



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

## **CONCLUSIONS OF THE SEMINAR OF ACTIVITY 1.3: “*The Magistrates’ Legal Status in the Republic of Bulgaria: Way Ahead for Its Improvement*”**

### **a) Conclusions Component 2: General Principles and Mechanisms for the Realization of the Magistrates’ Dicipinary Liability**

Maria Luisa Martin Morales. Sofia, 28<sup>th</sup> October 2005

All the experts from Bulgaria participated intensively in the seminar and considered the approach and strategy fixed in the framework document extremely adequate for the achievement of the necessary reform of the judicial system, supporting the work done with the framework document and wishing a successful process.

Their inputs enriched the conclusions of the framework document. Their participation can be summarized as follows:

#### **PROBLEM INVENTORY AND PROPOSED SOLUTIONS.**

##### **1.1 THE JUDICIARY CONSISTS OF JUDGES, PROSECUTORS AND INVESTIGATORS.**

The Bulgarian experts did not agree with the abolishment of the Investigative service. They consider that investigation of the criminal offences and criminal prosecution must be conducted within the judicial system and not within the executive. They find it more appropriate to transfer investigators to the Public Prosecutor’s Office. The Bg experts considered that removing them from the judiciary will result in losing lots of highly trained professionals.

##### **1.2 INFRINGEMENT ON THE INDEPENDENCE PRINCIPLE**

The Bulgarian experts agreed with problems identified and solutions proposed in the framework document: legal definition of the said principle



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should be introduced in Bulgarian legislation, differentiating between independence ad intra and extra; a special procedure should be regulated to protect the principle of independence against infringements, i.e. a procedure whereby judges may react against attempted pressure; the act of exercising pressure over magistrates in violation of the above principle should be criminalized.

The BG judges believed that it is of utmost importance not only to provide a legal definition of the independence principle, but also to secure legal guarantees for its observance.

They also point out that additional safeguards for the independence principle should be provided for:

- a. Only magistrates should be eligible for Administrative Heads, not other professions (arts. 125 b and 127 of the Judicial System Act).
- b. Introducing disciplinary liability of the Administrative Heads in the event of failure to progress on applications for promotion. (art. 30.6 Judicial System Act).
- c. Increasing the prestige of the judges by taking action against public authorities who publicly claim that a judge is partial to the case s/he works on. The SJC should take this role, without prejudice of an eventual action the prosecution office (excluding the media when expressing the opinion that a person must be declared guilty or not guilty in a specific case, because this situation would affect the fundamental liberty of expression).

A budget should be secured to obtain a better administration of the materials, facilities, and equipment. In accordance with Bulgarian Constitution, the Judiciary has an independent budget. However, in practice this does not seem to be the case, since for buildings and equipment, for instance, judges and other magistrates have to rely very much on the decisions of the Minister of Justice.

### **1.3 INFRINGEMENTS ON THE IRREMOVABILITY PRINCIPLE.**

The Bulgarian experts did not disagree with the amendments to the Bulgarian Constitution, whereby tenure is granted at the end of five years standing in office. This is so, because they believe this is a guarantee for having competent and well trained magistrates.

Nevertheless, they also suggested the possibility of considering an adjustment of the above provision in two respects:

1. Reduce the period of time to take life tenure from 5 to 3 years;



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2. Take irremovability status after the first two years in office, the moment when the judge starts to work not in a panel together with other judges, but as a single judge and can render judgments by him/herself
3. In case that the direct nomination possibility remains, special requirements must be established.

#### **1.4 INFRINGEMENTS ON IMPARTIALITY PRINCIPLE**

In accordance with Bulgarian legislation, the difference between disqualification and recusal is the following:

1. Disqualification should be considered ex officio by the judge who is working on a specific case, him/herself making a decision to step out of the proceedings, since he/she considers to be partial.
2. Recusal occurs following an application of the party concerned, but a decision is made by the same body that is considered to be partial by a party to the case. If the judge, for example, decides against the recusal, the case will proceed and the parties may only submit an appeal on these grounds jointly with the appeal of the case final decision on the merits.

This system was discussed in terms of its potential to distort the impartiality principle: the judge whose recusal has been requested will decide on it, rather than suspending the case and referring proceedings on this special issue to a higher-standing jurisdiction.

Like this, there is a high likelihood that at the outcome of proceedings an unfair judgment will have been pronounced, or this will at least be the perception of the affected party.

It will then appeal on these grounds but not only, also making reference to other matters on the merits of the case. If the appeal instance then finds the complaints well-founded, it will overturn the unfair judgment, remitting the case to another panel at first instance and all procedural actions will need to be repeated. This system does not seem to be reasonable or expeditious.

These are part of the arguments why a specific procedure for recusal should be considered – suspending the main proceedings and referring recusal matters to a higher instance that will have to rule quickly and efficiently, in order to avoid possible abuse by the parties wishing to make use of this procedure in order to gain delays. Sanctions for abuse can be set.



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**1.5 DAMAGES TO UNITY PRINCIPLE**

This point should be reconsidered according to the BG experts, since Bulgarian Judiciary is single, operating nationwide and territorial problems are virtually nonexistent.

The Bulgarian experts consider that the guarantees for this principle have been well established in the Bulgarian Constitution: emergency or extraordinary tribunals/courts being forbidden.

**1.6 DAMAGES TO RESPONSIBILITY PRINCIPLE**

There is a lack of regulation for the civil responsibility of judges, prosecutors and investigators. Bulgarian experts tended to agree on this. However they insisted on clarifying the meaning of the concept for “civil responsibility”.

It would be convenient to regulate not only the responsibility of the State in relation with the judicial error, but also the consequences and responsibility of the State in the case of failure of the Administration to enforce judgments against it and in favor of the citizens.

The experts agreed with the lack of definition on disciplinary responsibility. A comprehensive regulation of this matter should therefore be set up: a catalogue of infringements, a catalogue of sanctions, a specific procedure and the competent bodies. As regards the catalogue of infringements and sanctions, these should be provided for as a “numerus clauses” list, in order to avoid any possibility for abuse and guarantee the security of magistrates (distinguishing, for instance, what is a grave infringement and a systematic infringement).

A procedure and an institutional structure inside the Supreme Judicial Council should be created in order to develop responsibility proceedings, both with a unit for inspection in the SJC (not in the Ministry of Justice) to provide data and grounds, and also with a commission in the SJC to take the decisions.

**INDEX OF SECONDARY LEGISLATION (TITLE I, II, VI)**

They suggested to reconsider:

- Chapter I under Title I in respect to the “Unity and exclusive jurisdiction principles” – it may be unnecessary to further develop these principles.
- Section V, Title VI, Chapter III, “Extinction of disciplinary liability” – must take into account the regulation in the Judicial System Act.



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## **STRUCTURAL AND ADMINISTRATIVE REQUIREMENTS IN THE SUPREME JUDICIAL COUNCIL**

An institutional structure inside the Supreme Judicial Council should be created in order to develop the proceedings of liability. It must be a stable Commission (not created ad hoc for each single process) and the members of that should become from the Judiciary and in charge of taking the decisions.

The inspectorate unit should be created in the SJC to prepare the work of the disciplinary commission, as an instrument for the work and competences of the Council.

They considered that SJC members should be working as a permanent body and suspend all other functions. It may be necessary to reinstitute the provision of Art. 16(4)3 JSA, which has been declared unconstitutional in constitutional case No. 87/94.

## **NEEDS OF AMENDMENTS IN THE MAIN LEGISLATION**

In addition to the needs proposed in the framework, the Bulgarian experts have mentioned:

1. Art. 16(4)3 JSA has to be reinstated, as I say after.
2. Art. 172.3 JSA: Minister of Justice cannot have competence in order to imposing disciplinary sanctions to all judges, prosecutors and investigators. The abolishment of this faculty means guarantee the division between the different powers.
3. Art. 35 B) JSA in relation with the functions of the Inspectorate must be repealed because the inspection of Magistrates (judges, prosecutors and investigators) should be managed by the Supreme Judicial Council or an specific unit inside it, but not by the executive power. In the same way, art. 35 c) JSA must be amended.



## **b) Conclusions Component 3 Criteria and Mechanisms for the Selection, Appointment, Promotion and Downgrading of Magistrates**

Joaquin Moreno Grau, Francisco Jimenez-Villarejo. Sofia, 28<sup>th</sup> October 2005

All the experts from Bulgaria participated intensively in the seminar and considered the approach and strategy fixed in the framework document extremely adequate for the achievement of the necessary reform of the judicial system, supporting the work done with the framework document and wishing a successful process.

Their inputs enriched the conclusions of the framework document. Their participation can be summarized as follows:

### **A/- NECESSITY OF SCHEDULING OF NEEDS OF MAGISTRATES BRANCH.**

In order to have a complete view of the structural necessities of the Bulgarian judicial system (extending also to the Prosecution Service and Investigators Service), they considered the option to have the adequate information about the real needs to overcome the deficits of the current situation and improve the regulation of the judicial promotion system and the positions required to be covered.

Nowadays, they find out that the situation is presided by the Head Administrative appreciation and consequently by a local and territorially perspective of need, that have to be link with the prominent role of the administrative head who have a enormous capacity to promote the magistrates concerning to the judicial advancement criteria.

In order to replace the present situation and the risk of endogamy, because the files are developed in a local areas, they proposed a national system of evaluation of the needs of the judicial system.

In order to get this purpose they considered necessary to establish a Unit in the SJC structure which carries out the evaluation of needs all over the country.

To get this goal it would be advisable an assignation of this function to a Inspectorate Service that must be hosted in the SJC and not in the Ministry of Justice.

Additionally, a special procedure must be established in order to bet all the information to make out what the real requirements are. Through this



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procedure information must be collected by the inspectorate services of the SJC from every court regularly. That provision means that all Administrative Heads would have no competence over this issue in the future apart from providing information and recommendations to the SJC

Therefore, the procedure to foresee the vacancies of the courts to be covered inside the magistrate branch and all the functions concerning to the program of this requirements must be developed by the performance of a Inspectorate Unit hosted in the SJC, in order to safeguard the independence principle stipulated in the art. 117 Bulgarian Constitution, recommendation also applicable to the Prosecution and Investigators bodies.

Changes must also be done for the SJC to set out annually and announce the number, positions and judicial bodies for which a competitive procedure will be held during the next year; the date of competitions and the start date for the initial training at the NIJ. The positions may be occupied as at the time of announcement of the competition but it may be expected that they will be vacated.

All this information must be in the Official Gazette to guarantee elemental principle of transparency and publicity.

## **B/- SELECTION AND APPOINTMENT OF MAGISTRATES.**

### **SELECTION BY COMPETITION**

The current situation to access to the magistrates branch must be strengthened as the general or ordinary one, then they considered that Junior magistrates must be only appointed after a competitive procedure, and as a pre-condition to be appointed magistrate they must complete an initial training at the NIJ with a final evaluation made by the NIJ Board. Direct nomination should disappear.

This initial training should be integrated with a practical stage at the courts. Afterwards, the trainees have to be evaluated by a SJC Board (Committee for Proposals and Testimonials) in order to acquire the irremovability status. They suggested also that then that status should not be subordinated to the completion of the five years in office provided in the art. 30b (1) JSA for the junior magistrates and the guarantee tenure should be granted for then in a different way.

They considered that this is legally possible because art. 129 of the Bulgarian Constitution refer to judges, prosecutors and investigators but specifically not mentioned juniors' magistrates.

### **DIRECT OR LATERAL ACCESS WITHOUT COMPETITION**

They clearly supported that system must be undoubtedly suppressed as represent an unnecessary risk of public abuses as experience shows.



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If politician decide to keep this system, they understood that it must always be considered as an alternative and exceptional via, always subsidiary system of selection, and must then be regulated under a exceptional criteria only to supply the vacancies in the lower judicial and prosecution level structure.

Furthermore, in order to create a screening mechanism to control quality of applicants outside of the judicial system such as a lawyer, they recommended to establish a sort of competitive procedure or a exam (specific for them and different from the competition one) following by a initial compulsory training at the NIJ before getting the nomination. They also referred that applicants outside of the judicial system must have at least five years length of service.

The number of the vacant positions offered by the direct nomination system must be previous stipulates in the law, and published officially (1/5 maximum of all the positions offered to the respective judiciary body) providing a comprehensive regulation to avoid the abuses occurred in the recent past.

### **TRAINEES AT NATIONAL INSTITUTE OF JUSTICE**

They called the attention that during the training stage at the NIJ the trainees will have the statute of training magistrates and be paid according with the paid level stipulated by the SJC. During this period trainees may not administer justice, (just the performance of draft resolutions). They will be subject to the duties and rights established at the NIJ secondary regulation.

### **TRAINEES AT PRACTICE PERIOD AT COURTS**

In the length of this period the trainees will be consider as magistrates with all the duties and rights including the revenues corresponding to the junior magistrates despite not having been appointed as junior magistrate and, consequently, not having granted the guarantee tenure.

### **C/- INAMOBILITY STATUS, GUARANTEE TENURE.**

They considered that the procedures envisaged by the April 2004 amendments to the JSA, (art. 30b) on acquiring a status of immovability represent a positive change towards the creation of a national evaluation mechanism by which all judges must assessed under the same standardized and centralize procedures by the SJC in contrast to the past during which evaluations were conducted locally.

A unit for inspection and to support the work of the Committee for Proposals and Testimonials must be created in the SJC.

They also recommended to make a distinction between the status of junior magistrates and direct appointed magistrates. As the first ones may not be specifically included in the art 129.3 Bulgarian Constitution and the art. 129.1 JSA it can be concluded that regulation considering that because they should



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have to be selected after a competition and have the duty to demonstrate their qualification through a training stage, as it is proposed in this document, before their appointment, with a theoretical phase at the NIJ complemented with a two-years period of practical exercise at the courts.

Thus, the five-years period provides must be apply only to the magistrates directly appointed within legal experience individuals. Only those have to complete five years in office and obtain a positive evaluation conducted by the Committee for Proposals and Testimonials at the SJC acquiring the irremovability status with a minimum qualification guarantee that they should be skilled enough to develop magistrate competences strengthening the judicial system legitimacy.

Regarding junior magistrates they suggested that they can acquire guarantee tenure after having passed the training period in a court. In case of vacancies lack or deficit these magistrates would be waiting for the position. Meanwhile he/she could be committed to cover needs of service by the SJC, but never lose the nomination and condition.

Anyway, if the understanding of art. 129.3 of Bulgarian Constitution explained above is not adequate, the way of harmonize the five-years term before inamobility with UE standard of judicial independence pass thought remaining that period in the bench.

### **D/- JUDICIAL ADVANCEMENT SYSTEM.**

The current system is based in performance of the Administrative Head or the Prosecution/Investigator Chief that evaluate the structural requirements of the courts, prosecution and investigators services in order to make the proposals to the SJC.

There is no public announcement of vacancies in the State Gazette, and this must change in order to cover the standard UE promotion criteria's, opened to the whole magistrates branch. The applicants should then present their applications to the SJC and not be proposed by the Administrative Head in a discretionary decision.

The SJC can then ask for reports from the Inspectorate Units and to the Services and Administrative Heads which the applicant belongs from. Afterwards the SJC make up a final decision within the different applicants for the same position.

The criteria used to evaluate the performance of a judge a prosecutor or a investigator for promotion must not be limited to the length of service, the number and type of cases assigned to then, the number of reversals, and the judge's compliance with timelines, particularly given the manipulation of case assignment and the flawed appellate procedure, more concerned with the statistics of case management, rather than the integrity of the judicial process.

A criteria to be used for promotion, as well as for tenure of direct appointed magistrates, should be expanded to specifically include the quality of



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the judge's judicial decision-making process, including its objectivity and neutrality, the judge's character for honesty and integrity, and the judge's professional experience.

**E/- ADMINISTRATIVE HEADS**

The effect of having legal professionals who are not actively serving as a judge as a court president or vice president [Id. art. 125b(1)], may result in a demoralized judiciary where political considerations rather than professional performance as a judge is the determinative factor for promotion.

Then the candidates for the presidency or vice-presidency of these courts must have previously acquired inamobility status, if they are legal persons directly appointed, and be required to be currently serving during a minimum period as a sitting judge at the court whose presidency or vice-presidency he/she apply for.

This provision must be extend to Prosecution and Investigators Service in their respective cases.

The administrative head position must be announce and offered to be covered after a public and competitive procedure under objectives requirements and must be decided at the SJC.

Also they are appointed for a limited time and be remove by taxed reasons and after a contradictory procedure.

Concerning to the Prosecutors promotion system, the SJC must take this competence to provide the prosecution service with a ruled procedure with objective criteria and avoid the excess of power to the Chief Prosecutor, giving the prosecutors a coverage not based on a unipersonal structure.

With the system proposed, the problems identified in the framework document can be avoided, such as, the risk connected with the evaluation of magistrates when there is a determination of the relevant administrative head for promotion of a certain magistrate, [art. 167a (3) JSA] overall others.

This recommended change, solve the problem pointed out in relation with Art. 30, para 1, p.11 that allows Chairpersons of the Regional courts to make proposals for appointment of judges in their courts, and would prevent a negative impact of these new regulation, as there should not be judicial district oversight of the appointment process as a consequence of the national announcement of the vacancies.

In the same way, the change suggested affects the problems pointed out with the new Art.125B, para 2, that sets a rule that allows people from outside the judiciary (attorneys, notaries, law professors, legal experts etc.) to become court chairperson. Therefore this paragraph must be overruled.



## c) Conclusions Component 4: Criteria and Mechanisms for the Verification of the Work Performed by the Magistrates

Elmar Schuerman. Sofia, 28<sup>th</sup> October 2005

All the experts from Bulgaria participated intensively in the seminar and considered the approach and strategy fixed in the framework document extremely adequate for the achievement of the necessary reform of the judicial system, supporting the work done with the framework document and wishing a successful process.

Their inputs enriched the conclusions of the framework document. Their participation can be summarized as follows:

1. The **general principles** and aims were accepted.
2. They welcome the idea of developing **secondary legislation** in a comprehensive way.
3. Regarding **magistrates' skills and abilities** there were no objections to the headlines in the Component 4 Document. The participants agreed that flexibility including the use of IT should be made mention of as well as the participation of magistrates in international legal cooperation forums and training.
4. As regards **quantitative evaluation** there was a lively discussion about the following issues:
  - 4.1. Most of the participants agreed that an effective workload measurement system should be established. While discussing the details of the said system, there were lots of objections relating to complexity of some types of cases (e.g. bankruptcy and criminal cases). They agreed special provision should be made to take into account the complexity of cases when measuring workloads.
  - 4.2. There was a common opinion that there should be statistics about the cases magistrates are working on, pending cases, incoming cases, volume of evidence, number of parties and hearings. But most of the participants mentioned that the statistics should be individually assessed in order to get a clear picture of the workload.
5. The participants pointed out the difficulties of getting a clear view of **the work of a magistrate** because of specific Bulgarian circumstances, such as:
  - 5.1. Frequent removal from office of magistrates
  - 5.2. Dynamic legislative amendments
  - 5.3. Generation shift and lack of seniority



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- 5.4. Change in the social structure in the country
- 5.5. Restitution of property
- 5.6. Growth of crime rate resulting in increased workload and overloading
- 5.7. Inappropriate people joining the judicial system. The selection system must be changed to avoid that in the future
- 5.8. Undue propaganda and distorted media coverage of the judiciary
- 6.1 Some participants pointed out that the **administrative heads** of the judiciary based nominations for promotion on subjective criteria. Promotions competent bodies and procedure must then be clearly changed
- 6.2 If administrative heads should prepare statements, written reports and motivation should be required
- 6.3 Administrative heads should only collect, not evaluate the statistics. This must be done by a new inspectorate unit in the SJC in charge of providing data, analysis and information to the commissions of the SJC.
- 6.4 Magistrates' team work skills should be also taken into account
7. There was an animated discussion on **quality standards**:
  - 7.1. It was a common opinion that quality is the most difficult subject of evaluation.
  - 7.2. There might be many reasons for repealing/reforming decisions, and so this criteria cannot be taken into consideration, leading therefore sometimes to statistical data that is simply not valid. Evaluation based on repealed decisions can seriously affect the independence principle, and so it must be avoided.
  - 7.3. That is why an individual evaluation (on a case by case basis) should be made based on the quality of the work, the grounds and seriousness of the motivation. As concerns prosecutors there may be many reasons for acquittals. The statistics should be individually evaluated.
8. The participants shared the opinion that all appraisal components should be **fact-based**.
  - 9.1. Participants were in favour of **creating a unit** in charge of making appraisals of magistrates' work, providing the SJC Commission with the necessary data and grounds to take the decisions.
  - 9.2. This new Board should be an "Inspectorate unit" which should be in the SJC as natural instrument to develop its competences for judges, prosecutors and investigators.
  - 9.3. The members of this new unit should prepare the decisions of the Proposals and Appraisal Committee and the Supreme Judicial Council.
  - 9.4. The Inspectorate unit should also guarantee transparent and consistent application of the standards in the whole country.



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10. The new inspectorate unit:

- should collect information, the statements of administrative heads and statistics
- obtain personal impressions from the magistrate appraised, if possible in a hearing
- should attend some court hearings conducted by the judges appraised or where the prosecutors appraised take part.
- should also give magistrates advice and support based on all facts collected like a supervisor would do, helping them to solve specific problems and gaps (extra support judge, ...)

11.1. There should be both **periodical and occasional assessment**.

11.2. Participants' views on the period of appraisal varied – from one to five years.

11.3. The period subject to appraisal should differ depending on the length of a magistrate's experience, i.e. magistrates in the beginning of their career should be appraised more frequently.

11.4. Appraisals for granting irremovability status should be more thorough.

12.1. The mechanism of **direct appointments** (without competition) within the judiciary should be clearly eliminated as they considered it a open door to abuse. In case it must exist, direct nomination must be thoroughly regulated and the applicants' skills and knowledge should be subject to comprehensive assessment and training in the NIJ must be compulsory before getting the position.

12.2. Appraisals should also cover **psychological** tests to measure personal skills for direct nominated.

12.3. There should be a longer trial period for magistrates prior to acquiring irremovability status of those directly nominated without competition.

13.1. All magistrates appraised should be duly **informed in written** of all assessment findings, motivation, grounds and conclusions and receive copies of the appraisal report.

13.2. The magistrate appraised should have the opportunity to make objections in writing and in the end judicial review must be possible

14. A proposal was discussed to establish a **new “co-determination” boards** to review, confirm or reject the decision taken by the SJC not only related to evaluation but also to promotion.