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**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
(CCJE)**

Opinion of the CCJE Bureau

**following the request of the Bulgarian Judges Association to provide
an opinion with respect to the amendments of 11 August 2017
of the Bulgarian Judicial System Act**

A. The request

1. By letter of 5 October 2017, the Bulgarian Judges Association requested the opinion of the CCJE with respect to certain amendments of 11 August 2017 of the Bulgarian Judicial System Act, Art 230 (1).
2. According to the Bulgarian Judges Association, five members of the Bulgarian Parliament introduced, at the beginning of July 2017, a Bill amending the Bulgarian Judicial System Act. According to the Bill, it would be illegal for professional organisations of judges and prosecutors to fund their activities in ways other than by membership fees and membership donations. It would also be illegal for professional organisations of judges and prosecutors to receive funding from foreign states or foreign persons for research and teaching activities. These proposed provisions were withdrawn due to protests from Bulgarian and international organisations.
3. However, some amendments of the Bulgarian Judicial System Act, Art 230 (1), were adopted on 11 August 2017, and these entered into force on 15 August 2017. The request from the Bulgarian Judges Association concerns:
 - the provision requiring the Bulgarian magistrates to declare their membership in professional organisations;
 - the provision calling for removal of judges and prosecutors from their office following a public criminal charge against them concerning premeditated crime.
4. According to the Bulgarian Judges Association, the amendments jeopardise the independence of the judiciary. The requirement for all Bulgarian magistrates to declare membership of professional organisations imposes restrictions on the freedom of association and has a chilling effect on judicial independence.
5. Furthermore, according to the Bulgarian Judges Association, the provision concerning removal of judges following a public criminal charge against them, opens a wide avenue for arbitrary and unsanctionable interventions from the prosecution authorities in order to remove judges from the bench, including judges in pending criminal cases to which the same prosecution authority is a party. No judicial remedies are available to magistrates who have been removed from office.
6. The Bulgarian Judges Association indicated that the amendments were adopted in haste, without any public discussion, not even with the Bulgarian judiciary. The Bill was submitted to the Parliament on 4 July 2017 and was adopted in the first reading on 27 July 2017.

B. The procedure of the assessment

7. According to its terms of reference, one of the tasks of the CCJE is to provide targeted cooperation, *inter alia*, at the request of CCJE members, judicial bodies or relevant associations of judges, to enable States to comply with the Council of Europe standards concerning judges. The aforementioned request of the Bulgarian Judges Association falls within the terms of reference of the CCJE, and the CCJE is entitled to respond to the request presented by the Association. Following its general policy, the Bureau of the CCJE has communicated the letter of the Association to the CCJE member in respect of Bulgaria and invited her to provide the Bureau with her views on the subject matter.

8. The CCJE received, on 15 October 2017, a response from the CCJE member in respect of Bulgaria. According to the information presented by her, the request raises two questions following the amendments of 11 August 2017 of the Bulgarian Judicial System Act Art 230 (1). The first question concerns the freedom of association of judges, affected by the recently introduced obligation for judges to declare their membership in professional organisations. The second concerns the removal of judges from office upon criminal charges in publicly prosecutable premeditated crimes.
9. The CCJE member in respect of Bulgaria indicated that these issues are widely discussed among the magistrates in Bulgaria. The issues are also covered in the mass media and in specialised legal publications. The letter and the enclosed document provide a detailed description of the facts related to the Judicial System Act's amendments and their practical impact upon judges' freedom of association and independence.

C. The provision requiring Bulgarian magistrates to declare their membership in professional organisations

10. The Bureau of the CCJE recalls that the Committee of Ministers of the Council of Europe, in its Recommendation CM/Rec(2010)12 to member states on judges' independence, efficiency and responsibilities, has recognised the essential role of judges' associations in ensuring judicial independence and the rule of law, as well as in protecting the interests of judges. In that respect, judges should be free to form and join professional organisations. Judges may freely join such organisations which may operate at national or international level, be authorised to take part in discussions with the competent institutions on matters related to their purpose, and participate in the training of judges¹.
11. The Magna Carta of Judges (fundamental principles) adopted by the CCJE in 2010, emphasises the role of judges' associations in a democracy based on the rule of law and that *judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society*².
12. The right of judges to freely form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence, is endorsed by the General Assembly of the United Nations as one of the fundamental principles on the independence of judges. This follows from the United Nations Basic Principles on the Independence of the Judiciary. In accordance with the Universal Declaration of Human Rights, members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary³.
13. These international instruments recognise not only the role of judges' associations with respect to their role in defending the rule of law and the independence of the judiciary, but also the role of judges' associations in representing the interests of judges. With respect to

¹ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 25, and the Explanatory memorandum to the Recommendation, paragraph 33.

² The CCJE Magna Charta of Judges (fundamental principles), paragraph 12.

³ Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paragraphs 8 and 9.

the latter, members of associations of judges should enjoy the same protection as members of trade unions with regard to the protection of personal data, even in states where judges' associations merely act as NGOs⁴. Judges must enjoy protection of fundamental rights and freedoms as other natural persons, including the right to privacy with respect to disclosure and processing of personal data, unless otherwise necessary in a democratic society, prescribed by law and in the interest of the rule of law.

14. With respect to disclosure of judges' personal data, the CCJE Bureau refers to the practice of declaring conflicts of interest and the existence of both public and non-public registers of a judge's assets and income, which is effective in some member states of the Council of Europe. A proportionate disclosure of such information is justified on grounds of proper administration of justice, such as transparency with regard to judges' independence and impartiality and for the prevention of corruption within the judicial system. Disclosure of judges' membership in an association of judges cannot by any means be justified on such or similar grounds. Membership in judges' associations is for judges only, and raises as such no conflicts with the proper administration of justice.
15. Bearing in mind the fundamental right of judges to freely form and join associations of judges, the other powers of state must exercise the utmost restraint in this respect. An obligation should not be imposed on judges to disclose their membership in such associations. In this respect, the Bureau of the CCJE recalls the opinion of the First Study Commission of the International Association of Judges, opposing any requirement for a judge to reveal membership of a judicial association as this information could be misused⁵. The CCJE Bureau shares the same concerns. An obligation for judges to disclose their membership in judges' associations could be regarded as an interference with the right to form and freely join such associations of judges, thus having a chilling effect on judicial independence⁶.
16. The CCJE Bureau encourages the Bulgarian authorities to initiate a process for repealing the provision requiring the Bulgarian magistrates to declare their membership in professional organisations.

D. The provision calling for removal of judges from their office following a public criminal charge against them

17. The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The CCJE has taken the position that judges should be criminally liable in ordinary law for offences committed outside their judicial office. Furthermore, judges who, in the conduct of their office, commit what

⁴ The CCJE Bureau refers to the practice in Member States of the European Union whereby trade-union membership is considered as sensitive personal data alongside information on racial or ethnic origin, political opinions, religious or philosophical beliefs and data concerning health or sex life. Member States shall prohibit the processing of such personal data. See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 8 (1).

⁵ 2016 Report of the IAJ 1st Study Commission on measures to promote integrity and combat corruption within the judiciary

⁶ For disclosure of trade union membership, see the International Labour Organisation (ILO) Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (Revised) Edition, 2006, paragraph 866.

would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process⁷.

18. However, criminal liability should not be imposed on judges for unintentional failures in the exercise of their functions. According to the Committee of Ministers of the Council of Europe, in its Recommendation CM/Rec(2010)12 to member states on judges' independence, efficiency and responsibilities, the interpretation of law, assessments of facts and weighting of evidence carried out by judges to determine cases, should not give rise to criminal liability, except in cases of malice. When exercising judicial functions, judges should be held criminally liable only if the fault committed was clearly intentional.⁸
19. The CCJE Bureau also recalls the UN Basic Principles on the Independence of the Judiciary, stating that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. A charge or complaint made against a judge in his/her judicial and professional capacity, shall be processed expeditiously and fairly under an appropriate procedure. The judge shall furthermore have the right to a fair hearing⁹.
20. The CCJE has previously emphasised the need for fair trial requirements in disciplinary proceedings against judges. Such proceedings should be determined by an independent authority or tribunal, e.g. by an independent Council for the Judiciary, operating a procedure guaranteeing full rights of defence. The arrangements regarding disciplinary proceedings should be such as to allow an appeal from the initial disciplinary body to a court. The sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible, in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner¹⁰. Furthermore, disciplinary sanctions against judges must not violate the presumption of innocence as enshrined in the European Convention on Human Rights, Article 6 § 2.
21. The need for caution in the recognition of criminal liability for judges, and in the recognition of such disciplinary sanctions as suspension and removal from judicial office, arises from the need to maintain judicial independence and freedom from undue pressure¹¹.
22. Based on the aforementioned principles, the CCJE Bureau summarises that the suspension or removal of judges from office should not automatically be a disciplinary reaction generally imposed on judges alleged of having committed criminal actions, even for alleged cases of intentional or premeditated crimes. Each case should be dealt with individually, by an independent body, respecting all fair trial requirements, including the right to appeal, the presumption of innocence and the requirement of proportionality of sanctions.

⁷ CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paragraphs 51-54.

⁸ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 25, and the Explanatory memorandum to the Recommendation, paragraph 67.

⁹ See the UN Basic Principles on the Independence of the Judiciary, paragraphs 17 and 18.

¹⁰ CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paragraph 77.

¹¹ CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paragraph 51.

23. On the basis of these principles, the CCJE Bureau concludes that the provision entailing the removal of judges and prosecutors from their office following a public criminal charge against them concerning premeditated crime, is not in accordance with European standards for judicial independence. Cases are not dealt with on an individual basis. The judge in question is deprived of his/her right to enjoy the requirements of a fair trial, to have the case tried before an independent body and is furthermore deprived of an individual assessment of the proportionality of the sanction. Due to the lack of an individual assessment of each case, there is also a risk of violation of the presumption of innocence. Based on these concerns, the CCJE Bureau encourages the Bulgarian authorities to initiate a process for repealing this provision.

E. The law-making process

24. According to the Bulgarian Judges Association, the aforementioned amendments were adopted without any prior consultations with representatives of the Bulgarian judiciary and without any public discussion. The Bill was submitted to the Parliament on 4 July 2017, and it was adopted in the first reading on 27 July 2017.

25. The CCJE Bureau emphasises that, in general, a good law-making process, in the interest of democracy and the rule of law, should involve public participation and public consultations, especially with potentially affected stakeholders. Consequently, and also respecting the principle of the separation of state powers and for the benefit of judicial independence and judicial accountability, the judiciary should be ensured effective participation in any preparation of reforms of the judiciary and the judicial system. Such participation seems not to have been present in this case.

F. Conclusions

26. The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, reiterates the fundamental right of judges to freely form and join associations of judges. Such associations play an essential role in ensuring judicial independence and the rule of law, as well as in protecting the interests of judges. An obligation should not be imposed on judges to disclose their membership in their professional associations as this would have a chilling effect on judicial independence.

27. The suspension or removal of judges from office should not automatically be a disciplinary reaction generally imposed on judges alleged to have committed criminal actions, even for alleged cases of intentional or premeditated crimes. Each case should be dealt with individually, by an independent body, respecting all fair trial requirements, including the right to appeal, the presumption of innocence and the requirement of proportionality of sanctions.

28. The Bulgarian provision requiring the disclosure of judges' membership in judges' associations, and the provision entailing the removal of judges and prosecutors from their office following a public criminal charge against them concerning premeditated crime, are not in accordance with European standards for judicial independence. These provisions should be repealed.

29. The CCJE Bureau remains at the disposal of the Bulgarian authorities for any assistance in this matter.