisfies the rule of law principles and the autonomy of the

prosecution system and nonetheless the trust and belief of public in the legal system as a whole.

3.8. Analysis and observations on Article 19, 20, 21, 22, 23

IV DISCIPLINARY PROCEEDINGS

Article 19 - Disciplinary report
(1) Anyone can file a disciplinary report to the Disciplinary Prosecutor against a prosecutor who committed a disciplinary offense.
(2) Disciplinary report is filed in written form and shall contain:
- name and surname of the prosecutor against whom the charges are filed, as well as the name of the public prosecution office in which s/he performs prosecutorial duties;
- factual description of the event;
- evidence supporting the allegations in the report;
(3) Disciplinary prosecutor shall investigate any report.
(4) Records are kept on all submitted reports.
(5) For the purpose of examination of filed charges and fact finding, the Disciplinary Prosecutor has the right and obligation to gather all material evidences, conduct interviews, examine official documentation of the Public Prosecutors Office where an alleged Disciplinary Offense was committed, examine, through the Public Prosecutors Office, court cases and cases before other bodies where the prosecutor concerned acted, in connection with the Disciplinary Offense, as well as to carry out other actions and measures in accordance to the Law on Public Prosecution and Law on General Administrative Procedure for the purpose of fact finding.
(6) During the examination of the Disciplinary Charge and gathering of evidences, the Disciplinary Prosecutor and Deputies are obliged to conduct their duties with special caution in order to avoid possible influence on the course of examination of the charges.

Article 20 - Initiation of the disciplinary proceedings
(1) Disciplinary proceedings are initiated by the Disciplinary prosecutor who files the Motion for initiation of the disciplinary proceedings (hereinafter: the Motion) to the Disciplinary Commission on the basis of the filed report or ex officio.
(2) Disciplinary prosecutor may withdraw the Motion prior to initiation of the hearing, whereas upon initiation of the hearing he may do so only with an approval of the Disciplinary Commission and the prosecutor against whom the Motion was submitted.
(3) Disciplinary prosecutor cannot file a new Motion on the basis of identical facts in case the

Disciplinary Commission approved the withdrawal of the Motion following the initiation of the hearing.

Article 21 - Motion for conduction of disciplinary proceedings
(1) Motion for conduction of disciplinary proceedings contains:
- name and surname of the prosecutor whose disciplinary liability is being determined, name of the public prosecution office in which s/he performs office, as well as the information for his/her representative if there is one;
- factual description of the offense;
- legal qualification of the disciplinary offense;
- suggested evidence for the proceedings.

Article 22 - Disciplinary proceedings
(1) Disciplinary Commission delivers the Motion to the prosecutor concerned in order to obtain his/her response.
(2) The prosecutor concerned or his/her representative may respond to the Motion in a written form to the Disciplinary Commission within 8 days from the day of service of the Motion.
(3) Disciplinary Commission forwards the response with all attachments to the Disciplinary prosecutor.
(4) Having received the response to the Motion or upon the expiry of eight days from service of the Motion, Disciplinary Commission shall schedule a hearing.
(5) Disciplinary prosecutor or deputy Disciplinary prosecutor shall represent the Motion in the hearing.
(6) In the process of determining disciplinary liability, the Disciplinary Commission is obliged to hear the prosecutor subjected to disciplinary proceedings.
(7) Disciplinary Commission presents evidence necessary for proper and complete fact-finding.
(8) If the Disciplinary Commission during the course of the Disciplinary Proceedings finds that some facts should be additionally examined, the Commission may request such examination from Disciplinary Prosecutor, the Prosecutor charged, Public Prosecutor's Office where alleged Disciplinary Offense was committed or other authority before which the prosecutor acted with regard to the Offense, or from the person or entity affected by the offense, as well as to undertake other measures in accordance with the Law on Public Prosecution and Law on General Administrative Procedure for the purpose of fact-finding.
(9) If presented evidence indicate a change in the facts with regards to the submitted Motion or that the prosecutor subjected to disciplinary proceedings had committed another disciplinary offense, the Disciplinary prosecutor can verbally reverse or extend the Motion

during hearing, or postpone the hearing due to reversal or Motion extension.
(10) The prosecutor subjected to disciplinary proceedings can delay the hearing in order to respond to the extended Motion.
(11) In the case of unjustified absence of the Disciplinary prosecutor or deputy Disciplinary prosecutor, as well as in the case of unjustified absence of the prosecutor subjected to disciplinary proceedings and his/her representative, the proceedings can be performed in their absence.
(12) Disciplinary proceedings are urgent and closed to the public, unless the public prosecutor subjected to disciplinary proceedings or deputy public prosecutor, requests that the proceedings be open to the public.
(13) Disciplinary Proceedings cannot be the obstacle for conducting of other proceedings against charged Prosecutor.

Article 23 - Grave Disciplinary Offence proceedings
(1) Proceedings for establishment of existence of grave disciplinary offense and for establishment of responsibility of prosecutor shall be conducted under the provisions of these Rules.
(2) Disciplinary Prosecutor is obliged to particularly present and explain the circumstances and evidences which show that because of the Disciplinary Offense foreseen by Art. 8 hereof, a serious disruption in the performance of prosecutorial function has occurred, or that serious damage was incurred for the reputation or public trust in public prosecution, in particular in the case of statute of limitation of criminal prosecution, as well as in the cases of repeated Disciplinary Offense.
(3) Disciplinary Council is obliged to particularly elaborate the decision and sanction proposed by the Disciplinary Prosecutor for a Grave Disciplinary Offense.
(4) After receiving the Proposal for dismissal, the State Prosecutorial Council shall conduct the procedure for dismissal pursuant to the provisions of the Law on Public Prosecution.
(5) Disciplinary Prosecutor shall carefully examine the decision of State Prosecutorial Council and the fact-finding, and if s/he finds that grounds for commencing Disciplinary Proceedings exist, shall initiate such proceedings in accordance with these Rules.
(6) Disciplinary Proceedings and Disciplinary Sanction for Grave Disciplinary Offense may be conducted and pronounced until such time as the decision on dismissal issued by the Sate Prosecutorial Council becomes final.

The Articles 19-23, when analysed in their contextual aspect, are something that is a subject of the criminal procedure law. In this light, most of the European legislations do not contain such detailed provision concerning the flow of the disciplinary procedure, but rather refer to the

relevant Criminal Procedure Codes. Although there is nothing wrong with the approach entailed in the presented Rules, there is of course a possibility of a collision with the relevant Criminal Procedure Code, which regulates the same, or at least very similar matter.

Perhaps the most relevant article in connection with the Rules and the disciplinary procedure is the Article 19. This Article is very thorough and in compliance with the standards set forth by the CoE Recommendation. The only problematic issue lies in its first paragraph, where it is stated that anyone can file a disciplinary report against a prosecutor who committed an offence. Such formulation could be problematic in light of the principle "innocent until proven guilty", therefore it is recommended that the wording is changed to e.g. anyone can file a report /.../ against a prosecutor who is reasonably suspected of committing an offence.; Such a technical change means that the prosecutor in question is not deemed from the very start as the guilty party, but rather a person who is suspected to have done something wrong.

Article 20 defines the authorised party that can initiate a disciplinary procedure. Although the Article 19 stipulates that anyone can file a disciplinary report it is believed that the Article 20 should allow for a broader range of authorised bodies which can initiate such a procedure. In many European systems this right belongs not only to the Disciplinary Prosecutor but also the State Prosecutorial Council, the appropriate Ministry and the General Prosecutor. Such a broader collection of institutions which can demand the lodging of a disciplinary procedure ensures that this right does not belong only to the Disciplinary Prosecutor. Such possibility would assume better compliance with the CoE recommendations, which require that the public prosecution must function and operate in a way, where all doubts about its impartiality and are diminished.

Here it is important to note the difference between filling the disciplinary report and the initiation of the disciplinary proceedings. Disciplinary Prosecutor is of course the *dominus litis* of the disciplinary proceedings, however the number of institutions which can demand the initiation of a disciplinary procedure should be broader.

The Articles 21 and 22 comply with the good practice of different European legal systems and their criminal procedure codes. Additionally, it is important to stress (as stated at the beginning of this Technical Paper), that the CoE and the ECtHR do not contain specific

provisions concerning the disciplinary rules, and in this context say even less about the disciplinary procedure. The procedural rules of a disciplinary procedure are namely a very specific matter, especially taking into account that the Rules are a regulatory provision and, as such, are a legal act which is not usually subject of the ECtHR case law. However the institute of the ECtHR case law - "chilling effect" can also bring disciplinary rules in the case law of ECHR.

The important principle that must be abided is the rule of law, which guarantees that all the rights of the individuals who are subject of any sort of procedures have sufficient means for the defence of their rights. Articles 21 and 22 follow that pattern and it is especially encouraging to find that Article 23 has a special provision when dealing with the grave offences. Such a regulation definitely represents a very clear intention to comply with the rule of law doctrine in its most strict manner. We would only like to add that there is probably only a technical error in the paragraph 6 of the Article 23. Possibly, the text should read "Disciplinary Proceedings and Disciplinary Sanction for Grave Disciplinary Offense may not be conducted and pronounced until such time as the decision on dismissal issued by the Sate Prosecutorial Council becomes final."?

3.9. Analysis and observations on Article 24, 25, 26, 27, 28

Article 24 - Rights of the prosecutor subjected to disciplinary proceedings
(1) The prosecutor subjected to disciplinary proceedings has the right to:
- be informed of the reasons for initiating the proceedings after the Disciplinary Prosecutor has examined the allegations made in the disciplinary charges;
- examine the case file and supporting documentation;
- respond to the submitted and expanded Motion;
- have legal representative at all stages of disciplinary proceedings;
- request that the proceedings be open to the public;
- file an appeal against the decision of the Disciplinary Commission.
- file an appeal against the decision in second instance.

Article 25 - Decisions of the Disciplinary prosecutor
(1) Disciplinary prosecutor may:
dismiss a disciplinary report;
file a Motion for disciplinary proceedings;

drop the Motion;
reverse or extend the Motion;
appeal the decision of the Disciplinary Commission.
(2) In case of dropping of the Motion or not filing an appeal, Disciplinary prosecutor is obliged to make an official note of the reasons to do so.

Article 26 - Decisions of the Disciplinary Commission
(1) When determining disciplinary liability, the Disciplinary Commission may:
- dismiss the Motion as untimely and inadmissible;
- turn down the Motion as ill-founded;
- uphold the Motion, pronounce the prosecutor liable for the disciplinary offense and pronounce a disciplinary sanction.
(2) Disciplinary Commission shall take decisions within 15 days from the day of concluding the hearing and shall deliver decisions to the Disciplinary prosecutor and the prosecutor subjected to disciplinary proceedings or his/her legal representative.
(3) The Disciplinary Commission shall deliver a final decision to the Council so that it may be entered into the personal file of the prosecutor.

Article 27 - Decision making of the Disciplinary Commission
(1) Decisions of the Disciplinary Commission are made by the majority vote of the members of the Disciplinary Commission, for which a separate record is made and signed by all the members of the Disciplinary Commission.
(2) Rulings of the Disciplinary Commission are made in the form of a decision within 15 days from the closure of the hearing.
(3) A dissenting opinion of a member of the Disciplinary Commission is noted in the record on voting.
(4) A decision establishing that the prosecutor is responsible for the disciplinary offense contains:
- introductory part including: composition of the Disciplinary Commission, names of the parties, description of the case and date of the decision;
- factual description of the disciplinary offense;
- provisions of the Law on public prosecution and other applied laws and regulations, as well as the legal qualification of the disciplinary offense;
- disciplinary sanction pronounced;
-explanation, which contains an overview of presented evidence, determined facts and legal conclusion;
- instruction on legal remedy.

Article 28 - Statute of Limitation
Disciplinary proceedings are subject to statute of limitations (note: seems like the word "zastareva" is missing in the Serbian text) after the expiry of one year from the day the disciplinary offense was committed.

As noted under the analysis of the Articles 19, 20, 21, 22, 23, such provisions are — in their contextual analysis — typical criminal procedure provisions. In this manner it is considered that all of the provisions which regulate the status and the rights of the prosecutor being accused of an offence are sufficient. Perhaps one addition should be made to the Article 24, and that is the privilege against self-incrimination (e.g.: right to remain silent). The latter is the most fundamental legal principle. There is no reason why it should not be applied to the prosecutor being accused of an offence, as everyone has such a right and the burden of proof is always on the party which is claiming that an offence has been made.

Articles 25-27 are typical procedural provisions which regulate the decision making, voting system, the manner in which the Disciplinary Prosecutor must act etc. These articles are in accordance with the good practice set by the different European legal systems and their relevant criminal procedure codes.

Concerning the Article 28, which regulates the statute of limitation, it has to be added that the latter can be defined in the relative or absolute manner. Most of the European legal systems embody the absolute statute of limitation, where the expiry is set to two years after the day the offence has been committed. The statute of limitations is also interrupted by every procedural act committed by the authorised body for sanctioning of the disciplinary offences or if the suspected prosecutor, during the time when the statute of limitations is pending, commits another offence after the initial one. It is recommended that the Article 28 is complemented with these changes.

3.10. Analysis and observation on Article 29, 30, 31, 32, 33, 34, 35, 36

V APPEAL PROCEDURE

Article 29 - Appeal

(1) Against the decision of the Disciplinary Commission an appeal may be filed to the Council within 8 days from the day of service of the decision.
(2) An appeal may be filed by the Disciplinary prosecutor, prosecutor subjected to disciplinary proceedings and his/her representative.
(3) An appeal contains:
- number and date of the decision of the Disciplinary Commission against which an appeal is being filed;
- motion to contest the decision as a whole or in a specific part;
- grounds and reasons for the appeal;
- signature.
(4) Disciplinary Commission serves the appeal together with the attachments to the other party in the proceedings for a response.
The party may file a response to the appeal to the Council within 3 days from service of the appeal.
(5) An appeal against the Decision on dismissal can be submitted to the Constitutional Court within 30 days of the delivery of the decision in which case the proceedings shall be conducted pursuant to the provisions of the Law on Public Prosecution.

Article 30
A decision can be appealed due to:
a breach of the Rules of Procedure which could affect a lawful and correct decision;
incorrect or incomplete fact-finding;
wrong application of substantive law;
due to a decision on disciplinary sanction.

Article 31 - Decisions of the Council as an appeal disciplinary body
Acting on an appeal, the Council may:
- dismiss the appeal as untimely or inadmissible;
- turn down the appeal as ill-founded;
- uphold the appeal and reverse the decision of the Disciplinary Commission.

Article 32 - Decision making of the Council
(1) Upon service of the appeal, the president of the Council determines the rapporteur from among the Council members who are elected from among prosecutors.
(2) The decisions of the Council as the second instance disciplinary body are made by majority vote of the present members.
(3) The rulings of the Council are made in the form of a decision within 30 days from the closure of the hearing.

(4) The decisions of the Council are served to the parties in accordance with the rules of personal service.
(5) The decision of the Council is final.

Article 33 - Appeal against Council decision
(1) An appeal against a decision of the State Prosecutorial Council in second instance may be filed as administrative dispute in front of Administrative Court in accordance with Law on Administrative Disputes.
(2) An appeal against the Decision on dismissal may be submitted to the Constitutional Court of Serbia within 30 days of the delivery of the Decision in which case the proceedings shall be conducted pursuant to the provisions of the Law on Public Prosecution.

Article 34
The final decision on a Disciplinary Sanction shall be entered in the Personal File of the Prosecutor or Deputy Public Prosecutor.

Article 35 - Extraordinary Legal Remedy
An extraordinary legal remedy or repetition of the procedure in Disciplinary Procedings are not allowed.

Article 36 - Transitory and final provisions
These Rules shall enter into force on the 8th day from the day of publication in the „Official Gazette of the Republic of Serbia".

This set of articles represents a set of rules which are, by their nature, procedural rules that are, in most European legal systems, regulated in the relevant Criminal Procedure Codes. As already mentioned neither the CoE recommendations nor the ECtHR case law give any sort of specific guidance in this respect. The Articles 29-36 are generally in line with the practice of the majority of the European legal systems. There are, however, certain areas which could constitute a potential problem. One of such is the Article 29 and its 5th paragraph, where it is stated that the decision of dismissal may only be challenged before the Constitutional Court. Such measure could be problematic in the sense that the prosecutor who has been dismissed has no other means for securing his rights in the judicial system, e.g. before the Higher Court. In accordance with other relevant legislation of the Republic of Serbia there should be an analysis made to see if there is a possible judicial level which could decide on the dismissal of the prosecutor from his position, prior to the Constitutional Court.

Although the Article 30, in its first point, contains a broad definition for procedural violations which could be a reason for a complaint in the disciplinary process, possibly the reasons for a complaint regulated in the Article 13 should be mentioned separately. In other words if there has been a breach of the Article 13, this could constitute a grounds for appealing against the decision of the disciplinary procedure. Another reason that should be separately mentioned is if the decision was taken and the accused prosecutor was not present in the hearing but should have been; or if the public has been unlawfully forbidden to attend the legal proceedings; or if the decision in the disciplinary proceedings in unreasonable, unclear or has reasons that contradict each other or the tenure of the decision; and, last but not least, if the evidence provided in the disciplinary proceedings has been obtained unlawfully by violating the human rights of the accused prosecutor.

Articles 31 and 32 regulate the proceeding before the second instance body – these articles are compliant with the good practice of the European legal systems and the human rights standards. However, the Article 33 has the same problem already analysed in the Article 29 and its 5th paragraph. Given that the Article 33 gives the accused prosecutor the option to appeal to the Administrative Court if his offence has been confirmed (except for the sanction of dismissal) the Article 35 rightfully excludes any extraordinary remedies. The accused prosecutor is entitled to pass through the procedure before the first instance body, later on before the second instance body and lastly before the Administrative court. Given the fact that the disciplinary procedure rather resembles a misdemeanour procedure, such a regulation does not constitute a violation of human rights of the accused prosecutor "per se".

However, the regulation where the dismissed prosecutor may only challenge the decision of his/her dismissal before the Constitutional Court and not before the Administrative Court (as any other accused prosecutor can, whose disciplinary sanction does not include dismissal), could represent a potential problem. As already noted, the analysis of the legal and constitutional system of the Republic of Serbia should be made in this respect, where the options for a review from a regular or extraordinary judicial body in case of a dismissal from the prosecution service, should be considered and explored.

3.11. Other concepts that could be included in the Rules

The possible sanctions and the Rules as a whole do not contain the institute of suspension of a public prosecutor from his duties. Such a decision is usually taken in cases where a prosecutor is being suspected of a criminal act where he allegedly abused his position and powers entrusted to him or is suspected for committing a criminal act where the possible penalty is two or more years of imprisonment. The suspension in this context is, by its content, a disciplinary measure and should therefore be included in the Rules in a form of a special procedure for suspension of a prosecutor.

The Recommendations and Budapest Guidelines also include an important principle, i.e. the prevention of corruptive acts and dealings in the prosecution service. In this context it is recommended that the Rules adopt two types of supervision - general and special one. The latter is to be done through a decree of the Prosecutor General which includes designation of another prosecutor who will then enforce the Prosecutor General's decision and make a report in the specific case.. Such conduct is recommended in the cases where there is doubt over the professionalism of the work of a certain prosecutor in a certain case, especially if the work/performance could have been considered not in accordance with standards and professionalism required of him/her.

It is also recommended that a general supervision is being applied at least once in three years period, where its outlines and specific goals and tasks are being decided by the Prosecutor General. In this respect the work and overall performance by the by prosecutors is a subject of supervision where the standards and forms for conducting the supervision are set forth in advance and represent objectively measurable criterions. Such a supervision then enables the prosecution system to spot — in advance — the possible perils and areas which require special attention. Such practice would also generate an internally controlled system calibrated in a way that the corruption and other threats are detected before they are widespread. The Rules should therefore incorporate these two types of supervision in material and procedural sense. If suggested supervision is included in other, already existing, regulations than this recommendation is of course redundant.

4. Compliance of the Judges Rules

This part of the Technical Paper is based on compliance of the Judges Rules with the CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on Judges: Independence, Efficiency and Responsibilities (hereinafter 'the Judges Recommendations'), the European Charter on the statute for Judges; and also through the comparison of Judges Rules with the numerous other system in Europe, (such as France, Germany and Italy).

4.1. Analysis and observations on Article 1, 2, 3, 4

PART I

General provisions

Article 1

This Rulebook shall serve to regulate the procedure of determination of disciplinary responsibility of judges for disciplinary offenses regulated by the Law on Judges; issuing of disciplinary sanctions in accordance with the Law on Judges; establishment and work of disciplinary bodies.

Article 2

Provisions from the Criminal Proceedings Code shall apply to issues not regulated by the Law on Judges and this Rulebook.

Article 3

(1) Disciplinary sanction shall be issued in proportion with the severity of the committed disciplinary offense.

(2) In the process of issuing of disciplinary sanctions, the following shall be taken into consideration: former conduct of the judge, his/her professional work, his/her conduct during the disciplinary proceedings, and other circumstances that may influence the determination of the disciplinary sanction.

Article 4

Disciplinary proceedings shall be urgent and closed to the public, unless the judge against whom the disciplinary proceedings are conducted requests that they be public.

Article 1 states that the Judges Rules are merely a procedural rulebook which more detailed regulates the matter that is incorporated in the Law on Judges. As mentioned in the compliance report on the Rules and in the General Observations, neither the Judges Recommendations, the ECtHR case law or the European Charter on the statute for judges regulate in detail the procedural aspect of a disciplinary (or any other material field of law) procedure. As already noted in this paper, the first and foremost important and leading principle of the ECtHR case law and the CoE recommendations, is that the basic principle of the rule of law is not in a stipulation of a certain law, rule, guideline or other legal act, instead it is manifested through multiple individual cases where it is ascertained if the human rights of the individuals have been respected or not.

The Judges Rules refer to the Law on Judges in this manner, therefore, it is assumed that the latter completely and in detail regulates all disciplinary measures and disciplinary offences as well as the criteria for establishing a disciplinary responsibility of judge(s). Also principles mentioned in the chapter that examines the compliance of the Rules could be applied here. This means that the latter can be a simile used in the potential assessing of the Judges Rules, should the need arise.

The Article 2 reference to the Criminal Proceedings Code is very encouraging, because this code is, by its definition, conceived bearing in its core, two opposing parties. The potential judge who is being investigated or against whom a procedure has been launched is, nevertheless, only a suspect. His guilt or offence which he might have committed is therefore not ascertained beyond reasonable doubt and is only being investigated if such an occurrence has in fact occurred. Such a judge is, in this context, entitled to additional safeguard and guarantees, which will ensure that the whole procedure is transparent and legitimate. The reference to the Criminal Proceedings Code achieves that.

The Article 3 correctly takes into account the judges' previous conduct, his work results etc. in determining the sanction, which is appropriate. The only remark could be the danger of significant lowering of the imposed penalty on behalf of the previous results, conduct,

working ethics etc., for the judge who is the subject of a disciplinary procedure. In this light the application of such extenuating circumstances should always be reviewed in light of the severity of the disciplinary offence committed.

The Article 4 correctly takes into account that the judicial system is in need of even a greater independence than the Public Prosecution one. In this manner it is reasonable that the disciplinary proceedings are held in camera as its primary characteristic. A judge can only perform his/her duties as the guardian of the law and the Justice, if he feels that he/she has sufficient autonomy and that he/she cannot be punished or penalised for his/her decisions. However, it is in light of the CoE Criminal Law Convention on Corruption, that all procedures of the public institutions needs to be as transparent as possible. In this light it is recommended that publicity of a certain case can be approved if the latter bears significant consequences or at least that the decision is made public. Nevertheless, a very delicate balance must be struck in these instances, which will be dependent on individual circumstances and on a case to case basis.

4.2 Analysis and observations on Article 5, 6, 7, 8, 9, 10

PART II
Disciplinary bodies
Disciplinary Prosecutor
Article 5
(1) Disciplinary Prosecutor shall act upon the disciplinary report; decide on the submission of the proposal to conduct disciplinary proceedings; and perform other duties in accordance with the Law on Judges and this Rulebook.
(2) Disciplinary Prosecutor shall be appointed for a period of three years.
(3) Disciplinary Prosecutor shall submit the annual report on his/her work to the High Judicial Council (hereinafter: the Council) no later than on March 1 of the current year, for the previous year, as well as any time the Council so requests.

Article 6
(1) Disciplinary Prosecutor shall perform his/her duty directly or through his/her Deputies.

(2) Disciplinary Prosecutor shall nominate a Deputy who shall act in cases of the Deputy who is absent for a longer period of time, or otherwise prevented from acting in his/her cases.
(3) If the Disciplinary Prosecutor is absent or otherwise prevented from acting in his/her cases, his/her duties shall be performed by a Deputy of his/her choice; in case of exclusion or recusal, his/her duties shall be performed by a Deputy nominated by the President of the Council.

Deputy Disciplinary Prosecutors
Article 7
(1) Disciplinary Prosecutor shall have three Deputies; each shall be responsible for cases allocated by the Disciplinary Prosecutor.
(2) Deputy Disciplinary Prosecutor shall be appointed for a period of three years.

Disciplinary Commission
Article 8
(1) Disciplinary Commission shall consist of the President and two members with Deputies.
(2) Disciplinary Commission shall conduct disciplinary proceedings and decide on the proposal of the Disciplinary Prosecutor to conduct disciplinary proceedings.
(3) President and members and of the Disciplinary Commission, as well as their Deputies, shall be appointed for a period of three years.
(4) If the President of the Disciplinary Commission is absent or otherwise prevented from performing his/her duties, his/her duties shall be performed by a member of the Disciplinary Commission of his/her choice; in case of exclusion or recusal, his/her duties shall be performed by a member of the Disciplinary Commission nominated by the President of the Council.

Requirements for the appointment of members of disciplinary bodies
Article 9
(1) A judge with a minimum of ten years of judicial office who has never been issued a disciplinary sanction may be appointed Disciplinary Prosecutor.
(2) A judge with a minimum of ten years of judicial office who has never been issued a disciplinary sanction may be appointed Deputy Disciplinary Prosecutor.
(3) A judge with a minimum of ten years of judicial office who has never been issued a

disciplinary sanction may be appointed Chairman of the Disciplinary Commission, member, or Deputy.

Appointment of members of disciplinary bodies
Article 10
(1) The Council shall appoint members of disciplinary bodies from the ranks of judges with a permanent judicial office, having previously obtained their consent.
(2) When deciding on the appointment of the Disciplinary Prosecutor and his/her Deputies, President and members of the Disciplinary Commission and their Deputies, the Council shall take into consideration the length of their judicial office, information from their CVs and personal biographies, type of professional experience, opinion of the General Session of judges about the candidates, and their performance evaluations.

With "regard to the internal organisation of prosecution service departments, the prevailing model at European level is definitely that of a hierarchical structure, which many countries prefer for reason primarily connected with ensuring the effectiveness and consistency of prosecutions."[8] In this regard same can be said for the judicial disciplinary system, as they are, in their core, very similar or identical to the public prosecution one, especially with regard to the logistical and systematic hierarchical organisation of the disciplinary bodies.

In this respect, the Articles 5-10 are in line with majority of other European legal systems and with the CoE standards.

4.3. Analysis and observations on Article 11, 12, 13, 14, 15, 16, 17, 18

Exclusion and recusal of members of the Disciplinary Commission
Article 11
(1) A member of the disciplinary body may not participate in the disciplinary proceedings (exclusion) if the judge against whom disciplinary proceedings are conducted, or his/her representative, is a direct blood relative, up to four times removed; his/her spouse or life partner (current or former), in-law up to twice removed, even if the marriage had been terminated.

[8] Council of Europe Standards on Public Prosecutors, 18th IAP Conference, 12.9.2013.

(2) A member of the disciplinary body shall exclude him/herself from participation in the disciplinary proceedings when there are reasons that may raise the suspicion regarding his/her impartiality. A member of the disciplinary body is obligated to cease any work on the case as soon as he/she finds out that there are reasons for his/her exclusion or recusal.
(3) Deputy Disciplinary Prosecutor shall inform the Disciplinary Prosecutor about the existence of reasons from Paragraphs 1 and 2 of this Article. Members of the Disciplinary Commission and their Deputies shall inform the President of the Disciplinary Commission who shall decide on exclusion or recusal.
(4) President of the Council shall decide about the exclusion and recusal of the Disciplinary Prosecutor and President of the Disciplinary Commission.

Dismissal of members of disciplinary bodies
Article 12
(1) Member of the Disciplinary Commission shall be dismissed from duty if a decision has been made about his/her dismissal from duty.
(2) The Council shall make the decision on dismissal from duty of a member of a disciplinary body.
(3) Decision from Paragraph 2 of this Article also determines which member of the disciplinary body shall replace the member of the disciplinary body who has been dismissed from duty.

Article 13
If a member of the disciplinary body fails to perform his/her duty in accordance with the Constitution and the law, and if he/she is convicted for a criminal act with an unconditional prison sentence, that is, if he/she is convicted for a punishable act which renders him/her unworthy of membership in a disciplinary body, he/she shall be dismissed from duty before the expiration of the mandate.

Article 14
Any judge, member of the disciplinary body or member of the Council can submit the initiative for dismissal from duty of a member of the disciplinary body.

Article 15

(1) Within a period of seven days from the reception of the initiative, the Council shall assess the existence of reasons for the initiative.

(2) If the Council concludes, on the basis of submitted evidence, that reasons for dismissal are not valid, the Council shall inform the submitter in writing that the initiative has been rejected.

Article 16

(1) If the initiative is accepted, the Council shall make a decision on the initiation of dismissal procedure within a period of fifteen days from the day of reception of the initiative, and inform the submitter of the initiative and the disciplinary body about this.

(2) Member of the disciplinary body shall be allowed to make a stand regarding all the statements important for the decision on dismissal, as well as regarding all the accompanying evidence.

(3) Decision on the initiation of proceedings can include a measure of removal from duty until the conclusion of proceedings for dismissal.

Article 17

The Council shall make a decision on dismissal within a period of thirty days from the day of initiation of proceedings.

Termination of duty

Article 18

The duty of members of disciplinary bodies can be terminated upon their personal request, upon the expiration of mandate, by termination of judicial office, and if the final decision included a disciplinary sanction or dismissal.

The chapter on exclusion and recusal of members of the Disciplinary Commission of the Article 11 should list, more concretely, cases for recusal in para. 2. The list of reasons where the motion for recusal can be launched could contain the following:

- participation in the decision making in the first instance disciplinary body;
- participation in the disciplinary proceeding at hand as an advocate, legal representative or an authorised party of the judge whose disciplinary responsibility is determined

- participation in the disciplinary proceeding at hand as a witness or an expert opinion maker;
- being an injured party in the disciplinary proceeding at hand.

It is also recommended that the Article 14 is modified in a way which will allow every party that is included in the disciplinary process to file a motion for recusal. The current wording of the Article 14 could potentially allow this kind of interpretation, but for sake of clarity and reliability of legal rules, it is recommended that such a provision is directly mentioned.

Other Articles here, i.e. 12-13 and 15-18, are in their nature, procedural provisions that regulate the formalities when a dismissal is to be made. The CoE Judges Recommendations and the European Charter on the Statue for Judge contain no special provisions regarding this matter, while these articles are considered compliant and in line with the European good practice.

4.4. Analysis and observations on Article 19, 20, 21, 22, 23

PART III
Disciplinary proceedings
Disciplinary report
Article 19
(1) Anyone can submit a disciplinary report against a judge to the Disciplinary Prosecutor. A disciplinary report shall be submitted in the written form.
(2) A disciplinary report must include the following: name and last name of the judge and the title of the court in which he/she is performing his/her judicial duty; a short description of judge's activities; name and last name of the submitter of the report, address, and signature.
(3) If the disciplinary report is unclear or if it does not include all the elements necessary for a decision, the Disciplinary Prosecutor shall return the report to the submitter and allow eight days for the creation of a proper report. Acting of the Disciplinary Prosecutor upon reception of the report.

Article 20
(1) Disciplinary Prosecutor shall maintain records of all reports that have been submitted

against judges, and shall create a case for each of the reports.
(2) Disciplinary Prosecutor can obtain relevant evidence and information from the court, other state authorities, public institutions, or physical entities. Courts, state authorities, public institutions, judges, prosecutors, and civil servants are obligated to cooperate with the Disciplinary Prosecutor.

Article 21
(1) Disciplinary Prosecutor can request that the judge against whom a disciplinary report has been filed to make a statement about the contents of the disciplinary report.
(2) Judge shall not be obligated to respond to the request of the Disciplinary Prosecutor.
(3) Judge shall be allowed to have a representative throughout the disciplinary proceedings.

Article 22
(1) Disciplinary Prosecutor shall dismiss the report in the following situations:
- if the submitter of the report fails to complete the report within a period of eight days;
- if the Disciplinary Prosecutor finds that there are no grounds for the submission of the proposal for initiation of disciplinary proceedings;
- if the report was filed anonymously.
(2) Disciplinary Prosecutor shall inform the submitter of the report about his/her decision in writing.

Initiation of disciplinary proceedings
Article 23
(1) Disciplinary Prosecutor shall submit to the Disciplinary Commission a proposal for initiation of disciplinary proceedings if he/she feels that there are grounds to suspect that a disciplinary offense has been committed.
(2) Proposal to initiate disciplinary proceedings shall include the following;
1) personal information about the judge (name and last name, date of birth, and address), name, last name, and address of his/her representative;
2) description of facts and legal qualification of the disciplinary offense;
3) proposed evidence, to be presented at the disciplinary hearing.

Articles 19-22 are in line with the CoE recommendations. It is considered especially encouraging that anyone can file a motion for a disciplinary proceeding, as this gives the highest amount of compliance with the rule of law and the principle of transparency in the work of the judicial institutions. However, the Article 22 is in slight contradiction with what has been mentioned above. It's current wording allows the Disciplinary Prosecutor to have a complete autonomy over the proceedings that he/she may launch, therefore if he/she deems that certain motion is not justified he/she can chose not to pursue it, while the party that made a complaint which has been denied, has no available remedies. In this light it would be recommended that if a person files a complaint which is then not accepted by the Disciplinary Prosecutor, there is an option for appealing against such a decision to the High Judicial Council. Such possibility exists in most of the European legal systems and could be considered in line with the rule of law and the principle of transparency in the judicial institutions. Therefore, it is also recommended that the Article 22 is modified in a way that the anonymity, as a reason for dismissing a complaint, is removed. Anonymity is 'a tool' for protection of the person whose rights were potentially violated, thus the person was hesitant to lodge a complaint and sign it. The Disciplinary Prosecutor should at least evaluate such complaints and if he/she finds that they are groundless, dismiss them. The main focus should be on the evidence which support or does not support the claims and not on the identification of the person who files such claims and wants anonymity in this sense. The current formulation in the Article 22 leaves an open interpretation for de facto dismissal of such complaints, which could not be in line with the CoE recommendations.

With regard to the Article 23 a slight modification is recommended. This Article should allow for a broader range of authorised bodies to initiate a disciplinary procedure against a certain judge. In most of the European systems this right belongs not only to the Disciplinary Prosecutor but also to the Judicial Council, the appropriate Ministry and possibly the presidents of the courts and the judicial assistants. Such a broader collection of institutions which can demand the lodging of a disciplinary procedure ensures that the sole right does not belong only to the Disciplinary Prosecutor. It also aims at better compliance with the CoE recommendations, which require the judicial system to function and operate in a way where all doubts about its impartiality and moral prolificness are diminished. Giving the power to demand a disciplinary procedure to a broader range of subjects shall encourage that such practice is applied in reality in the highest manner possible. Of course, it is important to note

here the difference between filling the disciplinary report and the initiation of the disciplinary proceedings.

Overall, the Disciplinary Prosecutor is of course *dominus litis* of disciplinary proceedings, however, collection of institutions who can demand the initiation of a disciplinary procedure could be broader.

4.5. Analysis and observations on Article 24, 25, 26, 27, 28

First-instance disciplinary proceedings

Article 24

(1) The Disciplinary Commission shall forward to the judge against whom the disciplinary proceedings are conducted the proposal for the initiation of disciplinary proceedings, along with evidence of the Disciplinary Prosecutor and a warning that he/she should make a statement about them and propose evidence within a period of eight days from the day of reception.

(2) Having received a statement from the judge, of after the expiration of the set period, Chairman of the Disciplinary Commission shall schedule a disciplinary hearing.

(3) Along with the summons, judge's statement shall be forwarded to the Disciplinary Prosecutor.

(4) A minimum of eight days must pass between the delivery of summonses to parties and the day of the disciplinary hearing.

(5) After the proposal to initiate disciplinary proceedings has been submitted, the judge shall have the right to review the case file and the accompanying documentation and to provide, on his/her own or through his/her representative, explanations and his/her own evidence.

(6) The Disciplinary Commission shall, by decision, discontinue the proceedings if, during the proceedings, the Disciplinary Prosecutor desists from conducting disciplinary proceedings.

(7) Submission of the new proposal to initiate disciplinary proceedings based on the same facts shall not be allowed.

Article 25

(1) If a properly summoned judge, or his/her representative, fails to appear at the hearing without a justifiable reason, the hearing shall be conducted in his/her absence.

(2) If a properly summoned Disciplinary Prosecutor fails to appear at the hearing without a

justifiable reason, his/her absence shall be taken as withdrawal of the proposal to initiate disciplinary proceedings.

(3) In case from Paragraph 2 of this Article, the Disciplinary Commission shall dismiss the case by decision.

(4) During the disciplinary proceedings, the judge shall have the right to present oral statements and to provide explanations and propose evidence, directly or through a representative.

(5) During the course of proceedings, the Disciplinary Commission can present evidence that was not proposed by parties, or that have been withdrawn by parties, if the Commission finds them relevant for the correct and full determination of the facts.

Decisions of the Disciplinary Commission

Article 26

(1) After the hearing and the voting, the Disciplinary Commission shall make a decision in the form of Decree. The decision shall be made by majority vote. A special transcript shall be created with regard to deliberation and voting, and it shall be signed by members of the Disciplinary Commission and the transcript clerk.

(2) After the completion of disciplinary proceedings, the Disciplinary Commission can:

1) reject the proposal of the Disciplinary Prosecutor to conduct disciplinary proceedings;

2) adopt the proposal of the Disciplinary Prosecutor to conduct disciplinary proceedings, pronounce the judge responsible for the committed disciplinary offense and issue an appropriate disciplinary sanction.

(3) The decree from Paragraph 1 of this Article shall include:

1) Names and last names of the Chairman and members of the Disciplinary Commission and the transcript clerk;

2) Names of parties in proceedings, and representatives;

3) Date and venue of the decision;

4) Decision on the rejection of the proposal to conduct disciplinary proceedings, or the decision that pronounces a judge responsible for the committed disciplinary offense; legal classification of the disciplinary offense; and issued disciplinary sanction;

5) Facts and legal grounds of the decision;

6) Decision of the cost of proceedings;

7) Signature of the Chairman of the Disciplinary Commission;

8) Instructions about the legal remedy.
(8) Within a period of eight days from the day of the announcement of the decision, the Disciplinary Commission shall create a written decision and forward it, without delay, to the Disciplinary Prosecutor, judge, and his/her representative.

Cost of proceedings
Article 27
(1) Each party shall previously pay their own expenses, including expenses of proposed witnesses and expert witnesses.
(2) At the request of the judge against whom disciplinary proceedings have been conducted, the judge shall be compensated for justifiable expenses relating to the proceedings, including expenses of the representative, if disciplinary proceedings should end by discontinuation or rejection of the proposal to conduct disciplinary proceedings.
(3) The Disciplinary Commission shall decide about the cost of proceedings.
(4) Appeal can be filed with the Council against the decision from Paragraph 3 of this Article, within a period of eight days from the day of delivery of the decision.

Article 28
(1) The Disciplinary Commission shall submit to the Council a proposal for dismissal of the judge once it determines the responsibility of the judge for a grave disciplinary offense.
(2) Along with the reasoned proposal from Paragraph 1 of this Article, the complete case file shall be forwarded to the Council.
(3) Without delay, the Council shall forward the proposal of the Disciplinary Commission to the judge who shall have eight days to provide a comment.
(4) Having received the proposal from Paragraph 1 of this Article, President of the Council shall nominate a reporting judge from the ranks of judges – elected members of the Council. The reporting judge shall prepare the case, present it to the Council, and propose a decision.
(5) If the Council rejects the proposal for dismissal of a judge, it shall return the case file to the Disciplinary Commission for further acting.

Articles 24-28, when analysed in their contextual aspect resembles the provisions of the Criminal Procedure Code. In this light, most of the European legislations do not contain such detailed provision concerning the flow of the disciplinary procedure, instead they rather refer

to the relevant Criminal Procedure Code. Although there is nothing wrong with the approach taken in the Judges Rules, there is of course a possibility of a collision with the relevant Criminal Procedure Code, which regulates the same or at least very similar matter and to which the Judges Rules directly refer in the Article 2.

There is however a potential problem in Article 27 which deals with the expenses of the disciplinary proceeding. The judicial system should be as autonomous as possible, while judges should have internal as well as external independence.[9] The regulation which mandates that all parties must cover in advance their expenses could prove to be an disproportionate measure for the judge who is a subject of a disciplinary procedure. In this stage the judge is only a suspect and, as such, not proven guilty. In the light of preventing unjustified pressures on a certain judge, most of the European legal systems foresee that the resources for costs of a disciplinary proceeding against a judge are to be available from the public finances. If the judge in question is then found guilty for committing a disciplinary offence, he/she then has to return the funds that were spent in the process of the disciplinary procedure. Therefore, it is recommended that the Article 27 is amended appropriately.

4.6. Analysis and observations on Article 29, 30, 31, 32, 33, 34, 35, 36

The appeal

Article 29

(1) Judge and Disciplinary Prosecutor shall be allowed to file an appeal with the Council against the decision of the Disciplinary Commission, within a period of eight days from the day of forwarding of the decision.

(2) The decision may be disputed on the following grounds:

1) violation of procedure that may have influenced the adoption of a correct and legal decision;

2) incorrectly or incompletely determined state of the fact;

3) incorrect implementation of substantive law;

4) decision on issued disciplinary sanction.

(3) The appeal shall include:

1) title/number of the appealed decision;

[9] As stated in the Judges recommendations, chapters II and III.

2) statement whether the decision is being disputed in its entirety or in part;
3) reasons for the appeal;
4) signature of the person filing the appeal.

Second instance proceedings before the High Judicial Council
Article 30
(1) As a rule, the Council shall decide upon appeal without conducting a hearing. President of the Council shall nominate a reporting judge from the ranks of judges – elected members of the Council.
(2) The reporting judge shall provide a short presentation of the case and the facts; the Council shall, then, pass the decision.
(3) As an exception, when the Council finds that, for the purpose of determination of the factual state or elimination of violation of rules of proceedings, there is the need to repeat the presentation of already presented evidence before the Council, the Council shall schedule a hearing. The reporting judge shall provide a short presentation of the case and the facts, without opinion about the merits of the appeal. The parties shall, then, present their arguments.

Decisions of the High Judicial Council upon appeal
Article 31
(1) The Council shall decide upon appeal within a period of ten days from the day of filing of the appeal, in the form of a decree. The decision shall be made by majority vote. A special transcript shall be created about the deliberation and voting, to be signed by members of the Council and the transcript clerk.
(2) While deciding upon appeal, the Council shall have the right to:
1) dismiss the appeal as untimely or inadmissible;
2) reject the appeal as unfounded and confirm the decision of the Disciplinary Commission;
3) accept the appeal and reverse the decision of the Disciplinary Commission.
(3) Decision from Paragraph 1 of this Article shall include:
1) the composition of the Council;
2) names of parties in proceedings;
3) date and venue of the decision;

4) content of the appealed decision;
5) decision upon appeal;
6) legal and factual grounds of the decision;
7) signature of the President of the Council.
(4) If the first instance decision has been reversed, the decision upon appeal shall also include:
1) factual and legal elements of the disciplinary offense of which the judge was found guilty, and the issued disciplinary sanction;
2) determination of a new disciplinary sanction;
3) rejection of the proposal of the Disciplinary Prosecutor.
(5) The decision of the Council shall be final.

Article 32
The Council must create a written decision within a period of eight days from the day of adoption of the decision. Along with one copy of the decision, the file shall be returned to the Disciplinary Commission. Without delay, the Disciplinary Commission shall forward a copy of the decision to the Disciplinary Prosecutor, judge, and his/her representative.

Enforcement of final decisions on disciplinary sanctions
Article 33
A final decision which includes a disciplinary sanction shall be entered into the personal file of the judge.

Extraordinary legal remedies
Article 34
Extraordinary legal remedies and repeated proceedings shall not be allowed in disciplinary proceedings.

PART IV
Transitional and final provisions
Article 35
In the absence of performance evaluations, during the nomination of members of the Disciplinary Commission, the Council shall consider qualifications and competence of

candidate by use of standards from Article 14 Paragraph 1 of the Decision on the Establishment of Criteria and Standards for the Evaluation of Qualification, Competence and Worthiness for the Election of Judges and Court Presidents ("The Official Gazette of the Republic of Serbia" No. 49/09).

Article 36

This Rulebook shall come into effect eight days from the day of its publishing in "The Official Gazette of the Republic of Serbia".

Although the Article 29, in its second paragraph, contains sufficient reasons for appealing against the decision, as they are broad enough in their core. It is recommended to add few more specific reasons under which an appeal could be made, such as:

if the decision was taken and the accused judge was not present in the hearing but should have been;

if the public has been unlawfully forbidden to attend the legal proceedings;

if the decision in the disciplinary proceedings in unreasoned, unclear or has reasons that contradict each other or the tenure of the decision; and

if the evidence provided in the disciplinary proceedings has been obtained unlawfully by violating the human rights of the accused judge.

Articles 30-34 are (again) by their nature provisions of the criminal procedure code, and as such, they can be considered in compliance with the good practice of the European legal systems. The problem could arise with the Article 34 which excludes extraordinary legal remedies. Such a measure could be problematic in the sense that the e.g. judge who has been dismissed has no other means for examining such decisions before the 'regular courts', e.g. before the Higher court. In this sense the analysis of the relevant legislation of the Republic of Serbia should be made as to see if there is a possible judicial level which could decide on the dismissal of the judge from his/her position, before he/she addresses the Constitutional Court.

4.7. General reminder on the Judges rules

The Judges rules are in accordance with the most important and crucial principle of the proceedings against a certain judge and that is the autonomy of the judicial system. The latter should be a first and foremost guide and principle in all disciplinary proceedings. The purpose of the judicial independence is directly related to the Article 6 of the European Convention on Human Rights, that guarantees every person the fundamental right to have his/her case decided in a fair trial, on legal grounds only and without any improper influence.

The independence of an individual judge is therefore safeguarded by the independence of the judiciary as a whole, being a fundamental aspect of the rule of law. Judges should have unfettered freedom to decide cases impartially, and in accordance with the law and their interpretation of the facts. The disciplinary proceedings against a judge should be in proper balance with these fundamental principles. In this respect below is the summary of the principles concerning the judicial disciplinary proceedings as set forth in the Judges Recommendations:

- "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.
- Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation.
- The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.
- Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.
- Judges should not be personally accountable where their decision is overruled or modified on appeal.
- When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen."

5. Conclusions

In conclusion it can be said the Rules on Disciplinary Proceedings and Disciplinary Liability of Public Prosecutors and Deputy Public Prosecutors and the Rulebook on Disciplinary Proceedings and Disciplinary Responsibility of Judges of the Republic of Serbia constitute a well-designed and generally acceptable basis for functional system of the disciplinary responsibility of judges and prosecutors.

However, there are some weak parts in need of rectification, as elaborated in this paper.

With the suggested corrections, the system would have no objection with regard to its compliance with relevant standards.