DISCIPLINARY ACTIONS WITHIN EUROPEAN SELF-EMPLOYED JUDICIAL PROFESSIONS – AN ANALYSIS

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Glossary

In this Analysis the following terms are used with the following definitions:

APEOU	The Association of Private Enforcement Officers of Ukraine
CCEJ	The Consultative Council of European Judges
CCJ	The Committee on Legal Co-operation in Europe
CEPEJ(2009)11E	European Commission for the Efficiency of Justice (CEPEJ) – Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement (2009)
CoE	The Council of Europe
ECHR	European Convention on Human Rights (1950)
ECoHR	European Court of Human Rights
Enforcement Act	Statute of Ukraine on Enforcement Proceedings dated September 02, 2016, № 1404-VIII
Enforcement Entities Act	Statute of Ukraine on Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies dated June 02, 2016, № 1403-VIII
HAS	International Institute of Administrative Sciences
ICCPR	UN International Covenant on Civil and Political Rights (1966)
MOJ	The Ministry of Justice of Ukraine
PEO	private enforcement officer
PEO Disciplinary panel regulations	Regulations on the Disciplinary Commission of Private Enforcement Officers (Registered with the Ministry of Justice of Ukraine November 28, 2018, No. 1442/31310)
Project	Право-Justice
Rec(2003)17	Recommendation of the Committee of Ministers to member states on enforcement – the Council of Europe
Rec.(80)2	Recommendation of the Committee of Ministers to member states concerning the exercise of discretionary powers by administrative authorities – the Council of Europe

Resolution 1994/41	Commission on Human Rights, Resolution 1994/41 on independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. E/CN.4/1994/132 (4 March 1994)
Resolution (77)31	The Council of Europe, Resolution (77) 31 On the Protection of the Individual in Relation to Acts of Administrative Authorities (28 September 1977)
SES	the State Enforcement Service
UN Basic Principles	UN Basic Principles on the Independence of the Judiciary (1985)
UNCAC	UN Convention Against Corruption (2003)

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1. INTRODUCTION

The general public has high expectations of those who serve as public officials and the way in which they should conduct themselves in undertaking their duties. One meets those expectations by ensuring conduct above reproach.

Historically, the regulation of the legal profession in Europe laid in the hands of courts which controlled the right of self-employed judicial professionals (mainly notaries and lawyers) to practice. The ordinary courts have long since delegated large aspects of regulation to self-employed legal professions themselves. Between the 1930s and the 1980s the era of 'traditional' self-regulation of legal professions reached its height.

Since then criticism of self-regulation in Europe has led to a move to *co-regulation* – a broad multi-layered regulatory framework involving bodies such as public administration, ordinary courts, professional self-governance bodies, where applicable the Ombudsman, fiscal and other relevant financial authorities, departments of trade and industry (especially in relation to insolvency practices), appropriate competition authorities, consumer associations (in relation to consumer credit and debt advice) and in certain jurisdictions the immigration services (in relation to immigration and asylum advice).

Despite the shift towards co-regulation, public criticisms of the system have remained. Many petitioners view the complaints process as too long and complicated, requiring undue persistence to reach a conclusion, and there is also concern that the overall process might be weighted in favour of legal professionals.

At the same time, according to various Council of Europe evaluations, a number of European administrative bodies having discretionary prerogatives in adjudication of complains on violations of professional and disciplinary misconduct of judiciary related professionals tend to show a significant level of abuse of power.

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An example of such abuse of discretion was evident even with respect to discharge of judges, so that in 2017 even the Council of Ministers had to examine cases concerning the Ukrainian disciplinary liability (*Oleksandr Volkov v Ukraine*) and the career of judges (*Salov v Ukraine*). In jurisdictions where not even the supreme officers of the judiciary (the third segment within the separation of powers principle), is not exempt from the abuse of powers by the administration, it can be expected that such approach would be found related to other (lower) officers of the judiciary, especially self-employed judicial professions.

1.1. Key principles of the code of conduct for public officials

The general principles upon which codes of conduct are commonly based across Europe are predominantly used for guidance and interpretation only.

These general principles include:

1.1.1. Duty

This principle reflects a duty to uphold the law and act in accordance with the law and the public trust placed in the public official. It rests on a duty to act in the interests of the public body of which an officer is a member and in accordance with the core functions and duties of that body.

1.1.2. Selflessness

All decisions are to be taken solely in terms of public interest and rule of law. One must not act in order to gain financial or other material benefit for oneself, family or friends.

1.1.3. Integrity

A public officer must not place himself or herself under any financial, or other, obligation to any individual or organisation that might reasonably be thought to influence her or him in the performance of the bestowed duties.

1.1.4. Objectivity

Decisions are to be made solely on merit and in a way that is consistent with the functions of the public body when carrying out public business including making appointments, awarding contracts or recommending individuals for rewards and benefits.

1.1.5. Accountability and Stewardship

A public officer is accountable for her/his decisions and actions to the public. One has a duty to consider issues on their merits, taking account of the views of others and must ensure that the public body uses its resources prudently and in accordance with the law.

1.1.6. Openness

This principle is based on a duty to be as open as possible about the reached decisions and performed actions, giving reasons for the decisions and restricting information only when the wider public interest clearly demands.

1.1.7. Honesty

Includes a duty to act fairly, justly and uprightly. One must declare any private interests relating to public duties and take steps to resolve any conflicts arising in a way that protects the public interest.

1.1.8. Example

There is a duty to promote and support these principles by leadership and example, and to maintain and strengthen the public's trust and confidence in the integrity of the public body and its members in conducting public business.

1.1.9. Reverence

One must respect fellow members of the public body and employees of the body and the role they play, treating them with courtesy at all times. Similarly, one must respect members of the public when performing duties as a member of the shared community.

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1.2. Self-employed judicial professions as public servants

Legal practitioners across Europe have to comply with two main types of regulations: (i) regulations by the state, and (ii) regulations by their professional bodies. These two systems do overlap to a certain extent in that in the system of regulation by the professional bodies there is an ultimate right of appeal for practitioners to relevant state courts. Furthermore, the standards applicable to professional negligence actions that can be brought in the ordinary courts overlap with the standards relating to conduct and service set by the professional bodies. Lastly, the state requires practitioners to have professional indemnity insurance which provides cover to practitioners in relation to claims including professional negligence claims.

The main standards applicable to legal practitioners are considered below. The first three and the Code of Ethics in most European jurisdictions relate to the system of regulation by the professional bodies, while the forth one – professional negligence – is applied by courts. It has been argued that the distinction between the different standards is not clear cut and there is overlap between them.

1.3. *Pravo-Justice* assessment of the current Ukrainian private enforcement officers' (PEO) disciplinary liability

Pravo-Justice EU Project in 2019 issued its GAP Analysis on Enforcement Legislation in Ukraine.

Based on the findings of the Pravo-Justice expert group dealing with enforcement proceedings, "The overzealous oversight by the PEOs Disciplinary Commission [DC] at the MoJ [Ministry of Justice] evidences another block of problems. Five out of seven DC's decisions that were appealed were discarded by the court. The low quality (professional standing) of disciplinary decisions evidenced lack of professionalism and/or bias of the DC members and bad management on the MoJ part. Disciplinary decisions are currently enforceable before being subject to review by a court with full jurisdiction which is direct infringement of the fair trial acquis of the ECHR."

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The Project recommendations in this respect are as follows:

"Transfer the DC's administration from the MoJ to the APEO to achieve better personal composition (attract and retain high quality members of the DC), management, and accountability of the DC.

Regulate the disciplinary process in more details to put additional procedural safeguards for a fair trial.

Ensure that a disciplinary decision would be enforceable only after review by a court with full jurisdiction as defined in the ECHR's fair trial acquis."

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2. PROFESSIONAL STANDARDS IN SELF-EMPLOYED LEGAL PROFESSIONS

2.1. Professional misconduct

In terms of the standards applied by the professions and their disciplinary bodies, a finding of professional misconduct currently attracts the most serious consequences for legal practitioners. In the majority of European jurisdictions, the definition of ‘professional misconduct’ is currently not enshrined in relevant legislation (both primary and secondary).

In common law jurisdictions (having in mind their extensive case law) we can trace several descriptions of the professional misconduct concept, with the most notable being that of Lord Emslie in *Sharp v Council of the Law Society* (1984). Lord Emslie observed: “There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.” He also described it as a “grave charge” and made it clear that the whole circumstances and the degree of culpability of the individual practitioner must be considered.

The concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial. What is required is a working definition of ‘professional misconduct’ that sufficiently ensures that the full weight of a disciplinary process is brought to bear only on the most serious cases and that less serious cases are dealt with in some other way, such as a system of internal advice-giving. That is surely the essence of outcomes focussed regulation.

A margin of appreciation should be given to a disciplinary tribunal to define as to whether the conduct was so serious as to amount to professional misconduct. In particular, while mere negligence would not usually amount to professional misconduct, a single act was capable of being professional misconduct if it is particularly grave.

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The requirement of *mens rea* (at least alone) does not seem as the right approach due to the possibility of conceiving serious behaviour amounting to professional misconduct which was not intentional. The authorities address the *seriousness* of the conduct not the *mind* of the professional.

2.2. Unsatisfactory conduct

Unsatisfactory conduct is behaviour which, while falling just short of professional misconduct, is nonetheless unacceptable and worthy of public condemnation. Unlike professional misconduct, the test for it is only on the balance of probabilities. Indeed, the clearest examples of unsatisfactory conduct are cases where there is insufficient evidence to establish the behaviour beyond reasonable doubt but enough to establish it on the balance of probabilities. The most common form of unsatisfactory conduct is failing to send an appropriate letter to both clients where the solicitor is acting for both sides in a conveyancing transaction.

2.3. Inadequate professional services

Inadequate professional services (IPS) consists of professional services which are not in any respect of the quality which could reasonably be expected of a competent self-employed legal professional. Self-employed judicial professionals must provide adequate professional services. They are under a professional obligation to provide adequate professional services to their clients. An adequate professional service requires the legal knowledge, skill, thoroughness and preparation necessary to the matter in hand. They should not accept instructions unless they can adequately discharge these. This means that as well as being liable for damages assessable by a court of law for any act of negligence in dealing with parties' (clients') affairs, professionals may face disciplinary action by the relevant bodies in respect of a service to a party (client) which is held to be an inadequate professional service.

Various European judicial professional bodies have defined internal guidelines relating to consideration of complaints where IPS is alleged. In general, these guidelines provide that

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when analysing someone's professional conduct, a regard should have been given whether the professional:

(i) has dealt with the business with due expedition;
(ii) has displayed the adequate knowledge of the relevant area of law;
(iii) has exercised the appropriate level of skill;
(iv) maintains appropriate systems; and/or
(v) has communicated effectively with his [or her] parties (clients) and others.

2.4. Professional negligence

A possibility, in addition to or instead of, pursuing a complaint with the practitioner's professional body, is always open to an aggrieved individual to bring an action for negligence in the ordinary courts.

If IPS relates to a general lack of capacity to perform certain tasks adequately, negligence refers to a want of due care in performing a specific task which results in loss to a client. For example, the modern test for professional negligence in Scotland was established in the case of *Hunter v Hanley* (1955 SC 200). Essentially, negligence by a professional is only established if the course taken by the profession is one "which no professional man of ordinary skill would have taken if he had been acting with ordinary care".

2.5. Code of Ethics

Judicial ethics is a professional applied ethics of the members of the judiciary, as the third branch of government, having crucial importance in the administration of justice and gaining more and more attention as a domain of comparative and interdisciplinary academic research. The Consultative Council of European Judges (CCJE) in its *Opinion no. 3* emphasized that the ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom.

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The standards of conduct applying to judges and other members of the judiciary (especially including self-employed judicial professionals) are the corollary of these values and a precondition for confidence in the administration of justice.

Dilemmas related to judicial ethics are determined by the fact that it is considered to be governmental ethics and the ethics of the third state power. Ethical judicial dilemmas arise very often because of the concurrence of special power and service, namely, that both are an integral part of the judiciary. The complexity of judicial ethics is determined by the judiciary's specific constitutional status, its immunity and need of protection, as well as by the wide scope of values, its sensitivity and diversity. Society's expectations for judges and other judicial professions have caused the need to reflect on the question of judicial ethics.

These global developments of judicial practice confirm the need for comparative research, especially taking into consideration different European cultures, legal procedural traditions and historical heritage that determine various approaches to judicial ethics. Continuing globalization processes along with the unification of legal systems and judicial procedures requires identifying common values of judicial ethics in European countries and around the world; therefore, a comparative study of contemporary best practices is highly relevant. It becomes even more relevant considering the rise of a global justice which is very often related with the proliferation of international courts and tribunals. When the question of how global standards for a good performance of the judiciary is achieved, judicial ethics and judicial codes of conduct may be posed as the best answer to this question.

Norms of judicial ethics can be found both in national legal systems and in the documents of different international organizations. It is established by soft law as well as by binding law. Judicial ethics is the highest constitutional ethics because the main principles of judicial conduct (independence, impartiality, integrity, equality, etc.) are legal principles established in the constitutions of different European countries. In the countries with the status of a state under the rule of law, it is especially significant because the essential values of judicial ethics are prerequisite of this constitutional principle.

In many European countries, expectations for professional and sensitive justice in the society have always been an issue of great importance. But it became even more important

during the time of social and economic deficiencies which increased the amount of social conflict. Consequently, courts and professionals exercising judicial and quasi-judicial functions face the mission not just to solve a huge number of disputes, but also to decide on very sensitive social issues, which require not just legal professionalism, good knowledge of domestic and international jurisprudence on human rights issues, but also over-arching work in different areas that is regulated by law. Proper conduct in compliance with judicial ethics helps judicial professionals to overcome these challenges successfully.

The starting point of getting deep into any social field requires revealing its nature. This is even more important for judicial ethics because misunderstanding its nature can lead to serious confusion and antagonistic results, or even worse, a violation of judicial independence.

Judicial ethics can generally be recognized as ensuring the independence, impartiality and integrity of courts, judges, and judiciary related professioals, which have always been recognized as the core values in a democratic society, as reasonably expected from the judiciary. Justice is a fundamental precondition for developments in any of its fields: state governance, politics, economic, science, welfare, etc. Thus, the rule of procedural justice is not less important than material justice, because justice could be perceived as a form of human consciousness. The European Court of Human Rights has highlighted that justice must not only be done, it must also be "seen to be done" (*Delcourt v Belgium*, 1970). It should be noted that the persuasive and trustworthy practice of judges and other legal professionals is of immense importance for the final effectiveness in administration of justice.

The Consultative Council of European Judges (CCEJ) has declared that "the confidence in the justice system is even more important in view of the increasing globalization of disputes and the wide circulation of judgments. Furthermore, in a state governed by the rule of law, the public is entitled to expect the general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their impartiality and the effectiveness of their action" (*Opinion no. 3* of the CCEJ). Developing ethics regimes and standards for justice is recognized as one of the measures to combat corruption by implementing Article 11 of the

United Nations Convention against Corruption and increasing the effectiveness of courts and reducing both the incentives and opportunities for judicial corruption.

2.6. Serious failure

Breach of professional discipline must be regarded as such only if the conduct in question can be regarded as a serious failure to comply with well-established professional and/or ethical standards.

The relevant adjudication practice shows that the majority of European courts and disciplinary panels are astute to differentiate the isolated, albeit negligent, lapse from acceptable conduct from the serious kind of culpability which attracts the opprobrium of a finding of professional misconduct.

Such examples can be found both in European continental and common law jurisdictions. For example, in *Felix v The General Dental Council* (1960) an English court said this of three examples of mistaken, over-charging by a professional (dentist):

"To make good a charge of 'infamous or disgraceful conduct in a professional respect' in relation to such a matter as the keeping of the prescribed dental records it is not in their Lordships' view enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of 424 patients treated during the period in which the mistakes occurred whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told."

Similarly, European courts reiterate that, "It is not contended that an isolated, careless mistake should come within the range of professional misconduct at all. Equally, it is not necessary to go so far as to prove fraud before an element of infamous or disgraceful conduct is important. An element of recklessness or complete irresponsibility in regard to these matters would equally amount to infamous or disgraceful conduct."

It seems as a settled European principle that serious professional misconduct does not require moral turpitude. Gross professional negligence can fall within it. Something more is required than a degree of negligence enough to give rise to civil liability but not calling for the opprobrium that inevitably attaches to the disciplinary offence.

An example would be 2002 case of a doctor who had failed, when answering an emergency call, to recognise a serious clinical signs of cyanosis in a severely depressed patient treated with Diazepam and Dihydrocodeine. In that case the patient in fact died from a drug overdose. Nevertheless, the court declined to say this was inevitably misconduct, stating that, “[F]or every professional man whose career spans, as this appellant's has, many years and many clients, there is likely to be at least one case in which for reasons good and bad everything goes wrong – and that this was his, with no suggestion that it was in any way representative of his otherwise unblemished record.” Though the court defined that in this situation it is facing a borderline case, its decision was based on a fact that it a single incident. There was undoubted negligence but something more was required to constitute serious professional misconduct and to attach the stigma of such a finding to a doctor of some 25 years standing with a hitherto unblemished career.

Breach of professional discipline is clearly not a phrase that is apt within legal practice to cover a mere slip, a single isolated error of judgment, or an act that does not infringe the spirit of the rule. A momentary and uncharacteristic lapse does not cross the line of seriousness.

In number of jurisdictions, internal regulations of judicial professional self-governance bodies define, as a way of a professional self-inflicting, that such situations might result in written warnings, and that an accumulation of a number of written warnings or financial penalties (usually three) within a number of years (usually five) is to constitute professional misconduct. This, in effect, prescribes that the accumulation shall be regarded as serious enough so as to amount to disciplinary action.

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3. DISCIPLINARY ACTION

"Jesus went unto the mount of Olives. And early in the morning he came again into the temple, and all the people came unto him; and he sat down, and taught them. And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst, They say unto him, Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou? This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the ground, as though he heard them not. So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him first cast a stone at her. And again he stooped down, and wrote on the ground. And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last: and Jesus was left alone, and the woman standing in the midst. When Jesus had lifted up himself, and saw none but the woman, he said unto her, Woman, where are those thine accusers? hath no man condemned thee? She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee: go, and sin no more." (John 8, 1-10)

3.1. Introducion

To ensure orderly behaviour and to regulate the interaction between its participants, each independent profession has certain standards, rules and regulations. A disciplinary code is intended to provide a framework of these standards, rules and regulations which ensures that officers know and understand what the profession is expecting from them and what the officers themselves can expect in those situations. It also prescribes the penalties which are likely to be imposed by the profession should officers transgress the rules. A disciplinary code, usually, provides examples of minor and major transgressions which may lead to disciplinary action.

A disciplinary action should not be mistaken for situations which exceed disciplinary liability and should not be influenced by them (criminal and civil offences). The implementation of a disciplinary code and procedure by the profession is important to ensure its effective

functioning, and to achieve the goals and objectives set by the legal framework. The disciplinary procedure is therefore the instrument by means of which the profession can maintain effective discipline in its operations.

A disciplinary procedure must ensure the benefit of a disciplinary hearing for the professional in question, and an adequate prior notice of the holding of a disciplinary enquiry.

A disciplinary action should strive to be corrective and constructive. Discipline and dismissal are regarded as part of the profession's clear responsibility, which is to be exercised in respect of a disciplinary code where a professional fails to meet the statutory criteria for her/his operations, the work performance or behaviour of an officer deviates from the accepted standards, and/or is unsatisfactory.

The severity of disciplinary action should depend upon the circumstances of each case and mitigating factors have to be given proper attention. A dismissal should be imposed, only after clear disclosure of a systematic and continuous intent of breach of discipline by a professional. Disciplinary sanction of disbarment enacted by administrative bodies should not be effective in the case of an appeal to court before a judicial review is final (European Court of Human Rights).

The concept of responsibility is inherent in the rule of law. Namely, the rule of law, *inter alia*, involves mechanisms and procedures prescribed by law regulating the establishment of responsibility, enhancing the transparency, fairness, integrity and predictability of conduct of the state and the institutions thereof. Thus, the issue of accountability of judicial office holders is often mentioned in the context of democratic and/or judicial reforms. The establishment of an efficient judiciary guarantees the independence of its officers, as well as mechanisms for their accountability. However, it does happen that invoking responsibility of judiciary is simply an excuse for an attack on its independence. The central issue pertaining to the creation of an efficient judicial system is how to establish accountability mechanisms for judicial office holders while at the same time respecting their independence.

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Judicial independence guarantees exist in order to protect individuals, allowing a fair and impartial judicial procedure, and protecting the individual against the abuse of power. Accordingly, judicial office holders shall not act arbitrarily, but have a duty to decide fairly and impartially according to the law. This is secured by the fact that judicial officers are held responsible for all of their actions with all of their possessions (e.g. not like judges whose mistakes are compensated to the engraved individuals by the state budget). This is one of the means in order to ensure full public confidence in the judiciary as a whole, by maintaining independence and impartiality in exercising their duties.

International standards on the impartiality of judicial office holders are defined by both universal and regional international legal instruments defining human rights. Article 14 of the UN International Covenant on Civil and Political Rights (1966) reads that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Article 6 of the European Convention on Human Rights (1950) states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

However, the question of accountability of public officials is provided indirectly under certain international agreements. In view of the aforementioned, the UN Convention Against Corruption specifies that the purpose of the Convention is to promote "integrity, accountability and proper management of public affairs and public property" (Article 1 (c)). The Convention requires each state party to promote "integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system" (Article 8 (1)), requiring them to endeavour to "apply, within [their respective] institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions" (Article 8 (2)) as well. The specific obligation relating to the prevention of corruption in the judiciary requires each state party to undertake measures for strengthening the integrity of the judges that would have no impact on their independence, which may include adoption of the rules with respect to the conduct of members of the judiciary (Article 11).

In addition to the aforementioned international agreements, there are a number of international documents providing guidelines for the states on how to regulate accountability of office holders within the judiciary. They were adopted at both the universal (within the United Nations) and the regional levels. As far as the documents adopted at the regional level are concerned, this study shall focus on the ones adopted at the European level (within the Council of Europe), since they are relevant in the context of Ukraine.

Contribution to the improvement of the standards governing accountability of officers within the judiciary is made by the Special Rapporteur on the independence of judges and lawyers of the UN, appointed in 1994 (Commission on Human Rights, Resolution 1994/41 on independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. E/CN.4/1994/132 (4 March 1994)). The Special Rapporteur, *inter alia*, dedicated the entire 2014 report to the issues of judicial accountability. It is based on an analysis of the rules established at the international level and the implementation thereof in the practice of international bodies. Based on the aforementioned findings, the recommendations have been drafted, providing additional guidance for the sates in adopting and implementing efficient mechanisms of judicial accountability in compliance with the principles of judicial independence.

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United Nations' Basic Principles on the Independence of the Judiciary adopted in the framework of the UN are the first international document relevant to disciplinary accountability of judges. Nevertheless, the language of the documents clearly indicated that it rests on the independence of the judiciary as a whole (Article 1), after which it deals with specific issues related to judges (as holders of the judicial branch of government). Article 1 of the UN Basic Principles reads as follows:

> **Independence of the judiciary**
>
> 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
> 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
> 5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
> 6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
> 7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

3.2. Disciplinary tribunal

The Council of Europe (CoE) has been dealing with the issues related to accountability and independence of the enforcement agents in a more specific way, especially after establishing its CEPEJ branch – European Commission for the Efficiency of Justice, more than 15 years ago.

The initial document specific for the area of enforcement of judgments is by the CoE was issued in 2003 (Recommendation of the Committee of Ministers to member states on enforcement – Rec(2003)17). In order to define the enforcement procedure, Rec(2003)17 introduces the concepts of independence and accountability in the following manner:

“Enforcement should be carried out in compliance with the relevant law and judicial decisions. Any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible” (Article III 1 (b));

“Enforcement agents should be honourable and competent in the performance of their duties and should act, at all times, according to recognised high professional and ethical standards. They should be unbiased in their dealings with the parties and be subject to professional scrutiny and monitoring which may include judicial control” (Article IV 4).

Finally, provision that deals specifically with the issue of disciplinary of judicial officers in specific states:

“Enforcement agents alleged to have abused their position should be subject to disciplinary, civil and/or criminal proceedings, providing appropriate sanctions where abuse has taken place” (Article IV 6).

In order to ensure best practice in the efficiency of justice, CEPEJ has created a number of documents dealing with enforcement. One of the most important documents is the CEPEJ Guidelines on Enforcement from 2009. According to CEPEJ Guidelines “The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus

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between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests. The enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a "post judicial mediator" during the enforcement stage" (Point 8). "Enforcement agents' status should be clearly defined so as to offer potential parties to enforcement procedures a professional who is impartial, qualified, accountable, available, motivated and efficient" (Point 31).

Recommendations regarding disciplinary liability of judicial officers (enforcement agents), state that "Enforcement agents must bear a responsibility for maintaining confidentiality when secret, confidential or sensitive information comes to their attention in the course of enforcement proceedings. In case of a breach of this duty, measures of disciplinary liability should be applicable, along with civil and criminal sanctions" (Point 45), as well as that "Breaches of laws, regulations or rules of ethics committed by enforcement agents, even outside the scope of their professional activities, should expose them to disciplinary sanctions, without prejudice to eventual civil and criminal sanctions. Disciplinary procedures should be carried out by an independent authority. Member states should consider introducing a system for the prior filtering of cases which are filed merely as delaying tactics. An explicit list of sanctions should be drawn up, setting out a scale of disciplinary measures according to the seriousness of the offence. Disbarment or "striking off" should concern only the most serious offences (the principle of proportionality between the breach and the sanction should be observed)" (Points 80-82).

The case law of the European Court of Human Rights in Strasbourg, has been dealing with the disciplinary liability of civil servants in a number of applications, thus establishing a number of violations of the Convention with respect to disciplinary proceedings. The Court has defined that Article 6 is applicable to disciplinary proceedings before professional bodies:

i) where the right to practice the profession is at stake (*Le Compte, Van Leuven and De Meyere v. Belgium*; *Philis v. Greece*);
ii) a negligence claim against the State (*X v. France*);

iii) an action for cancellation of an administrative decision harming the applicant's rights (*De Geouffre de la Pradelle v. France*);

iv) administrative proceedings concerning a ban on fishing in the applicants' waters (*Alatulkkila and Others v. Finland*); and

v) proceedings for awarding a tender in which a civil right – such as the right not to be discriminated against on grounds of religious belief or political opinion when bidding for public-works contracts – is at stake (Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, § 61; contrast I.T.C. Ltd v. Malta (dec.)).

According to *Vilho Eskelinen and Others v. Finland* [GC], disputes relating to public servants do not fall within the scope of Article 6 when two criteria are met: (i) the state in its national law must have expressly excluded access to a court for the post or category of staff in question, and (ii) the exclusion must be justified on objective grounds in the state's interest (§ 62).

That was the case of a soldier discharged from the army for breaches of discipline who was unable to challenge his discharge before the courts and whose "special bond of trust and loyalty" with the state had been called into question (*Suküt v. Turkey*). In order for the exclusion to be justified, it is not enough for the state to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in *Pellegrin*, a "special bond of trust and loyalty" between the civil servant and the state, as employer. It is also for the state to show that the subject matter of the dispute in issue is related to the exercise of state power or that it has called into question the special bond. There can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question (*Vilho Eskelinen and Others v. Finland* [GC]).

It is important to note that the fact that it performs many functions (administrative, regulatory, adjudicative, advisory and disciplinary) cannot in itself preclude an institution from being a "tribunal" (*H. v. Belgium*). Likewise, the fact that the duty of adjudicating is conferred on professional disciplinary bodies does not in itself infringe the Convention. Nonetheless, in such circumstances the Convention calls for at least one of the following two systems: either

the professional disciplinary bodies themselves comply with the requirements of Article 6, or they do not so comply but are subject to subsequent review by “a judicial body that has full jurisdiction” and does provide the guarantees of Article 6 § 1 (*Albert and Le Compte v. Belgium*; *Gautrin and Others v. France*). Judicial body that have not been considered to have “full jurisdiction” is a court which heard appeals on points of law from decisions of the disciplinary sections of professional associations, without having the power to assess whether the penalty was proportionate to the misconduct (*Diennet v. France*; *Mérigaud v. France*).

Finally, the issue that needs further analysis is related to procedural and legal safeguards of the Disciplinary tribunal’s independence. According to point 81 of CEPEJ Guidelines (2009), ‘Disciplinary procedures should be carried out by an independent authority.’

The independence of the disciplinary authority rests on both subjective and objective elements. The primary subjective element rests on a personal quality of impartiality, which a Tribunal member must disclose in her/his work, while the objective element is based on a real possibility of a Tribunal member to voice her/his assessment about a given case without having any later repercussions that might be of influence.

3.3. Decision-making process

Decision-makers should ensure that the processes for dealing with complaints about legal practitioners are fairly applied and are in accordance with equality and human rights legislation. Decision making should always be consistent and impartial.

Complementarily to pertinent laws and regulations, in order to effectuate fairness and predictability, disciplinary decision-makers should take into consideration models emerging from earlier cases (allowing for the passage of time since the decision was made). They should study, but not be dictated by, decisions which have been made previously. Guidance and reached standards should be used to support the decision making and not seek to impose a stringent tariff or to fetter discretion.

In order to achieve the general objectives and principles of a disciplinary action, the decision-makers might consider applying several stages in reaching their final decisions. These stages might include:

- (i) deciding the nature and seriousness of the conduct;
- (ii) identifying the basic penalty from the range available and/or a combination of potential sanctions;
- (iii) considering any aggravating/mitigating factors;
- (iv) considering any appropriate adjustment to a) ensure proportionality, b) eliminate any financial gain, c) achieve appropriate deterrent, and/or d) discount for admissions / rectification / engagement in process; and
- (v) deciding the appropriate level and duration and publication requirements.

3.3.1. Deciding the nature and seriousness of the conduct

In assessing the nature and seriousness of the conduct, i.e. does the conduct amount to breach of professional discipline (unsatisfactory professional conduct or professional misconduct), and the sanctions that might be appropriate, consideration should be given to the following factors (not an exhaustive list) and weight to be attached to each:

- (i) full facts and circumstances of the case;
- (ii) quality of the evidence available;
- (iii) nature, extent and importance of standards breached;
- (iv) intention;
- (v) seniority/supervisory position;
- (vi) the culpability of the practitioner, i.e. sole responsibility;
- (vii) dishonesty, deliberate action or recklessness;
- (viii) whether caused/encouraged others to be complicit;
- (ix) duration/frequency/repetition;
- (x) influence;
- (xi) number/type of people/organisations adversely (or potentially) affected;
- (xii) attempts at rectification;

(xiii) continuation of failure to adhere/comply;
(xiv) conviction of criminal offence;
(xv) previous disciplinary sanctions;
(xvi) impact of loss or harm caused by the conduct;
(xvii) any financial benefit derived (or intended to be derived); and
(xviii) risk/loss of substantial sums of money.

The parties should always be given the opportunity to make representations as to the level of sanction to be imposed.

3.3.2. Identifying the basic penalty from the range available and/or a combination of potential sanctions

The basic penalty will be subject to any statutory/rules limits of amount ceilings on (i) fines, or (ii) compensation. In some cases, a tariff may set out the basic penalty, including categories of seriousness and a range of basic awards.

3.3.3. Considering any aggravating/mitigating factors

Once a basic penalty has been agreed, consideration should be given to any **aggravating** features, such as:

(i) pre-meditation/intent;
(ii) repeated actions over a long period of time;
(iii) recklessness/knowledge of risks and likely consequences;
(iv) negligence/incompetence;
(v) collusion (with colleagues/clients);
(vi) cumulative complaints;
(vii) position of responsibility;
(viii) vulnerability of the client/third party;
(ix) attempts to hide/deceive/lay blame elsewhere;
(x) delayed/no acceptance of actions;
(xi) limited/no remedial action;
(xii) no apology;

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(xiii) lack of remorse;
(xiv) delayed/no reaction to complaint;
(xv) no co-operation or hindered investigation process;
(xvi) failure to attend disciplinary hearing;
(xvii) previous disciplinary actions;
(xviii) misuse of illegal substances;
(xix) discrimination on any grounds;
(xx) concerns about probity, i.e. being honest/trustworthy.

Consideration should also be given to any **mitigating** factors, such as:

(i) (early) admissions of unsatisfactory conduct/misconduct;
(ii) timescales, i.e. immediate reaction to complaint/delay;
(iii) apology provided;
(iv) action taken to remedy harm (financial or otherwise) caused;
(v) (early) offers of settlement;
(vi) co-operation in the investigation;
(vii) expressing insight/demonstrating reflection;
(viii) one-off action;
(ix) no history of disciplinary action;
(x) was deliberately misled;
(xi) no gain or profit;
(xii) junior position and lack of training/experience/supervision;
(xiii) adhering to principles of good practice, i.e. keeping up to date, working within their area of competence;
(xiv) personal and professional matters, e.g. personal medical conditions/bereavement/work-related stress;
(xv) lapse since the incident occurred;
(xvi) limited duration of loss/harm;
(xvii) heat of the moment;
(xviii) acted on advice from professional body;
(xix) good references.

References and testimonials may be produced to support good standing and character. Decision-makers should consider whether the authors are fully aware of the events and what weight, if any, to attach to this evidence.

3.3.4. Considering any appropriate adjustment to (a) ensure proportionality, (b) eliminate any financial gain, (c) achieve appropriate deterrent, and/or (d) discount for admissions / rectification / engagement in process

Making an appropriate adjustment is important, as this tailors the sanction to the individual circumstances of the case and to those of the paying party. Proportionality plays a great part in dealing with the application of sanctions and is essential to eliminate any financial gain.

Decision-makers should always have at the back of their minds the first Key Principle:

Preserving the reputation of the profession v. protecting the general public.

Means – Is the proposed sanction proportionate to the means of the paying party, including income, benefits/liabilities & assets? If the practitioner is not employed, what financial resources are open to them?

Consideration should be given to any insurance arrangements (which should not be a reason to increase the amount if available). In addition, requests for time to pay/ instalments should be acknowledged, although it might be helpful to limit any instalments to a maximum period, as small instalments over a lengthy period of time can be expensive to administer and involve costs to the profession in excess of the original sanction.

Employment – consider whether the sanction may impinge on the future employment of the paying party, e.g. a sole practitioner who is put out of business due to imposition of significant fine? The amount of revenue generated by the practitioner/firm could be a factor when assessing the size of fine to be ordered, as well as profitability, number of clients, size of firm / number of partners etc.

Deterrent – does the proposed sanction have deterrent value? Is the sanction sufficient to deter practitioners from behaving below the expected standards of competent legal

professionals? A strong deterrent effect may be achieved by the certainty of sanctions being made, as well as the severity of the sanction. Consistently applying and maintaining sanctions is important to deter practitioners from behaving contrary to the expected conduct standards.

In order for sanctions to deter, practitioners must be made aware of sanction risks and consequences. Sanction policies and awareness of sanction risks is an essential part of deterrence. Steps should be taken to ensure that information about sanctions and any modifications are clearly publicised.

Discounts – any action already taken against the practitioner by other bodies, such as the courts, regulators and other professional bodies should be taken into account, e.g. if a practitioner has already been fined by a court, it would not be usual to fine again for the same ‘offence’, but it may be appropriate to apply other sanctions. The decision-makers should not take a less stringent line because of the prospect of legal action.

3.3.5. Deciding the appropriate level and duration and publication requirements

Once all of the circumstances and surrounding factors have been considered, decide the appropriate sanction(s), level and duration (as applicable). Depending on the sanction(s), the following considerations might apply;

Reasons should be given for any sanction(s) applied and where there has been a departure from the general guidance (if applicable). Reasons should also be given for discounting the sanctions it rejects, e.g. if there is to be a suspension, reasons should be given about why a lesser sanction, i.e. a reprimand or restrictions, was not appropriate.

It is good practice to explain why it is not necessary to impose the next most severe sanction.

Where errors have been made or standard practice/codes/regulations have been breached, this may not, of itself, amount to the breach of discipline. If **no finding** is made and no sanction is imposed, clear reasons must be given.

Where there is a finding of the breach of discipline, only **rarely/exceptionally** would it be **appropriate not to impose a sanction**, e.g. if the practitioner was severely incapacitated

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at the time of the conduct or the impact of the conduct (on the client or other third party) was so minimal. The decision should provide:

(i) a full/clear explanation of what the rare / exceptional reasons are;
(ii) why the circumstances are exceptional; and
(iii) how the exceptional circumstances justify taking no further action.

Where a practitioner has **resigned** or has been **expelled** from membership of the professional organisation, this should not normally influence the sanctions to be applied, but it may limit the range of sanctions available. Consideration should always be given to applying a sanction as if the practitioner was still a current member.

Where a **combination** of **sanctions** might be appropriate, consider all of the circumstances, the appropriateness of the proposed sanctions both individually and collectively. Sanctions should be considered separately and in order of severity, e.g. a practitioner should not be expelled unless suspension or restriction is considered insufficient to protect the public, offer a suitable deterrent and maintain confidence in the profession.

Multiple complaints, e.g. same / similar wrong-doing committed concurrently. Is it proportionate / unjust to impose a sanction for each matter? Consider the totality or impose sanctions for the more serious allegations and whether it is appropriate to make no separate order for lesser matters.

Duration – sanctions may be applied immediately or delayed (unless restricted by terms of statute / rules). Full reasons should be given for either approach. A separate explanation as to why the sanction should last for a particular period should be provided.

Publication – decisions should (usually) be pronounced publicly. Consideration should be given to whether all decisions should be published, including those where no findings are made. Publicity may be restricted if there is any risk to the health or well-being of the practitioner or anyone associated with the practitioner. A public interest test may require to be applied in each case. It is good practice for decisions to be widely published and available to the general public, e.g. on the professional organisation's website or public journal.

3.4. Disciplinary sanctions

The purpose of imposing sanctions is not to punish, but to protect the public and the reputation of the profession. Although the application of sanctions might have a punitive effect, the objective should be to impose a sanction or a combination of sanctions necessary to achieve the overall principles of a disciplinary action.

These overall principles include:

(i) preserving the reputation of the profession *v* protecting the general public;
(ii) achieving credible deterrence;
(iii) maintaining, improving and promoting proper professional standards and conduct for members of the profession;
(iv) maximising proportionality, clarity, consistency, impartiality & transparency;
(v) ensuring decision-makers ultimately retain discretion; and
(vi) applying appropriate penalties in each individual case.

Any disciplinary action should make sure that the parties are aware from the outset of the approach that might be taken to the imposition of sanctions following a finding of unsatisfactory professional conduct or professional misconduct.

According to CEPEJ Guidelines (2009), "An explicit list of sanctions should be drawn up, setting out a scale of disciplinary measures according to the seriousness of the offence." In this respect, the 2016 *Ukrainian Enforcement Entities Act* has to be amended in at least two areas.

Firstly, the Act has to catalogue a much more specific list of disciplinary offences, avoiding situations in which almost any action of a PEO might be construed as an "incompatible activity", "violation of ethics", or a "failure to perform duties properly". Unclear and ambiguous expressions have to be altered by more unequivocal ones, leaving no space for wide discretional interpretations, thus creating a much more explicit list of actions which are "incompatible" (e.g. membership in executive or supervisory boards of corporate entities), or "improper" (e.g. like violating the principle of proportionality between the amount to be

collected and the selected means of enforcement, unlawful management of funds placed on a PEO's separate bank account, etc.).

Secondly, the disciplinary measures, as stipulated in Article 41 (warning, reprimand, suspension, and disbarment), are not in any way matched with any of the disciplinary offences, leaving a wide possibility for the Disciplinary tribunal to impose each of the stipulated sanctions for any of the violation ad lib, without any substantial legal constrains, other than their own 'sense of proportionality' between the breach and the sanction.

Art. 40 of the *Enforcement Entities Act* sets forts a rather wide leeway for such approach, stipulating that, “When defining the type of the imposed disciplinary sanctions, the Panel has to take into account the following: the level of PEO's culpability, the gravity of transgression, the scope of damage, and whether disciplinary sanctions were already imposed on the same PEO.” This provision has to be characterized as excessively discretional, not limiting the Disciplinary tribunal in anyway when it comes to defining sanctions imposed on a PEO. Disciplinary tribunal members, with the exception of one of them, are not justices, and should not enjoy the same freedom in reaching decisions as members of the judiciary.

In addition, the so far “case-law” of the Disciplinary tribunal, with respect to the imposed disciplinary measures, express their willingness for harsh measures, having in mind that the first sanction that was imposed by them was disbarment (sic), and the second one suspension. This tendency to choose measures ‘from the bottom up' (starting with the harshest, and moving towards more moderate ones), raises questions regarding the capability of its current regulatory arrangement and composition to impose measures in a manner which is less spontaneous, detached, and having a clear understanding of the ‘bigger picture’. In other words, the current regulatios on Disciplinary tribunal members seem to forget that decreasing the level of actions that immediately lead to ‘striking off’ from the profession, can create a case-law that will impose harsh sanctions in a disproportionally vast number of cases. Such situation would not infect just the PEOs, but also the public image of the profession, which by the very nature of its operations, inevitably generates suspicion and antagonism with the general public.

Thirdly, in situations when disciplinary action leads to disbarment, in accordance with the case-law of the European Court of Human Rights, in respect with Art. 6 of the Convention, the disciplinary panel should be construed as a "tribunal" (*Le Compte, Van Leuven and De Meyere v. Belgium*; *Philis v. Greece*). This means that immediate enforcement of the Disciplinary tribunal's decision on disbarment cannot be automatic but pending to a final judicial review in a case of a lodged appeal. Direct and immediate disbarment is impossible by the decision of the Disciplinary tribunal, since it has the role of a ‘first instance tribunal’, and as such its findings have to be subject to a higher judicial review, having in mind that otherwise it might lead to a violation of PEOs' human rights.

Fourthly, Art. 41-42 of the 2016 Enforcement Entities Act stipulates that the Disciplinary tribunal's decision to rule in favour of the motion of the Ministry of Justice or the Council of PEOU, and to impose a disciplinary sanction against a private enforcement officer shall be enacted by the order of the Ministry of Justice. According to Disciplinary Regulations, this order is affixed to the minutes of the disciplinary hearing, and as such they jointly form the final decision.

In situations when the Disciplinary tribunal has found a PEO liable for breach of disciplinary duty and has imposed one of the disciplinary measures, the decision of the Ministry of Justice has to be duly elaborated, defining its clear statutory basis, the action of the PEO which is deemed as a violation of professional conduct, as well as legal and factual grounds on which such findings are based. Current situation, in which the ministerial decision is co-occurring with minutes of the disciplinary hearing, lacks actual rationale, and even if it can be traced in the attached minutes, it is not clearly expressed, but is to be additionally construed by the interested parties.

In the event of disbarment, the Ministry of Justice should sepratately explain what were the reasons not to impose a ligter disciplinary measure.

3.4.1. Particular types of sanctions

In addition to the guidance above, the following considerations may also apply when considering which of the available sanction(s) may be the most appropriate to the circumstances of the case.

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Sanction	Considerations
Written undertaking	There may be provision for a written undertaking to be accepted from the practitioner as an alternative to a statutory sanction. The decision-makers must be satisfied that an undertaking is sufficient to protect the public. Evidence to support the undertaking may be required, e.g. evidence of remedial action.
Censure, admonition	A censure or admonition marks the disapproval of the decision-makers, but does not affect the practicing status of the practitioner. The admonition may be made verbally, or as a written reprimand.
Compensation (limited by statute/rules)	Compensation may be appropriate where the complainer has suffered distress, inconvenience and/or actual loss (and can vouch those losses) as a direct result of the conduct. The practitioner may or may not have accepted the amount of compensation; this should not prevent a direction for compensation to be made. Similarly, it should not be necessary for a complainer to actively claim compensation. If the decision-makers are satisfied that compensation should be paid, then such a direction may be made. It is not necessary, but it might be helpful if a tariff sets out the amounts of compensation which might be awarded, depending on the seriousness of the conduct. It is usual to see bandings in the tariff, such as 'limited', 'modest', 'significant' and 'serious'.
Fee abatement & refunds (incl. outlays)	Fee abatement/refund may be appropriate where it is found that fees have been unreasonably charged for work which was not carried out or where the work carried out was deficient. There might also be a fee refund if excessive fees have been charged.
Fine (limited by statute/ rules)	Where there are limited funds, priority should be given to any award of compensation rather than the imposition of a fine.
Training orders	Training may be necessary to be ordered to improve the professional competence of an individual, ensure that the practitioner is trained to deal with a particular area of practice, prevent further non-compliance with rules or regulations. Such Orders should be approved and compliance monitored by the professional organisation.
Supervision	If supervision is to be ordered, is there someone suitable to supervise; how is the supervision to be monitored and by whom?
Suspension	Suspension has a deterrent effect and can be used to send out a signal to the individual, the profession and the public about what is regarded as behaviour unbefitting of a competent legal practitioner. It has a punitive effect, removing the practitioner's right to practice during the period of suspension.

	Suspension may be appropriate for conduct that is serious but falls short of requiring expulsion or exclusion, e.g. where there has been an acknowledgement of fault and steps taken to rectify the position and where the conduct is unlikely to be repeated. The length of suspension should be carefully reasoned and take into account the risk to public safety and seriousness of the matter. In some circumstances (and if the legislation/rules allow), a period of interim suspension might be necessary.
Conditions, restrictions & revocations	Conditions, restrictions or revocations are likely to be appropriate and workable where the practitioner has performance/training issues. The following factors might be relevant to the suitability of this sanction: (i) does the practitioner have insight into the concerns and the potential to react positively to training/supervision? (ii) does the practitioner have any deep-seated or attitudinal issues? (iii) is the practitioner a danger to the public if a restriction is not made? (iv) are there identifiable areas of practice to be developed? (v) is the practitioner willing to take part and be honest and open with colleagues / supervisors / professional body? (vi) does the practitioner have insight into any health issues? Conditions should be appropriate, proportionate, workable and measurable. Objectives should be set so the practitioner knows what is expected of them. This will assist decision-makers at any future review hearings to understand (i) the original concerns; and (ii) the exact proposals to resolve them. It should also assist in evaluating whether the concerns have been resolved.
Review hearings	Where there has been a restriction/conditions imposed, it is important that a practitioner is not able to resume unrestricted practice unless they are deemed safe to do so. In most cases, a review panel should consider whether the practitioner has shown that (i) they accept the full gravity of the conduct; (ii) there has been no repeat offence; (iii) they have kept up to date in their particular area(s) of practice; and (iv) there is no longer a risk to the public.
Expulsion, exclusion	Expulsion or exclusion (in full or for short periods of time) should only be appropriate if: (i) the conduct seriously falls short of what the profession expects; (ii) it is necessary to protect the public; (iii) the action is necessary to maintain confidence in the profession, and

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	(iv) no other sanction or combination of sanctions is sufficient given the nature and seriousness of the conduct. Decision-makers should also consider the impact that preclusion will have on the other members of the firm, as it is important that the sanctions which are applied in respect of the conduct of one practitioner should not have an adverse knock on effect to other members of the firm.

3.4.2. Costs

Costs should also be considered. It is not the purpose of a costs order to serve as an additional punishment, but to compensate for the costs of bringing the proceedings. Any order should never exceed the amount actually and reasonably incurred. Evidence of financial means to pay should be obtained before a decision is made.

3.5. Various European jurisdictions

3.5.1. The United Kingdom of Great Britain and Northern Ireland

3.5.1.1. England and Wales

High Court Enforcement Officers (HCEOs) represent the liberal judicial officers' profession in England and Wales. Their disciplinary liability can be assessed by the profession itself or the court, depending on the line of action chosen by the complainer. The profession is represented by the High Court Enforcement Officers Association Limited.

In the event that the complainer choses the Association, one can make a complaint if one is affected by the HCEO's behaviour, or if one has experienced or witnessed the HCEO's behaviour. The Association will consider complaints from: judgment creditors; judgment debtors; other people affected by the HCEO's behaviour; and an HCEO about another HCEO.

The complainer should first make her/his complaint to the relevant HCEO. Most HCEOs are employed by a company providing enforcement services. Once the company's complaints

procedure had been exhausted, if the complainer is still not happy with the result and feels that (s)he has a good reason to take the matter further, (s)he may ask the Association to deal with the complaint.

After receiving the complaint in writing, the Complaints Officer will, within 28 days of receiving the complaint, assess whether the Association is able to deal with the complaint and whether or not it will investigate it further. If the Association is not able to deal with the complaint, the Complaints Officer will inform the complainer in writing.

The Association will automatically reject complaints regarding the following:

(i) disagreements about an amount claimed on the writ;
(ii) disagreements about the fees;
(iii) complaints about whether a writ is legal;
(iv) disputes about the law, rather than the behaviour of an HCEO;
(v) cases where legal action against the HCEO has already been made or started, or where the case would be more appropriately dealt with through legal action; and
(vi) cases falling within paragraph 4 of part 2 of the High Court Enforcement Officers Regulations 2004, or a matter that is within Article 10.12 of the Association's Articles of Association. If this is the case, the matter will be referred to the Lord Chancellor.

If not satisfied with the decision of the Complaints Officer, the complainer can address the Complaints Board. The Complaints Board will be made up of a legally qualified independent advisor and two members of our Board of Directors (but not the Complaints Officer or anyone else who has already been involved in looking at the complaint). If there is no member of the Board of Directors available, a full member of the Association, unconnected with the complaint, may be co-opted to the Complaints Board.

The Complaints Board will investigate the complaint in the manner it thinks fit. This will normally be in private and be restricted to a consideration of the evidence contained in the documents presented, although, exceptionally, it may decide to hold a hearing with parties present, if the members of the Complaints Board consider it desirable.

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The Complaints Board will prepare a report, consider the complaint and make a decision. They may decide to:

(i) dismiss the complaint;
(ii) uphold the complaint; or
(iii) award costs against the HCEO for additional hearings of the Complaints Board caused by their failure to comply with the Board's Directions.

If the complaint is upheld, the Complaints Board may decide to:

(i) give instructions about the HCEO's and/or their agent's behaviour, which they must follow in the future;
(ii) direct the HCEO to pay up to £15,000 in penalties &/or costs;
(iii) recommend to the Association to take away the membership of the HCEO and take the case (and report from the Complaints Board) to the Lord Chancellor; and/or
(iv) award compensation to the complainer if the Board thinks that (s)he has been unfairly treated in any way by the HCEO.

If the Complainer is unhappy with the Complaints Board's decision (s)he and the HCEO have 21 days, from the date of the letter from the Chairman (which includes the report about the Complaints Board's decision), to tell the Chairman in writing if either of them wants to appeal against the decision to the Appeals Board.

A legally qualified independent advisor, who was not involved in making the original decision, will decide whether or not to allow the appeal to go forward.

The Appeals Board will be made up of the President of the Association, a legally qualified independent advisor, and one member of the Board of Directors (but not the Complaints Officer or anyone else who has been involved in the complaint process so far).

The Appeals Board may:

(i) confirm the decision of the Complaints Board; or

(ii) change the decision of the Complaints Board. The decision of the Appeals Board is final.

This complaints procedure does not prevent the Complainer or the HCEO from taking the case to court, or to other regulatory organisations at any time. The Association will not investigate a complaint while it is being looked at by someone else.

A case fee is potentially chargeable for all cases accepted by the Association.

3.5.1.2. Scotland

The complaints procedure in Scotland is dealt with by the Society of Messengers-at-Arms and Sherriff Officers.

The Honorary Secretary is the official of the Society who deals with complaints. Either he or the Administrative Secretary would contact the officer about whom the complaint is about and explain the matters at issue. The complainer would receive a response, normally in writing, from the Administrative Secretary.

The following options are available to the Honorary Secretary:

(i) might decide that, having investigated matters as far as he can, he thinks that there are no justifiable grounds to complain about the officer. The Society would therefore take no further action; the Complainer, however, would still be entitled to send the complaint directly to either the relevant Sheriff Principal or the Lord President.

(ii) might ask the Executive Council of the Society to consider the complaint at an Executive Council meeting. In this way, a group decision could be taken on whether the complaint could be resolved by the Society.

(iii) might conclude that the complaint does raise serious disciplinary issues. If this were the case, he would, if the complainer has given her/his permission, forward the complaint to the relevant judge and report to him on the Society's own investigations.

The Society has no disciplinary powers over its members: those powers lie with the relevant Sheriff Principal or the Lord President. One is always entitled to send a complaint directly to those judges, if one prefers.

3.5.2. Balkan jurisdictions

3.5.2.1. Macedonia

In Macedonia the Disciplinary panel is an entity of the Chamber of Enforcement Agents of Macedonia, whose members are elected by the Chamber's General Assembly. The Disciplinary panel consists of five members, of which two come from judicial officers, two from the judiciary (judges) and one from the public prosecutor.

A disciplinary action may be initiated by the president of the Chamber, the president of the court to which region the judicial officer is nominated to, and by the Ministry of Justice. The grounds these bodies have for initiating a disciplinary action against a judicial officer are based on their inspections of the operations of the judicial officers.

The Disciplinary panel can issue one of the following sanctions:

(i) written warning;
(ii) public warning;
(iii) monetary fine from 500 to 5,000 EUR;
(iv) temporary suspension from 3 to 6 months; and
(v) disbarment.

Macedonian statute on enforcement clearly stipulates specific grounds for issuing any of the set disciplinary sanctions, precisely defining their range, especially with respect to monetary fines and the way they are calculated.

For example, warnings or monetary fines can be issued in situations when a judicial officer would not keep clear records of his activities, nominating a deputy when necessary, or even starts his work before the claimant has paid prepayment for his activities.

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3.5.2.2. Montenegro

Montenegrin statute on judicial officers stipulates a number of disciplinary breaches, grouping them as minor (5), major (15) or grave (6), having the total of 26 offences. Disciplinary sanctions are related to the level of an offence, so that for minor offences possible sanctions are warning and monetary fine (of one month’s salary of a first-instance court judge); for major offences monetary fine up to 24-month’s salary of a first-instance court judge); for grave disciplinary breaches the measure is disbarment.

There are two disciplinary panels – the first instance one and the second-instance one.

The first instance one has three members – one first-instance court judge, one public prosecutor and one judicial officer. This panel deals with minor and major disciplinary breaches.

The second instance disciplinary panel consist of three members: one from the High Council of the Judiciary, one from the High Council of Prosecution and one member of the Chamber. The second instance disciplinary panel deals with appeals on first instance panel’s decisions and is the first instance panel for grave disciplinary breaches.

Disciplinary panels can decide to temporarily suspend the activities of a judicial officer, if (s)he is being a suspect in a criminal procedure.

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4. Abuse of discretionary powers by state administration

Although discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law.

Perhaps the following definition by Tom Bingham covers most appropriately the essential elements of the rule of law: "All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".

This short definition, which applies to both public and private bodies, is expanded by 8 "ingredients" of the rule of law. These include:

(i) accessibility of the law (that it be intelligible, clear and predictable);
(ii) questions of legal right should be normally decided by law and not discretion;
(iii) equality before the law;
(iv) power must be exercised lawfully, fairly and reasonably;
(v) human rights must be protected;
(vi) means must be provided to resolve disputes without undue cost or delay;
(vii) trials must be fair, and
(viii) compliance by the state with its obligations in international law as well as in national law.

The need for certainty does not mean that discretionary power should not be conferred on a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must

indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.

Statutes conferring broad discretionary powers do not have neat corners, nor is the process of statutory construction self-executing. In general, administrative bodies may abuse their discretionary powers in two ways:

(i) acting *ultra vires*, i.e. using their powers for a purpose not being allowed by primary legislation; and

(ii) using the powers within their sphere of discretion, but doing so in a manner that can be considered as unreasonable, irrational or disproportionate. In a number of European jurisdictions such procedural anomalies of the administrative bodies are denoted as (a) illegal and (b) irrational.

An expectation of an applicant that a public body would act as a guarantee of the her/his basic human rights, the legal system in general and its core values must be regarded as a legitimate one. Nevertheless, in a number of situations, even when the behaviour of the public body was prima facie lawful, the presence of ambiguity, or the absence of an unequivocal and specific ruling of the decision-maker is regarded as a sufficient cause of action against such administrative adjudicature.

4.1. The doctrine of legitimate expectation

Since its inception, the doctrine of legitimate expectation has been viewed as an offshoot of justice. The duty to act fairly is a core tenet of administrative law and a predominant feature in the application of the rules of justice. With each individual's entitlement to justice and fairness, legitimate expectation reinforces the duty of public bodies to act fairly. It is this protection of fairness that made way for the courts' acknowledgement of legitimate expectations.

The term legitimate expectation was first used in the UK case of *Schmidt v Secretary of State for Home Affairs* (1968), but was not applied on the facts. Subsequently, in a latter case from 1983 (*O'Reilly v. Mackman*) the doctrine of legitimate expectation was recognized as part of judicial review in public law, allowing individuals to challenge the legality of

decisions on the grounds that the decision-maker "had acted outwith the powers conferred upon it". Although initially unclear, the nature and boundaries of the doctrine of legitimate expectation have been elucidated by subsequent case-law. Notwithstanding efforts of the courts, some ambiguity as to when legitimate expectations arise persisted. It can be said that aspiration of "good administration" is a clear justification for the protection of legitimate expectations. Legitimate expectations can be procedural and substantial.

A **procedural legitimate expectation** is created when a representation is made by a public authority that it will follow a certain procedure before deciding on the substantive merits of a particular case. Examples of procedural legitimate expectations include an expectation to be consulted and to a fair hearing. A substantive legitimate expectation is formed where a representation is made by an authority as to the final decision and outcome that the authority will make in a particular case.

The doctrine of legitimate expectation has been one of the more interesting developing areas of the law of judicial review in recent years. It signals a shift away from the more traditional grounds on which to challenge the decisions of public bodies, such as breaches of procedural rules and misdirection on the law.

At its most basic, a legitimate expectation is based on the assumption that, where a public body states that it will or will not do something, a person who has reasonably relied on that statement should be entitled to enforce it; if necessary, through the courts. For a legitimate expectation to arise, the public body's statement must be clear, unambiguous and without qualification. Interference with legitimate expectations may be justified on public policy grounds.

4.2. The Council of Europe

The Council of Europe is an intergovernmental organisation conducting specific activities on administrative law as such. These became visible to the outside world for the first time in the late 1970s when the Committee of Ministers adopted Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities. This was followed in 1980 by Recommendation No. R (80) 2 on the exercise of discretionary powers by administrative authorities.

At first sight, it is somewhat puzzling that it has taken the Council of Europe almost thirty years before it acted in a field which comes so manifestly within its task of guarantor of democracy, rule of law and human rights, all the more so as 'legal and administrative matters' are specifically mentioned as fields of activity in Article 1 b of the Statute. One explanation is that originally, administrative law and administrative procedures were not regarded as subject matters *per se*. One member State even declared on several occasions that in its domestic legal system there was no such thing. Gradually, as the Council of Europe developed its standard-setting activities, the impact of these activities in the administrative field became clearly visible. Examples are the numerous legal instruments relating to data protection, mutual assistance in administrative matters, aliens' law, trans frontier co-operation, social security, equivalence of degrees and diplomas, etc. However, the way in which each state would implement these questions in its domestic administrative law was largely left to its discretion. There is a standard formula in many legal instruments asking states to give effect to common European norms "in its law and practice."

Several factors have induced the Committee of Ministers to undertake in the 1970s a major intergovernmental activity relating to the protection of the individual vis-à-vis administrative authorities.

First of all, the Human Rights Convention gave only partial satisfaction to the solution of conflicts arising out of the exercise of public authority in administrative cases affecting individuals.

Secondly, the Convention is designed mainly to check abuses and possibly to help bringing about a friendly settlement of conflicts, but it does not contain detailed standards on good administration. There are many instances of action which the Council of Europe has undertaken outside the framework of the Convention proper in order to foster optimal conditions in specific fields of governmental activity and thus to promote respect for human rights and fundamental freedoms. Examples are the Council of Europe's Conventions, Declarations and Recommendations in the fields of asylum, conditions of detention, data protection, nomads, search for missing persons, mass media. Its action to reinforce the protection of the individual in relation to administrative authorities is yet another example.

A third factor which has stimulated this activity is the fact that more and more administrative acts of one state affect citizens and residents of other states and sometimes even the public administration of other states. An example is the construction of factories or power stations located near the border between two states, for instance when that border is a river. The administrative decisions enabling the construction must take the rights and interests of the population of the neighbouring country into account. The Council of Europe has concluded a number of Conventions on trans frontier co-operation and on mutual assistance in administrative matters which take this need for an *espace européen administratif* into account, and these instruments are based on the assumption that while administrative procedures and remedies at both sides of the border may be widely different in form, they should offer similar guarantees to individuals as far as the substance is concerned.

In this respect, a tendency has developed in the Council of Europe which is inspired by Articles 1 and 14 of the Human Rights Convention. Rights and freedoms of individuals laid down in this and other European instruments should be enjoyed by all, not by some. This means that there is a preference in those cases for universal rather than reciprocal undertakings and for European rather than bilateral instruments.

The contribution of the organs under the Human Rights Convention to the protection of citizens *vis-à-vis* the administration can be the subject of a separate paper. Suffice it to mention here the two milestones in the pioneering work of the Commission and the Court in discovering the common law of Europe in the administrative field, i.e. the *Ringeisen* and *König* cases. The doctrine of the two organs has focussed on Articles 6 (fair trial) and 13 (right to an effective remedy). Although the Convention mentions neither administrative proceedings nor administrative remedies, the Court decided in the *Ringeisen* judgment of 16 July 1971 that the fair trial safeguards of Article 6 are applicable to a procedure which under the law of the State complained against is an administrative procedure when that involves the determination of what is deemed under the Convention to be a "civil right" or "criminal charge".

It would be strange indeed if a convention protecting the individual against the state would not apply to one of the most typical state / citizen relationships, i.e. the administrative act. The Court developed the Ringeisen doctrine further in its *König* judgment of 1978 and the

Le Compte, Van Leuven and de Meyere judgment of 1981 and other judgments thereafter. It is interesting to note that in the three cases mentioned, the Court also awarded compensation of costs of damages under Article 50.

In summary one can state that the human rights organs have contributed in two distinct ways to clarifying due administrative process. They have made some parts of the administrative field subject to the safeguards laid down in the Convention. With regard to other matters they have excluded from these safeguards, they have nevertheless helped by defining them. Many decisions by the Commission on non-admissibility of applications made to it under Article 25 have listed such matters, such as: the widening of a street or admission to the public service, etc.

At the Ministerial Conference on Human Rights in Vienna in March 1985, it has been proposed that procedural guarantees with regard to individual measures and decisions taken in the exercise of public authority should be studied in depth. This might lead to certain procedural guarantees in administrative matters being included in a Protocol to the Convention. But it is clear that the Human Rights Convention can incorporate only such new rights as are widely accepted in the member States. It is therefore fortunate that already in the early seventies, specialists of the Council of Europe in the field of administrative law have begun to take stock of and codify certain principles of administrative justice common to all member States.

4.2.1. Resolution (77)31

In 1970, the Committee on Legal Co-operation in Europe (CCJ) included the protection of the individual in relation to acts of administrative authorities in a list of legal questions recommended for action at the European level. It did so on the basis of a report drawn up by four distinguished constitutional lawyers, Professor E. Loebenstein (Vienna), B. Christensen (Copenhagen), M. Fromont (Dijon) and H. Wade (Oxford). They pointed out that while various national and international instruments spelled out in detail the rules to protect persons accused of criminal offences or involved in civil disputes, no uniform body of rules existed for example where an authority refused someone a permit to run a taxi service. And yet the financial loss he would suffer as a result might be infinitely greater than,

say a fine for a minor traffic offence. In particular, Professor Wade suggested that the Council of Europe draw up a "European Charter of fair administrative process".

The Committee of Ministers reacted favourably to the CCJ's proposal for action in this field to the extent even of giving it a high priority.

In 1971, the CCJ set up a Sub-Committee to find out whether any principles common to all member States could be discovered with regard to the protection of the individual in relation to acts of administrative authorities. The Sub-Committee, chaired by Professor J.M. Grossen (Switzerland) first sent a questionnaire containing 77 questions to the then 17 member States, as well as Finland and Spain, which participated as observers. Extensive replies were received from all States except Iceland and Malta.

Having sifted through the wealth of information received the Grossen Committee presented an interim report to the CCJ in 1974 in the form of an analytical survey. It also based itself on the results of a study on the same topic, but in a world-wide context, carried out by the International Institute of Administrative Sciences (HAS). The main conclusion of the interim report, which was endorsed by the CCJ and the Committee of Ministers, was that: "Despite the differences between the legal and administrative systems of the member States, it was possible to discern a large measure of agreement on the fundamental aims of the rules relating to the administrative process, in particular the need to ensure fairness in the relations between the individual and the administration".

The CCJ instructed the Grossen Committee to concentrate on the administrative process, i.e. the process relating to the taking of an administrative decision, and not to concern itself with the second phase, i.e. remedies against decisions. The Committee had noted in its interim report that the situation in 1971 with regard to the administrative process showed Europe to be roughly divided into two parts.

In some member states, all administrative processes were governed by one general law. This was evidently of great importance for the legal security of the citizens. Whether they were applying for a fishing licence or objecting to the construction of a motorway behind their house, the same basic procedures and rules were applicable.

In other member states, the administrative process was different from case to case. One government replying to the questionnaire stated in fact that it was virtually impossible to answer the different questions asked by the questionnaire for it would require that government to undertake extensive research into the rules and practices governing the activities of its numerous administrative agencies.

The Committee could not help wondering how citizens were supposed to find their way through the administrative labyrinth if the Government admitted not to know it either.

It is true that in the countries belonging to the second category, certain general principles were recognised. But the Committee also noted that there were sometimes two conflicting general principles governing different administrative processes in the same country.

For example, in one respondent country applications made by citizens to a public authority were, depending on the subject matter, either considered rejected or granted if that authority did not reply within a given time-limit. Another difficulty which the Committee noted was the fact that in this second category of countries it was often unclear, in the absence of a general rule or principle, whether a specific procedure should be regarded the rule or the exception (for example, with regard to access to information).

On the whole, the Committee found, not surprisingly, that the overall position of the individual *vis-à-vis* the public administration was more satisfactorily regulated in countries having a general law on administrative procedure. This was not only a factor in favour of the individuals concerned, but also of the administration, which was thus spared the need of devising procedural rules for every particular administrative statute. A typical example to illustrate this point is the right to be heard in administrative proceedings.

The Committee found that this right is recognised in all states having a general administrative procedure law. The other states may be divided into those where the right is provided by law or required by case-law in so many cases that it can be said to be the rule, states where it is more sparingly given and those where it appears to be rather the exception.

It should be mentioned that the composition of the Committee greatly contributed to the success of its work. It comprised civil servants, members of conseils d'état or similar bodies,

ombudsmen, professors of administrative law and members of administrative tribunals, who brought together theoretical and practical expertise from the different parts of Europe. On many principles, the Committee had no difficulty in identifying a rule common to all member states, for example **the rule of proportionality** (*the decision taken by an authority should not be more onerous for the citizen than is required for the fulfilment of the particular public interest at issue*). On other principles, the Committee sometimes found that there was basic agreement even though the principle was differently worded in different legal systems (e.g. the German notion of *Vertrauensschutz*, i.e. predictability of the action of the public administration). Finally, it found that certain rules considered essential in some countries (e.g. indication of available remedies to the citizens concerned (*Rechtsmittelbelehrung*) or the right of a citizen to know the identity of the official dealing with his case) were not so considered in other countries.

The Committee elaborated a set of principles on administrative justice which it submitted in April 1977 to the CCJ (now the CDCJ, having acquired the status of "Comité Directeur"). The text was adopted on 28 September 1977 by the Committee of Ministers as Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities. It is applicable to individual measures or decisions taken in administrative procedures in the exercise of public authority and of such a nature as to affect the rights, liberties or interests of persons. This excludes acts of an administrative agency not taken in the exercise of public authority, for example as a party to a private law transaction. It should be stressed that the drafters have not yielded to the temptation of simply referring for the definition of administrative acts to the domestic law of States. Not only would that have handicapped the interpretation of the Resolution, but it was also found that the domestic law of some countries did not even offer a ready definition. The Resolution laid down five major principles, while noting that in their application the requirements of good and effective administration, interests of third parties and major public interests can be taken into account:

(i) right to be heard;
(ii) access to information;
(iii) assistance and representation;
(iv) statement of reasons;
(v) indication of remedies.

With regard to the right to be heard the Committee noted that in several countries difficulties have arisen in relation to administrative proceedings directly affecting a very large number of people, e.g. in the case of the construction of a nuclear power plant. This question had at the time (1985) been studied with a view to the drawing up of a separate Recommendation.

The question of access to information in administrative cases forms part of a much wider issue of access to public files in general and is also closely related to the right to information as laid down in Article 10 of the Human Rights Convention. Following a *Colloquy* organised by the Council of Europe in Graz, a Recommendation was adopted by the Committee of Ministers in 1981 (Recommendation No. R (81) 19 on access to information held by public authorities) and that the Committee of Ministers re-confirmed the principle of the pursuit of an open information policy in the public sector, including access to information in their Declaration of 29 April 1982 on the freedom of expression and information, the importance of making progress in. the implementation of this principle was, moreover, stressed again at the above-mentioned Ministerial Conference on Human Rights. Further, the principle of access of the individual to information about himself stored in computerised files has been reaffirmed in the Council of Europe's Resolution (74) 23 on data protection in the public sector as well as the Data Protection Convention of 28 January 1981. The main problem with which the drafters of Resolution (77) 31 were concerned, in connection with both principle (ii) and principle (iv) (statement of reasons) was: ‘How much information and with how much effort on the part of the public administration?’.

The wording chosen shows that both legal and factual information is meant ("elements of information"). The term "appropriate means" leave the administration a certain flexibility: it may show the whole case file to the citizen or supply him with relevant extracts, but in any case the means should be appropriate. It would not be appropriate, for instance, to overwhelm the citizen with such an amount of information that he feels lost as well (the "truckload" strategy as one expert called it). If the citizen loses and asks for the reason why, the administration might send him another truckload of documents.

With regard to the principle of the citizen's right to be assisted or represented in the administrative procedure, the Committee noted that this should not prevent the person concerned from appearing and defending his case himself.

The Committee devoted a great deal of discussion to the last principle (indication of remedies), not so much because of the principle itself as its practical implementation, the main difficulty being that in many instances more than one normal remedy is open to the aggrieved individual. This provision is also closely connected with Article 26 of the Human Rights Convention (exhaustion of domestic remedies). In the opinion of the Committee, an administrative authority should not suffice by simply advising the citizen to go and see his lawyer, nor should it lead him astray by referring to unusual remedies or to recourse to bodies of the ombudsman type who cannot alter the decision.

4.2.2. Recommendation No. R (80)2

Resolution (77)31 laid the basis for further co-operation between the member states in the field of administrative justice. When it presented the draft text to the CDCJ and the Committee of Ministers, the Committee of Experts of administrative law called attention to a number of other questions which required a common European approach. Among these was the question of the exercise of discretionary powers by administrative authorities. These powers allow an authority to choose from among several solutions which the law permits, the one which appears most fitting (e.g. selecting one from a number of equally qualified applicants for an appointment).

Originally, some member states had reservations. Since discretionary power means leaving the administration a certain latitude, how could one legally circumscribe the application of that criterion?

To this, the Committee replied that "discretion" should never be allowed to deteriorate into "arbitrariness" or "abuse of power" and that the administration should never lose sight of the purpose for which it received the power.

The Committee began work on this question in December 1978 and already by May 1979 had adopted a draft Recommendation; this was approved by the CDCJ and adopted by the Committee of Ministers on 11 March 1980, as Recommendation No. R (80)2 on the exercise of discretionary powers by administrative authorities.

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It is interesting to note that the Committee was inspired, *inter alia*, by an Australian act on the same subject. Australia, being an immigration country with a common law tradition, had a particular need for a law on the relationship between citizens and authorities, drawn up in the clearest possible language.

Contrary to Resolution (77)31, the new Recommendation deals both with administrative decision-making and administrative review.

With regard to the decisions themselves, the Recommendation lists six criteria which the authority taking them should observe:

(i) the purpose for which the power was granted;
(ii) objectivity and impartiality;
(iii) equality before the law and non-discrimination;
(iv) proportionality;
(v) reasonable time; and
(vi) consistency (predictability).

With regard to the procedure, the Recommendation refers back to the rules contained in Resolution (77)31 but adds to these:

(i) publicity of administrative guidelines; and
(ii) statement of reasons in case of deviations from the guidelines.

With regard to review the Recommendation contains three principles

(i) the legality of discretionary decisions should be subject to review by a judicial or other independent body;
(ii) failure to take a decision within a reasonable time, in cases where no time-limit has been fixed by law, should be subject to review; and
(iii) the control organs must have sufficient powers to obtain the necessary information.

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4.3. Concluding remarks

This activity of the Council of Europe, which is supplementary to the Human Rights Convention, fills a specific need in the field of administrative law. The range of responsibilities and regulatory activities of the modem state is enormous and the speed with which new urgent problems arise is such that the law-maker has considerable difficulty keeping up with it. Desire to avoid a legal vacuum and to regulate new questions in detail, may result in a lack of attention to general principles of justice and fairness. Administrative authorities, for their part, may even be confronted with total silence on the part of the law.

In all these situations it is very useful to have available a concise, sensible and general code, such as is contained in Resolution (77) 31 and Recommendation (80) 2.

This activity of the Council of Europe may also help certain countries to overcome internal obstacles. They can now point to the common agreement reached in the Council of Europe with regard to principles of administrative justice and fairness. A clear example are the laws which several member states have introduced or adopted, since 1977, on access to information and on the general administrative process. The working methods of the Council of Europe enable States, in particular, to learn from each other. Participation of member states in these activities also enable each State to see its own peculiar system, product of a long historical evolution, against a common European background.

5. Conclusion

The scope of disciplinary liability of the members of the judiciary, especially its self-employed professionals is necessary for safeguarding all fundamental principles of a society regulated by the rule of law.

A number of legal scholars suggest that *real law* rests not in regulations, regardles of their source, but in the *practice of law* – in its implementation in our everyday lives. This implementation of law requires professionals – individuals empowered with state prerogatives – that are in a position to impose general legal norms into a unique, individual case.

Actions of these individuals have to be closely scrutinised by relevant state and professional bodies and every registered inconsistence has to be deal with. But, not all inconsistencies can be seen as breach of discipline or professional misconduct.

Further, in situations when a breach of discipline has been found, professionals should be ***primarily*** advised, improved, corrected, and just after that, and ***only if needed*** sanctioned.

The appropriate level of sanctions cannot remain in total with the discretionary powers of the decision maker, but it has to be limited to a number of regulated choices. Prerogatives to waive the pre-set decision frames can be allowed only exceptionally, and exclusively to the benefit of the defendant, not in order to issue a sanction harsher than regulatorily predefined.

In case of the professional's dissatisfaction with the decision of an administrative or professional body within a disciplinary action, the defendant has to be allowed a full jurisdiction judicial review, with a clear prohibition of *reformatio in peius*.

Any abuse of discretionary power bya member of the administrative body deling with professional disciplinary actions has to be part of a Penal Code, leading to clear and efficient

criminal consequences for the offender. Also, such conduct has to lead to consequences much harsher than those resulting from the abuse on the injured party (defendant in the disciplinary action), never limiting the offender's civil liability in damages.

The corner stone of a fair disciplinary actions is an independent Disciplinary tribunal, consisting of panel members capable of leading a meticulous procedure, based on a *presumption of innocence* principle. Disciplinary action partakers always have to be alert not to 'cross the line' in order of staying within the particularities of a disciplinary action as an instrument of a professional scrutiny of a fellow colleague.

Jurisdictions in which disciplinary liability of self-employed judicial professions rests on the findings of fellow members within the same *guild*, show that that profession is mature enough and that it is trusted by the society in which it is exercised. Unfortunately, such trust is (with empirical precision) completely absent in jurisdictions where state administration is not immune to corruption, and disciplinary actions are in a number of cases just another instrument for a hysterical control.