REPUBLIC OF BULGARIA

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 AMENDMENTS IN THE CONSTITUTION OF BULGARIA

-FORTIEHT NATIONAL ASSEMBLY, draft 22-12-2005-

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SUPREME JUDICIAL COUNCIL 9, Saborna Str 1000 SOFIA (Bulgaria) ☎: +359 2 930 4990 ☎/Fax: + 359 2 981 5851

1.- INTRODUCTION

The Twinning Fiche of this Phare Project (CRIS Number BG2004/016-711.08.02 / Twinning Code:BG/2004/IB/JH/04), stated that its overall **objective** is to *support the bodies of the judiciary and the executive in the implementation of the Strategy for reform of the judiciary. Contribution to the process of preparation of the Republic of Bulgaria for accession to the EU by introduction of European standards for higher quality of justice and judicial training, as well as for effective and smooth management of the judiciary and the institutional cooperation*.

According to the Twinning Contract, the reform of the Judiciary with a view to ensuring its independence, effectiveness, transparency, agility and quality, is always **based both on** the existence of an adequate legal order **and on** the development of a proper institutional structure and framework by strengthening the capacity of the Supreme Judicial Council in Bulgaria. This twinning project refers to these two aspects.

The areas identified for the improvement of the magistrates´ legal status, as fields of joint work between the partners are: the general principles of the Judiciary, Prosecutors and Investigators; the mechanisms for the realization of disciplinary liability of magistrates; the Mechanisms for their selection, appointment, promotion and downgrading of magistrates; and the methods for verification of the quality of the magistrates' work.

The areas related to the institutional building aspect (strengthening the capacities of the SJC) refers to issues connected to its capacities to manage its competences, budget of the judiciary included.

Accordingly, the Phare **Twinning contract** signed between the Supreme Judicial Council in Bulgaria and the Consejo General del Poder Judicial in Spain, **aims to** provide assistance to improve or produce secondary legislation within the competences of the Supreme Judicial Council for the improvement of the Magistrates' legal status and for strengthening the capacities of the Supreme Judicial Council **and, eventually, to** provide assistance and suggest recommendations for legislative amendments of the related main legislation in line with European standards and best practices.

The activities developed during the first months of the Project produced, among other documents, the "***framework document***" and the "***conclusions of the seminar***" held from 26-30 September.

In these documents, needs for amendments in the main legislation were identified. These documents were formally **approved** by the Supreme Judicial Council on its plenary session on 30 November 2005.

The **index of the secondary legislation** was also submitted to the plenary of the SJC for approval. **Approval** was granted by the plenary of the SJC on the 2 November 2005. Later work was developed through the agreed activities of the project.

On 28 November 2005, the Twinning Project prepared the report **"*Judicial System in Bulgaria and the Accession to the Eu: Report from the Twinning on the Strategic Approach and Priorities Proposals for Amendments in the Main Legislation*"**, with suggestions for improvement the main legislation (Constitution and Judicial System Act) in those

issues having relation with the areas covered by the Twinning Project.

The **SJC** in its plenary session on 14 December 2005 **decided** to send this report to the Ministry of Justice for the new JSA and to the Parliament for the on-going amendments in the JSA now in force.

Once the information about the draft for modification and amendment of the Bulgarian Constitution (dated 22-12-2005) was made public, the current report refers to this legislative initiative, complementing the previous report dated on 28 November 2005.

The **Bulgarian Constitution** already identifies the fundamental principles of separation of powers and judicial independency: in **Article 8** of the Constitution: *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*.

This wording recognizes that a strong, reliable and efficient judiciary is absolutely **essential** to the **efficiency of the Rule of Law** and the **protection of individual liberties**. To be strong, a judiciary must be independent from pressures by and management by the executive branch and the legislative branch.

The key is to **find out** if a proposal or recommendation to amend the Constitution, based on the purpose to strengthen those principles, to build up the Rule of Law and to improve the judicial system, reinforces that independence and that separation of powers or jeopardizes them.

This report from the Twinning Project offers some points of view in this direction, strictly limited to the areas covered by it, **concluding that** the reforms commented does not go towards a strengthening of the principles of separation of powers and independency and towards a consolidation of the role of the Supreme Judicial Council as the constitutional institution in charge of the judiciary.

2.- ARTICLE 84 OF THE CONSTITUTION AND THE REPRESENTATION OF THE SUPREME JUDICIAL COUNCIL

Article 84 item 16 Const.: wording of the Draft Act for modifications in the Constitution.
Art. 84. The National Assembly shall …: **16. "***hears and adopts the annual reports submitted by the chairpersons of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General on the activities of the courts, the prosecutor's offices and the investigation offices***".**

This amendment introduces in article 84 the obligation to the chief members of the three main benches of the judiciary to submit and present an annual report to the National Assembly.

To analyse this change in the Constitution, we must first examine if a proper institutional structure has been developed in order to ensure the position of the Supreme Judicial Council in the State organization, the principle of separation of powers and the principle of independency.

The Supreme Judicial Council is identified in the Bulgarian Constitution as the institution to represent and manage the judicial power, as a necessary tool to guarantee the independence and unity of the judicial power, as autonomous and separated from legislature and the executive and as an effective institution governing judges, prosecutors and investigators.

However, the Bulgarian Constitution, although mentioning the Supreme Judicial Council, does not define specifically the institution as the one in charge of the judicial government. There is no real conceptual definition of the Supreme Judicial Council in the Constitution. It only refers a list of competences for the SJC:

A) Competence of the SJC for the election, promotion, demotion, re-assignation and dismissing of judges, prosecutors and investigators (art. 129.1 and 131);

B) Composition of the Supreme Judicial Council (art. 130);

C) Previous authorization in case of charge or custody of judges, prosecutors or investigators (art. 132);

D) Organization and activity of the Supreme Judicial Council, of the courts, the prosecution and the investigation, status of judges, prosecutors and investigating magistrates, conditions and procedure for appointment and removal from office of judges, court assessors, prosecutors and investigating magistrates and materialization of their liability shall be established by law (art. 133).

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

Therefore it is necessary to fill this gap and statute at constitutional level that the SJC is the institution responsible for judicial government and management and put into to the law the specification of its powers.

In different forums and occasions, it has been stressed that the reform of the Judicial System in Bulgaria should ensure its independence and self governance and needs a proper institutional structure as an unavoidable condition able to build up a strong judicial system ready to face the current challenges in Bulgaria.

We must also remember two of the priorities in the field of Justice identified 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".

The separation of powers is so opposed to the intervention of one of the members of the executive in the government institution of the judiciary.

The rules about interaction between the Minister of Justice and the judicial branch are not nowadays accurate, do not follow EU standards on basic principles and may represent an eventual danger for the effectiveness of the judicial independence, the principle of self governance and the principle of the separation of powers.

In this sense, the fact that the meetings of the SCJ is chaired by the Minister of Justice compromises the observance of the mentioned principles and considerations and may make easier a possible *de facto* intromission of a member of the executive in the competences of the Supreme Judicial Council.

The SJC, considered as the representative and management institution of the judiciary, needs to be reinforced within the framework of the institutional state structure following the principle of the division of powers (article 8 of the Constitution). In its 2002 Regular Report, the European Commission clearly emphasised 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?

On these grounds it comes necessary for the SJC to have an own chairperson who can take on that representative function of this constitutional institution in the Republic, who can be the visible head of this institution before all citizens and before the rest of the powers of the Republic, and, as in the case now commented, who can assume the role of reporting to the National Assembly in the name of all the judiciary and its governing institution, the Supreme Judicial Council.

This chairperson can be also useful to avoid eventual risks of conflicts of interest, such as the one that Bulgaria faces every year during the preparation of the budget of the Supreme Judicial Council.

We should also recall that article 27 in the JSA fixes within the competences of SJC to present an annual report to the National Assembly on the activity of all the courts, prosecutor's offices and investigation services, not only of the Supreme Court of Cassation, the Supreme Administrative Court and General Prosecution Office. The relationship among the different powers of the State 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 relationship between main institutions of the Republic as well as a mechanism of democratic accountability of the Supreme Judicial Council.

It is a competence of the chairperson in each court, office or service to issue the correspondent report and to submit them to the SJC, with no intervention of the Supreme Court of Cassation, the Supreme Administrative Court or the Chief Prosecutor in this matter (see in the Judicial System Act: art. 56.2 a) for District Court; art. 79.2 a) for Courts of appeal, art. 90.1.6 for the Supreme Court of Cassation, art.100.1.6 for the Supreme Administrative Court, art. 114.6 for the Chief Prosecutor and art. 122.5.10 to the Director if the National Investigation Service).

As an administrative body with authority to manage the Judiciary, the SJC has the competence to acquire the necessary information to fulfil its duty to produce the annual report in all topics related with the situation, functioning and activity of the courts, prosecution offices and investigation services. This information is unavailable to the Supreme Court of Cassation, the Supreme Administrative Court or the Prosecutor General.

Moreover, it is also necessary to emphasize that judicial independence must be preserved for every one of the members of the judicial branch, who are submitted only to the law and liable according with it (article 117.2 of the Constitution). Independency and liability comes together.

In this sense, the new provisions in order to hear in the National Assembly the report of the chairpersons of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General, confuse the mentioned principles, as they are judges and prosecutors, they exercise in their courts and offices jurisdictional and professional duties *submitted only to the law and liable according with it* (art. 117.2 Constitution) and they do not have the representation of the SJC in order to face a "political control" in the National Assembly.

Implementing the principle of independence in the judicial system should mean to respect the jurisdictional work of the members of the judiciary. According to European standards, the independence of the judiciary is foremost linked to the maintenance of the separation of powers. The significance of this assessment is that members of the judiciary should not be asked to rend statements of the activities in their respective offices to other powers.

Therefore the identified gap, this lack of chairperson in the SJC, seems necessary to be covered in an adequate way. Here several alternatives or formulas can be used to achieve the observance of these principles and standards, taking into account the peculiarities of every culture and the situation in each historical moment. Once filled this gap, the question about reporting to the National Assembly and about the accountability of the Supreme Judicial Council before it, will have an easy and natural solution.

On these grounds, we consider not adequate the reform in article 84.16 of the Constitution and submit to your consideration the mentioned concerns.

3.- ARTICLE 129 OF THE CONSTITUTION: THE DISMISSAL OF THE CHAIRPERSON OF THE SUPREME COURT OF CASSATION, THE CHAIRPERSON OF THE SUPREME ADMINISTRATIVE COURT, AND THE CHIEF PROSECUTOR

Article 129 Const.: wording of the Draft Act for modifications in the Constitution.	**Art. 129 Const Original wording**:
1.- Para. 2, sentence one – the phrase "*and dismiss***" shall be deleted.** **2.- A new para. 6 shall be created providing for the following:** ***"(6) In the cases under para. 3, item 2 and item 3, the Chair of the Supreme Court of Cassation, the Chair of the Supreme Administrative Court and the Chief Prosecutor shall be dismissed by the President upon proposal of the Supreme Judicial Council. In the cases under para. 3, item 4 and item 5, they shall be dismissed upon proposal of at least one-fourth of the Members of Parliament and upon decision of the National Assembly if more than two-thirds of the Members of Parliament have voted for this. The President may not refuse the dismissal in the event of a second proposal made."***	Art. 129. (1) Justices, prosecutors and investigating magistrates shall be elected, promoted, demoted, reassigned and dismissed by the Supreme Judicial Council. (2) The Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor shall be appointed and dismissed by the President of the Republic on a motion from the Supreme Judicial Council for a period of seven years, and shall not be eligible for a second term in office. The President shall not deny an appointment or dismissal on a repeated motion. (3) Upon the completion of a five-year service as justice, prosecutor or investigating magistrate, and after an attestation, by a decision of the Supreme Judicial Council the justice, prosecutors and investigating magistrates shall become unsubstitutable. They, including the persons under para 2 shall be dismissed only upon: 1. accomplishment of 65 years of age; 2. resignation; 3. enforcement of a prison sentence for a deliberate crime; 4. lasting actual disability to perform their functions over more than one year; 5. grave offence or systematic non-fulfilment of the official duties, as well as actions undermining the prestige of the judicial authority. (4) The acquired unsubstitution shall be restored by a subsequent occupation of the position of a justice, prosecutor or investigating magistrate in the cases of discharge under para 3, item 2 and 4. (5) The administrative heads of the bodies of the judicial authority, with exception of those under para 2, shall be appointed at the position for a period of five years, having the right of a repeated appointment.

The proposal for amendment in article 129 of the Constitution introduces a different system of dismissal for the individuals mentioned in art. 129, para. 2 (the Chairman of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, and the Chief Prosecutor).

The current provision gives always the competence to the President of the Republic to appoint and dismiss them, on a motion from the SJC. A repeated motion shall be binding for the appointment or dismissal.

With the modification of the Constitution, the dismissal of the Chairperson of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, and the Chief

Prosecutor will follow a different regime. Two different institutions shall be competent for dismissal: the President of the Republic upon proposal of the SJC; and the Parliament. The distinction is made on the reasons for the dismissal:

a) Reasons that can be objectively identified: resignation (129.3.2) and enforcement of a prison sentence for a deliberate crime (129.3.2) shall follow the old provision. The competence for dismissal remains in the President of the Republic upon proposal of the SJC

b) Reasons that can not be objectively identified requiring assessment and interpretation: Lasting actual disability to perform their functions over more than one year (129.3. 4) and grave offence or systematic non-fulfilment of official duties, as well as actions undermining the prestige of the judicial authority (129.3.5). The competence for dismissal is in these cases placed in the hands of the Parliament.

We should beg special attention to the inner contraction in art. 129 after the proposed amendment. Based on the idea of reinforcing the principles of separation of powers and independency of the judiciary, it is not possible to find grounds to explain why dismissal could be decided by a different institution than appointment.

The appointment is made by the President of the Republic under motion by the SJC as ruling institution of the Judicial Power, but the dismissal (precisely in the most delicate cases) is proposed to be decided by the National Assembly which will have to interpret and evaluate the work and behaviour of the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the Chief Prosecutor.

No political criteria or interests took part in their appointment and should not take part in the dismissal in observance of these principles of separation of powers and independency.

The amendment opens the risks of political influences in the status of the most relevant members of the judiciary in Bulgaria and does not comply with the requirements we can draw from the European Charter on the Statute for Judges. All judges must enjoy proper safeguards relating to their recruitment, incompatibilities, conduct outside, and the termination of their office.

The legal guarantees to appoint or dismiss a judge or prosecutor shall never be reduced precisely in the cases of dismissals of the most important positions of the judicial system in Bulgaria.

The present regulation for the appointment reveals a respect to the constitutional function of Supreme Judicial Council, only submitted to the main role attributed to the President of the Republic, as the Head of State (who, in accordance with art. 92.1 "*shall embody the unity of the nation...*")

The text of the proposal for amendment in the Constitution loses this basis and structure, to transfer to the National Assembly the capacity to remove the highest members of the Judiciary, forgetting the relevant role of the President of the Republic and, most important, without no previous decision of the SJC, institution in charge of the management of the Judicial System.

If the current regulation about dismissal in some cases is considered not adequate, the legal reform should reinforce the role of the SJC and offer it a proper legal framework to develop its powers.

It should be noticed that the three individuals mentioned should be the only ones not dismissed by the President of the Republic, although having been appointed by him (see art. 98. 7 BC).

On these grounds, we submit to your consideration the recommendation to keep the current wording of article 129 of the Constitution unchanged.

4.- NEW ARTICLE 130 (6) OF THE CONSTITUTION: THE NEW POWERS OF THE MINISTRY OF JUSTICE

Article 130 item 6 Const.: wording of the Draft Act for modifications in the Constitution.	**Original wording:**
A new para. 6 shall be created in Art. 130 providing for the following: *(6) The Minister of Justice shall:* *1. prepare a draft of the judiciary budget and submit it for discussion to the Supreme Judicial Council;* *2. manage the property of the judicial branch of government;* *3. make proposals to the Supreme Judicial Council for appointment, promotion, demotion and dismissal of magistrates;* *4. organize the magistrates' qualification;* *5. exercise control over the magistrates with respect to the procedure of initiation, movement and resolution of cases."*	CURRENT WORDING: 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. (2) Eligible for election to the 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. (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. (4) The elected members of the Supreme Judicial Council shall serve terms of five years. They shall not be eligible for immediate re-election. (5) The meetings of the Supreme Judicial Council shall be chaired by the Minister of Justice, who shall not be entitled to a vote.

The modification of the Constitution in this new article 130 (6) aggravates the current situation about the rules on interaction between the Minister of Justice and the judicial branch.

As mentioned above these rules are nowadays not accurate, do not follows EU standards on basic principles and may represent an eventual danger for the effectiveness of the judicial independence, the principle of self governance by the Supreme Judicial Council and the principle of the separation of powers.

The separation of powers is opposed to the implication of one of the members of the executive in the government institution of the judiciary. The new article 130.6 is considered to be in contradiction with these basic principles, foundations of the rule of law, as well as with the mentioned priorities in the field of Justice identified in the Accession Partnership with Bulgaria 2003, weakening in depth the role and competences of the Supreme Judicial Council and the principle of independency.

The grounds previously explained can be reproduced here. The following considerations can also be briefly added:

4.1.- Budget of the Judiciary: *"The Minister of Justice shall: 1. prepare a draft of the judiciary budget and submit it for discussion to the Supreme Judicial Council*

Budgetary independence of the judicial system is identified in art. 117.3 of the Bulgarian Constitution as one of the features of an independent power of the State. We should recommend allowing the Supreme Judicial Council to prepare its own budget with no involvement of the executive power, but always taking into account the macroeconomic and judicial policy decided by the government and always being accountable for its budget.

The need of an adequate independent budgeting for the Judicial System is the essential instrument to contribute to achieve its improvement and modernization and to prepare it for the nowadays challenges. An adequate budgeting not only reflects the public support to the Judicial System but also have a clear incidence in its independency, efficiency and functioning. If the SCJ cannot draft its own independent budget, it becomes dependent in the implementation of its competences and in the management of its decisions.

In the preparation of the budget, the principle of separation of powers is opposed to the implication of one of the members of the executive in this important aspect of the government institution of the judiciary.

The design of the judicial priorities in the powers of the SJC will be different depending on which points of view is taken into account, either that of the SJC, or the one from the Minister of Justice. Consequently the proposed constitutional change will not help to have a *clear division between the powers of SJC and those of the Ministry of Justice to ensure respect for the independence of the judiciary*, in a relation that shall be based on a mutual institutional confidence between constitutional institutions.

On these grounds, we submit to your consideration the recommendation not to establish this new competence of the Minister of Justice and to keep in the SJC this competence as an essential aspect of the principle of independency and a requirement of the principle of separation of powers.

4.2.- Appointment, promotion, demotion and dismissal of magistrates: *"The Minister of Justice shall: … … 3. make proposals to the Supreme Judicial Council for appointment, promotion, demotion and dismissal of magistrates"*.

The proposed amendment related to the appointment, promotion, demotion and dismissal of magistrates collides with the disposition on item 1 of the same art. 129 of the Constitution that reads as follow: "*Judges, prosecutors and investigating magistrates are elected, promoted, demoted, reassigned and dismissed by the Supreme Judicial Council*".

The new paragraph introduces at constitutional level the capacity of the Minister of Justice to propose some the SJC decisions affecting the legal status of the members of the judiciary. It was already included in art. 30 (4) of the Judicial System Act ("*The Minister of Justice may make proposals under para 1 and give opinion on the proposals to the SJC*.")

However, we have pointed out the risks of appointment, promotion or demotion decided with discretional or no objective criteria, and the need to decide about these important aspects

without interference of a member of the executive in order to protect the principles of independency, equality, merit and capacity.

All decisions concerning the professional career of judges should be based on objective criteria (*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*).

As a part of the executive, the Minister Justice should not be entitled to influence at any step in this decision-making process. Even if proposals are not binding for the competent body entitled to decide, there is no need to state this competence at the constitutional level and it is considered necessary to eliminate this provision stated in art.30.4 JSA, taking into account the requirement of having a *clear division between the powers of SJC and those of the Ministry of Justice to ensure respect for the independence of the judiciary*.

The SJC should remain in an independent position when deciding about the appointment, promotion, demotion and dismissal of magistrates, with no other submission but to the Constitution and the law and with no influence of a member of the executive.

The efforts to construct a strong and reliable judicial bench should be focused in changing the law to ensure transparency, equal opportunities, merits and capacity evaluation, impartiality, reasonability and to guarantee the absence of any kind of influence or intervention of the executive in the process of selection of judges, prosecutors and investigators.

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*".

The proposed reform in the Constitution in this regard is considered not to follow the mentioned grounds and requirements. Consequently we submit to your consideration the recommendation not to establish this new competence of the Minister of Justice and to keep in the SJC this competence as an essential aspect of the principle of independency and a requirement of the principle of separation of powers.

4.3.- Qualification by the Minister of Justice: *"The Minister of Justice shall: … … 4. organize the magistrates' qualification".*

The reasons given above should guide us to consider inadequate to introduce the organization of the magistrate's qualification system as a competence of the Minister of Justice. Since appointment, promotion and demotion are part of the legal capacity of SJC, the qualification of the professional requirements in the members of the judiciary should obviously remain as an exclusive duty to be carried out by this management judicial institution.

Either if qualifications are referred at the initial evaluation of candidates to be appointed as magistrates, or as a system of on-going training or evaluation in order to promotion, specialization or whatever change in the status of the magistrates, the competence now intended to be given to the Minister of Justice will represent a breach in the principles of independency and separation of powers, in the provisions already mentioned set by the European Charter on the Statute for Judges and in the Common Position and the Negotiations Paper on Chapter 24 (15 October 2003) conclusions that then referred that "*the EU underlines the importance of ensuring the effective independence of the Supreme Judicial Council from the Ministry of Justice and therefore*

invites Bulgaria to provide the necessary commitment to fully implement the division of tasks and responsibilities between the Supreme Judicial Council and the Ministry of Justice as provided for in the Judicial System Act".

We share the arguments explained by Mr. Pencho Penchev, director of the National Institute of Justice, in his report about this issue.

According to art. 35g (2) of Judicial System Act, the National Institute of Justice is the institution with competence in training of the three branches of the judiciary. The NIJ is governed by the SJC and transfer the organization of the qualification of magistrates to the Minister of Justice, will damage the requirements of the principle of separation of powers and the role of the Supreme Judicial Council.

Following the standards of the EU, once considered training as part of appointment, it should be carried out by an authority "*independent of the executive and legislative powers*" (Charter on the Statute of judges already quoted).

The proposed reform in the Constitution in this regard is considered not to follow the mentioned grounds and requirements. Consequently we submit to your consideration the recommendation not to establish this new competence of the Minister of Justice and to keep in the SJC this competence as an essential aspect of the principle of independency and a requirement of the principle of separation of powers.

4.4.- Control over performance of magistrates in cases: *"The Minister of Justice shall: … … 5. exercise control over the magistrates with respect to the procedure of initiation, movement and resolution of cases".*

Once again, we must recall the provision in art. 117 (2) BC: *In performance of their functions, all judges, prosecutors ands investigators shall be subservient only to the law*; the provision in Article 8 BC: *The power of the state shall be divided between legislative, executive, and judicial branches*; and the need of ensuring the effective independence of the Supreme Judicial Council from the Minister of Justice and the division of tasks and responsibilities.

Independence of the judiciary means freedom form other powers and absence of dependency or interference. It should be preserved *ad intra* and *ad extra* in order to guarantee its impartiality and to respect the principle of separation of powers.

Is then possible talk about "control" of the independency by the Minister of Justice or the correct approach is to talk about "liability or responsibility" of those who need to independent?

Precisely, the balance to these principles of independency and impartiality is the principle of liability of magistrates. A proper regulation of the responsibility of the magistrates guarantees the rule of law and creates the grounds for a real and vigorous democratic system. The law must reinforce both the principle of independency of the judiciary and its liability.

Several comments and arguments on this regard can be found in the conclusions of the European Commission for Democracy Through Law (Venice Commission) of the Council of Europe that prepared in 2003 recommendations for the amendment of the Constitution of the Republic of Bulgaria related to the liability of magistrates.

The "control" of the accurate the necessary independent activity in courts, prosecution offices and investigation services obligatory requires the intervention of an authority independent

of the executive and legislative powers, should be based on objective and professional criteria and must be related directly to the liability of the members of the judiciary.

There is no explanation about to which kind of “control” the proposed amendment of art. 130 (6). 5 is referring. Certainly, a disciplinary and liability system as well as responsibility rules shall ensure the efficiency of the Judiciary and the confidence on it. Here the Supreme Judicial Council is the institution designed to assume this role. If the current regulation about this issue is considered not adequate, the legal reform should reinforce the role of the SJC and offer it a proper legal framework to develop its powers. Its legal framework shall be reinforced and not weakened.

The reinforcement of the efficiency and reliability of the judicial organization achieved should not waste all the efforts already made in the field of independence and in the principle of separation of powers and so the “control” over the independent and professional duties of the magistrates shall remain in the Supreme Judicial Council.

For the same reasons that in the appointment, promotion, demotion or dismissal of magistrates there shall not be any intervention of the executive or legislative in the independent body of the judiciary (the Supreme Judicial Council), the development of the professional (and necessarily independent) functions of the magistrates shall be out of any kind of influence or intromission that could compromise the principles on which the development of the jurisdictional duties are based.

The proposed reform in the Constitution in this regard is considered not to follow the mentioned grounds and requirements. Consequently we submit to your consideration the recommendation not to establish this new competence of the Minister of Justice and to keep in the SJC this competence as an essential aspect of the principle of independency and a requirement of the principle of separation of powers.