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CONSEJO GENERAL
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KINGDOM OF SPAIN



**IMPROVEMENT OF THE MAGISTRATES' LEGAL STATUS
AND STRENGTHENING THE CAPACITY OF
THE SUPREME JUDICIAL COUNCIL**

PHARE TWINNING PROJECT BG-04-IB-JH-04

**REPORT ON THE
DRAFT LAW FOR THE FOURTH AMENDMENT
TO THE CONSTITUTION OF BULGARIA**

-Draft Law 25-09-2006

20 October 2006



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1.- INTRODUCTION

1. This Twinning Project team of experts **produced several reports** on the process of reform of the primary legislation concerning the areas that fall within the scope of this project, thereby offering a **comprehensive and coherent set of recommendations** that seek to fulfil the tasks and objectives set out in the Twinning Contract, i.e.: improvement of the Magistrates' legal status and strengthening the Supreme Judicial Council.

Regarding the Third Constitutional Amendment in particular, we produced the Report dated 31 January 2006, and **regarding the reform of the Judicial System Act** we produced two reports on the Amendments of May 2006 on 28 November 2005 and April 2006¹.

On 28 September 2006 we also produced a specific **report on the draft new Judicial System Act**.

2. Apart from them, several **recommendations** were also presented regarding the different areas within this Project scope, which can be summarized as follows:

- General principles and Mechanisms for the Realization of the Magistrates' Disciplinary Liability.
 - Final experts' proposals and recommendations were officially presented to the SJC on 31 March 2006. Detailed recommendations to improve the magistrates' legal status with new legislation concerning:
 - 1. the **Independence** of Judges, Prosecutors and investigators
 - 2. the **Rights and Obligations** of Judges, Prosecutors and investigators
 - 3. the **Disciplinary Liability** of Judges, Prosecutors and Investigators
 - 4. the **Magistrates' Administrative Situations**.
- Criteria and mechanisms for the **selection, appointment, promotion and demotion** of magistrates.
 - Final experts' proposals and recommendations were officially presented to the SJC on 21 June 2006.
- Criteria and Mechanisms for the appraisals of Magistrates' performance.
 - Final experts' proposals and recommendations were officially presented to the SJC on 14 March 2006.
- Strengthening the Supreme Judicial Council capacity.
 - Final experts' proposals and recommendations were officially presented to the SJC on 5 June 2006 covering two aspects of the "*Regulations for the Work of the SJC and its Administration*":

¹ Detailed information on the activities, results, all the recommendations produced under this Twinning Project and the regular assessments can be found at <http://www.vss.justice.bg/bg/enter.html>, link to the Twinning Project, or directly at <http://212.122.184.99/spain/spain.htm>.



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- The first one makes recommendations to introduce new provisions to establish an **Evaluation and Supervision Department in the SJC**;
- The other one makes recommendations regarding Article 77, Section 5 of Chapter of the Regulation.

3. Said recommendations were **based** on the needs stated in the *Accession Partnership Agreement with Bulgaria 2003* and the following **fundamental principles**:

- Clear separation of powers (Minister-Ministry of Justice # Supreme Judicial Council),
- Principle of independence of the SJC (including budgetary independence),
- Strengthening the SJC,
- Principle of independence of Judges, Prosecutors and Investigators (independence ad extra and ad intra – limitation of the role of Administrative Heads-),
- Full accountability of magistrates as a correlative consequence of their independence,
- Improvement of magistrates' legal status.

4. In order to briefly analyze some aspects of the draft fourth amendment to the Constitution of Bulgaria, it is essential to take into account the following relevant aspects:

a) **The Monitoring Report (16 May 2006) on the State of Preparedness for EU Membership** contains some relevant conclusions²:

- *The **newly adopted constitutional amendments** allow the Minister of Justice to play a role in the establishment of the budget, the training of magistrates, the promotion and dismissal and other human resource decisions, the management of the court infrastructure and the judicial processing of cases. While the Supreme Judicial Council (SJC) continues to have a final say on all these important issues, **its role is weakened by the fact that it is not a permanent body**. Its members are full time magistrates, often heading courts, prosecution or investigation offices entailing a considerable amount of responsibilities.*
- *In view of this and of the fact that the Supreme Judicial Council has only 65 staff members, it will remain a considerable challenge for it to **act in practice as a counterbalance to the Minister of Justice and to contribute substantially to the policy formulation in the further reform of the justice system**.*
- *Against this background, the constitutional amendments leave some ambiguities regarding the guarantees of the independence of the judiciary. **Any ambiguity must be removed***
- *A **uniform mechanism with well defined criteria** for assessing the quality of the work of magistrates is not in place yet. The Supreme Judicial Council **has no specialised department responsible for this task**. Corruption within the judiciary remains a serious challenge*

² Bold by the reports' authors.



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- Overall, **limited progress** has been made both in terms of **quality and accountability** of justice as well as regarding **the institutional relations between the executive and the justice system**
- Bulgaria needs to complete the reform of the judiciary, **ensure tangible results, and take the additional steps to guarantee its independence**

b) The Action Plan- June 2006: Measures for Implementation of the European Commission Recommendations, identified in its Comprehensive Monitoring Report of 16 May 2006 fixed the following working areas:

- **Remove the ambiguities** as regards the full respect of the independence of the Judiciary.
- Drawing up a new Judicial System Act (JSA) in **close cooperation** with the NA and the experts **from the Twinning project with Spain**, including regular consultations with the EC concerning the Draft JSA.
- The Draft JSA should include **criteria for evaluation of the work quality of magistrates**, and eventually envisage establishment of **new commissions within the Supreme Judicial Council (SJC)** in this respect.
- The Draft JSA should **reconsider the generalized principle of competitions and limit** them to the entry into the system.
- For promotions etc. a real **merit based career path** should be developed, hence the importance of objective and harmonized assessment (attestation) criteria and a unit in SJC to oversee implementation.
- Provide in the new JSA the creation of a **new Evaluation and Supervision Department**.
- In parallel, foresee legal provisions in the new JSA **to limit the role of the Administrative Heads**: Competence for evaluation, selection, appointment, promotion or downgrading should be exclusively given to the SJC. The role of the administrative heads should be limited only to the designation of the number of vacancies in their respective courts or offices with no outstanding role in the career development. Consult with Spanish Twinning in SJC³.

c) In the last Monitoring Report (26 September 2006) On the State of Preparedness for EU Membership, it was clearly stated that “... as a **result of the progress made**, Bulgaria and Romania will be in a position to take on the rights and obligations of EU membership on 1 January 2007 ...”

³ Regarding this “close cooperation” and “consult” with this Project mentioned in this Action Plan, in the last Quarterly Report approved by this Project Steering Committee on 14 September 2006 we can read:

“However, up to now this project has not received any communication whatsoever regarding the Action Plan implementation and, therefore, to our regret, we cannot avoid reporting the lack of any co-operation whatsoever between this project in the SJC and the MoJ, not even mere communication. This situation makes it impossible for this Twinning Project to assess the extent to which the Action Plan has been implemented in its aspects related to this Project”.



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At the same time the report refers that “... the Commission also identifies a number of **areas of continuing concern**, and also areas where the Commission will initiate appropriate measures to ensure the proper functioning of the EU, unless the countries **take immediate corrective action**. Both countries are strongly encouraged to make proper use of the months before accession, in order to address the remaining issues ...”

The following comments can be found in the last monitoring report regarding the Justice area:

- The necessary **amendments to the Constitution** to remove ambiguities concerning the independence of the judiciary, the accountability of the judicial system need to be adopted
- The **composition and functioning of the Supreme Judicial Council** still give rise to concern.
- Members of the Supreme Judicial Council continue to discharge other professional duties (in most cases as heads of courts or prosecution offices) and therefore cannot devote their effort full-time.
- Decision making on disciplinary measures by the Supreme Judicial Council has often been slow.
- There are no legal provisions to suspend magistrates who are under internal disciplinary investigation.
- A magistrate who is a member of the Supreme Judicial Council and is found to have committed a disciplinary offence cannot be dismissed from the Council.
- Therefore, concern remains regarding the ability of **the Supreme Judicial Council to act as a credible and leading body** to promote the highest ethical standards throughout the Bulgarian justice system
- Following the adoption of the regulation on **competitions** for and **evaluation** of magistrates, efforts need to continue to ensure it is rigorously applied
- The **anti-corruption departments** in the Supreme Judicial Council and in the Prosecution Office need to be reinforced and to be protected from undue influence
- Ensure a more **transparent** and **efficient** judicial process by adopting and implementing a new Judicial System Act and a new Civil Procedure Code. Report on the impact of these new laws and of the Penal and Administrative Procedure Codes, notably on the pre-trial phase
- Continue the reform of the judiciary in order to enhance **professionalism, accountability** and **efficiency**. Evaluate the impact of this reform and publish the results annually

5. The **Bulgarian Constitution** has already proclaimed the fundamental principles of separation of powers and judicial independence in **Article 8**: *The power of the state shall be divided between legislative, executive, and judicial branches*; and in **Article 117**: *The judicial branch shall be independent. In the performance of their functions all judges shall be subservient only to the law.*



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This wording recognizes that strong, reliable and efficient judiciary is absolutely essential for the effectiveness of the Rule of Law and the protection of individual liberties. To be strong, the judiciary must be independent from pressures and management by the executive and the legislature.

6. It is essential to **find out** whether this new constitutional amendment, intended to strengthen said principles, the Rule of Law and to improve the judicial system, reinforces the independence and separation of powers or jeopardizes them. It is essential to establish if this new amendment will definitively clarify the areas of concerns mentioned in the last monitoring reports.

7. This Twinning Project **Report** offers some reflections on the abovementioned issues, strictly limited to the Project scope. We would not make a comprehensive analysis of all issues. We will only raise some relevant ones and offer some ideas based on the understanding that in areas where no “*standards*” are in place, **the best practices we could think of should be referred to**. Separation of powers and independence **are not absolute principles anywhere in the world. They are only principles that have diverse grades (scales) or stronger or weaker content**.

The aim should be, in the framework of the so called “*checks and balances*”, to clearly design and **offer to the society the most solid principles of the judicial system and the highest possible level of efficiency, accountability and professionalism** in order to reinforce the rule of law and strengthen the essential role that judiciary has in its effective and real implementation.

Judicial independence is not a privilege of the judiciary or of its governing institution to be used in their own interest. It is in the interest of the Rule of Law and those seeking and expecting justice.

2.- THE ROLE OF THE SJC PURSUANT TO THE PROPOSED NEW AMENDMENT TO THE CONSTITUTION OF BULGARIA

2.1 GENERAL ASSESMENT

In view of the straightforward messages emphasised in the last monitoring reports and the commitments laid down in the *Accession Partnership Agreement with Bulgaria 2003*⁴, it is really quite surprising that, more than three years after this international legal, and binding, agreement and only a few months after the Third Constitutional Amendment aimed at “*improving the coordination and cooperation among the state authorities and elaborating the principle of separation of powers (Article 8 of the Constitution) and re-affirming the independence of the judiciary (Article 117 of the Constitution)*”, we are currently facing again

⁴ a) “drawing a clear divide between the powers of SJC and those of the Ministry of Justice”

b) “to ensure respect for the independence of the judiciary”

c) “reinforcing SJC’s administrative capacity, thus enhancing its operation in two aspects: strategic decision-making and management of the judicial system”



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a new effort to “*identify novel Constitutional solutions*” “ *concerning the Chapter on the Judiciary in particular*”.

As mentioned in the explanatory notes to the draft law for the fourth constitutional amendment, “*in the strive to meet public expectations, as well as the expectations of our partners from the EU, it has become inevitable to make some adjustments to the legal framework governing the Judiciary, also at the Constitutional level, in view of upholding strong institutional independence and the essential guarantees for individual independence via the elements inherent in the status of magistrates*”.

As we will try to explain after analysing some aspects of the amendment proposed at this crucial moment, the draft is not a positive reflection of the aims and expectations set out in the last monitoring reports, as the constitutional definition of the SJC role remains unclear, its position of a “*leading body*” is further weakened, almost nothing new is introduced, gaps are not filled and ambiguities are not clearly removed, all of this as if indicating a kind of distrust in the SJC which governs the Judicial Power.

2. 2.- ARTICLE 84 OF THE CONSTITUTION: THE SUPREME JUDICIAL COUNCIL, AN INSTITUTION WITHOUT ITS OWN CHAIRPERSON

Article 84 item 16 Const. (existing wording after the third amendment)	<i>Draft for the Fourth Amendment: Item 16 is reworded</i>
<p>Art. 84. The National Assembly shall ...:</p> <p>“16. hear and approve the annual reports of the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, the General Prosecutor on the application of the law and on the activities of the courts, prosecution offices and the investigation service.”</p>	<p>„16. <i>hear and adopt annual reports from the Supreme Court of Cassation, the Supreme Administrative Court, and the Prosecutor General, presented by the Supreme Judicial Council, on the enforcement of the laws and on the operation of the courts, the prosecution offices, and the investigation bodies.</i>”</p>

<p><i>Draft Fourth Amendment:</i> <i>A new item 17 in Article 84 is inserted with the following content:</i></p>
<p><i>“17. hear and adopt the annual reports on the activities of those State authorities whose members are elected, in whole or in part, by the National Assembly under a procedure set out by law.”</i></p>

In our Report on the Third Constitutional Amendment we expressed our concern about the then newly introduced obligation of the heads of the three judiciary branches to submit and present an annual report to the National Assembly.

The draft Fourth Amendment follows our recommendations in part as it regulates the SJC function to present the annual report to the National Assembly. Rightly, as the explanatory notes to the draft law for the fourth constitutional amendment reads “*this helps*



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single out the Supreme Judicial Council's place and role as a body which represents the Judiciary before the Legislative, while ensuring that the Council would assume responsibility", But, again an essential gap is not addressed: who represents the SJC?

Mr. Kjell Björnberg's in his Report after the Peer Review on 20-24 March 2006 pointed out that *"an independent judiciary is the basis for a democratic society governed by the rule of law. Such independence demands freedom from interference by both the executive and legislature with the exercise of the judicial function. It requires a set of institutions that assure that judges decide according to law, rather than according to their own whims or to the will of others, including other branches of the government. A judiciary that remains subject to the influence of political power loses its objectivity, its respectability and its ability to effectively protect human rights and fundamental freedoms"*.

The SJC, considered to be the representative and management institution of the judiciary, needs to be reinforced within the framework of the institutional state structure following the principle of division of powers (article 8 of the Constitution).

In its 2002 Regular Report, the European Commission clearly emphasised at that time that *"the Supreme Judicial Council represents judges, prosecutors and investigators"*, but who is the representative of the SJC?; is it possible to have a collective constitutional institution without a chairperson who can represent it in the State?; why is this question avoided again?.

As we have already commented in previous reports, apparently it is absolutely necessary for the SJC to have its own chairperson who can take over the representative function of this institution provided for in the Constitution. The Chairperson should act on behalf of the entire judiciary, be the visible head of this institution before all citizens and the other branches of power in the Republic, and, as in the case discussed herein, assume the role of reporting to the National Assembly on behalf of the entire judiciary and its governing body, the Supreme Judicial Council.

The relationship between different state powers should be developed at the highest level, by and before representatives of the institutions involved. The annual report submitted to the National Assembly should be considered as the instrument for said relationship ("checks and balances") between the main institutions of the Republic as well as a mechanism for democratic accountability of the Supreme Judicial Council and the judiciary as a whole⁵.

⁵ There are several possible formulas for selection of the SJC Chairperson. In our report dated 28 November 2005, in order to ensure the involvement of the National Assembly as the highest democratic institution, we proposed the following constitutional wording:

The Supreme Judicial Council is the self-government institution of the Judiciary in charge of ensuring its independence. Its competences and status shall be established by law.

The meetings of the Supreme Judicial Council shall be chaired by its Chairperson who shall organize its sittings.

The SJC Chairperson shall be appointed by the National Assembly among three candidates proposed by the 3/5 of the members of the SJC at the first meeting of the SJC. This inaugural session of the SJC will be chaired by its most senior Member. The Vice president of the SJC will be elected by a plenary session of its Members by a majority of three fifths.



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The chairperson could also have an important role in avoiding potential risks of conflict of interest, such as the one Bulgaria faces every year at the time the Supreme Judicial Council budget is elaborated⁶.

Having regard the above grounds, we do not consider the amendment to Article 84.16 of the Constitution adequate as it fails to fill in the gap related to the absence of a SJC chairperson independent of the other two powers. In our view the ambiguity and uncertainty in the general SJC institutional framework still exists.

Apart from this, we find the proposed new Article 130.7 an unnecessary repetition of Articles 84.16 and new Article 130.6 (4).

Finally, it is very important to point out that the constitutional reform restricts and further weakens the role of the SJC in this respect. The constitutional lawmakers seem to refer to the SJC functions (to hear, adopt, decide on the content and present to the National Assembly) only in relation to the “*annual reports of the Supreme Court of Cassation, the Supreme Administrative Court, and the Prosecutor General*”, but no reference is made whatsoever to the annual report of the SJC, i.e. to its own annual report, as the self-governance institution of the judiciary in charge of ensuring its independence.

The SJC, being the “leading body” entitled to manage and represent the Judiciary, should obviously be the only one in charge of elaborating such annual report, i.e. its own comprehensive annual report at a national level on the situation, functioning and activities of the Council itself and of the Courts, Prosecution and Investigations offices. This report should mention all their needs in terms of personnel, installations and resources in general to ensure an adequate discharge of the duties vested in the Judiciary by the Constitution and the law.

The Chairperson of the SJC will represent the Supreme Judicial Council and the Judiciary and convene and preside the plenary sessions. In the event of voting, he or she will have the casting vote.

⁶ Regarding the judiciary budget, in our report (28-09-2006) on the draft new Judicial System Act we concluded the following:

1. *The competencies vested in the MOJ under the new Act are exorbitant with regard to the ones held by the SJC.*
2. *The powers of the MOJ extend to almost all areas of budgetary activity related to the administration of justice which is highly detrimental to the SJC powers.*
3. *The implementation of the budget includes provisions which reinforce the MOJ powers.*
4. *The JSA contains obvious contradictions, repetitions and legal loopholes with regard to the allocation of powers.*
5. *The intervention of an Advisory Council comprising representatives of different institutions in order to prepare the Budget does not have any precedent in other EU Member States and must be considered a lack of confidence in the SJC. This involvement simply extends and adds further complexities to the process, which is already complex, and we do not find that its contribution leads to any improvement.*
6. *The Parliament is faced with examining the Judiciary Budget from three perspectives: two from the Executive and one from the Judiciary, wherefore the weight of the Judiciary (SJC) in the Judiciary Budget is minimized.*
7. *The independence of magistrates and independence of governance are not equivalent concepts. There are several valid models which uphold the separation of powers but vest the drafting and execution of the budget either to the executive or the judiciary, without undermining the independence of magistrates. The historical evolution of the organization of the State which the Republic of Bulgaria is currently undergoing makes it advisable that the SJC itself should hold and reinforce its powers to plan, budget, monitor and provide the administration of Justice.”*



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Therefore, we do find this new wording of Article 84.16 makes no step forward to fill in the mentioned gap regarding the absence of a SJC Chairperson and to recognize and strengthen the leading role of the SJC in the State structure.

2.3 THE NEW PARAGRAPHS 6, 7 AND 8 IN ARTICLE 130, ARTICLE 130 a) AND THE NEW ARTICLE 132a).

The SJC must be considered the representative institution of the judicial power. As a management institution, the SJC discharges the duties set out by law. The Supreme Judicial Council is the institution suitable to represent and manage the judicial power to guarantee its independence and unity, its autonomy and separation from the legislature and the executive and its effectiveness as an institution governing judges, prosecutors and investigators.

The 26 September Monitoring Report states: *“concern remains regarding the ability of the Supreme Judicial Council to act as a credible and leading body to promote the highest ethical standards throughout the Bulgarian justice system”, “the composition and functioning of the Supreme Judicial Council still give rise to concern”.*

In the previous Monitoring Report of May 2006, the Commission found out that with the third constitutional amendments: the role of the Minister of Justice increased; the role of the SJC is weakened; that it is still a considerable challenge for the SJC to act in practice as a counterbalance to the Minister of Justice and to contribute substantially to the policy formulation in the further reform of the justice system; that the third constitutional amendments leave some ambiguities regarding the guarantees of the independence of the judiciary; and that any ambiguity must be removed.

In view of these considerations, the analysis of the new paragraphs 6, 7 and 8 of Article 130, Article 130 a) and the new Article 132a) lead to the conclusion that not only the ambiguities have not been removed but also that the following new areas of concerns have been introduced:

a) No broad constitutional definition of the SJC but a system of limited *“numerus clausus”* powers and competences.

CURRENT WORDING:	<i>Draft Fourth Amendment</i>
<p>Art. 130. (1) The Supreme Judicial Council shall consist of 25 members. Sitting on it ex officio shall be the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor.</p> <p>(2) Eligible for election to the</p>	<p><i>New paragraphs 6, 7 and 8 are inserted in Article 130, with the following content:</i></p> <p><i>“(6) The Supreme Judicial Council shall make decisions on:</i></p> <ol style="list-style-type: none"> <i>1. the appointment, promotion, demotion, transfer, removal from office, and the disciplinary liability of judges, prosecutors, and investigators;</i> <i>2. the organisation of the qualification of judges, prosecutors, and investigators;</i> <i>3. the draft budget of the Judiciary;</i>



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<p>Supreme Judicial Council besides its ex officio members shall be practising lawyers of high professional and moral integrity with at least 15 years of professional experience.</p> <p>(3) Eleven of the members of the Supreme Judicial Council shall be elected by the National Assembly, and eleven shall be elected by the bodies of the judicial branch.</p> <p>(4) The elected members of the Supreme Judicial Council shall serve terms of five years. They shall not be eligible for immediate re-election.</p> <p>(5) The meetings of the Supreme Judicial Council shall be chaired by the Minister of Justice, who shall not be entitled to a vote.</p>	<p><i>4. the content of the annual reports referred to in s. 84, point 16;</i></p> <p><i>(7) The Supreme Judicial Council shall hear and adopt the annual reports from the Supreme Court of Cassation, the Supreme Administrative Court, and the Prosecutor General on the enforcement of the laws and on the operation of the courts, the prosecution offices, and the investigative bodies, and shall present them to the National Assembly.</i></p> <p><i>(8) The term of office of any member of the Supreme Judicial Council shall be ended in the event of:</i></p> <ol style="list-style-type: none"> <i>1. resignation;</i> <i>2. the entry into force of a sentence of imprisonment for an intentional criminal offence;</i> <i>3. that member's lasting physical inability to perform his or her duties for more than one year;</i> <i>4. that member's disciplinary dismissal in his or her capacity as a judge, prosecutor or investigator.</i> <p><i>In that member's stead, a new member of the Supreme Judicial Council shall be elected from the respective quota who shall serve for the remainder of the term of office."</i></p>
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Although the Bulgarian Constitution mentions the Supreme Judicial Council it does not define specifically the institution as the one in charge of governing the judiciary. There is no actual definition of the concept of the Supreme Judicial Council in the Constitution. It only refers to an exhaustive list of SJC powers:

- A) Competence of the SJC for the election, promotion, demotion, re-appointment and dismissal of judges, prosecutors and investigators (Art. 129.1 and 131);
- B) Composition of the Supreme Judicial Council (Art. 130);
- C) Permission in case of charges or remand in custody of judges, prosecutors or investigators (Art. 132);
- D) Organization and activity of the Supreme Judicial Council, of courts, prosecution offices and investigation services, status of judges, prosecutors and investigators, conditions and procedure for appointment and removal from office of judges, court assessors, prosecutors and investigators and their liability shall be established by law (Art. 133).

This lack of definition and similar list of competences is reproduced in the existing Judicial System Act.

The draft constitutional amendment to paragraph 6 concerns the SJC power to make decisions on: 1. the appointment, promotion, demotion, transfer, dismissal, and the disciplinary liability of judges, prosecutors, and investigators; 2. the organisation of training of judges, prosecutors, and investigators; 3. the draft budget of the Judiciary.

This is really nothing new, this is not a “*novel constitutional solution*”, and it does not remove the ambiguities regarding the guarantees for the judiciary independence. This wording only enshrines, at a constitutional level, the existing system that gave rise to the above-mentioned European Commission concerns on this issue.



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The SJC role is further weakened with no general definition of its constitutional role and concept and a restricted and exhaustive list of competences.

b) The SJC as an institution deprived of initiative; the powers of the Minister of Justice under Article 130 a).

In this respect, we must again call your attention to the commitments laid down in the *Accession Partnership Agreement with Bulgaria 2003*:

- “drawing a clear divide between the powers of SJC and those of the Ministry of Justice to ensure respect for the independence of the judiciary”.
- “reinforcing SJC’s administrative capacity, thus enhancing its operation in two aspects: strategic decision-making and management of the judicial system”.

In our understanding, the third constitutional amendment falls short of these requirements and the rules about interaction between the Minister of Justice and the judiciary are still not accurate, do not follow EU best practices on some fundamental principles and may present a potential risk to the effectiveness of the judicial independence, the principle of self-governance and the principle of the separation of powers.

Separation of powers stands opposite to the intervention of one of the members of the executive in the institution governing the judiciary and involves freedom from inappropriate relations with and influence by the legislative and the executive.

In the same line as we reported, some other analysts clearly concluded that the third constitutional amendment was a step backwards in clarify these fundamental principles and strengthening the SJC.

The existing structure allows the executive to effectively take part in the judiciary self-governance. While the functions of the SJC were weakened, the position of the Minister of Justice was substantially reinforced with the introduction of Article 130 a)⁷. The powers and functions of the Minister of Justice were clearly defined and as a result of which, all judiciary areas were opened to the influence of the executive, i.e. the Minister of Justice.

The European Charter on the Statute for Judges clearly states (1.3) that “in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers”.

Recommendation No R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges, also points out

⁷ “Article 130a. The Minister of Justice:

1. shall propose a draft budget of the judiciary and submit it to the Supreme Judicial Council for consideration;
2. shall manage the property of the judiciary ;
3. may make proposals for appointment, promotion, demotion, transfer and dismissal of duties of judges, prosecutors and investigators;
4. shall participate in the organization of the qualification of judges, prosecutors and investigators;
5. shall inspect the organization on the formation, movement and closure of cases.”



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that all decisions concerning the professional career of judges should be based on objective criteria.

As mentioned in our previous reports, it was on these grounds that we proposed that the Minister of Justice should be removed from the Supreme Judicial Council⁸ and that Article 130 a) should be repealed.

After the Third Constitutional Amendment, the institutional definition of the SJC as the body “deciding” on proposals put forward by the Minister of Justice gave rise to concerns and ambiguities and weakened the SJC position.

In this respect, the draft Forth Amendments to the Constitution introduces nothing new to the existing situation. We still have a body, the SJC, not properly defined as the governing body of the judiciary, with a restricted and exhaustive list of competence and lack of initiative. Is it not the power of initiative, i.e. to make proposals for decisions, the most essential aspect of the decision-making process?

The inconsistency, ambiguities and concerns that the Minister of Justice powers regarding the SJC generate, is not only reflected in the EC monitoring reports, but also in the national debate.

In fact this issue have been addressed to the Constitutional Court of Bulgaria three times in cases No 34 in 1998, No 17 in 2002 and No 7 2006.

In this last case, in its Judgement No 8 of 13 September 2006 (regarding the powers of the Minister of Justice to make proposals for the appointment, promotion, demotion, transfer, and dismissal of judges, prosecutors and investigators), we can find the final decision, upheld by only five justices⁹, to reject the claim of unconstitutionality of Article 130 a) (3), but also two dissenting votes, one by four justices¹⁰ and the other one by one justice¹¹.

⁸ In this respect see the same conclusion in Mr. Kjell Björnberg’s Report after the Peer Review on 20-24 March 2006

⁹ Justices Stefanka Stoyanova, Rumen Yankov, Lazar Gruev, Emilia Drumeva, and Evgheni Tanchev

¹⁰ We can find the following reasoning:

“...In practice, this new article vests in the Minister certain powers that are typical for judicial bodies, which is an **infringement on the principle of the separation of powers** underlying the Constitution adopted by GNA In Judgement No. 7 from 2006 in const. case No. 6 from 2006 the Constitutional Court held that by adding new powers for the Minister of Justice under Art. 130a of the Constitution to para 4 of Art. 129 of the Constitution, as challenged in const. case No. 6 from 2006, one of the most important aspects of judicial organisational independence was at stake, “the lack of balance between the powers thus becoming ostentatious”. **The Minister of Justice, constitutionally belonging outside the Judiciary, involved in staffing proposals with regard thereto, indisputably breaks the balance among institutions.** Although the new constitutional provision only allowed the Minister to make proposals, not being involved in SJC decision-making, **the very fact of making proposals already constitutes an interference by the Executive into the affairs of the Judiciary ...**

..... For these reasons Justices Vassil Gotsev, Liudmil Neykov, Zhivan Belchev, and Vladislav Slavov consider that the National Assembly, adopting the contested amendment to the Constitution, has stepped outside its powers under Art. 153 of the Constitution into those of the Grand National Assembly under Art. 158 of the Constitution, the provision of Art. 130a being therefore unconstitutional.

¹¹ “Justice Margarita Zlatareva only **considers the request well-founded** as regards the paragraph of Art. 130a, subpara 3 of the Constitution, giving the right to the Minister of Justice to make proposals to SJC for the appointment, promotion, demotion, transfer, and dismissal of judges and prosecutors with SCC, SAC, the Supreme Prosecution Office of Cassation, and the Supreme Administrative Prosecution Office. (As regards the power of the Minister of Justice in



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We do not see how this Fourth Amendment to the Constitution will help settle this discussion and ease the European Commission's concerns regarding the ability of the Supreme Judicial Council to *act as the leading body* of the Judiciary in Bulgaria, to *act in practice as a counterbalance to the Minister of Justice*.

We do not see how the amendments in question will remove ambiguities regarding the guarantees for the judiciary independence or how it will satisfy the requirements of the *Accession Partnership Agreement with Bulgaria 2003* and the guarantees of the European Charter on the Statute for Judges.

As stated by Justices Vassil Gotsev, Liudmil Neykov, Zhivan Belchev, and Vladislav Slavov in their dissenting votes in judgement of the Constitutional Court of Bulgaria No 8 of 13 September 2006 "*the very fact of making proposals already constitutes interference by the Executive into the affairs of the Judiciary*".

c) The SJC is not defined as a permanent constitutional institution

The European Commission, in its Monitoring Report (16 May 2006) on the State of Preparedness for EU Membership, pointed out that the SJC *role is weakened by the fact that it is not a permanent body as its members are full time magistrates, often heading courts, prosecution or investigation offices entailing a considerable amount of responsibilities*.

The last Monitoring Report on 26 September 2006 again refers this pointing out that *the composition and functioning of the Supreme Judicial Council still give rise to concern, members of the Supreme Judicial Council continue to discharge other professional duties (in most cases as heads of courts or prosecution offices) and therefore cannot devote their effort full-time*.

No reference to this very relevant matter, also mentioned in our previous reports, can be found either in the proposed fourth constitutional amendment or the draft new Judicial System Act. We cannot see a better opportunity to do so.

d) New article 130 (8): termination of office of SJC members

The regulation in this respect is positive, however it exhibits an inadequate legislative drafting technique that we can also notice in other Articles of the Constitution whereby fundamental principles and should be enshrined. Said provisions leave it to the law, i.e. the Judicial System Act, and the secondary legislation under the JSA to give more accurate and concrete regulation of those principles¹².

respect to the rest of judicial and prosecutorial positions, as well as to investigators, the conclusion of justices not supporting the request is shared.)"

¹² In this sense, one of the major drawbacks we have pointed out on several occasions is the lack of any express statutory powers of the SJC to draft regulations and secondary legislation regarding magistrates' legal status. The current absence of SJC powers to pass legal instruments on this matter is considered to be a key barrier to its real governance of the judiciary.



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e) The new Inspectorate -Article 132a)-; weakening of the SJC and disregard for the Action Plan 2006 and EC recommendations to create an Evaluation and Supervision Department in the SJC

§ 9. A new Article 132a is inserted with the following content:

“S. 132a. (1) An Inspectorate is set up with the Supreme Judicial Council which shall consist of a Chief Inspector and 10 members meeting the conditions laid down by law.

(2) The Chief Inspector shall be elected by the National Assembly, by a majority of two thirds of the Members of Parliament, for a term of five years.

(3) The members of the Inspectorate shall be elected by the National Assembly, for a four-year term of office, under the procedure set out in paragraph 2. Half of the members of the Inspectorate shall be rotated every other year. The members of the Inspectorate and the Inspector-General may be re-elected but for no more than two consecutive terms of office.

(4) The Inspectorate shall have its autonomous budget within the framework of the budget of the Supreme Judicial Council.

(5) The Inspectorate shall conduct inspections of the operation of all the bodies of the Judiciary, without interfering with the content of the administration of justice. In performing their functions, the members of the Inspectorate shall be independent and shall obey the Constitution and the laws.

(6) The Inspectorate shall act of its own motion as well as on the initiative of citizens, organisations of citizens, legal entities or State authorities. Any judge, prosecutor and investigator may also refer matters to the Inspectorate.

(7) The Inspectorate shall make referrals, proposals and reports to other State authorities, as well as to the competent bodies of the Judiciary. The Inspectorate shall be under an obligation to provide information in public on its activities.

(8) The Inspectorate shall submit an annual report of the results of its activities to the Supreme Judicial Council.

(9) The Chief Inspector and the members of the Inspectorate cannot be members of the Supreme Judicial Council. The other conditions for taking office and for removal from office shall be laid down by law.”

This new provision generates important doubts and new ambiguities. We will point out some considerations.

1. This new inspectorate is a new drawback. We cannot see how it will help protect and ensure:
 - a. The aim of strengthening the SJC own capacity, set in *Accession Partnership Agreement with Bulgaria 2003* and emphasised in the last monitoring reports,
 - b. The commitment of the Action Plan approved by the Council of Ministers and the EC recommendations to create **in** (not with) the SJC a new Evaluation (performance appraisal) and Supervision (inspection) Department ,
 - c. The principle of independence and EU standards on this aspect, clearly identified in the European Charter on the Statute for Judges (“*in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the*



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intervention of an authority independent of the executive and legislative powers)

2. It creates more ambiguities, as there is no clarity as to the objects of inspections by this new Inspectorate, it is not clear if the SJC will be object of this inspection.

This new draft constitutional provision refers that *“the Inspectorate shall conduct inspections of the operation of all the bodies of the Judiciary”*.

Article 19 of the draft new Judicial System Act (1) reads: *“The Supreme Judicial Council shall be a body of the judiciary and ensure its independence and self-governance.”*

The integrated interpretation of these two draft provisions introduces more ambiguities and more concern. It can be concluded that the lawmaker is aiming at introducing an inspection to the SJC. If so, this states an incomprehensible institutional distrust.

The checks and balances with other powers are already in place through the system of election of the SJC members and will be fully equipped once the SJC is provided with its own chairperson and once the power of the SJC to present to the National Assembly its own annual report were recognized.

3. Inspection of the magistrates' work and professional activities.

The necessary inspection, supervision or control of judges, prosecutors and investigators' performance may not be considered without regard to Article 117 (2) of the Bulgarian Constitution (*“In performance of their functions, all judges, prosecutors and investigators shall be subservient only to the law”*); and Article 8 of the Bulgarian Constitution (*“The power of the state shall be divided between legislative, executive, and judicial branches”*);

Independence of the judiciary means freedom from inappropriate relations with and influence from other powers.

As it has already been highlighted, this judicial independence is not a privilege of the judiciary to be used in their own interest. It is in the interest of the Rule of Law and those seeking and expecting justice. It should be preserved *ad intra* and *ad extra* in order to guarantee its impartiality and to respect the principle of separation of powers.

The introduction of this new Inspectorate with (not in) the SJC elected by the highest political representatives (the National Assembly) not only disregards the *Accession Partnership Agreement with Bulgaria 2003*, the Action Plan 2006 and EC recommendations, but also establishes a severe interference of the National Assembly, i.e. of political criteria, into the inspection of judges, prosecutors and investigators' performance, thus seriously jeopardizing the principles of separation of powers and independence.

The balance to the principles of independence and impartiality is the principle of magistrates' liability. A proper regulation of magistrates' accountability will guarantee the rule of law and create the grounds for a real and vigorous democratic system. The law must reinforce both the principle of judiciary independence and liability.



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The “control” of the accurate and necessarily independent activity in courts, prosecution offices and investigation services requires the intervention of an authority independent of the executive and legislature. Said intervention should be based on objective and professional criteria and directly tied to the liability of judiciary members.

The Supreme Judicial Council is the institution to assume this role through its new Evaluation and Supervision Department¹³.

¹³ Regarding this new department in the SJC we made our first recommendations in our report on 28 November 2005. The same recommendations were made by the 4th Peer Review expert Mr. Björnberg. We presented our final proposals on 5 June 2006:

Article a) (please include the appropriate number)

1.- *The Evaluation and Supervision Department is a technical body which provides support to the Supreme Judicial Council in the discharge of those functions which are vested in this Department by the Constitution and the Judiciary Act, under the direct supervision of its Secretary General.*

2.- *The Department acts pursuant to the principles of transparency, objectiveness and full compliance with statutes and regulations applying the procedures approved by the Supreme Judicial Council.*

3.- *The Department consists in Judges, Prosecutors and Investigators as well as additional administrative staff.*

4.- *The Department is divided into three different sections: Judges, Prosecutors and Investigators.*

Article b) (please include the appropriate number)

1.- *The Chairmanship of the Department will be held by a Judge with at least twelve years of seniority in the legal profession.*

2.- *Experts working in the Department will be selected among Judges, Prosecutors and Investigators with the required experience and legal seniority for the performance of their duties which will not be less than twelve years.*

3.- *Appointment of Judges, Prosecutors and Investigators of the Department will be made at the Plenary Session following a proposal by the Judicial Administration Commission after the corresponding public examination contest has been held for those candidates which meet the requirements to be part of this body.*

4.- *The number of Judges, Prosecutors and Investigators appointed to each Section of the Department will be determined by the Plenary Session in the Classification of Work Positions of the Council.*

In the exercise of their functions, Judges, Prosecutors and Investigators will only act with regard to Judiciary Bodies which have an equal or lower rank than the Judiciary body in which they held office prior to being appointed to the Supreme Judicial Council.

Article c) (include the corresponding number)

In evaluation matters, the Department will submit a report to the Proposals and Evaluation Committee in the cases of appointment, promotion, transfer and removal of Judges, Prosecutors and Investigators pursuant to the evaluation procedures approved by the Plenary Session.

Article d) (include the corresponding number)

In supervision matters, the Department will:

- *Submit a report to the Proposals and Evaluation Committee on the adequate performance of their duties by Judges, Prosecutors and Investigators pursuant to the evaluation procedures approved by the Plenary Session;*
- *Handle complaints and claims;*
- *Submit a report to the Proposals and Evaluation Committee when it must issue a report on the judicial organization;*
- *Submit a report to the Anti-Corruption Commission providing it with as many data, background and circumstances are considered necessary for the performance of the Commission's duties*
- *Perform any other functions entrusted to it by the Council in this area.*

Article e) (include the corresponding number)

In disciplinary matters, the Department will provide the Council with any particulars, background and circumstances obtained when it is aware that a breach of duty may have been taken place by a Judge, Prosecutor or Investigator so that the Council may decide whether the appropriate disciplinary proceedings should be initiated.



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The new inspectorate in the SJC (Evaluation and Supervision Department) must be a technical body which provides support to the Supreme Judicial Council and its Commissions in the discharge of its inspection, evaluation and supervision functions.

This new inspectorate service in the SCJ, i.e. the new Evaluation and Supervision Department, should imply termination of the Inspection within the Ministry of Justice.

The Inspectorate of the bodies of the judiciary must not be political in selection or design, as the draft Fourth Constitutional Amendment proposes. Its function is not so much to “control” those who need to independent, but rather to support that independence and, correlatively, reinforce magistrates’ professional accountability (not a political one) in discharging their duties.

The regulation of inspection of the work of judges, prosecutors is even more confusing if we consider the draft new Judicial System Act. Here the lawmakers propose a different approach to the one we can now see in the draft Fourth Constitution Amendment.

The new Article 33 of the draft new JSA reads: *The Supreme Judicial Council shall have the following powers: (...) 12. to inspect the workload level of judges, prosecutors and investigators; 13. to inspect the correct and accurate application of criteria established for appraisal of judges, prosecutors and investigators, as well as for appraisal of administrative heads.*

However, the rules in paragraph 12 and 13 of this article, as well as those related to the Commission for Control (Articles 48 and 49) could be deprived of meaning as the Inspectorate service within the Minister of Justice is preserved pursuant to Article 55 of the Draft. This creates contradictions, ambiguities and confusion.

In compliance with the Accession Partnership Agreement with Bulgaria 2003, the Action Plan 2006, the EC recommendations, European best practices and the European Charter on the Statute for Judge, the inspection, supervision or control of judges, prosecutors and investigators’ professional performance should be placed in the SCJ with its the new Evaluation and Supervision Department, should imply termination of the Inspection within the Ministry of Justice, and should never be political in selection or design, as the draft Fourth Constitutional Amendment proposes.

3.- MAGISTRATES’ LEGAL STATUS: INDEPENDENCE AND ACCOUNTABILITY (ARTICLE 132)

CURRENT WORDING:	<i>Draft Fourth Amendment</i>
Art. 132. (amend., SG 85/03) (1) In implementing the judicial authority the justices, prosecutors and investigating magistrates shall bear criminal and civil responsibility for their official actions and for the acts rules by them, unless the deed is an indictable deliberate crime. (2) In the cases of para 1 charges may not be brought against the justices, prosecutors and investigating	<i>Paragraphs 2, 3, and 4 of Article 132 are repealed</i>



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<p>magistrates without a permit of the Supreme Judicial Council.</p> <p>(3) The justices, prosecutors and investigating magistrates may not be detained, except for a grave crime, and only by a permit of the Supreme Judicial Council to that effect.</p> <p>(4) For obtaining a permit under para 2 and 3 a motivated request shall be extended to the Supreme Judicial Council by the Chief Prosecutor or by no less than one fifth of the members of the Supreme Judicial Council.</p>	
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As we have already insisted, judicial independence is not a privilege of the judiciary to be used in their own interest. It is in the interest of the Rule of Law and those seeking and expecting justice. The balance to the principles of independency and impartiality is the principle of magistrates liability. A proper regulation of magistrates' individual liability (penal, civil and disciplinary¹⁴) guarantees the Rule of Law.

Under the existing Bulgarian Constitution magistrates may not be subjected to civil or criminal liability except for cases where they have committed an intentional publicly actionable criminal offence. However, no provision is made for cases of damages caused by professional actions of judges, prosecutors and investigators as a result of malice or gross negligence.

Apart from this individual liability, there is no provision concerning the financial liability of the State for damages caused to property or rights in the administration of justice.

Very soon this kind of State liability will have to be complied with the EU principle of State liability for breaches of EC law by its public institutions (including judiciary). Said liability arises in cases, such as damages caused due to judicial errors, the abnormal functioning of the administration of justice, or malice or gross negligence on the part of magistrates (notwithstanding the right to recover from them by means of the corresponding declaratory suit before the competent Court).

There is a common principle underlining our analysis of the proposed constitutional amendment, namely: immunity may not turn into unaccountability and necessary tools must be provided by the law to protect magistrates from arbitrary, groundless or illegal penal, civil or disciplinary actions aimed at encroaching their independence.

¹⁴ We have comprehensively addressed this issue of magistrates' disciplinary liability. We considered *inter alia* the following particularly essential:

- to abrogate the Ministry of Justice powers in the SJC and to initiate disciplinary proceedings against magistrates,
- to limit the sanctioning powers of administrative heads,
- to keep the jurisdictional monopoly of the Supreme Administrative Court to review sanctions imposed on magistrates and have the review of decisions for dismissal at two instances,
- to finish with the current open classification for disciplinary violations from the point of view of legal certainty,
- to establish gradation of sanctions and redefine them in very serious, major and minor offences,
- to graduate the sanctions attached to them or at least authorise the SJC to undertake this task,
- to clarify the disciplinary proceedings, introducing a simple procedure for minor violations which seems more suitable from the point of view of procedural economy and proportionality, or
- to reinforce the SJC capacities on this respect.



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The conclusion drawn regarding the repeal of paragraphs 2, 3 and 4 in Article 132 differs depending on the different cases they refer to.

In the case of paragraph 2, it establishes a procedural pre-requisite for prosecuting, which is too rigid from the point of view of the citizens' right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests. However, at the same time, it is necessary to include, in line with common standards, some kind of guarantee to protect magistrates from arbitrary, groundless or illegal actions aimed at influencing their independence. No trace of this can be seen.

Regarding paragraph 3, the regulation existing hitherto recognizes the immunity of judges, prosecutors and investigators from detention (to be lifted following a Supreme Judicial Council decision) except for a grave crime. This kind of provision affords a type of protection or guarantee generally accepted in the EU. Consequently its elimination is considered to be a negative decision.

On the other hand, apart from keeping paragraph 3, a new exception to the immunity from detention may be included to also cover flagrant crimes.

In view of the above considerations regarding the judiciary independence and magistrates' liability the draft Constitutional Amendments may not be assessed as the well structured and comprehensive reform this moment requires.

We consider it can be made a better use of this opportunity in order to improve the regulation of magistrates' individual liability and of the State at constitutional level.