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Support to the Judiciary in Serbia in the Implementation of the European Convention on Human Rights

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OPINION OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF EUROPE ON THE LAW OF JUDICIAL ACADEMY OF THE REPUBLIC OF SERBIA AND THE DRAFT RULEBOOK OF THE STATE PROSECUTORIAL COUNCIL REGARDING THE ELECTION OF CANDIDATES FOR THE PROSECUTORIAL FUNCTION

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Executive summary

This opinion addresses the compliance of the Law on Judicial Academy and the draft Rulebook on State Prosecutorial Council with European standards. It begins by reviewing the eligibility requirements for initial judicial and prosecutorial appointments prior to the rulings of the Constitutional Court which found the priority in first-time judicial and prosecutorial appointments given to candidates for election who had undergone the Judicial Academy's initial training scheme to be unconstitutional. It then examines the various reasons given for those rulings, none of which concerned the actual merits of the training programme. The opinion then identifies the European and international standards governing eligibility for judicial and prosecutorial appointments and, in particular, the extent to which there is any requirement for training before appointment. This is followed by an examination, in the light of these standards, of the relevant European national practice with respect to judicial and prosecutorial appointments. Thereafter, in a review of the Draft Rulebook, many of its provisions are found to be appropriate but not only are some important points of detail considered to need clarification and revision but also problems are seen in the relative weighting of various elements and the equivalence between the different means of assessment. Suggestions for remedying these issues are made before turning to consider ways in which the arrangements for initial judicial appointments could be brought into line with the Constitutional Court rulings, while also giving effect to a recommendation of the European Union with respect to such appointments. These are dependent upon first establishing the relative extent to which the Judicial Academy's initial training programme and the experience of judicial assistants respectively contribute to fulfilling the criteria for election for the first time as a judge. The opinion recommends that the provision of any additional training required for judicial assistants should be the responsibility of the Judicial Academy and that steps should also be taken to ensure that its role in assessing the satisfactory completion of this training is not open to any constitutional objection. It also suggests that consideration should be given to the desirability of maintaining for the long-term a judicial assistant route to becoming a candidate for election as a judge.

A. Introduction

1. This opinion is concerned with the Law on Judicial Academy of the Republic of Serbia ('the Law') and the draft Rulebook of the State Prosecutorial Council regarding the election of candidates for the prosecutorial function ('the Draft Rulebook'). In particular, it is directed to the former insofar as it can entail a compulsory and/or single point of entry to the judicial profession - including the practical implications flowing from such a point of entry - and with the latter in connection with the arrangements being proposed for the election of candidates for prosecutorial functions. This opinion has been requested by the Ministry of Justice of the Republic of Serbia[1].

2. The opinion reviews the compliance of these aspects of the Law and the Draft Rulebook with European standards - and, in particular, the European Convention on Human Rights ('the European Convention'), the case law of the European Court of Human Rights ('the European Court'), the recommendations of the Committee of Ministers and of the Consultative Council of European Judges ('CCJE') and the opinions of the European Commission for Democracy through Law ('the Venice Commission') - as well as national practice relating to the implementation of these standards.

3. This review also takes into account the need for the Law and the Draft Rulebook to be in compliance with the two rulings of the Constitutional Court that found unconstitutional for various reasons the scheme of giving preference to those candidates for judicial and prosecutorial appointments who had undergone the initial training scheme provided by the Judicial Academy ('the Constitutional Court rulings')[2]. In addition, it takes into account the view of the European Commission that the Judicial Academy's legislative and institutional framework needs to be adapted to allow it to become the compulsory point of entry to the judicial profession while ensuring compliance with the rulings[3].

4. The opinion first gives an overview of the existing legal requirements to be eligible for initial judicial and prosecutorial appointments in the Republic of Serbia prior to the Constitutional Court rulings and then analyses the scope and effect of those rulings. Thereafter, it sets out European standards governing eligibility for initial judicial and prosecutorial appointment, especially as regards education and training, and the manner in which this should be given effect, as well as providing an overview

[1] The Ministry requested "a detailed standpoint of the Council of Europe with regard to the practical implication of the compulsory point of entry and/or single entry point, commonly used across relevant documents" and "a detailed standpoint of the Council of Europe with regard to the Draft Rulebook of the State Prosecutorial Council".
[2] Decisions of the Constitutional IUz-497/2011, 6 February 2014, published in Official Gazette 32/2014 and IUz-427/2013, 12 June 2014, published in Official Gazette 111/2014..
[3] *Serbia 2014 Progress Report* (COM(2014) 700 final), p. 41.

of relevant national practice both as to the general approach followed and to any exceptional arrangements that exist. Recommendations and suggestions, in the light of these standards and practice, are then made with first respect to the finalisation of the Draft Rulebook and then to the system of initial judicial appointments so as to fulfil the Constitutional Court rulings and the finding of the European Union. They are made in this order as the formulation of the Draft Rulebook helps highlight issues relevant to the revision of the system of initial judicial appointments. There is finally an overall conclusion regarding the two measures under review.

5. The opinion has been based on translations into English of the Law and the Draft Rulebook and have been prepared under the auspices of the Council of Europe project "Support to the judiciary in Serbia in the implementation of the European Convention on Human Rights", funded by the voluntary contribution of the Kingdom of Norway. The contribution made by the CCJE to the preparation of the opinion relates to the matters covered in paragraphs 1-12, 19-80, 98-121, 249-284 and 288-292.

B. The eligibility requirements for initial judicial and prosecutorial appointments prior to the Constitutional Court rulings

6. This section considers the general eligibility requirements first for judicial and then prosecutorial appointments and then the specific requirement to undergo the initial training programme that has been found to be unconstitutional.

1. Judges

7. The appointment of judges in the Republic of Serbia - other than those of the Constitutional Court[4] - is regulated by Articles 99, 105 and 154 of the Constitution and various laws, namely, the Law on High Judicial Council, the Law on Court Organisation and the Law on Judges. However, only the latter two laws specify the actual requirements to be eligible for appointment as a judge or judicial assistant[5], with certain of these being particularly concerned with appointment as a judge for the first time[6].

8. The basic set of requirements for appointment as a judge entails being 'a citizen of the Republic of Serbia who meets the general requirements for employment in state bodies, who is a law school graduate, who has passed the bar exam and who is deserving of judgeship may be elected a judge'[7]. These requirements are then elaborated in some further ones.

9. The first of these relates to length of experience in the legal profession and this will vary according to the actual level of appointment involved[8].

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[4] This is regulated by Article 172 of the Constitution (which requires that a justice of the Constitutional Court shall be elected and appointed from among the prominent lawyers who are at least 40 years' old and have 15 years' experience in practicing law) but such appointments are not covered by the opinion.

[5] "A judicial assistant assists a judge, prepares draft court decisions, studies legal issues, case law and legal literature, prepares draft legal opinions, prepares adopted legal views for publication, and autonomously or under the supervision and guidance of a judge carries out tasks set forth by law and the Court Rules of Procedure"; Article 58 of the Law on Court Organisation. The most senior of them - court advisors - perform ".professional tasks relevant to a court department or the whole court"; Article 60.

[6] This opinion is concerned only with the requirements themselves and not the process to be followed in making appointments. However, Article 99 and 154 of the Constitution respectively provides that "Within its election rights, the National Assembly shall ... 3. appoint the President of the Supreme Court of Cassation, presidents of courts, (...) judges (...), in accordance with the Constitution" and "The High Judicial Council shall appoint and relieve of judges, in accordance with the Constitution and the Law, propose to the National Assembly the election of judges in the first election to the post of judge, propose to the National Assembly the election of the President of the Supreme Court of Cassation as well as presidents of courts, in accordance with the Constitution and the Law, (…)., and perform other duties specified by the Law". The nomination and election process is further regulated by both the Law on High Judicial Council and the Law on Judges. Election to a permanent position after an initial term of three years is, however, by the High Judicial Council; Article 52 of the Law on Judges. The opinion also does not deal with the requirements for appointment of lay judges, which is governed by Chapter 6 of the Law on Judges.

[7] Article 43 of the Law on Judges.

[8] Article 44 of the Law on Judges; namely, two years for a judge of a misdemeanour court, three years for a judge of a basic court, six years for a judge of a higher court, a commercial court, and the Higher

10. Secondly, nominees must satisfy requirements relating to qualification, competence and worthiness which are to be set by the High Judicial Council[9]. These requirements are to relate, respectively, to the level of theoretical and practical knowledge necessary for performing the judicial function, skills enabling the efficient use of specific legal knowledge in dealing with cases and the ethical characteristics that a judge should possess and conduct him or herself with[10]. Provision is also made for gathering information and opinions about the three requirements from bodies and organisations where the candidate worked[11].

11. Thirdly, those elected must take an oath by which they swear to:

> perform my duties in compliance with the Constitution and the law, according to the best of my knowledge and ability and in the service of only truth and justice[12].

12. Fourthly, there are some additional requirements in the Law on Judges for those who will become judges for the first time, namely, consideration of the type of jobs performed after passing the bar exam; obtaining the performance evaluation of candidates who are judge's assistants[13]; and an interview with the High Judicial Council (although this is at the latter's discretion)[14].

2. Prosecutors

13. The appointment of public prosecutors is regulated by Articles 99 and 105 of the Constitution and by various laws, namely, the Law on State Prosecutorial Council, the Law on Public Prosecution and the Law on Judicial Academy. However, only the latter two laws specify the actual requirements to be eligible for appointment as a public prosecutor, with the last being particularly concerned with appointment as a public prosecutor for the first time[15].

Misdemeanour Court, ten years for a judge of the Appellate Court, the Commercial Appellate Court and the Administrative Court and twelve years for a judge of the Supreme Court of Cassation.

[9] Article 45 of the Law on Judges.

[10] The ethical characteristics are the only ones to be further elaborated, namely, to 'include honesty, thoroughness, diligence, fairness, dignity, perseverance, and esteem, and conduct in compliance with these characteristics involves upholding of dignity of a judge on and off duty; the awareness of social responsibility; preserving of independence and impartiality; reliability and dignity on duty and off, as well as taking the responsibility for the internal organisation and a positive public image of the judiciary'; Part 5 of Article 44 of the Law on Judges.

[11] Article 49. In the case of a candidate coming from a court, it is mandatory to obtain the opinion of "the session of all judges of that court, as well as the opinion of all judges of the immediately higher instance court". Candidates have the right to view the information and opinions received before any election takes place.

[12] Article 54 of the Law on Judges.

[13] This is to be performed by the relevant court president; Article 62 of the Law on Court Organisation.

[14] Article 50.

[15] Articles 99 and 165 of the Constitution respectively provides that "Within its election rights, the National Assembly shall ... 3. appoint the (...) Public Prosecutor, public prosecutors (...) and deputy public prosecutors (...), in accordance with the Constitution" and "The State Prosecutorial shall propose to the National Assembly the candidates for the first election of a Deputy Public Prosecutor, elect Deputy Public Prosecutors to

14. The basic set of requirements for appointment as a public prosecutor or deputy public prosecutor entails being 'a citizen of the Republic of Serbia who fulfils the general requirements for employment in state bodies, who is a law school graduate, who has passed the bar exam and who is worthy of the office of public prosecutor' may be so elected[16]. These requirements are then elaborated in some further ones.

15. The first of these relates to length of experience in the legal profession and this will vary according to the actual level of appointment involved[17].

16. Secondly, nominees must satisfy requirements relating to professional qualifications specific knowledge and worthiness which are to be set by the State Prosecutorial Council[18]. However, in contrast to the position under the Law on Judges, there is no elaboration of what any of these requirements entail.

17. Thirdly, potential nominees may be interviewed by the State Prosecutorial Council[19].

18. Fourthly, those elected must take an oath by which they swear to:

> perform the public prosecutorial office with dedication, conscientiously and impartially, and shall protect constitutionality and legality, human rights and civil liberties[20].

3. Initial training

19. However, until the Constitutional Court rulings, Part 8 of Article 40 of the Law on Judicial Academy, Part 4 of Article 50 of the Law on Judges and Part 2 of Article 75 of the Law on Public Prosecution[21] meant that in making judicial and prosecutorial appointments account had also to be taken of the requirement that:

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permanently perform that function, elect Deputy Public Prosecutors holding permanent posts as Deputy Public Prosecutors in other Public Prosecutor's Office". Election to a permanent position after an initial term of three years is, however, by the State Prosecutorial Council; Article 75 of the Law on Public Prosecution.

[16] Article 76 of the Law on Public Prosecution.

[17] Article 77 of the Law on Public Prosecution; namely, four years for a basic public prosecutor, and three years for a deputy basic public prosecutor, seven years for a higher public prosecutor, and six years for a deputy higher public prosecutor, ten years for an appellate public prosecutor and a public prosecutor with special jurisdiction, and eight years for a deputy appellate public prosecutors and deputy public prosecutor with special jurisdiction and twelve years for the Republican Public Prosecutor and eleven years for Deputy Republican Public Prosecutor.

[18] Article 82 of the Law on Public Prosecution.

[19] Article 81 of the Law on Public Prosecution. In addition, Article 82 provides that: "In electing and nominating candidates for election as public prosecutors and deputy public prosecutors, care shall be taken of the national composition of the population, adequate representation of members of national minorities, as well as knowledge of professional legal terminology in national minority languages in official use in courts".

[20] Article 84 of the Law on Public Prosecution.

[21] The requirement was introduced into the latter two laws by the Law on Amendments and Supplements to the Law on Judges and the Law on Amendments and Supplements of the Law on Public Prosecution (*Official Gazette of the Republic of Serbia*, No. 101/13) but was already in the Law on Judicial Academy when it was adopted in 2009. The requirement was introduced after taking into account the CCJE's Opinion No. 4 on

> In proposing the candidates for the election to the post of misdemeanour or basic court judge or a deputy basic public prosecutor, the High Judicial Council or the State Prosecutorial Council shall have the obligation to propose the candidate that has completed the initial training at the Academy, according to the success he/she has achieved at the initial training.

20. This did not seem to be an absolute requirement since Part 9 of Article 40 of the Law on Judicial Academy also provides that:

> If there are no candidates who have completed the initial training among the candidates for the job, the High Judicial Council or the State Prosecutorial Council may propose the candidate that satisfies the general conditions of election.

21. Nonetheless, the effect of Parts 8 and 9 of Article 40 was to give priority to those who completed the initial training for the purpose of nomination as a judge in misdemeanour and basic courts or as a deputy basic public prosecutor.

22. At the same time, it should be noted that the requirement in Part 8 of Article 40 of the Law on Judicial Academy for candidates for judicial appointment to have undergone the initial training only applies to appointment as a judge at misdemeanour or basic courts. As a result, it is theoretically possible for someone to be appointed as a judge in a court at a level higher than those courts without having completed the initial training. However, in the system of a 'career judiciary' as exists in Serbia, it seems very unlikely that those appointed to courts at the higher level will not already be judges, whether appointed as such before the present requirement was introduced or pursuant to it. Although Part 8 of Article 40 also only applies to the appointment of deputy basic public prosecutors, public prosecutors must be appointed from the ranks of deputy public prosecutors[22].

23. The introduction of the initial training requirement nonetheless displaced the former arrangement of a career path from judicial assistant to judge, albeit not one that all assistants pursued Of course, that arrangement had meant that there was no requirement of formal training as a prerequisite for judicial assistants becoming judges, although the practical experience that many of them would have gained in the former role - the tasks that they perform vary from the more menial to the drafting of judgments but do not always entail work in the court room itself - would have mitigated this to some extent.

24. The initial training was envisaged as being:

> an organised process of gaining practical and theoretical skills and knowledge and understanding of the role and basic principles of actions of judges (...) with the aim of

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appropriate initial and in-service training for judges at national and European levels (27 November 2003); as to which see paras. 67-70 below.

[22] Article 55 of the Law on Public Prosecution.

> ensuring that judges at the misdemeanour and basic courts (...) perform their duties independently, professionally and efficiently[23].

25. The requirements for admission to this initial training were: successful completion of the bar exam; fulfilment of the general conditions for employment of state bodies; and passing the entrance examination[24].

26. The goal of the entrance examination was "to determine the level of professional knowledge necessary for undergoing the initial training and ability for performing the duties of judges (...)"[25]. Its subject matter "refers to the determination of the level of professional knowledge necessary for undergoing initial training, which includes the applicable material and procedural civil and criminal law and law on misdemeanours, as well common knowledge[26]. The programme for the initial training is to be regulated by the Judicial Academy's Programme Council[27] and the number of persons that can be admitted to it each year is to be determined by the High Judicial Council[28].

27. The initial training programme was supposed to encompass:

> the implementation of the material and procedural laws, standards of judicial ...practice, ethical standards for judges (...), international legal standards, internal organization of performance of courts and prosecution offices, scientific and professional papers in the field of domestic and international law, as well as skills of the judicial ... work.

It should also consist of:

> theory and practice in the field of constitutional, civil and criminal law and law on misdemeanours as well as the general and professional knowledge[29].

28. The initial training was to last for 2 years, during which those admitted become temporary employees of the Judicial Academy and receive 70% of the salary of a basic court judge[30]. The theoretical part is delivered by the Judicial Academy - although there are some court simulation exercises undertaken there as well - and the practical one entails working under judicial mentors in the courts, public prosecutors' offices and other state bodies, law firms and other organisations. The latter part constitutes 80% of the initial training.

29. Each segment of the initial training - other than time spent in non-judicial institutions - was to be graded and those getting the lowest grade (1 out of a possible 5) for any

[23] Article 25 of the Law on Judicial Academy; the omitted text relates to the appointment of deputy public prosecutors.
[24] Article 28 of the Law on Judicial Academy.
[25] Article 29 of the Law on Judicial Academy.
[26] Article 30 of the Law on Judicial Academy.
[27] Part 2 of Article 30 of the Law on Judicial Academy.
[28] Part 2 of Article 26 of the Law on Judicial Academy.
[29] Article 35 of the Law on Judicial Academy.
[30] The employment actually can last for up to 30 months but will end after successful completion of the initial training and election as a judge at a misdemeanour or basic court; Article 40 of the Law on Judicial Academy.

segment will not be able to continue to follow it. Furthermore, there was a requirement to take a final exam at the end of the initial training to test the practical knowledge and skills acquired in it for the performance of duty of a misdemeanour or basic court judge. Anyone receiving the lowest grade (1 out of a possible 5) will not be considered to have completed the initial training.

30. Although completion of the initial training was normally a prerequisite for appointment, it was not a guarantee of actual appointment since there must be a vacancy - which must be published[31] - and, while the High Judicial Council has the power of nomination (and thus has the power to determine whether or not all the relevant requirements have been fulfilled), it is the National Assembly that has the right to decide whether or not the person(s) concerned should be elected as a judge for the first time[32].

31. However, appointment of these judges to permanent office was a matter for the High Judicial Council, although it must so appoint judges who have, during their first three-year term of office, been assessed with a "performs the judicial duty with exceptional success" rating[33].

32. Any judge appointed for the first time without having completed the initial training - which does not seem to have occurred since the introduction of the programme - could be required by the High Judicial Council to undergo special training but there has been no elaboration as to what this entails. However, should such special training be required, a focus on the theoretical rather than the practical aspects of the initial training would probably be more appropriate since judicial assistants should already have gained plenty of the latter.

33. The requirements for appointment as a judicial assistant comprise having a law degree, meeting the general requirements for employment in the public service and, after three years' employment as a judicial trainee, passing the juridical examination "with distinction"[34].

[31] Article 47 of the Law on Judges.
[32] Article 51 of the Law on Judges. However, Parts 10 and 11 of the Law on Judicial Academy provides that: "The High Judicial Council ... Council may allow the person who has completed the initial training to be employed at the court ... for a definite period of up to three years at the most if he/she applied for the position of a judge ... and if he/she has not been elected. If a candidate who has completed the initial training does not become a judge at misdemeanour or basic courts ...within three years after receiving the certificate on the completion of initial training, including the years when the National Assembly elected judges at the misdemeanour or basic courts ..., this fact shall be taken into consideration when nominating for the election to these offices.
[33] Article 52.
[34] Articles 65 and 66 of the Law on Organisation of Courts.

C. The Constitutional Court rulings

34. The constitutionality of the requirement that the High Judicial Council and the State Prosecutorial Council should give priority to persons who have successfully completed the initial training programme of the Judicial Academy when respectively making nominations for election of basic or misdemeanour court judges and deputy prosecutors in basic public prosecutor's offices by the National Assembly was addressed by the Constitutional Court in two rulings, the first concerned with Parts 8, 9 and 11 of Article 40 of the Law on Judicial Academy[35] and the second with Part 4 of Article 50 of the Law on Judges[36].

35. In both rulings the Constitutional Court did not dispute that:

> the professional training of judicial staff, specifically not only of those persons who are being prepared to perform judicial and public prosecutorial functions, but also of the elected judges, public prosecutors and their deputies, contributes to the raising of the quality in performing of those functions and that, therefore, it should be adequately evaluated within the criteria prescribed by the law both for the first election to a judicial, or to a public prosecutorial function, and on the occasion of election to a court, or to a public prosecutor's office of a higher instance[37].

36. However, this undoubted benefit was not something that could stand in the way of finding unconstitutional the priority requirement.

37. In respect of the relevant provisions of the Law on Judicial Academy on several grounds.

38. Firstly, it found objectionable the inclusion of this requirement in what it regarded as an "organizational" regulation as opposed to the laws regulating in a systemic way the requirements for election to a judicial or a public prosecutorial function, i.e., the Law on Judges and the Law on Public Prosecution.

39. Secondly, it found that the completed initial training was not only decisive in the evaluation of professional qualifications and specific knowledge as general requirements for election but had become the essentially decisive requirement for accessibility of a judicial or prosecutorial function, thereby eliminating and preventing adequate evaluation of other prescribed requirements for performance of public functions. This was seen as giving those who had completed the initial training not only the absolute advantage on the occasion of the first election with respect to all other candidates who fulfil the requirements prescribed by the Law on Judges, or by the Law on Public Prosecution, but also the guarantee that he/she will be elected if

[35] Decision IUz-497/2011.
[36] Decision IUz-427/2013.
[37] In Part IV of the former Decision and Part III of the latter one

there are vacancies[38] and thus violating the principle of equality of citizens who are in the same legal situation - i.e., fulfilling the requirements for election prescribed by the Law on Judges or the Law on Public Prosecution - and the right to assume public functions under equal conditions[39].

40. Thirdly, the contested provisions were considered to have limited the powers of the High Judicial Council and of the State Prosecutorial Council as autonomous and independent government authorities independently to nominate candidates for election as judges and deputy public prosecutors and had disrupted the realization of the function of independent bodies established by the Constitution since they were bound by the grades determined in the initial training by the Judicial Academy, noting that the latter was formed "to engage in certain activities related to professional improvement of its "beneficiaries"".

41. Finally, the Constitutional Court took the view that the legal concepts in the contested provisions also called into question the application of the constitutional guarantee of equality to the members of national minorities in administering public affairs, whereby the ethnic structure of the population and appropriate representation of national minorities was to be taken into consideration and members of national minorities should be able to assume public functions under equal conditions[40].
42. In this decision, the Constitutional Court did advert to the fact that the priority requirement had also been introduced as amendments to the Law on Judges and the Law on Public Prosecution. However, it did not seem to regard the relevant provisions as significant, stating that they were:

> reference norms that indicate that, in a certain legal situation, it is necessary to apply and/or another regulation that regulates such a legal situation. The legal relevance of reference norms is, by the nature of things and as a rule, exhausted only in the domain of ensuring of easy reference to the way in which certain area is regulated when this is done in a number of related regulations, by actually providing an easily accessible piece of "information" to the competent authorities and subjects to whom the regulation is related that it is necessary to apply and/or another regulation to certain issues and legal situations. However, in the concrete legal situation, the *Law on Judicial Academy*, which is, first of all, judging by its legal content, the so-called organizational law (...), is and exists in the legal system as, tentatively, the primary law with respect to the laws on judges and public prosecutor's offices, when the prescription of requirements for election of persons who are for the first time elected as a judge, or a deputy public prosecutor in a certain type of a court and a public prosecutor's office is in question

43. In sum, perhaps the most important aspect of the decision is the perceived lack of equal treatment. Thus, the Constitutional Court observed that:

> all the persons, who have not completed the initial training at the *Judicial Academy*, are thereby, essentially eliminated from the circle of candidates for the first election as a judge of

[38] With the exception of another candidate who has applied for the same vacancy, has also completed the initial training and has demonstrated better results in it.
[39] Under Articles 21 and 53 of the Constitution.
[40] Under Article 77.

> a certain type of courts and deputy public prosecutors of a certain type of public prosecutor's offices. This particularly when bearing in mind that the trainees of the *Academy* in the course of the initial training primarily do the jobs of judicial and public prosecutor assistants, equally as judicial and public prosecutor assistants, who are not "beneficiaries" of such training.

44. This observation did not, however, attach any importance, let alone mention, the theoretical aspects of the initial training programme.

45. In its ruling on Part 4 of Article 50 of the Law on Judges, the Constitutional Court reaffirmed its view that the priority requirement operated as a limitation on the power of the High Judicial Council to independently nominate candidates for election as judges and that the completion of the initial training had become the decisive requirement which

> obliterates and precludes adequate evaluation of the remaining requirements for holding judicial offices, as stipulated by the Law on Judges.

46. It thus concluded that this again violated the constitutional guarantees regarding the equality of citizens who are in the same legal situation and the assumption of public functions under equal conditions, as well as the equality of members of national minorities in administering public affairs. Furthermore, it repeated its observation about the nature of the initial training being primarily to do the jobs of judicial and public prosecutor assistants.

47. The effect of both rulings has been to remove the priority requirement from the moment that they were adopted[41].

48. However, neither ruling necessarily precludes the existence of a scheme of initial training for judicial and prosecutorial appointments. They do permit the operation of the existing requirement to have qualifications and competence for nomination for election and essentially require that the practical experience that judicial assistants have is not automatically trumped by completion of the initial training programme. The Constitutional Court's concern about unequal treatment arose from its view that the initial training was essentially a duplication of the work of judicial assistants. This may be questionable in that trainees seem to be shadowing judges and working in other institutions as a preparation for judgeship rather than preparing judgments for judges.

49. However, even if there is some duplication, the rulings did not discuss the theoretical part of the initial training, which includes a significant component devoted to human rights. Focusing on this component might provide a means of addressing the concern for the equal treatment of judicial assistants and those who complete the initial training.

[41] Until the rulings there had been stays on execution of individual acts or actions being undertaken pursuant to the provisions found unconstitutional.

50. Thus, it could well be constitutional to have a requirement that this component - and any other not covered in work as a judicial assistant that is deemed appropriate - as a prerequisite for judicial appointment, whether this was fulfilled by undergoing the initial training or by taking the component while still acting as a judicial assistant. In this connection, it should be noted that Part 2 of Article 43 of the Law on Judges empowers the High Judicial Council to require judges "who are elected as judges (...) for the first time and who have not attended the initial training program" to undergo 'special training.

D. European and international standards governing eligibility for judicial and prosecutorial appointments

51. European and international standards governing the eligibility for appointment as a judge or prosecutor flow from the respective functions that appointees are expected to discharge.

1. Judges

52. Thus, judges are required by Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights to constitute an 'independent and impartial tribunal' which determines rights and obligations in a reasoned manner[42].

53. As the European Court has made clear, this has implications for the manner in which judges are appointed or removed[43] and the way in which they conduct themselves[44].

54. Another crucial element of these requirements is that they be individuals of integrity. This has been underlined in the United Nations Basic Principles on the Independence of the Judiciary[45], Recommendation No. (94) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges[46], the recognition by the Court of the subjective aspect of impartiality[47] and in many other documents[48].

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[42] This is also required by Article 47 of the European Union's Charter of Fundamental Rights and the Bangalore Principles of Judicial Conduct 2002 (the Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002).

[43] See, e.g., *Belilos v. Switzerland*, no. 10328/83, 29 April 1988, paras. 63-67 (as to appointments by the executive), *Holm v. Sweden*, no. 14191/88, 25 November 1993, paras. 30-33 (as to appointment by a local council) and *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013 (as to the procedures used for removal).

[44] See, e.g., *Wille v. Liechtenstein* [GC], no. 28396/95, 28 October 1999, paras. 64-70 (as to the exercise of the right to freedom of expression) and *Lavents v. Latvia*, no. 58442/00, 28 November 2002, paras. 117-121 (as to comments made on the conduct of the defence in a case being heard).

[45] " Persons selected for judicial office shall be individuals of integrity ..." (Principle 10); adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[46] "... the selection and career of judges should be based on merit, having regard to qualifications, integrity ...' (Principle I, para. 2.c); adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Minsters' Deputies.

[47] See, e.g., the statement in *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 at para. 118 that: "(...) Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and Grieves v. the United Kingdom [GC], no. 57067/00, § 69, 16 December 2003).

55. However, these requirements also entail that persons appointed as judges have the appropriate competence for the position that they will hold and this is undoubtedly of particular relevance to consideration as to the appropriateness of the need for a compulsory and/or single point of entry to the profession.

56. The need for competence - which is inextricably linked to the requirements of independence and impartiality - is explicitly stated in Article 14 of the International Covenant on Civil and Political Rights[49] but it has also been underlined in many standards specifically concerned with the appointment of judges.

57. Thus, the United Nations Basic Principles on the Independence of the Judiciary require that:

> Persons selected for judicial office shall be individuals of (...) ability with appropriate training or qualifications in law[50]

58. It is also an issue that the Committee of Ministers has addressed twice, recommending first that:

> Proper conditions should be provided to enable judges to work efficiently and, in particular by (...) providing appropriate training in the courts and, where possible, with other authorities and bodies, before appointment[51]

and secondly that:

> 44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based

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[48] See, e.g., Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges: "The authorities responsible in each member State for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria with the aim of ensuring that the selection and career of judges are based on merit having regard to qualification, integrity, ability and efficiency" (Conclusion 2) (23 November 2001), which was endorsed in the Venice Commission's Report, *Judicial Appointments* (CDL-AD(2007)028, Opinion No. 403/2006, 22 June 2007), para. 37. See also the Bordeaux Declaration "Judges And Prosecutors In A Democratic Society (Opinion No. 12 (2009) of the CCJE and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors ('CCPE') ('the Bordeaux Declaration'): " Judges and prosecutors must be individuals of high integrity and with appropriate professional and organisational skills. Due to the nature of their functions, which they have accepted knowingly, judges and prosecutors are constantly exposed to public criticism and must, in consequence, set themselves a duty of restraint without prejudice, in the framework of the law, to their right to communicate on their cases. As principal actors in the administration of justice, they should at all times maintain the honour and dignity of their profession and behave in all situations in a way worthy of their office" (para. 39) and Principle 3 of the Bangalore Principles of Judicial Conduct 2002 ("*Principle:* Integrity is essential to the proper discharge of the judicial office. *Application:* 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. 3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done").

[49] "1. 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 (...)" (emphasis added).

[50] Principle 10.

[51] Recommendation No. (94) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges, Principle III.

> on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.
> 56. Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience
> 57. An independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office.
> 65. Judges should regularly update and develop their proficiency[52].

59. The need for those appointed as judges to have the appropriate qualifications and ability has also been underlined by both the CCJE and the Venice Commission[53].

60. The CCJE has, in particular, noted that, while there is a large diversity of methods by which judges are appointed, there was "evident unanimity that appointments should be "merit-based""[54].

61. Furthermore, the CCJE has stated that:

> 2. The independence of the judiciary confers rights on judges of all levels and jurisdictions, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training which they have a duty, as well as a right, to undergo.
> 3. It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily.
> 4. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.
> 5. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively. Training is in short essential for the objective, impartial and competent performance of judicial functions, and to protect judges from inappropriate influences[55]

and that:

> 8. Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system[56].

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[52] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.
[53] See n. 27.
[54] Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, para. 32. It had previously pointed out that "the systems presently in place differ between countries with a career judiciary (most civil law countries) and those where judges are appointed from the ranks of experienced practitioners (e.g. common law countries, like Cyprus, Malta and the UK, and other countries like Denmark)" (para. 21).
[55] Opinion No. 4 on appropriate initial and in-service training for judges at national and European levels (27 November 2003).
[56] *Magna Carta of Judges (Fundamental Principles)*; adopted, during its 11th plenary meeting, 17-19 November 2010.

62. In addition, the CCJE has stated in the Bordeaux Declaration that:

> 10. The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organised on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality.

which was explained in the following way in the Explanatory Memorandum:

> 43. The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role. Adequate professional training plays a crucial role since it allows the improvement of their performance, and thereby enhances the quality of justice as a whole (Declaration, paragraph 10).
> 44. Training for judges and prosecutors involves not only the acquisition of the professional capabilities necessary for access to the profession but equally permanent training throughout their career. It addresses the most diverse aspects of their professional life, including the administrative management of courts and prosecution departments, and must also respond to the necessities of specialisation. In the interests of the proper administration of justice, the permanent training required to maintain a high level of professional qualification and to make it more complete is not only a right but also a duty for judges and public prosecutors (Declaration, paragraph 10)[57].

63. The need for appropriate competence has also been emphasised in the European Charter on the statute for judges:

> 2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.
> 2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties
> 2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties[58]

and by the European Association of Judges in the Judge's Charter in Europe:

> 4. The selection of Judges must be based exclusively on objective criteria designed to ensure professional competence[59].

[57] The Bordeaux Declaration was adopted jointly with the CCPE.
[58] Approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg on 8-10 July 1998.
[59] Finalised 4 November 1997. See also Principle 6 of the Bangalore Principles of Judicial Conduct 2002 ("*Principle:* Competence and diligence are prerequisites to the due performance of judicial office. *Application:*6.1 The judicial duties of a judge take precedence over all other activities. 6.2 A judge shall devote

64. The manner in which the necessary competence is to be acquired has been elaborated in certain of these instruments with, as can be seen from the texts above, the Committee of Ministers in its second Recommendation[60], the European Charter on the statute for judges and the CCJE all placing emphasis on the importance of appointees having received some initial training before taking up their posts[61].

65. In the Explanatory Memorandum to Recommendation CM/Rec(2010)12, it is made clear that initial training as a precondition to the exercise of judicial functions, comprising both theoretical and practical teaching, should be fully funded by the state. Furthermore, it was stated that this initial training should include European law, with particular reference to its practical application in day-to-day work, the European Convention and the case law of the European Court, as well as the practice of foreign languages as required. Moreover, it was explained that training on economic, social and cultural issues referred to in the recommendation is meant to take into consideration the general need for social awareness and understanding of different subjects reflecting the complexity of life in society. Moreover, it was stated that initial training should allow for study visits to European jurisdictions and other authorities and courts. In addition it was emphasised that the reference in the recommendation to the intensity and duration of the training in the light of previous experiences was not intended to suggest that there be:

> an individualised training system but rather to reflect the variety of systems, noting that in some member states, candidates may sometimes have a long professional experience as non-judges before being trained to become judges, and that in this precise case, their initial training will be different from the one provided to post-university candidates with no professional experience[62].

66. The Explanatory Memorandum to the European Charter on the statute for judges emphasised that:

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the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations. 6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges. 6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms. 6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness. 6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control. 6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties").

[60] Recommendation CM/Rec(2010)12.

[61] Although the United Nations Basic Principles on the Independence of the Judiciary refer to the need to those selected for judicial office being persons with 'appropriate training', there is no indication as to when this training should have occurred.

[62] Para. 58. This recommendation was developed having regard to Opinion No. 4 of the CCJE discussed in paras. 67-70 below.

> The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things[63]

This also clarified what were the requirements in it both as to experience and training in the following way:

> 2.2 In order to ensure the ability to carry out the duties involved in judicial office, the rules on selection and recruitment must set out requirements as to qualifications and previous experience. This applies, for instance, to systems in which recruitment is conditional upon a set number of years' legal or judicial experience.
> 2.3 The nature of judicial office, which requires the judge to intervene in complex situations that are often difficult in terms of respect for human dignity, is such that "abstract" verification of aptitude for such office is not enough.
> Candidates selected to discharge judicial duties must therefore be prepared for the task by means of appropriate training, which must be financed by the State.
> Certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training programmes and the functioning of the bodies implementing them. This is why the Charter provides that the authority referred to in paragraph 1.3 must ensure the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The said authority must have the resources so to ensure. Accordingly, the rules set out in the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programmes and their implementation by the training bodies.

67. The most elaborate indication as to the training required before someone takes up a position as a judge for the first time has, however, been provided by the CCJE.

68. It has observed, firstly, that:

> 6. There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary. Some countries offer lengthy formal training in specialised establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organised and compulsory.
> 7. Regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service[64].

69. Nonetheless, it has recommended that some initial training be a mandatory requirement:

> 23. While it is obvious that judges who are recruited at the start of their professional career need to be trained, the question arises whether this is necessary where judges are selected from among the best lawyers, who are experienced, as (for instance) in Common Law countries.

[63] Point 2.1.
[64] Opinion No. 4 on appropriate initial and in-service training for judges at national and European levels.

24. In the CCJE's opinion, both groups should receive initial training: the performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings.
25. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately: experienced lawyers need to be trained only in what is required for their new profession. In some small countries with a very small judiciary, local training opportunities may be more limited and informal, but such countries in particular may benefit from shared training opportunities with other countries[65].

70. Furthermore, it has clarified the nature of this initial training in the following way:

27. The initial training syllabus and the intensiveness of the training will differ greatly according to the chosen method of recruiting judges. Training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. In addition, the opening up of borders means that future judges need to be aware that they are European judges and be more aware of European issues.
28. In view of the diversity of the systems for training judges in Europe, the CCJE recommends:
i. that all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure;
ii. that training programmes more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves;
iii. that these theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR);
iv. that the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge;
v. that, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.
29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.
30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges' backgrounds, it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc).
VI. The European training of judges
43. Whatever the nature of their duties, no judge can ignore European law, be it the European Convention on Human Rights or other Council of Europe Conventions, or if appropriate, the Treaty of the European Union and the legislation deriving from it, because they are required to apply it directly to the cases that come before them.
44. In order to promote this essential facet of judges' duties, the CCJE considers that member states, after strengthening the study of European law in universities, should also promote its inclusion in the initial and in-service training programmes proposed for judges, with particular reference to its practical applications in day-to-day work.

[65] *Ibid.*

> 45. It also recommends reinforcing the European network for the exchange of information between persons and entities in charge of the training of judges (Lisbon Network), which promotes training on matters of common interest and comparative law, and that this training should cater for trainers as well as the judges themselves. The functioning of this Network can be effective only if every member state supports it, notably by establishing a body responsible for the training of judges, as set out in section II above, and by pan-European co-operation in this field.
> 46. Furthermore, the CCJE considers that the co-operation within other initiatives aiming at bringing together the judicial training institutions in Europe, in particular within the European Judicial Training Network, can effectively contribute to the greater coordination and harmonisation of the programmes and the methods of training of judges on the whole continent[66].

71. There was also some elaboration of the approach to training in the Explanatory Memorandum to the Bordeaux Declaration, in which the CCJE (and the CCPE) stated that:

> 47. In this context, much importance attaches to the direct contribution of judges and prosecutors towards training courses, since it enables them to provide opinions drawn from their respective professional experience. Courses should not only cover the law and protection of individual freedoms, but should also include modules on management practices and the study of judges' and the prosecutors' respective missions. At the same time, additional lawyers' and academic contributions are essential to avoid taking a narrow-minded approach. Finally, the quality and efficiency of training should be assessed on a regular basis and in an objective manner.

72. Furthermore, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, adopted by the OSCE Office for Democratic Institutions and Human Rights and the Max Planck Minerva Research Group on Judicial Independence also point to the need for some preparatory training, stating that:

> 19. Where schools for judges are part of the selection procedures, they have to be independent from the executive power. Training programmes should focus on what is needed in the

[66] *Ibid.* Subsequently, it has expanded on its recommendation regarding training in European and international law in Opinion No. 9 (2006) on the role of national judges in ensuring an effective application of international and European law, in which it stated that: "10. The CCJE considers that it is important that international and European legal issues be part of university curricula and also be considered in entry examinations to the judicial profession, where such examinations exist. 11. Appropriate initial and in-service training schemes on international subjects should be organised for judges, in both general and specialist areas of activity. Although differences exist among European countries with respect to the systems of initial and in-service training for judges, training in international and European law is equally important to all the judicial traditions in Europe. 12. In some countries special training initiatives in international and European law are organised specifically for judges, or for judges and prosecutors, by judicial training institutions (including judicial service commissions) or ministries of justice, as well as jointly by these agencies. In other countries, no special training in international and European law is provided; in these countries judges usually may take part in general training courses organised by the judiciary itself or by other bodies (universities, bar associations, foreign judicial training schools). 13. In this respect, the CCJE therefore notes the *acquis* of the Council of Europe concerning the training of judges on the application of international treaties, affirming the needs (a) to develop the study of international law, treaties, European and other international institutions within the framework of university courses; (b) where appropriate, to introduce tests on the application of international norms in examinations and entrance competitions for judges; (c) to develop the international dimension in initial and further training of judges; (d) to organise, within the framework of the Council of Europe, and in collaboration with European institutions and other international organisations, training seminars for judges and prosecutors aimed at promoting a better knowledge of international instruments" (10 November 2006).

> judicial service and complement university education. They should include aspects of ethics, communication skills, the ability to settle disputes, management skills and legal drafting skills. (...)
> 20. Special training as referred to in para. 19 should also be provided for representatives of other legal professions joining the judiciary[67].

73. This last point underscores the view in the Kiev Recommendations, also shared by the CCJE, that:

> 17. Access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession (that is, through mid-career entry into the judiciary). the degree to which experience gained in the relevant profession can qualify candidates for judicial posts must be carefully assessed.

74. European standards are, thus, clearly developing in the direction of a mandatory requirement of some initial training for all those who will be appointed as judges. However, there is also acceptance that the background of those who are so appointed can vary and that this ought to be taken into account in the training that is specifically required. In other words, there should not be an insistence on uniformity in the training to be undertaken. Nonetheless, although there the content initial training provided can vary according to the background and experience of the potential trainees, it does seem clear that the cumulative minimum effect of background, experience and initial training should be at least comparable for all those taking up a judicial appointment for the first time.

75. There are also developing standards with respect to the body that sets the standards for this training.

76. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities stipulates that:

> 57. An independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office.

77. Furthermore, the European Charter on the statute for judges specifies that:

> 1.3 In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary
> 2.3. (...) The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

[67] Adopted 23-25 June 2010; Anja Seibert- Fohr (ed.), *Judicial Independence in Transition*, (Max Planck Institute, Heidelberg 2012).

The Explanatory Memorandum then clarifies this as entailing that:

> The said authority must have the resources so to ensure. Accordingly, the rules set out in the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programmes and their implementation by the training bodies.

78. The tasks and nature of this authority have been elaborated by the CCJE which, after endorsing the statement in the European Charter on the statute for judges and the point made in that instrument that the training of judges should not be limited to technical legal training "but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations"[68], stipulated in its Opinion No. 4 on appropriate initial and in-service training for judges at national and European levels that:

> 14. This highlights the key importance attaching to the independence and composition of the authority responsible for training and its content. This is a corollary of the general principle of judicial independence.
> 15. Training is a matter of public interest, and the independence of the authority responsible for drawing up syllabuses and deciding what training should be provided must be preserved.
> 16. The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.
> 17. In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.
> 18. Those responsible for training should not also be **directly** responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) **referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45,** is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks.
> 19. In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.
> 20. It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.
> 21. When judges are in charge of training activities, it is important that these judges preserve contact with court practice.
> 22. Training methods should be determined and reviewed by the training authority, and there should be regular meetings for trainers to enable them to share their experiences and enhance their approach.

79. However, the CCJE has also emphasised that different approaches are possible in the practical arrangements for the institution responsible for providing training for judges. Thus, in the Bordeaux Declaration it has stated that:

[68] Paragraph 1.3

> 46. Different European legal systems provide training for judges and prosecutors according to various models. Some countries have established an academy, a national school or other specialised institution; some others assign the competence to specific bodies. International training courses for judges and prosecutors should be arranged. It is essential, in all cases, to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence.

80. Nonetheless, variations in the practical arrangements should not affect the independence of the body with overall responsibility for determining what training is to be provided.

2. Prosecutors

81. There are no explicit treaty provisions governing the standards expected of public prosecutors but their role in ensuring respect for human rights has been recognised by the European Court, notably as regards ensuring the conduct of thorough and effective investigations[69], as well as observing the presumption of innocence[70] and the need for equality of arms and other rights of the defence in the conduct of proceedings[71].

82. This is, of course, a reflection of the crucial role played by public prosecutors in the administration of justice, which has been well summed up as follows:

> Prosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary[72].

83. Their position cannot, however, be equated with that as judges, which has been underlined by the European Court:

> The mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors[73].

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[69] See, e.g., *Kaya v. Turkey*, no. 22729/93, 19 February 1998.
[70] See, e.g., *Khuzin and Others v. Russia*, no. 13470/02, 23 October 2008.
[71] See, e.g., *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 and *Natunen v. Finland*, no. 212022, 31 March 2009. The responsibility of public prosecutors regarding human rights is also underscored in Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies), which provides: "24. In the performance of their duties, public prosecutors should in particular: *a.* carry out their functions fairly, impartially and objectively; *b.* respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms; *c.* seek to ensure that the criminal justice system operates as expeditiously as possible", as well as in Title III of the European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005).
[72] *Report of the Special Rapporteur on the independence of judges and lawyers*, (A/HRC/20, 191, 7 June 2012), para. 93.
[73] *Zlínsat, spol. s r.o. v. Bulgaria*, no. 57785/00, 15 June 2006, at para. 78.

84. Nonetheless, their responsibility is considerable, as the Venice Commission has observed:

> 14. The prosecutor, because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, must act to a higher standard than a litigant in a civil matter.
> 15. The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution.
> 16. Because of the serious consequences for the individual of a criminal trial, even one which results in an acquittal, the prosecutor must act fairly in deciding whether to prosecute and for what charges.
> 17. A prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity[74].

85. It is not surprising, therefore, to see the adoption of standards underlining the need for the independence for public prosecutors to be secured[75] and also emphasising the importance of integrity for those appointed to this role[76].

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[74] *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* (Study No. 494/2008, CDL-AD(2010)040, 3 January 2011).

[75] Thus, the United Nations Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) provide "4. States shall ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. (...) 17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution". Furthermore, Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system provides: "4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors. (...) 11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out. (...) 13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that: *a*. the nature and the scope of the powers of the government with respect to the public prosecution are established by law; *b*. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law; *c*. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way; *d*. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example: − to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution; − duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels; − to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments; *e*. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received; *f*. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs *d*. and *e*. above

86. However, as with judges, it is also recognised that public prosecutors need to have an appropriate level of competence to perform their responsibilities, for which training may be required.

87. Thus, the United Nations Guidelines on the Role of Prosecutors provide that:

> 1. Persons selected as prosecutors shall be individuals of ... ability, with appropriate training and qualifications.
> 2. States shall ensure that:
> (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

88. Similarly, Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system states that:

> 5. States should take measures to ensure that:
> *b.* the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience;
> 7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:
> *a.* the principles and ethical duties of their office;
> *b.* the constitutional and legal protection of suspects, victims and witnesses;
> *c.* human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;
> *d.* principles and practices of organisation of work, management and human resources in a judicial context;
> *e.* mechanisms and materials which contribute to consistency in their activities.

89. Furthermore, the Venice Commission has indicated that:

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but also to an appropriate specific control with a view in particular to guaranteeing transparency. 14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law. Similarly, the Bordeaux Declaration provides that "6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially". The need for the independence of prosecutors to be secured is also underlined in the Venice Commission's *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* and paragraphs 24-28 of *Report of the Special Rapporteur on the independence of judges and lawyers*, (A/HRC/20, 191, 7 June 2012), as well as in point 2 of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors (23 April 1999), which were endorsed by the United Nations Commission on Crime Prevention and Criminal Justice (Resolution 17/2, 14-18 April 2008).

[76] E.g., point 1 of the United Nations Guidelines on the Role of Prosecutors provides that "Persons selected as prosecutors shall be individuals of integrity", paragraphs 14-20 of the Venice Commission's *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* and Title II of the Budapest Guidelines.

> 47. In order to allow them to exercise their functions in accordance with the law, appropriate legal qualifications are indispensable for all levels of prosecutors, including the prosecutor general

and that:

> Appropriate training should be available for prosecutors throughout their career. The importance of training for prosecutors is certainly of the same level as that for judges. Such training should include legal, including human rights, training as well as managerial training, especially for senior prosecutors. Again, an expert body like a Prosecutorial Council could play an important role in the definition of training programmes. For reasons of cost and efficiency, synergies could be found in common training for prosecutors and judges[77].

90. Moreover, the Bordeaux Declaration provides that:

> 10. The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organised on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality.

91. In addition the International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors stipulate that:

> 6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: (...)
> (e) To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures.

92. However, the Special Rapporteur on the independence of judges and lawyers considers that:

> a public competitive selection process (an examination) is an objective way to ensure the appointment of qualified candidates to the profession[78].

93. On the other hand, the need for public prosecutors to receive training has also been emphasised by the CCPE[79].

94. Nonetheless, there has been no detailed elaboration as to the qualifications, experience or training that a person should have attained or received prior to his or her initial appointment as a public prosecutor. Indeed, the only indication that some

[77] *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System.*
[78] *Report of the Special Rapporteur on the independence of judges and lawyers*, (A/HRC/20, 191, 7 June 2012), para. 62.
[79] See para. 71 above.

training might be required before commencing work has been made in a handbook recently published by the United Nations:

> Prosecutors have great responsibility, and much is expected of them by society. The courts expect prosecutors to demonstrate a high level of legal acumen and well-defined ethics; society in general expects prosecutors to be sensitive to the needs of that society, particularly victims of crime; investigators expect and need sound and proper legal advice or supervision in increasingly complex investigations; and the accused expects that the evidence will be carefully considered and the law correctly applied and that where discretion can be used, it is used fairly and impartially.
> None of the competencies above are easily obtained, but none of them can be ignored by a prosecution service that is committed to excellence. Training in these skills is a lifelong endeavour requiring commitment from management to provide the training and the duty of prosecutors to avail themselves of it and, in many instances, provide it. The increasing complexity of crime has required that new skills be developed in the prosecution services, with specialized legal and forensic knowledge being an important component of a prosecution service's training regime. *Training should commence in the induction phase* and continue through the prosecutor's career, enabling the prosecutor to take on more complex cases and allowing for career advancement. Training of this type should also be viewed as an investment by the prosecution service, and appropriate funds should be allocated to provide training to staff[80].

95. Thus, although there is a clear requirement in European and international standards that persons appointed as public prosecutors be appropriately qualified, with some indication as to what that entails, there has been no significant attempt to specify that this necessitates some initial training prior to appointment. However, such training is definitely not inconsistent with the need to be appropriately qualified and the general failure to mention it as a requirement does not mean that it does not happen in practice or is considered undesirable.

96. Furthermore, as has been seen[81], the Venice Commission considers that an expert body like a prosecutorial council could play an important role in the definition of training programmes.

97. The Venice Commission also envisages such a body as being "independent from other state bodies"[82] and the need for the autonomous character of the institution in charge of organising training for public prosecutors to be assured has also been emphasised by both the CCJE and CCPE in the Bordeaux Declaration[83].

[80] United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors* (2014), p. 26 (emphasis added and footnotes omitted).The only instance of training during the induction phase cited was with respect to the Republic of Korea.
[81] See para. 89 above.
[82] *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System*, para. 65.
[83] In paragraph 46 of the Explanatory Memorandum; see para. 71 above.

E. Relevant European national practice with respect to judicial and prosecutorial appointments

1. Introduction

98. The different approaches to the appointment of judges within European, and especially European Union, countries has been broadly summarised as follows:

> In fact in the United Kingdom and Ireland judges are chosen from among experienced lawyers to fill specific judicial positions and there is no formal system of judicial career and professional evaluation while in service. Quite different the status of judges and prosecutors predominant in continental European countries. They are recruited exclusively or prevalently from among young law graduates without previous professional experience by means of competitive written and/or oral exams intended to evaluate their general knowledge of various branches of the law. This model of selection is based on the assumption that judges and prosecutors thus recruited will develop their professional competence and will be culturally socialized within the judiciary, where they are expected to remain for the rest of their working lives, moving along career ladders whose steps are based on successive evaluations which in various ways take into account seniority and professional merit. Moreover, newly appointed judges and prosecutors are not recruited to fill permanently specific judicial functions but rather to fill indifferently the vacancies existing at the first level of jurisdiction and, when promoted, they are expected, once again, to fill indifferently the existing vacancies in the judicial positions reserved to the higher level of the career. In other words the judicial corps of the countries of continental Europe follow to a large extent the same organizational model of the higher echelons of public bureaucracies (to a certain extent they both share the same basic regulations regarding their status). If on the one hand the judiciaries of continental Europe share the same organizational model, on the other they use quite different means of recruitment, initial and continuing education, professional evaluation for the career, and discipline[84].

99. However, as the responses to a questionnaire sent to thirty countries by the European Judicial Training Network indicate, the position is slightly more nuanced:

> In nineteen countries Judges and Prosecutors are recruited through a **public competition**. The selection of candidates for judicial vacancies is announced and organized according to national procedures, generally through written tests and interviews. But in other countries (Cyprus, Denmark, Ireland, Malta, Slovenia, Sweden, Netherlands) judges are selected on the basis of their university grades (Slovenia), or through an application process (Netherlands), or through interviews, university diplomas or relevant information about work experiences, references from former employers, courses taken abroad, etc. In Germany, the German Länders have the responsibility and the sovereignty power to recruit judges , to decide select procedures and criteria (i.e. previous working experience as lawyer, doctor of law degree, etc.), assessment center, oral interviews) that may be different from Lander to Lander. There are two exams that have to be passed and recruitment is decided, generally, by the Ministry of Justice of the respective Land.
> The Ministry is in charge of recruitment in the majority of the European countries.
> In Finland, after a law degree , students who want to pursue the judicial career will apply for a one-year traineeship in District Courts and Court of Appeal or Administrative Courts. Judges are appointed by the President of the Republic on the recommendations given by the independent Judicial Appointment Board. In Slovakia it is possible, only in exceptional cases, that the Minister chose the candidate without exams. In Malta, judges are selected and

[84] G. di Federico (ed.), *Recruitment, Professional Evaluation And Career Of Judges And Prosecutors In Europe: Austria, France, Germany, Italy, The Netherlands And Spain*, (2005)

appointed by the Executive: it is possible that this it is done after consultation with the commission for the Administration of Justice, but this course of action is not mandatory
Except in England1, a five - year **law degree is always required**.
Some countries (Austria, Czech Rep, Ireland, Lithuania, Malta, Slovenia, Sweden, England and Wales, Netherlands, Finland) require a **work experience or a previous training at courts** after graduating, while others allow candidates to access the judicial career immediately after completing University (e.g., France, Romania, Poland, Spain). Italy requires that applicants have a second title , besides the University diploma: in particular, admission to the bar, or a PhD, or a two- year master in Legal Professions.
Hungarian Judicial Academy, which selects candidates for the judiciary, requires also a **Professional Aptness Opinion by Psychologist**. An assessment of the psychological attitudes of the candidate is also required in Czech Republic, Luxembourg and France, while in Ireland it is required that candidates outline the reasons why they consider themselves to be suitable for elevation to the bench (as well as a **Tax Clearance** certificate)
In the most of Europe, the **average age of trainees** is under thirty years (Austria, Belgium, Bulgaria, Czech Republic, Hungary, Luxembourg, Poland Portugal, Slovenia, Spain, Sweden, France).
In Denmark, new judges are between forty and seventy years-old , while prosecutors are 25/40 years-old, due to their different recruitment system. In England and Finland, judges are more than 35/40 year- old. In the other countries the average is between thirty to thirty-five years of age[85].

100. The responses with respect to the initial training of judges were summarised as follows:

Very different is the **length of the initial training period**: generally , the internship is longer when the recruitment takes place immediately after graduation (for instance in France), but it becomes minimum when candidates are chosen among lawyers with considerable experience (for instance, in England and Wales). The length of the initial training period usually ranges between one and four years and group teaching and individual practical trainings at the Courts are generally organized in two separate blocks.
The majority of European countries (Bulgaria, Denmark Estonia, Hungary, Lithuania, Spain, Sweden, UK, Finland) organize a completely **separate training for judges and for prosecutors** and some other countries organize only one part of the initial training for both professions (Austria), or some specific activities (Slovenia, Belgium, Czech Rep, Poland, Romania, Netherlands). Only Portugal, France, Italy, Luxembourg, Germany have a common training. It is interesting to find that, when the internships are separated, prosecutors' training has a duration is shorter than that of judges (by about a half), as if it where less important to prepare good public prosecutors.
Practical training is longer than training session within a School for the Judiciary or similar training institution: in fourteen countries the average length of practical training is more than one year ; less than one year in eight countries; in the other countries the training system is different and it is not possible to provide an accurate answer to the question. On the other hand, when there is a School or training Institution (Italy, France, Austria, Bulgaria, Poland, Portugal , Romania, Slovenia, Spain), the training session lasts six months or more. In Estonia, Hungary, Lithuania, Luxembourg, Slovenia, Spain Sweden, UK and Netherlands , the training session for prosecutors lasts less than six months. In Finland, the training to become a Judge is obtained through " *a learning by doing*" in duties , providing assistance to Judges: but the Supreme Court also organizes theoretical training for referendiares, while the Ministry of Justice is responsible for the provision of In-service training (continuous training) for judges.
Only Italy, France, Austria, Belgium, Luxembourg, Poland, Spain, Denmark (and Romania for stages in lawyer's office) organize **mandatory stages** for trainees in penitentiaries, public

[85] http://www.ejtn.eu/PageFiles/6343/Outcomes_Questionnaires_InitialTraining_Ichini.pdf (spelling corrected). Only Greece, Latvia, Northern Ireland and Scotland out of the 30 countries to which the questionnaire was sent did not respond to it. See also the report, *Judicial Training in the European Union Member States*, (2011), prepared by the Directorate General for Internal Policies of the European Parliament, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET%282011%29453198%28ANN01%29_EN.pdf.

bodies, social services, international organizations, etc., and in most cases these stages last between a week and ten days.
All the countries adopt a combination of different **methodologies**, especially seminars, lectures, group works, mock trials, self directed studies, case studies.
The Evaluation of the internship and the candidates is carried out trough the assessment by a tutor and, in the great majority of cases, through final exams. The negative evaluation of a trainee at the end of the training period involves the obligation to take a new training period and, after a new negative evaluation, the dismissal.
It is very difficult to make a report with regard to the last two questions (relations between training institutions and other public entities – as the Ministry of Justice, education, finances, the Council for the Judiciary) because each country has a different experience. But generally, if there is a training Institution (i.e., an Academy), it is autonomous in the organization of training, although it depends economically from the Minister of Justice.
Due to spending review and financial problems, some countries are not able to plan good initiatives for the future (in Lithuania, judges feel the lack of teaching materials and suitable equipment and would like to have a longer training period and specified training on computer literacy, but it is impossible to plan a good initiative, due to the lack of resources). In some countries facing that face new challenges in the field of criminal business law, such as Austria, the High Regional Court and the Ministry of Justice have passed new regulations that allow for trainees to be trained in private companies and financial authorities in order to develop a better understanding of business processes[86].

101. Many of the foregoing observations are also applicable to the approach taken to prosecutorial appointments.

102. It is worth elaborating on the position in three non-common law countries - France, Poland and the Netherlands - in which access to judicial and prosecutorial posts is not limited to taking the 'normal' route of initial training in a specialised school after graduating with a law degree[87].

2. France

103. Most judges and prosecutors are recruited through admission as junior judicial officials ("*auditeurs de justice*") to the French National School for the Judiciary (*Ecole Nationale de la Magistrature* ('ENM') following an entrance examination for one of three different categories of person.

104. These examinations are for candidates who are (a) 31 years' old or under at the time of the examination who have completed at least four years of undergraduate study or have graduated from certain schools (e.g. *Ecole Normale Superieure, Institut d'Etudes Politiques*) but without any prerequisite of prior legal education, (b) civil servants who are 46 years and 5 months old or under who have served at least four years in civil service and (c) persons of 40 years or under with at least eight years experience in a law related field. The study programme and the examinations are the same for all three categories.

[86] *Ibid.* (spelling corrected). Further details about individual countries can be found through the link in the preceding note.
[87] What follows concerns only the present arrangements, which have evolved in all three countries.

105. In addition, there is a possibility of admission as a junior judicial official to the ENM by title, for which applicants must be over 31 but under 40 and have either (a) a master's degree in law, economics or social sciences and four years' experience in the legal, economic or social field or (b) a doctorate in law and master's degree in another subject, or (c) a master's degree in law and at least three years' experience as a teaching assistant in law[88].

106. All admitted to the ENM as junior judicial officers in one of these ways then follow a 31-month course of study in both theory and practice. They attend general study courses at the school in many disciplines, including law, history, sociology, psychology, psychiatry, forensic science, pathology and accounting. They also undertake several internships in various institutions, including attorneys' offices, police investigative services, prisons, and courts. This training is followed by an examination used to rank them by order of merit and their first posting will be determined by their rank.

107. However, some people are eligible to enter the judiciary directly. They must be at least 35 years old and have had a professional career that makes them particularly suitable to become a judge or prosecutor (including attorneys, clerks and law professors). Their applications are submitted to a selection committee, which decides who will follow the recruitment process. There is a mandatory probationary period for all eligible judges, after which the jury of the ENM will deliver an opinion as to whether each one is suitable for exercising judicial functions. Currently, a quarter of the total number of judges entering the second rank and one tenth of judges promoted to the first rank are admitted in this way.

3. Poland

108. The main way to become a judge or a prosecutor in Poland is - after having completed higher education in law and has obtained the title of master (graduate) or has completed higher education in law abroad which is recognised in the Republic of Poland - through initial training in the Polish National School of Judiciary and Public Prosecution, although judges and prosecutors do not constitute a common group of professional, as it is a case in France (*magistrature*). However, one may also become a judge in Poland having previously worked in other legal professions.

109. The initial training route involves a common 12 month general training and then a more specialised training for those who intend to become judges (an additional 48 months) or prosecutors (an additional 30 months). During their general training trainees attend classes, lectures and apprenticeship schemes in the common courts, prosecutor's offices and other institutions associated with the functioning of the judiciary. In order to complete the general training, the trainee must gain positive

[88] About one third of junior judicial officials are admitted by this route.

grades on all tests and apprenticeship schemes attended as part of the training. The total sum of points obtained will determine the trainee's position on the list of qualifying trainees and admission to the further training for intending judges or prosecutors turns on a person's position on this list.

110. The specialised training for intending judges entails first a 30-month-long course at the National School as well as an apprenticeship and, if the examination at its end is passed, an 18-month-long internship on the position of a court referendary. After the successful completion of the internship, the trainee can apply for a vacant judge's position in a district court.

111. For intending prosecutors, there is training and apprenticeship taking place in courts and prosecutor's offices but also in forensic pathology institutions, the Institute of Forensic Research in Kraków, police units – including the police school – and tax inspection offices. Trainees who have passed the prosecutor's examination will be offered the opportunity to take up the position of an assessor of a common organisational unit of the public prosecution according to the order of their appearance on the list. Assessors are entitled to perform the prosecutor's duties under the relevant act of law for a specified period of time. A graduate of the prosecutorial training who has completed the assessor's internship is entitled to apply for the position of a prosecutor.

112. However, it is also possible to become a judge or a prosecutor by virtue of graduating only the general training in the National School and then gaining a relevant practical experience. This will be so in those cases where a person has completed the general apprenticeship in the Polish National School of Judiciary and Public Prosecution, notarial apprenticeship, attorney at law apprenticeship or legal counsel apprenticeship and passed a relevant exam (judicial or prosecutorial) and either held the full time post of court referendary (*referendarz sądowy*) for at least five years, or held the full time post of an assistant to a judge or a prosecutor for at least six years; such a person may be appointed a judge of a district court or a prosecutor of a district prosecutor's office.

113. In addition, direct entry to the judiciary is also possible for persons who (a) have worked in a Polish university, the Polish Academy of Sciences or a research and science institute or other science facility and who hold the academic title of a professor or a post- Ph.D. academic degree (*doktor habilitowany*) in legal sciences, (b) have worked as an attorney at law, legal counsel or notary for at least three years or (c) have held the post of a president, vice-president, senior counsel or counsel at the General Public Prosecutor of the State Treasury for at least three years[89]. Nonetheless, this route to becoming a judge is also quite exceptional; most judges

[89] The same applies to a person willing to become a judge of an ordinary court who, prior to becoming a judge of an ordinary court, held the post of administrative, military court judge or a public prosecutor.

have no experience of working in other professions but have entered the judiciary through the competitive process.

4. The Netherlands

114. There are separate programmes for judges and prosecutors.

a. Judges

115. After a centrally organised selection procedure (which includes a personality assessment), there are two groups of trainees: those with between two and five years' experience after the university degree (often as a lawyer or civil servant) and those who have such experience for more than five years.

116. Once selected, entrants to the initial judicial programme will complete an internship at the court where they will work. Here, in consultation with the *Studiecentrum Rechtspleging* ('SSR') - the Dutch Training and Study Centre for the Judiciary - the length of their programme will be determined (at least one year and three months and at most four years, depending on their knowledge and experience). as well as the work-training environments in which they will first work. Subsequently, the trainees, together with all other professional entrants in the country, will take part in a central induction week, which marks the start of the three month preliminary phase. During the induction week, the trainee will be familiarized with the organisation and the profession.

117. The trainee will then get to work within his/her own court and jurisdiction. Throughout the rest of the preliminary phase, time will be devoted to the craft of writing drafts and practising court sessions via simulations. Furthermore, the trainee take part in a work-training team in the jurisdiction in question, in which the trainee will develop his/her own direction and competencies, transcending the boundaries of the work-training environments. Furthermore, a brief internship at the Public Prosecution Service will be completed. At the end of the preliminary phase, the trainee will complete a self-evaluation and a personal learning plan.

118. Subsequently, the main phase of the programme will commence (minimum of one year, maximum of three years and nine months). The main phase will be completed within two or three work-training environments within the court, depending on the length of the programme and the personal learning plan. In this regard, it is possible to switch between courts and appellate bodies. The first work-training environment is the same as the work training environment in the preliminary phase. This will be a work-training environment in which the focus is on writing (civil law, administrative law). Supervision will be provided by judges as practical trainers.

119. Furthermore, on one day a week, under the supervision of a core trainer, attention will be paid to the learning process, the portfolio and the learning plan, as well as to research projects and the competencies that transcend the work-training environments. The supervision provided by the practical and core trainers focuses purely on learning, not assessment.

120. The trainee will also complete the following internships: society, European/international, courts/appellate bodies and a brief/extended internship at the Public Prosecution Service if a criminal-oriented work-training environment is selected. Every three months, the core trainer, the practical trainer and the trainee will assess and update the personal learning plan. Upon completion of each work-training environment, a transfer evaluation will take place with the trainee, the core trainer and the practical trainer.

121. Assessments relating to legal status will take place six months after commencement of the main phase and at the end of the programme. At the end of the programme, the trainee must comply with all final terms with regard to the five themes: 'preparing court session', 'court session', 'verdicts and decisions', 'magistracy, professionalization, policy' and 'co-operation, communication, intervision'.Trainees are assessed on a portfolio that they will be responsible for compiling themselves. A series of final attainment levels on five topics has been formulated in order to determine whether or not a trainee has reached a stage of functioning independently as a new judge. These final attainment levels serve as measurement standards when assessing trainees[90].

b. Prosecutors

122. The initial training for public prosecutors has changed with effect from the beginning of 2015, which obviously means that it is too early to judge how well the new scheme functions[91]. The scheme is no longer institution-based but customer-based.

123. All candidates for the programme must have graduated as a master in law and also need to have at least two years' relevant legal experience (e.g., working as a clerk in a court or a prosecutor's office).

124. After their selection[92], successful candidates are admitted to an initial training programme which lasts between one and a half and four years, depending on their

[90] See further http://www.ssr.nl/uploads/Pdf-documenten/Initieel/Assessment%20for%20the%20new%20programme%20-%20summary.pdf.
[91] Currently there are just 7 trainees as there is no need for new prosecutors in the Netherlands.
[92] After publication of a vacancy, candidates apply in writing and those who pass an initial sifting are received for a pre-selection interview. Those who are still under consideration after that then undergo an assessment by a professional organisation, followed by an interview with the selection committee.

previous experience, both in terms of character and relevance. During the programme, the trainees are employees of the prosecutor's offices[93].

125. The programme is organised according to the following principles:
- selection and composition of the modules to be followed;
- each candidate is the "owner" of his or her own learning process, is expected to show an active approach as to contents and progress of the training and is offered a stimulating environment in which he is able to acquire the required knowledge and skills;
- dual training according to which theory and practice are combined;
- getting to know the legal environment and so being aware and informed about the functioning of the organisations linked with the prosecutorial process (the court system, the police and the bar, as well as other penitentiary or forensic institutions); and
- the ability to represent the prosecutor's office in court a prerequisite.

126. The theoretical part is given by the SSR upon the application of the candidate and will also include performance and soft-skills. This part takes approximately 1 day a week, thus constituting about 20% of the candidate's working time.

127. During the introduction period of 2 months the candidate gets to know the organisation of the public prosecution, achieves his or her proof of proficiency to represent in court and designs his or her training plan for the entire training period. A candidate failing the proof of proficiency twice has to quit the service.

128. The next period has four different stages:
- 3-15 months' practical training in the prosecutor's office and in court[94];
- 2-6 months at the prosecutor's office before the appeal courts;
- 6-36 months' practical training at the prosecutor's office, the court and a traineeship outside the judiciary (e.g., a law firm, an international organisation, the Ministry of Justice or a, penitentiary or forensic institution); and
- 3-6 months in depth training at a branch of the prosecutor's office.

129. In the prosecutor's office the prosecutor who is appointed as the coordinator for the initial training, supports the candidate and will together with him or her identify his or her training need, both in practice and in theory. There is also a team leader who is responsible for the formal evaluations during the training. Every three months a meeting is held to discuss the candidate's progress.

[93] Under the former scheme they were employees of the SSR.
[94] In the court they can sit as one of the judges in a panel of three.

130. At the end of the training the candidate will have a final interview with a professional committee.

F. The Draft Rulebook

131. The Draft Rulebook is concerned with the basis and procedure for proposing and electing three different groups of public prosecutor: the Republican Public Prosecutor (Serbia's highest prosecutor) and public prosecutors; deputy public prosecutors (those already in post and being made permanent or being elected to a different or higher office); and deputy public prosecutors being elected for the first time. It thus covers both candidates who are already functioning as public prosecutors and those who are seeking election for the first time.

132. It is comprised of five chapters - one setting out some general provisions, one each for deputy public prosecutors elected for the first time, deputy prosecutors already in post and public prosecutors and the Republican Public Prosecutor and one concerned with transitional provisions - and two forms to be used in giving opinions on candidates for appointment by, respectively, the First Basic Public Prosecution Office in Belgrade and the Higher Public Prosecution Office in Belgrade under the transitional arrangements, which last for either one or three years after the implementation of the Rulebook[95].

133. The context in which the Draft Rulebook must be evaluated is not just its compliance with European standards and practice but also the rulings of the Constitutional Court that the giving of priority to candidates for election who have successfully completed the initial training programme of the Judicial Academy is unconstitutional[96].

1. General provisions

134. The first chapter on general provisions first sets out the scope and purpose of the Draft Rulebook[97], including the requirement to exclude any unfair influence or discrimination and to take into consideration the national composition of the population, as is also specified in the Law on Public Prosecution[98]. It then reiterates the need to fulfil both the general and special requirements in that Law in order to participate in the procedure for election[99].

135. The criteria for proposal and election - qualification, competences and worthiness - are then listed, together with the stipulation that the degree of meeting them is identified in the indicators included in the Draft Rulebook, those indicators to be expressed in points[100].

[95] Article 64specifies one year with three years added as an alternative.
[96] See paras. 39-43.
[97] Articles 1and 2.
[98] See n. 19 above.
[99] Article 3. The requirements are those discussed in paras. 14-18.
[100] Article 4.

136. The three criteria are the ones specified in the Law on Public Prosecution[101] but, as already noted[102], that law did not define them. However, the Draft Rulebook now defines them as follows:

> **Qualifications** imply having theoretical and practical knowledge necessary to perform the public prosecution function.
> **Competences** imply skills enabling efficient application of specific legal knowledge in working on a public prosecution case.
> Skills enabling efficient application of specific legal knowledge in working on a public prosecution case include the ability to make decisions, the readiness to perform the function, dedication, objectivity, ability to plan and organise, negotiate and mediate, the ability to resolve conflicts, ability to express oneself clearly, readiness to undertake new tasks and work with modern information and communication technologies and interest for continued development.
> Competences also imply additional training relevant for the work of the public prosecution, working experience abroad in the profession, and working experience as lecturer in institutions of relevance for the work of the public prosecution.
> **Worthiness** implies moral qualities that public prosecutors and deputy public prosecutors should posses and behaviour in line with such principles. Moral qualities include: honesty, conscientiousness, justice, dignity, commitment and exemplarity, and behaviour in line with these qualities implies preservation of the reputation of public prosecution in exercising the function and outside of it, awareness of the social responsibility, preserving one's independence and non-bias, reliability and dignity in exercising the function and outside of it, and undertaking responsibility for the internal organisation and a positive perception of the public prosecution among the public.
> Worthiness is the reputation that the candidate for holder of public prosecution function enjoys within the profession and outside the profession.
> Worthiness is assumed to exist[103].

137. These definitions are actually the same as those found in the Law on Judges[104], with the addition of two new final paragraphs for the definitions of both competence and worthiness.

138. The remainder of the general provisions set out the procedure for election[105] - essentially the decision to publish an advertisement, the place where the latter is to be published and an indication as to where its form and contents are prescribed - and the procedure for filing applications[106], as well as a requirement for the State Prosecutorial Council to acquire data and opinions regarding the fulfilment of the three criteria by candidates from bodies and organisations in the legal profession with which they have worked[107].

139. There is nothing problematic about these general provisions and, indeed, the procedural aspects are entirely appropriate, as is the approach of specifying that

[101] Article 82.
[102] See para. 16
[103] In Articles 5-7.
[104] Article 45.
[105] Article 8. Elements of which are also found in Article 78 of the Law on Public Prosecution.
[106] Article 9. Elements of which are also found in Article 79 of the Law on Public Prosecution
[107] Article 10. This restates Article 80 of the Law on Public Prosecution.

indicators should be used to establish whether the extent to which the listed criteria have been met by particular candidates.

140. However, although the different considerations included in the definition of the criteria are clearly relevant ones, there are perhaps some others which are either missing or only implicit in the definitions when they should be explicit. In particular, the following might be added to the list of competences: stable and balanced personality; independent thinking; patient; active listener; aware of developments in society; speed and efficiency; collegiality; and sense of responsibility.

141. *These considerations should thus be added to the definition of competences.*

142. Furthermore, the appropriateness of the criteria cannot be assessed entirely in isolation as, in practice, it is the way in which their existence is established that really determines their utility for assessing the suitability of candidates. They are, therefore, discussed further below[108].

2. The procedures for election

143. The chapters specifically concerned with the three groups of public prosecutors generally follows a similar format but with certain elements specific to the kind concerned.

144. The common elements are:

- provision for an interview and its evaluation[109];
- specification of what makes a candidate unworthy[110]; and
- provision for the ranking of candidates and resolving complaints about that ranking[111].

145. The specification of what makes a candidate unworthy in the following way:

> A candidate shall be considered unworthy if convicted of a criminal offence making him unworthy of performing the public prosecution function

146. It is unclear from the English text, at least, whether unworthiness is a consequence of being convicted of any kind of offence or just particular kinds of offence. It is also not specified whether unworthiness is sufficient in itself to preclude election, although this would be appropriate.

147. *There is a need, therefore, for the effect of this requirement to be clarified and also, if it is only certain kinds of offence that lead to unworthiness, these ought to be specified.*

[108] See paras. 157-243.
[109] Articles 15, 16, 33, 34, 55 and 56,
[110] Articles 17, 35 and 57.
[111] Articles 18-20, 36-38 and 58-60.

148. In any event, the introduction of this provision - together with the statement in the definition that worthiness is assumed to exist - transforms the task of applying the criteria of worthiness into a determination of what the candidate does or does not have - a conviction - rather than an assessment of whether he or she actually has the qualities specified in the first two paragraphs of the definition in the chapter on general provisions. In effect, the absence of a conviction is being equated with a presumption of worthiness. Although it may sometimes be difficult to establish whether or not someone has the qualities of worthiness previously defined, this seems an unduly simplistic approach to determining suitability for appointment as a public prosecutor.

149. *It would be more appropriate to require a positive assessment of worthiness, while also keeping the existence of a conviction (subject to the point previously made), as an element in the selection process*.

150. The practical arrangements proposed for ranking candidates and resolving complaints about decision in respect of this seem appropriate.

151. The purpose of holding an interview - which is to be with the State Prosecutorial Council - is to enable the ranking of candidates who have achieved the same marks, something that may be necessary where there are more suitable candidates than positions to be fulfilled. Under the scheme in the Draft Rulebook, this ranking is to be determined by the views formed in the interviews. However, although it is required to have recorded minutes for each interview, there is no clear guidance in the Rulebook as to the format of the interviews or indeed as to whether these must be conducted in a comparable manner so that any ranking based on them is as objective as possible. There is, of course, no need for a rigid structure for these interviews - which should be to gain an overall impression of the candidates - but their ought to be some outline of the issues considered appropriate to focus on with respect to all candidates.

152. *A requirement for such an outline to be determined in advance of any interviews for a particular selection procedure should thus be added to the relevant provisions.*

153. Furthermore, where there are oral tests also to be undertaken, there is no indication as to whether those taking the oral test will also take part in the interview. This would be undesirable as there is a risk of the assessment at the interview being shaped by the previous view adopted in the oral test.

154. *There should thus be a provision that excludes anyone who has taken part in a candidate's oral test from also taking part in the subsequent interview of him or her.*

155. Finally, the election process for the different groups of candidates involves many different elements but there is no sense in the Draft Rulebook of certain elements being used to eliminate candidates at particular stages in the process. Thus, there is no provision for assessing whether the minimum qualifications to be a candidate - nationality, passing the bar exam, etc.[112] - have been met, determining worthiness before allowing a candidate to take any written test and precluding candidates who have not achieved a minimum standard in the tests from proceeding to the interview stage. Such an arrangement would save time for the State Prosecutorial Council and also be kinder to candidates who do not really even approach the basic requirements for election.

156. *The Draft Rulebook should thus be revised to include some eliminatory stages in the process of election*.

a. Election of deputy public prosecutors for the first time

157. In addition to the common ones, the other elements involved in the election of candidates as deputy public prosecutor for the first time are:

- specification of the indicators for fulfilment of the criteria and the points to be allocated to them[113];
- provision for holding and evaluating written and oral tests[114]; and
- provision for decision-making on proposals with respect to candidates[115].

158. The indicators for the determination of the criteria - presumably qualification and competence but not worthiness - are:

- written test;
- oral test;
- academic titles (Ph.D., M.A.);
- specialised or master studies;
- average mark received during studies (8.5 and greater) and duration of studies (up to 5 years);
- mark received at the state examination - passed with credits;
- publication of technical and scientific papers;
- working experience in the public prosecution (type of work previously performed by the candidate, length of working experience, performance, promotions, etc.);
- certificate of completed inception training at the Judicial Academy;
- evidence of completed continued training for judge and prosecutor associates;
- evidence of professional development.

[112] See para. 14.
[113] Articles 11 and 14.
[114] Articles 12 and 13,
[115] Articles 21,

159. These indicators are all potentially relevant for establishing fulfilment of the qualification criterion and many aspects of the competence one but it is questionable whether they would provide sufficient guidance as to a candidate's ability to plan and organise, negotiate and mediate, the ability to resolve conflicts and readiness to undertake new tasks, for which testimonials might be more pertinent. The latter might also be the basis for assessing a candidate's working experience and professional development but this is not specified.

160. In this connection, it should be recalled that those working as prosecutor are part of a profession and fellow professionals are generally well-placed to assess and determine whether someone is, or will be, a good professional colleague.

161. Moreover, experience shows that some academics, who are excellent professors (and, as will be seen below, would gain many points under the proposed system), will still not be good prosecutors because they tend to find scientific challenges instead of practical solutions. In other words, they are not decisive and someone who is not decisive will not make a good prosecutor.

162. Each of the indicators is expressed in terms of points, either potentially available or automatically ascribed. Thus, the written and oral tests can, respectively, be awarded up to 20 and 10 points, a Ph.D. will achieve 3 points, an M.A. 2 points and all the others 1 point each.

163. The effect of this is to make the written and oral tests - which will be evaluated by the State Prosecutorial Council - the decisive basis for choosing candidates for election.

164. Although these tests are stated to be ones to be taken

> in order to determine the fulfilment of requirements in terms of qualification and competences and indicators prescribed by this Rulebook[116]

there is no indication as to their length.

165. Moreover, the specification that the written test

> checks the qualifications and competences of candidates for the performance of the function of deputy public prosecutor[117]

does not clarify its form, although its scope is determined by the Manual[118].

[116] Part 1 of Article 12.
[117] Part 3 of Article 12.
[118] Part 4 of Article 12.

166. *The form and length of the written test should thus be prescribed in greater detail*.

167. Furthermore, although the statement that the oral test

> checks the communication skills and the ability to justify legal positions[119]

is more focused - and more clearly appropriate - it is not really possible to assess in the abstract how suitable either test would be in practice for the making of such determinations.

168. In addition, the allocation of points for academic titles, specialised or master studies, average marks and duration of studies and publications are not necessarily relevant to the performance of public prosecution functions, particularly in connection with first-time appointments.

169. *The evaluation of candidates should thus not be based on these factors*.

170. The manner in which the points have been allocated also means that the initial training at the Judicial Academy is far from decisive, counting for only one out of a possible 43 points available to a candidate. As such, the proposal meets the objections raised by the Constitutional Court as to the priority accorded to candidates who have taken the initial training programme. However, this does not mean that there is an appropriate allocation of points under the proposed scheme or indeed that there is now fairness in the respective assessment of candidates who have completed the initial training programme.

171. In particular, only 1 point is accorded for working experience in the public prosecution but this is something that could be achieved both by those who have taken the initial training programme - the major part of it is devoted to practical experience - and those who have been prosecutorial assistants. The latter may have longer such experience but it may also be that the work they have done is less comparable to the tasks performed by deputy public prosecutors, which may have been undertaken by those shadowing them as part of the initial training programme.

172. Moreover, the completed continued training for which a point can be earned by prosecutorial assistants will not necessarily be comparable to the theoretical element of the initial training programme.

173. Furthermore, those candidates who have undergone the initial training programme will already have undergone potentially substantial assessment of their capabilities, including a final examination to test the practical knowledge and skills

[119] Part 6 of Article 12.

acquired by them and prosecutorial assistants will not have had any comparable assessment.

174. Although it is entirely appropriate not to give priority to those who have completed the initial training programme, the present scheme does not make clear what is the added value of the written test which all candidates must take over the assessments already taken by those who have not completed that programme. It would be more equitable to determine first what (if anything) that has been done in the assessments for the initial training programme would satisfy the matters that need to be covered by the written test. Only after that has been established would it be possible to identify the remaining matters on which they still need to be tested and evaluated Such an approach - which would entail prosecutorial assistants taking the full written test and potentially the provision to them of some relevant training beforehand - would then put both groups of candidates in a comparable position for assessment. Of course, if the initial training programme offered nothing relevant to the matters covered by the written test, those who have taken that programme should also be required to undergo the written test.

175. A similar approach should be followed for the purpose of comparing the achievements of the two groups of candidates as regards completion of training of a more theoretical character (i.e., the issues covered both in the theoretical stage of the initial training programme and the continued training of those who are prosecutorial assistants) and practical experience.

176. Only once each group of candidates has completed a comparable portfolio of evaluations for the purpose of assessing their qualification and competence - and have demonstrated that they have reached the appropriate minimum threshold deemed essential for performing the functions of a public prosecutor - would it be appropriate to put them through the same oral test to determine their respective overall suitability for election.

177. Those so tested would thus have been assessed with respect to the same requirements, albeit taking due account of the different ways in which they might have fulfilled some of them.

178. This could then be followed by the interview as presently envisaged.

179. At the end of this procedure, there would be just one group of candidates - whether prosecutorial assistants or graduates of the Judicial Academy - regarded as suitable to be proposed to the National Assembly for election.

180. *The arrangements for evaluating candidates for election as deputy public prosecutor should thus be revised so as to fulfil the approach outlined in the preceding ten paragraphs.*

b. Election of deputy public prosecutors

181. For candidates for election of a deputy public prosecutor to a permanent office or of such a prosecutor who already has a permanent office into a different or higher public prosecution office, the additional elements involved in determining the fulfilment of the criteria applicable vary according to whether or not this is to be done under the transitional provisions.

182. However, in both cases, the determination is to be based on the following:

- evaluation of qualification and competences;
- academic titles (Ph.D., magisterium, master, specialised studies);
- publication of technical and scientific papers;
- certificates of completed professional development, evidence of completed permanent training or attended lectures at the Judicial Academy; and
- participation in working groups drafting laws and by-laws.

183. These are items, in the English text at least, all confusingly referred to as 'criteria' when what is just comprised by the very first item has already been referred to earlier in the Draft Rulebook as two of the three criteria for proposing and electing candidates for holders of public prosecution functions'[120].

184. Moreover, the remaining items - apart from the last one - are ones that are used for assessing fulfilment of the qualification and competences criteria when electing deputy public prosecutors for the first time[121].

185. For the purpose of evaluating qualification and competences during the transitional period, the approach to be followed is to assess

> the degree of complexity of cases assigned to such candidate to work on, the demonstrated general professional knowledge needed for qualified and technically sound performance of function and the technical knowledge in special areas of relevance for work in the public prosecution office[122].

These are relevant considerations for making the assessment.

186. This assessment is to be made by the public prosecutor in charge of making the assessment - although there is no procedure specified for determining this - by taking into consideration the opinion of the collegiate of public prosecution office in which the candidate is performing the public prosecution function[123].

[120] Article 4.
[121] See para. 158.
[122] Article 24.
[123] Articles 24 and 29.

187. *Provision should thus be made in the Draft Rulebook for determining the public prosecutor in charge of making the assessment.*

188. The assessment provides only for two possibilities, namely, that the candidate is either "'exceptionally successful in performing the public prosecution function" (for which 30 points will be given) or is "successful in performing the public prosecution function" (for which 20 points will be given)[124].

189. The collegiate may, "before making its opinion, acquire also other data and facts relevant for the giving of the opinion", which the public prosecutor is obliged to provide[125].

190. The opinion can be given only if at least two-thirds of deputy prosecutors are present[126] and is to be based on a survey that is to be undertaken

> in such a way that a member of the collegiate body at the session fills in a certified format with justification, after which the filled in forms are processed and an opinion is made[127].

191. The questions to be asked are to be prescribed by the State Prosecutorial Council[128] but they have been set out in the first form attached to the Draft Rulebook, namely,

> 1. Does the candidate through his/her conduct contribute to the reputation of the public prosecution?
> YES NO
> 2. Does the candidate threat with respect other holders of public prosecution functions, staff employed in the public prosecution and parties in procedures?
> YES NO
> 3.Does the candidate perform the public prosecution function conscientiously, without bias and professionally?
> YES NO

192. In addition, the form leaves a space comprising two lines for a 'Justification' and also requires a 'Valuation: Positive Negative' to be given.

193. The questions have some relevance to the role to be performed by a successful candidate but the judgment will inevitably be peremptory rather than fully reasoned given the space allowed.

194. There is also provision for a candidate not satisfied with the valuation of his or her qualification and consequences to ask for this to be re-evaluated[129].

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[124] Articles 24 and 30.
[125] Article 25.
[126] However, the candidate cannot participate in the process.
[127] Part 3 of Article 27.
[128] Part 2 of Article 28.
[129] Part 2 of Article 30.

195. There is no indication as to how exactly the public prosecutor in charge of making the assessment is to integrate the opinion of the Collegium into his or her own assessment. In particular, how is a majority negative evaluation by the Collegium to be reconciled with a positive assessment by the public prosecutor in charge?

196. *The Rulebook should thus include some guidance as to how this integration is to be achieved for the purpose of making the overall assessment*.

197. *The treatment of a deputy public prosecutor whose performance is not regarded as satisfactory should thus be clarified*.

198. Apart from the points given for this assessment, there is also provision for points to be given for the other 'criteria', namely, 3 for a Ph.D, 2 for a magisterium and one each for all the others[130].

199. As already noted, the appropriateness of using academic degrees and publications for assessment is questionable but the professional development and training could be relevant. However, mere attendance at lectures does not seem a useful aid to assessment.

200. *The provision for using degrees, publications and attendance at lectures should be deleted.*

201. The total of the points awarded is then to be the basis for ranking the candidates[131], with the interview being used to differentiate between candidates who have the same number of points[132].

202. Once the transitional provisions cease to apply, the assessment of qualification and competences - the first of the five 'criteria' - is generally to be on the basis of the candidate's performance appraisal for which a different Rulebook is applicable[133].

203. Under the performance appraisal, public prosecutors are evaluated as being "exceptionally successful at performing public prosecutor function", "successful at performing public prosecutor function" or "not satisfactory", with unspecified points attributed accordingly[134].

[130] Article 32.
[131] Parts 1 and 2 of Article 36.
[132] Article 34. This is also the case for candidates for election for the first time. See para. 151.
[133] Article 32. Appraisals are to be regulated by the Rulebook on criteria and indicators for valuation of performance of public prosecutors and deputy public prosecutors..
[134] Article 31. There is also provision in Part 4 for the State Prosecutorial Council to order a performance appraisal for candidates who do not have one.

204. It cannot be assessed how suitable the appraisal scheme actually is for assessing the performance of public prosecution functions as the content of the relevant Rulebook has not been made available and thus reviewed for the purpose of the present opinion. However, in principle, the approach of using such a scheme is appropriate.

205. An exception from the use of the performance appraisal is made "in the case of the first election for deputy prosecutor" where the procedure of written and oral tests for first election as a deputy prosecutor is to be used[135] but it is not clear how this is relevant to the posts under consideration.

206. *The circumstances in which this exception is to be used should thus be clarified.*

207. Apart from the different approach to the determination of qualification and competences, the allocation of points for academic titles, etc., the use of interviews and the approach to ranking to be used in the transitional period are also applicable.

208. All these requirements are additionally applicable to elections to deputy public prosecutor posts in the Republic Public Prosecution Offices and prosecution offices of special jurisdiction but technical knowledge and experience in the field relevant to work in those offices is only to be determined by the public prosecutor in charge[136].

209. *The use of the a performance appraisal scheme should, in principle, be an appropriate basis for making appointments permanent or transfers from one post to another since it focuses upon the actual achievements of a candidate when performing the public prosecution functions but certain aspects need clarification. The proposed transitional arrangements are likely to be less useful but, in the absence of an appraisal scheme, would still be acceptable so long as the modifications suggested above are implemented. There is, however, no justification for taking into account degrees, publications and attendance at lectures either temporarily or on a permanent basis*.

c. Republic and other public prosecutors

210. The elements for identifying the list of candidates for election of Republic public prosecutor and public prosecutors also vary according to whether or not the transitional provisions are applicable.

211. Once the transitional period is over, the degree of fulfilment of criteria for election is to be expressed in points that are based on two elements, evaluation of qualification and competences and an oral test.

[135] Article 32. See paras. 163-167 above.
[136] Article 41.

212. For the former, this entails a written test in the case of candidates who are "for the first time elected to the public prosecutor function and who are not holders of public prosecution function"[137]. The outcome of the written test - which is to be assessed by the State Prosecutorial Council - will be the award to each candidate of points from 1 to 20[138].

213. The content of this test is to be determined by the State Prosecutorial Council and to be based on the Manual[139]. Having regard to the use of the same formulation as used for election of deputy prosecutors for the first-time[140] and to the specification that it is only to be taken by candidates "who are for the first time elected to the public prosecutor function and who are not holders of public prosecution function"[141], the test is presumably not meant to be more exacting than that used for such candidates.

214. *However, as with the test for first-time prosecutors, its form and length should be prescribed in more detail.*

215. The statement in Part 1 of Article 45 that candidates who are holders of public prosecution functions should not take the written test seems unnecessary as the point is already covered by Part 1 of Article 43 and the present provision is part of the transitional arrangements under which no written test is prescribed.

216. *Part 1 of Article 45 should thus be deleted.*

217. For those who are holders of public prosecutor functions, the determination of their qualification and competences is to be based not on a written test but on the candidate's performance appraisal for which, as has been seen[142], a different Rulebook is applicable. Under the performance appraisal, public prosecutors are evaluated as being "exceptionally successful at performing public prosecutor function", "successful at performing public prosecutor function" or "not satisfactory", with unspecified points attributed accordingly[143].

218. As already noted, the use of the appraisal scheme is, in principle, appropriate for assessing performance of public prosecution functions. It is also likely to be more effective in that regard than any written test and the real comparability of the two bases for assessment must be questionable. However, if the aim is only to establish

[137] Part 1 of Article 43.
[138] Article 44.
[139] Part 3 of Article 43. The Manual must be published on the Council's website at least 30 days before the test is taken.
[140] See para. 165.
[141] Part 1 of Article 43.
[142] See para. 202.
[143] Article 52. There is also provision in Part 4 for the State Prosecutorial Council to order a performance appraisal for candidates who do not have one.

minimum standards then there is no reason to object to the different methods of assessment.

219. *Nonetheless, it would be appropriate to require in addition to the written test some other basis - comparable to what might be revealed in a performance appraisal - for assessing their capabilities for the post in question so that there is a more genuine equivalence between candidates who have and have not exercised public prosecution functions.*

220. Certainly, given the senior nature of the posts involved, the oral test - which all candidates are required to undergo - looks especially significant under the present scheme

221. This test is supposed to involve the candidates in

> presenting the program of organisation and improvement of work of the public prosecution, and the candidates ability to organise the work, his/her knowledge of the work of prosecution office management, his/her commitment to preserving the reputation of the public prosecution among the public[144].

222. Candidates are given between 1 and 10 points for the oral test[145] but there is no specification as to who is supposed to conduct or evaluate it[146].

223. More significant, however, is the way in which the oral test only attracts half the points of the written test yet the content of the former is clearly of direct relevance to the role to be fulfilled by a public prosecutor or the Republic public prosecutor whereas the written test - where taken - is only concerned with the basic requirements for the first time election of a deputy public prosecutor. At the same time there is no evident distinction being made in this test between the capacity to be the Republic public prosecutor and the less senior public prosecutor.

224. *There is thus a need to introduce into the Draft Rulebook a dimension to the oral test that reflects the requirements of the two different posts to be filled and at the same time accords this aspect of the assessment greater weight than the written test, if taken. This is equally true of the use of performance appraisal to assess qualification and competences, although this might not be such a significant issue if the appraisal was not being equated with the written test as at present.*

225. As with the election of other prosecutors, there is a provision for interviewing candidates, with the interview being used to differentiate between candidates who

[144] Article 53.
[145] Article 54.
[146] *Cf.* the provision in Article 15 for the State Prosecutorial Council to evaluate the oral tests for candidates for first-time election as deputy public prosecutors.

have the same total number of points when determining the list to be submitted to the Government[147].

226. During the transitional period the evaluation of qualification and competences is to be based on an assessment of the candidate's performance. The responsibility for making this assessment varies according to the level of the candidate and the post involved. Thus, the assessment of the deputy Republic public prosecutor is to be by the Republic public prosecutor, along with the acquired opinion of the collegiate body of the Republic public prosecution; a deputy public prosecutor by the public prosecutor of the office in which the deputy public prosecutor performs his/her function; a public prosecutor by the directly superior public prosecutor, along with the acquired opinion of the collegiate body of the office in which the candidate performs his/her public prosecution function; and deputy public prosecutors who are candidates for Republic public prosecutor by the collegiate body of the Republic public prosecution[148].

227. The provision on assessment of deputy public prosecutors does not refer to an opinion of a collegiate body being required along with that of the public prosecutor but Part 1 does specify for such a candidate such an opinion shall be sought in the manner previously discussed (including the questions to be used in the survey) for the election of deputy public prosecutors[149].

228. *The provisions in this regard in Articles 45 and 46 should thus be harmonised.*

229. The assessment of performance in the transitional period involves only for two possibilities, namely, that the candidate is either 'exceptionally successful in performing the public prosecution function' (for which 30 points will be given) or is 'successful in performing the public prosecution function' (for which 20 points will be given)[150].

230. The manner of procuring the opinion on deputy public prosecutors who are candidates for Republic public prosecutor is to be regulated by an act of the State Prosecutorial Council and so what this entails cannot be assessed in this opinion

231. For all other candidates, the manner of procuring the opinion from the collegiate body is similar to that for election of deputy public prosecutors, i.e., acquiring other data and facts relevant for it, requiring at least two-thirds of deputy

[147] Articles 55, 56 and 61. The procedure to be followed is that for interviews of candidates for first-time appointment; see paras 151-154.
[148] Article 45.
[149] See para. ?
[150] Articles 24 and 30.

prosecutors are present, excluding the candidate(s) from the process and completing a survey[151].

232. The questions to be asked are to be prescribed by the State Prosecutorial Council[152] but they have been set out in the second form attached to the Draft Rulebook, namely,

> 1. Does the candidate through his/her conduct contribute to the reputation of the public prosecution?
> YES NO
> 2. Does the candidate threat[153] with respect other holders of public prosecution functions, staff employed in the public prosecution and parties in procedures?
> YES NO
> 3.Does the candidate perform the public prosecution function conscientiously, without bias and professionally?
> YES NO

233. In addition, the form leaves a space comprising two lines for a 'Justification' and also requires a 'Valuation: Positive Negative' to be given.

234. The questions have some relevance to the role to be performed by a successful candidate but the judgment will inevitably be peremptory rather than fully reasoned given the space allowed.

235. There is also provision for a candidate not satisfied with the valuation of his or her qualification and consequences to ask for this to be re-evaluated[154].

236. As with the election of deputy public prosecutors[155], there is no indication as to how exactly the particular public prosecutor making the assessment is to integrate the opinion of the relevant collegium into his or her own assessment. In particular, how is a majority negative evaluation by the collegium to be reconciled with a positive assessment by the public prosecutor in charge?

237. *Some guidance should thus be included in the Rulebook as to how this integration is to be achieved for the purpose of making the overall assessment*.

238. *There should also be clarification as to the treatment of a public prosecutor whose performance is not regarded as satisfactory*.

239. Apart from the different approach to assessment of qualification and competences, all candidates during the transitional period must undergo the oral test

[151] Articles 46-50.
[152] Part 2 of Article 49.
[153] Presumably a misprint for 'treat'.
[154] Part 2 of Article 51.
[155] See para. 195.

discussed above and also be interviewed, with ranking also being determined on the same basis.

240. *The use of a performance appraisal scheme together with the proposed oral test should, in principle, be an appropriate basis for making appointments as public prosecutor or Republic public prosecutor but there should be a requirement for their focus to differ according to the posts involved.*

241. *It is doubtful whether there is real equivalence between the written test and the performance appraisal of a serving prosecutor.*

242. *Certain other points of detail also need attention.*

243. *The proposed transitional arrangements are likely to be less useful than the permanent ones but would, in the absence of an appraisal scheme, still be acceptable so long as the modifications suggested above are implemented.*

3. Conclusion

244. *Many elements of the arrangements for determining the fulfilment of the criteria for election of public prosecutors at all levels covered by the Draft Rulebook are appropriate.*

245. *However, there are important points of detail that need clarification and revision, as well as there being certain matters of no especial relevance which ought not, therefore, to be taken into consideration*[156].

246. *Furthermore, the relative weighting of various elements is not always appropriate and, in a number of respects, there is not an appropriate equivalence between the different means of assessment. Achieving the latter in the case of deputy prosecutors appointed for the first time could well entail the provision of common preparatory training for candidates, although given their different background the circumstances in which it is delivered need not be identical.*

247. *The proposed transitional arrangements for other elections are undoubtedly a second best arrangement but are not fundamentally objectionable.*

248. *Nonetheless, making use of performance appraisal as part of the election process is not something that should be unduly delayed since this will enhance the professionalism of the public prosecution service.*

[156] As to the latter, see paras. 168-169 and 184.

G. Fulfilment of the Constitutional Court rulings and the EU recommendation with respect to initial judicial appointments

249. The issue to be addressed in this section concerns the possibility of adopting a compulsory and/or single point of entry to the judicial profession, including the practical implications flowing from such a point of entry for the Law on Judicial Academy.

250. For the purpose of the present discussion a compulsory entry point is not understood as being equated with a single entry point. The former is taken to mean that those entering the judicial profession for the first time all satisfy certain requirements whereas a single entry point is seen as the only process whereby those requirements can be fulfilled.

1. Background

251. As has already been seen, this issue of the entry point for entry to the judicial profession has become problematic as a result of the rulings by the Constitutional Court that the giving of preference in the first time election of those candidates for judicial (and prosecutorial) election who had completed the Judicial Academy's initial training programme - a step towards a single entry point - was unconstitutional, partly because of its incompatibility with equality and minority rights and partly because of an effective usurpation of the role that should be played by the High Judicial Council (and the State Prosecutorial Council). At the same time, the European Commission has recommended that the Judicial Academy's legislative and institutional framework should be adapted to allow it to become the compulsory point of entry to the judicial profession, albeit while ensuring compliance with the rulings of the Constitutional Court.

252. Despite finding the preferential position of those candidates who had completed the initial training programme, it should be recalled that in both its rulings the Constitutional Court did not call into question the value of the professional training of prospective judges by the Judicial Academy. Indeed, it recognised that this:

> contributes to the raising of the quality in performing of (...) [judicial and public prosecutorial] functions and that, therefore, it should be adequately evaluated within the criteria prescribed by the law both for the first election to a judicial, or to a public prosecutorial function, and on the occasion of election to a court, or to a public prosecutor's office of a higher instance[157].

253. Furthermore, it has been seen that European standards clearly point to the existence of certain minimum requirements for appointment as a judge, including an

[157] In Part IV of the former Decision and Part III of the latter one

appropriate level and range of legal knowledge and the skills and disposition required to perform judicial functions[158].

2. Different approaches to fulfilling European standards

254. In order to ensure that the minimum requirements for appointment as a judge are fulfilled, European standards also envisage some initial training being mandatory for all those who will be appointed as judges[159]. However, they also recognise that the background of those who are being considered for appointment can vary and that, therefore, this should be reflected in the particular training that different groups of candidates must undertake before their appointment.

255. As the CCJE has pointed out, extensive initial training should be mandatory where lawyers are appointed to the judicial profession at the outset of their legal career but much more targeted training programmes can also be appropriate where experienced legal practitioners are being appointed as judges[160].

256. Thus, there is no requirement for uniformity in the training to be undertaken. Rather, it is perfectly admissible for the content of the training that is provided before appointment or exercising judicial functions to vary according to the background and experience of those being appointed. This approach is reflected in the diversity of arrangements in many European countries, even if certain models - such as those involving appointment at the outset of a legal career - might form the predominant basis for appointment within a particular system.

257. At the same time, although there is no European standard that requires a single entry point for judicial appointments, the adoption of one is not precluded by them.

258. However, much more significant than the specific way in which entry to the judicial profession is possible is the fact that European standards require that the cumulative minimum effect of background, experience and training should be at least comparable for all those taking up a judicial appointment for the first time. Thus, as the CCJE has recommended, there should be objective criteria to ensure that the selection of judges is "based on *merit*, having regard to qualifications, integrity, ability and efficiency"[161]. From this perspective, European standards do prescribe a compulsory entry point in the sense discussed above[162].

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[158] See paras. 55-63.
[159] See paras. 64-74.
[160] Opinion No. 4 on appropriate initial and in-service training for judges at national and European levels, para. 23.
[161] Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges, Conclusion No. 2 (emphasis added).
[162] Para. 250.

259. Where there are different ways in which the criteria for judicial appointment can be fulfilled, the process should thus be one that does not treat one potential group of candidates for appointment more favourably than any other such group, while ensuring that the requisite quality standards are maintained. Although the former aspect was found by the Constitutional Court to have been breached, securing equal treatment of potential candidates does not mean that an appropriate assessment as to whether or not particular candidates have fulfilled the quality standards cannot or should not be undertaken. The latter point needs to be emphasised as, in the present context, equal treatment is concerned here with the standards and requirements for initial appointment. Thus the decisive element will be whether and how far those standards and requirements are met by the members of one group or another. Insofar as they were not entirely fulfilled by those belonging one group, there would not be any unequal preferential treatment in requiring them to undergo some further training before becoming eligible for appointment.

260. All initial training should be introduced and take place on the basis of a structure and programme implemented by primary legislation.

3. Finding a way forward

261. Apart from being a citizen, eligible for public employment and a law graduate who has passed the bar exam, the key requirements in the Law on Judges are qualification, competences and worthiness[163]. What these criteria entail in concrete terms is something for the High Judicial Council to determine but, in principle, they are entirely appropriate one on which decisions concerning judicial appointments, whether for the first time or subsequently, are to be made.

a. Fulfilling the criteria

262. Until the enactment of the Law on Judicial Academy, being a judicial assistant - with appropriate supporting references from judges - was considered sufficient to fulfil the requirements of criteria, competences and worthiness. However, that law and the amendment to the Law on Judges introduced a new means of fulfilling them, namely, completion of the initial training programme. This sought to give those taking it the practical and theoretical skills and knowledge and understanding of the role and basic principles of actions of judges through an organised process. Such an approach is entirely consistent with European standards on the need for initial training before appointment as a judge.

263. The implication of the preference for election as a judge accorded to the graduates of the Judicial Academy over judicial assistants is that they would be better

[163] Article 45.

qualified to perform judicial functions but it must still have been considered that the assistants were capable of fulfilling the criteria as they were not totally excluded from the possibility of election. Nonetheless, just as theoretical education alone is not an adequate basis for the demanding responsibilities of a first time judicial appointment, so is practical experience - which has been the primary basis for the election of assistants as judges - insufficient for this purpose. Rather a well-balanced combination of theoretical training and practical training and experience, according to the particular needs of the relevant judicial system, now appears to accord most closely with European standards.

264. However, although the Constitutional Court rulings relied to a great extent on the denial of equal treatment to judicial assistants, this stemmed essentially from the priority for appointment given to graduates of the Judicial Academy. There was no actual comparison of the different ways in which either those graduates or judicial assistants fulfilled the criteria for election as a judge, or the extent to which one group did so in a more extensive way than the other one. It thus remains unclear whether or not one or other group is actually better qualified *a priori* for election as a judge.

265. Moreover, while it is clear that judicial assistants have not had the theoretical training given to graduates of the Judicial Academy[164], the extent to which their respective practical experience either differs or is comparable remains unclear. Certainly, it seems that some judicial assistants have little or no court room experience and spend their time drafting judgments by reference only to the file whereas the graduates will have spent a good part of their practical stage shadowing the work actually done by judges[165].

266. Nonetheless, the merits of the emphasis on the insistence on initial training seen in European standards is that those receiving it should not only gain any theoretical knowledge required but they should also - through its more holistic approach - be better equipped to become a judge. This it because its focus should especially be on applying legal knowledge in a concrete and appropriate way through developing the ability to conduct a hearing, to select in complicated cases the questions that need to be addressed and answered, to reach a reasoned decision and to act in accordance with ethical standards.

267. *For these reasons, the starting point for devising, in the light of the Constitutional Court rulings, any new system for the election of judges for the first time is that the fulfilment of the criteria of qualification, competences and worthiness should entail achieving what is now expected of graduates of the Judicial Academy's*

[164] In practice they also seem to receive very little in the way of continuous education and training.

[165] Many graduates will, of course, have both experiences since they will have been judicial assistants before entering the Judicial Academy. This is not, however, a factor that is being taken into account when comparing the extent to which graduates and judicial assistants meet the criteria for election as a judge since it is not universally the case.

initial training programme without it necessarily being required for the candidates concerned to have taken that specific programme.

268. This would require identifying, in a more profound way than has been done so far, the respective merits for preparing future judges of the initial training programme and the practical experience of judicial assistants (or indeed other lawyers if it was eventually thought appropriate to appoint them as judges which, as has been seen, is a practice in various European countries). The outcome of a review to this end is likely to lead to the conclusion that there are at least some elements of the former programme missing from the profile of judicial assistants (or other lawyers), although some apparent shortcomings could be counterbalanced by aspects of the latter's practical experience that might be more advantageous than that enjoyed by graduates of the Judicial Academy. Undoubtedly, not having the benefit of the theoretical element of the initial training programme will be a major weakness in the profile of judicial assistants (and possibly of other lawyers), as will their potentially limited court room experience, but the advantages of the more holistic approach outlined above should also not be overlooked[166].

269. Once this has been established, it should then be possible to work out how best to bridge any gaps that emerge, both in terms of how and when this should be done. This is certainly likely to entail some further training and this could, in principle, be given before or after the election of the candidates concerned as judges.

270. However, there seems no basis for reverting to the system of reliance on references from judges as it would not only be difficult to ensure that all the relevant material had been covered but the references would also not be sufficiently objective for this purpose, preventing comparability as between different assistants and between them and graduates of the Judicial Academy.

b. Some options

271. The provision of training after appointment is actually envisaged in Article 43 of the Law on Judicial Academy, which provides for special training is to be provided pursuant to a law or a decision of the High Judicial Council

> for judges ... who are elected as judges ... for the first time and who have not attended the initial training program[167]

and such special training is obligatory.

272. Although this might seem particularly apt to cover the situation of any judicial assistants so appointed, it might be argued that this is not consistent with the equality

[166] It may also be that judicial assistants will not have undergone the personality test required to undertake the entrance examination for admission to the Judicial Academy's initial training programme.
[167] *Ibid.*, Article 43(2).

concerns of the Constitutional Court since the judicial assistants will be less qualified at the time of their appointment than those who have done the initial training programme. Furthermore, there is always the possibility that those undergoing the training after election will be found not actually to fulfil in practice all the requirements for performing judicial functions. Moreover, European standards point to any initial training being undertaken before undertaking judicial functions.

273. Another possibility would be to have a twin-track approach, with the initial training programme being maintained as it is currently being operated but a second - and undoubtedly shorter - initial training programme also being introduced for those who are or have been assistants. The second programme could either be the exclusive route which judicial assistants (and other lawyers with an appropriate background if that were ever considered appropriate) could take or they could choose between the two programmes[168]. However, making it the exclusive route could lead to further objections since, while some judicial assistants will have held such a position for many years and will be understandably reluctant to start again with a full course of training, others who have been so employed for a shorter period of time might be more likely to have the individual incentive to adapt to the new system. In any event, the holding of any second initial training programme will need to be carefully scheduled so that candidates who have passed one or other are both in a position to be considered for elections held at a particular point in a given year, at least so long as the present approach of deciding to fill vacancies only once a year is maintained. No such problem would arise if vacancies were filled at several points during the year.

274. The provision of a discrete initial training programme in this way should be capable of meeting the requirements to respect equality and minority rights that were of concern to the Constitutional Court and thereby respect the vested rights of judicial assistants. It would also ensure that, while allowing for different routes to be taken, those elected as judges would have passed through the same compulsory entry point in the sense outlined above[169].

275. However, careful thought may ultimately need to be given as to whether this should be a permanent or transitional arrangement. Certainly not all judicial assistants have ever wanted or sought to become judges and it might be questionable whether an enhancement in the professional nature of the judicial profession would be best served by maintaining such a bifurcated approach over the long term. Resolving this issue - which is essentially an organisational matter rather than compliance with European standards - would, however, require much fuller consideration of the function of judicial assistants in the court system and a significant period of notice would also need to be given before the special training scheme for judicial assistants could be abandoned. So long as this function and the possibility of judicial assistants becoming

[168] There might be some cost savings in not allowing a choice but that might depend on the extent of the period for which candidates would need to be employed in the respective courses.
[169] See para. 250.

judges are retained, there will continue to be a need for both training programmes. Thus, until such a consideration of the judicial assistant function is seen as necessary, the proposed arrangement should not be characterised as a transitional one.

c. The role of the Judicial Academy

276. Under either approach, it would be most appropriate for the Judicial Academy to be responsible for the training provided to those candidates for election who have not completed its initial training programme. This is because it already has the experience of providing the sort of training that is likely to be required. Moreover, European standards require that the body responsible for training should not also be directly responsible for appointing or promoting judges[170], which is the position of the Judicial Academy. It does not seem sensible to create yet another body for this purpose, particularly as the Judicial Academy also has significant role in the provision of continuous education and training for judges (which perfectly matches that of European practice).

d. Assessment

277. Whichever of the routes suggested above is chosen, the extent to which the training provided for judicial assistants has been satisfactorily completed would need to be assessed. Although this is something that the Judicial Academy is undoubtedly well-placed to undertake, it should be recalled that the Constitutional Court also found the preference for those who had completed the initial training programme unconstitutional because the High Judicial Council was bound by the grades determined by the Judicial Academy, thereby usurping the role of the former body. It may be that this objection would be overcome by a much greater involvement of the High Judicial Council in determining the basis for assessment[171]. At present this is within the competence of the Programme Council of the Judicial Academy, to which members of the High Judicial Council may not be appointed[172]. Changing this arrangement is unlikely to run counter to the European standard noted above, namely, that the body responsible for training should not also be directly responsible for appointing or promoting judges[173]. Other solutions might be to establish that any ranking of candidates by the Judicial Academy is not binding on the High Judicial Council when making appointments or even to give the grading role of the Judicial Academy a constitutional basis, although the latter would be very unusual.

4. Conclusion

[170] Opinion No. 4 on appropriate initial and in-service training for judges at national and European levels, para. 17.
[171] The High Judicial Council must approve the initial training programme; Article 35 of the Law on Judicial Academy.
[172] Article 16 of the Law on Judicial Academy.
[173] See para. 276.

278. The initial training programme provided by the Judicial Academy is an appropriate way of giving effect to European standards with respect to the first time appointment of judges.

279. *Furthermore, the starting point for devising, in the light of the Constitutional Court rulings, any new system for the election of judges for the first time should be that the fulfilment of the criteria of qualification, competences and worthiness entails achieving what is now expected of graduates of the Judicial Academy's initial training programme, without it necessarily being required for the candidates concerned to have taken that specific programme*.

280. *However, the relative extent to which the initial training programme and the experience of judicial assistants contributes to fulfilling the criteria for election for the first time as a judge needs to be identified.*

281. *A choice should be made, having regard to constitutional rights, between the alternative ways outlined above of ensuring that judicial assistants are in a comparable position to graduates of the Judicial Academy when considering candidates for election as judges.*

282. *The provision of any additional training required should be the responsibility of the Judicial Academy and steps should be taken to ensure that its role in assessing the satisfactory completion of this training is not open to any constitutional objection.*

283. *Consideration should be given to the desirability of maintaining for the long-term a judicial assistant route to becoming a candidate for election as a judge but this is essentially an organisational matter and, subject to this route including appropriate theoretical training, this is not something that engages European standards.*

H. Summary of recommendations

284. The following changes should be made to the Draft Rulebook:

General provisions

- the list of competences should be expanded to include: stable and balanced personality; independent thinking; patient; active listener; aware of developments in society; speed and efficiency; collegiality; and sense of responsibility;

Procedures for selection (general)

- there is a need to clarify whether 'unworthiness' is a consequence of being convicted of just any kind of offence or just particular ones and also whether 'unworthiness' is sufficient in itself to preclude election but it would be more appropriate to require a positive assessment of worthiness, while also keeping the existence of a specific type of conviction as an element in the selection process;
- there should be a requirement to determine in advance of interviews an outline of the issues considered appropriate to focus on in with respect to all candidates for a particular selection procedure;
- there should be a bar on anyone who has taken part in a candidate's oral test from also taking part in the subsequent interview of him or her; and
- some eliminatory stages should be included in the process of election;

Election of deputy prosecutors for the first time

- the form and length of the written test should thus be prescribed in greater detail;
- the evaluation of candidates should not be based on the allocation of points for academic titles, specialised or master studies, average marks and duration of studies and publications;
- the allocation of points for completion of the Judicial Academy's initial training programme should be revised upwards;
- any completed continued training should not necessarily be treated as comparable to the theoretical element of the initial training programme;
- there should be a determination as to what (if anything) done in the assessments for the initial training programme would satisfy the matters that need to be covered by the written test before identifying on what those concerned those concerned still need to be tested and evaluated so that there should not be any automatic requirement for the full written test to be taken by them;
- prosecutorial assistants should be required to take the full written test and, if necessary, provided with some relevant training beforehand; and

- the oral test and interview to determine overall suitability for election should only be taken by candidates who have completed a comparable portfolio of evaluations for the purpose of assessing their qualification and competence and have demonstrated that they have reached the appropriate minimum threshold deemed essential for performing the functions of a public prosecutor;

Election of deputy public prosecutors

- provision should be included for determining the public prosecutor in charge of making the assessment;
- there should be guidance as to how exactly the public prosecutor in charge of making the assessment is to integrate the opinion of the Collegium into his or her own assessment and, in particular, how a majority negative evaluation by the Collegium to be reconciled with a positive assessment by the public prosecutor in charge;
- the treatment of a deputy public prosecutor whose performance is not regarded as satisfactory should be clarified;
- the provision for using degrees, publications and attendance at lectures either temporarily or on a permanent basis should be deleted; and
- the circumstances in which the exception from the use of the performance appraisal "in the case of the first election for deputy prosecutor" where the procedure of written and oral tests for first election as a deputy prosecutor is to be used should be clarified;

Election of republic and other public prosecutors

- the form and length of the written test should thus be prescribed in greater detail;
- Part 1 of Article 45 should be deleted;
- some basis - comparable to what might be revealed in a performance appraisal - should be prescribed in addition to the written test for assessing the capabilities of candidates for the post in question so that there is a more genuine equivalence between candidates who have and have not exercised public prosecution functions;
- a dimension to the oral test should be introduced that reflects the requirements of the two different posts to be filled and at the same time accords this aspect of the assessment greater weight than the written test, if taken;
- the provisions in Articles 45 and 46 should be harmonised;
- there should be guidance as to how exactly the public prosecutor in charge of making the assessment is to integrate the opinion of the Collegium into his or her own assessment and, in particular, how a majority negative evaluation by the Collegium to be reconciled with a positive assessment by the public prosecutor in charge;

- the treatment of a deputy public prosecutor whose performance is not regarded as satisfactory should be clarified; and
- there should be a requirement for their focus of the performance appraisal and the oral test to differ according to the nature of the posts involved.

285. The election of judges for the first time should be based on the following consideration:

- candidates should be required to fulfil the criteria of qualification, competences and worthiness;
- there should be no reversion to the system of reliance on references from judges;
- the fulfilment of the three criteria should entail achieving what is now expected of graduates of the Judicial Academy's initial training programme without it necessarily being required for all the candidates concerned to have taken that specific programme;
- the relative extent to which the initial training programme and the experience of judicial assistants contributes to fulfilling the criteria for election for the first time as a judge needs to be identified;
- the missing elements from that programme in the profile of judicial assistants should be completed either by appropriate training after election (as envisaged in Article 43 of the Law on Judicial Academy) or by a separate shorter initial training programme for candidates (which could but need not be the exclusive route for them);
- the holding of any second initial training programme should be scheduled so that candidates who have passed one or other are both in a position to be considered for elections held at a particular point in a given year, at least so long as the present approach of deciding to fill vacancies only once a year is maintained;
- the Judicial Academy should be responsible for the training provided to those candidates for election who have not completed its (original) initial training programme and steps should be taken to ensure that its role in assessing the satisfactory completion of this training is not open to any constitutional objection; and
- both training programmes will be required so long as the function of judicial assistant is retained and it remains possible for a person holding this post to become a judge.

I. Conclusion

286. The Constitutional Court rulings clearly require a revised approach to the basis on which persons are elected for the first time as judges and prosecutors, notwithstanding that the initial training programme provided by the Judicial Academy is an appropriate way of giving effect to European standards relating to such appointments.

287. There are many elements in the arrangements proposed in the Draft Rulebook for determining the fulfilment of the criteria for election of public prosecutors at all levels which are appropriate. However, clarification and revision is also required with respect to various important points of detail and it includes within these criteria some matters which do not really deserve to be taken into consideration for purpose of election.

288. More fundamentally, the relative weighting of various elements used for differentiating between candidates is not always appropriate and this criticism can also be levelled at the equivalence made between the different means of assessment. In respect of the latter goal with respect to deputy prosecutors being appointed for the first time might well be facilitated by a requirement that candidates undergo some form of common preparatory training for candidates, although the manner in which this is delivered should take account of the potentially differing backgrounds of those concerned.

289. The proposed transitional arrangements for other elections are undoubtedly a second best arrangement but are not fundamentally objectionable. Nonetheless, making use of performance appraisal as part of the election process for prosecutors who are not being appointed for the first time is not something that should be unduly delayed since this will enhance the professionalism of the public prosecution service.

290. The starting point for devising, in the light of the Constitutional Court rulings, any new system for the election of judges for the first time should be that the fulfilment of the criteria of qualification, competences and worthiness entails achieving what is now expected of graduates of the Judicial Academy's initial training programme, without it necessarily being required for the candidates concerned to have taken that specific programme.

291. However, responding to the requirement for equal treatment of candidates for initial appointment of judges will require an identification of the relative extent to which the initial training programme and the experience of judicial assistants (or, indeed, other lawyers with an appropriate background if that were ever considered appropriate) can be regarded as contributing towards the fulfilment of the criteria, which should be consistent with European standards, used for the purpose of their

election. In approaching this task, it will be particularly important to avoid making the sort of inappropriate equivalence between different means of assessment seen in the Draft Rulebook .

292. Insofar as judicial assistants might be found to lack the necessary theoretical training provided in the initial training programme, there is a choice that can be made between at least two alternative ways of ensuring that they obtain this so that they are put in a comparable position to graduates of the Judicial Academy when considering candidates for election as judges for the first time.

293. The provision of any such training for judicial assistants should be the responsibility of the Judicial Academy and steps should be taken to ensure that its role in assessing its satisfactory completion is not open to any constitutional objection.

294. Maintaining a judicial assistant route to becoming a candidate for election as a judge is not, in itself, contrary to European standards but any such election should be based on the candidate concerned fulfilling both theoretical training and practical experience to the requisite levels.