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Challenges for judicial independence and impartiality in the member states of the Council of Europe

Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled *"State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe"*

TABLE OF CONTENTS

List of abbreviations

AEAJ	Association of European Administrative Judges
EAJ	European Association of Judges
CCBE	Council of Bars and Law Societies of Europe
CCJE	Consultative Council of European Judges
CCPE	Consultative Council of European Prosecutors
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ENCJ	European Network of Councils for the Judiciary
GRECO	Council of Europe Group of States against corruption
IAP	International Association of Prosecutors
MEDEL	Association «Magistrats européens pour la démocratie et les libertés»
Rec(2000)19	Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system
Rec(2010)12	Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities
Venice Commission	European Commission for Democracy through Law

Note for the reader: the list of sources and relevant legal instruments and documents used during the preparation of this report is provided in the appendix at the end of the report

A. Scope, purpose and limitations of this report

1. In his 2015 report entitled "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe", the Secretary General of the Council of Europe requested that the CCJE and the CCPE "urgently draft a comprehensive review of the main challenges for judicial impartiality and independence in member states"[1].

   Following the request of the Secretary General, the bureaus of the CCJE and the CCPE have jointly prepared the following report.

   This report is based on a preparatory report drawn up by the expert appointed by the CCJE and the CCPE, Professor Anne SANDERS (Germany).

   The sources of this report are the documents listed in the Appendix, information received by the CCJE and the CCPE through letters and complaints from members of the CCJE and the CCPE, national and international judicial bodies, national bodies entrusted with the management of prosecution services, national and international associations of judges and prosecutors, the offices of prosecutor generals, individual judges and prosecutors, NGOs, as well as information reported by the media.

2. The bureaus of the CCJE and the CCPE underline that this report is not the result of systematic and scientific research. For the preparation of the report, given the limited time and resources available, empirical and statistically representative surveys could not be conducted. Therefore, results found, and especially incidents reported, are not based on thorough and exhaustive research. Some examples reported may since have been remedied, others not mentioned may deserve reporting. Hence, incidents reported must be regarded as examples.

3. The bureaus of the CCJE and the CCPE emphasize that they are not in a position to examine or investigate the factual basis of the events which were alleged to have taken place. They have, however, applied great care only to report information they consider plausible or at least important enough to mention. The report, therefore, must not be understood as a compilation of facts established by full and complete evidence. The findings of this report must be considered to be preliminary and possibly necessitating further research and corroboration should it be desired to use them for specific initiatives in respect of member states named.

4. In addition, the bureaus of the CCJE and the CCPE point out that, in their understanding, the purpose of the report is not to highlight persons or institutions that may bear the responsibility for the events reported. Listing the reported incidents and information on a country by country basis is not meant to criticize specific member states; it has been unavoidable in order to illuminate the overall picture. The overriding aim of the report is to show, where possible, where challenges to independence and impartiality of judges and prosecutors may be found, in which ways they may occur and what their effects on the justice system can be. Public trust in judges and prosecutors can be destroyed or undermined not only in cases of real,

[1] See the Report of the Secretary General of the Council of Europe (2015), p. 29.

existing and convincingly established infringements of the administration of justice but also where sufficient cause for doubt as to its independence and impartiality can be found.

B. Overview of the report

5. The incidents reported show a number of challenges and concerns for the independence and impartiality of judges and prosecutors. Such challenges were identified in relation to

- (i) the appointment of judges and prosecutors free from undue influence
- (ii) the organisational independence of judges and prosecutors as exercised by Councils for the Judiciary and the administration of courts
- (iii) securing the necessary independence of prosecutors within the hierachical structure of prosecution services
- (iv) infringement of the security of tenure of judges and prosecutors, their status and their independence in their working environment
- (v) shortcomings in the effective enforcement of judicial decisions
- (vi) the impartiality of judges and prosecutors
- (vii) the economic basis of the work of judges and prosecutors, caused in particular by the difficult economic situations in the member states
- (viii) public criticism of judges and prosecutors and their decisions, reaching a degree encouraging disobedience and violence against judges and prosecutors
- (ix) the fight against corruption by and of judges and prosecutors and the role of standards of professional conduct

6. The report depicts some incidences where a challenge could be remedied by the introduction of formal constitutional and statutory guarantees. The CCJE and the CCPE encourage the member states to introduce such formal guarantees. However, the report also shows that, in some cases, international standards have been violated despite the introduction of constitutional and statutory safeguards. In other cases it seems that safeguards have been overlooked or eroded by the actions of the executive or legislature powers. The incidents reported and analysed in this report show that quite often it is not the absence of formal legal guarantees but rather concrete political practices in the member state that cause concern. Therefore, the CCJE and the CCPE believe that more important than formal legal rules is how the powers of state, judges, prosecutors, politicians, victims, defendants, the media and society as a whole interact in practice. As valuable as they are, constitutional guarantees, formal legal rules and institutional safeguards are not in themselves sufficient if the values of independence and the separation of powers, which form the

basis of such rules, are lacking. All parties concerned must act according to a culture of independence and mutual respect to create and sustain this basis. The introduction of formal legal guarantees forms the starting point, not the completion of this culture of independence and mutual respect.

7. Therefore, the CCJE and the CCPE agree that any action and initiative aiming at strengthening and protecting the independence of judges and prosecutors must not only address the introduction of formal rules and guarantees but must also focus on their application in practice. Encouraging international discussion on minimum standards of independence and the way they should be applied can contribute to strengthening the independence of judges and prosecutors in the member states. In this respect, the CCJE and the CCPE wish to recall a statement the CCJE made in its Opinion N°1 (2001): "What is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed"[2].

I. Appointment of judges and prosecutors

8. The ECtHR, the CCJE[3] and the CCPE[4] have recognised the importance of institutions and procedures guaranteeing the independent appointment of judges and prosecutors for an independent and impartial judicial system. The CCJE[5] and the CCPE[6] have recommended that every decision relating to a judge's or prosecutor's appointment, career and disciplinary action should be regulated by law, based on objective criteria and be either taken by an independent authority or subject to guarantees, for example judicial review, to ensure that it is not taken other than on the basis of such criteria. Political considerations should be inadmissible[7] irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature.

9. There are different appointment procedures of judges and prosecutors in the member states. These include, for example: appointment by a Council for the Judiciary or another independent body[8], election by parliament[9] and appointment by the executive[10]. Each system has its advantages and disadvantages[11]. The report shows that formal rules and Councils for the Judiciary have been introduced in the member states to safeguard the independence of judges and prosecutors. As welcome as such developments are formal rules alone do not guarantee that appointment decisions are taken impartially, according to objective criteria and free from political influence. The influence on the executive and legislative on appointment decisions should be limited

[2] See the CCJE Opinion No. 1(2001), para 6.
[3] See the CCJE Opinion No. 1(2001), paras 19-23; see also the Report of the Venice Commission on Judicial Appointments, 2007, paras 9-17.
[4] See the CCPE Opinion No. 9(2014), paras 51-56.
[5] See the CCJE Opinion No. 1(2001), para 37.
[6] See the CCPE Opinion No. 9(2014), Rome Charter, section XII.
[7] See the CCJE Opinion No. 1(2001), para 17.
[8] See, for example, Albania D I 2 a, para 43; Croatia D I 2 d, para 48; France D I 2 g, para 51; Portugal D I 2 p, para 61; Turkey D I 2 t, para 66.
[9] See, for example, Switzerland D I 2 s, para 64.
[10] See, for example, Austria D I 2 b, para 45; the Czech Republic D I 2 f, para 51; Latvia D I 2 k, para 56; Malta D I 2 l, para 57; with executive influence: Norway D I 2 n, para 59.
[11] See the CCJE Opinion No. 1(2001), para 33; the CCJE Opinion No. 18(2015), para 15.

in order to prevent appointments for political reasons[12]. Elections by parliament carry the risk of a politicisation of judges and prosecutors. Especially if such elections are not for life[13], due care must be taken that judges are not punished for individual decisions in re-elections.

10. The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office[14]. If governments have control over the appointment of the Prosecutor General, it is important that the method of selection is such as to gain the confidence and respect of the public as well as of the members of the judicial and prosecutorial system and the legal profession. The report shows a number of different approaches. In many cases, the Prosecutor General is appointed either by the executive[15] or by vote of parliament usually for a short term, often renewable[16]. In all these cases, the mode of appointment, or the wish for reappointment, can invite indirect pressure and influence. In such cases, the independence of the Prosecutor General is called into question. This is even more the case if the Prosecutor General can be removed at will by parliament[17] or the executive[18].

II. Organisational independence: Councils for the Judiciary and the administration of courts

11. Councils for the Judiciary are bodies the purpose of which is to safeguard the independence of the judiciary and of individual judges and prosecutors and thereby to promote the efficient functioning of the judicial system. Their introduction has been recommended in Recommendation 2010(12), by the CCJE, and by the European Commission for Democracy Through Law (Venice Commission)[19]. The CCPE has reasoned that the impartiality of decisions concerning the recruitment and career prospects of public prosecutors might be helped by the establishment of High Councils either for judges and prosecutors or just for prosecutors[20]. Over recent years, many European legal systems have introduced Councils for the Judiciary. The report highlights a number of challenges ranging from external influence over Councils for the Judiciary[21] over executive interferences with the administration of courts[22] to threats to internal judicial independence by powerful court presidents[23].

[12] As reported from Malta, see D I 2 l, para 57.
[13] As reported from Switzerland, D I 2 s, para 64.
[14] See the CCPE Opinion No. 9(2014), para. 55 referring to the Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, § 34-35.
[15] See, for example, Azerbaijan D I 2 c, para 47; Cyprus D I 2 e, para 49; Iceland (for an infinite term) D I 2 i, para 54.
[16] See, for example, Albania D I 2 a, para 44; Croatia D I 2 d, para 48; Hungary D I 2 h, para 53; Turkey D I 2 t, para 66.
[17] As in Ukraine, see D I 2 u, para 67.
[18] As in Germany, see D III 2 f, paras 127-131.
[19] Rec(2010)12, paras 26-29; the CCJE Opinions No. 1(2001), para 45, and No. 10(2007); the Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges (para 32), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), recommend the establishment of such Councils.
[20] See the CCPE Opinion No. 9(2014), para. 54.
[21] See D II 2 a, para 73-.95.
[22] See D II 2 c, para 99-113.
[23] See D II 2 b, para 96-98. .

12. The independence of judges and prosecutors can be infringed by weakening the competences of the Council for the Judiciary, by reducing the financial or other means at the disposal of the council or by changing its composition. As the report shows, such councils must have significant competences in order to be influential safeguards of the independence of judges and prosecutors. Mere advisory functions are not enough[24]. Member states have introduced Councils for the Judiciary with a variety of competences and compositions. According to European standards, at least a substantial majority of members of a Council for the Judiciary should be composed of judges and/or prosecutors chosen by their peers from all levels with respect for pluralism[25]. Elections must be free from external influences[26]. The executive must not influence the elections or the work of the Council in any way. The incidents reported vividly illustrate that the introduction of a Council for the Judiciary is only useful if its members can work independently from the executive and are not overly politicised[27]. Only an independent Council for the Judiciary can secure the independence of judges and prosecutors by rendering decisions which fulfil the requirements of "an independent and impartial tribunal" according to Article 6 of the ECHR[28].

13. Court presidents can be important spokespersons for the judiciary in relation to the other powers of state and the public at large. They can act as managers of independent courts instead of managers under the influence of the executive. However, in light of the findings of this report, the CCJE notes the potential threat to judicial independence that might arise from an internal judicial hierarchy[29]. Court presidents must respect that a judge, in particular a judge working in the court he/she presides over, is in the performance of his/her functions no-one's employee. He/she is holder of a State office and the servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary[30], including the president of the court. A court president should not have the power to decide questions relating to a judge's remuneration or housing[31] and should never execute his/her duties in a way that puts pressure on a judge or influences him/her to decide a case in a certain way.

14. The member states use different models for the administration of the judiciary[32]. The report depicts a number of possible challenges and concerns. While self-administration by the judiciary has been introduced or its scope enlarged in many member states, in some countries, Ministries of Justice have exerted considerable influence over the administration of courts through administrative agreements[33], directors of courts[34] and judicial inspections. In some member states the court administration is directly

[24] As, for example, the Council for Prosecutors in Albania, see D II 2 a aa, para 77; and Malta D II 2 a, gg, para 84.
[25] For the purpose and minimum requirements of councils, see Rec(2010)12, para 27; the CCJE Opinion No. 10(2007), para 18; see in this context the reports on Bulgaria D II 2 a cc, para 80; Croatia D II 2 a, dd para 81; Serbia, D II 2 a, ii, para 86; Slovakia, D II 2 a jj, para 87.
[26] Executive influence and pressure like those which have allegedly happened in Turkey in 2014 are unacceptable, see D II 2 a ll, paras 90-94.;
[27] See, for example, the reports on Albania D II 2 a aa, para 77; and Turkey see D II 2 a ll paras 90-94; Ukraine D II 2 a mm, para 95.
[28] See, for example, ECtHR *Tsanova c. Bulgarie (Requête no. 43800/12)* 15.09.2015*; Mitrinovski v. The former Yugoslav Republic of Macedonia (Application no.6899/12)* 30.7.2015*, Volkov v. Ukraine (Application no. 21722/11*), 27.5.2013.
[29] See the CCJE Opinion No. 1(2001), para 66.
[30] Ibid., para 64.
[31] As in the Russian Federation; see D II 2 b cc para 98.
[32] Some examples are provided at D II c aa, para 99-102.
[33] As in Belgium, see D II 2 c, cc, paras 104-105.
[34] As in Poland, see D II 2 c, dd, paras 106-109.

dependent on a Ministry of Justice[35]. Accordingly, the regulation of court management scores low in the survey on the independence of the judiciary undertaken on EU member states by the ENCJ in 2014/2015[36]. The CCJE has made recommendations on these issues, in particular in relation to the dangers to judicial independence arising from a direct or indirect influence of the executive over the administration of the judiciary[37]. The presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence[38]. The CCJE considers that, while an insight by external investigators can help to see shortcomings in a particular institution, such as the judiciary, it is vital that the activities of inspectors should never interfere with the development of judicial investigations and trials[39]. It is especially worrying if the executive gains insight into court files[40].

15. Legal and organisational reforms including the closing of local courts[41] are not necessarily problematic in relation to the independence of judges and prosecutors. Rather, within constitutional limits, they fall under the responsibility of the legislature, which must take action to adapt the legal system to new challenges, especially social and demographic developments. However, as the CCJE has observed, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice[42]. Closing of courts must not be done for political reasons. Where changes to the system of justice are made, care must be taken to ensure that they are accompanied by adequate financial, technical[43] and procedural provisions and that there will be sufficient human resources[44]. Otherwise there is a risk of instability in the proper administration of justice and the public might perceive (wrongly) that any failings in administering a new system were the fault of the judiciary[45].

III. The independence of prosecutors within the hierarchical prosecution service

16. A hierarchical structure is an essential feature of most public prosecution services in the member states. The CCPE has shown that in all hierarchical systems, it is essential to develop appropriate guarantees of non-interference to ensure that the prosecutor's activities are free from external pressure as well as undue or illegal pressures from within the prosecution system[46]. The organisation of prosecutors and the legal framework within which they work can make it easier or more difficult for external forces such as politicians to exert influence, thereby undermining the necessary

[35] As in Austria D II 2 c bb, para 103, the Czech Republic D II 2 a para 74.
[36] See the ENCJ Report on Independence and Accountability of Judges and Prosecutors 2014-2015, p. 6.
[37] See the CCJE Opinion No. 18(2015), paras 48, 49.
[38] Ibid., para 48.
[39] Ibid., para 49.
[40] See the report on Poland D II 2 c dd, paras 106 - 109; and Slovenia D II 2 c ee paras 110-111.
[41] As in Croatia (abolition of 40 courts), Estonia, Finland, Poland (abolition of 79 courts, 25% of Polish district courts), "The former Yugoslav Republic of Macedonia" (abolition of 16 courts); see D II 2 c ff, paras 112-113.
[42] Poland D II 2 c dd, paras 107-108.
[43] See the CCPE Opinion No. 7(2012), paras 39-44.
[44] See the CCJE Opinion No. 11(2008); the CCPE Opinion No. 7(2012), paras 36-38.
[45] See the CCJE Opinion No. 18(2015), para 45.
[46] See the CCPE Opinion No. 9(2014), para 40.

independence of public prosecutors. However, the traditions and culture of a member state are also important factors that should not be disregarded. The report shows the importance both of the legal framework as well as of traditions for the independence of prosecutors. A strong tradition of independence can protect prosecutors[47]. In some member states, especially in those with more recently drafted constitutions, the independence of prosecutors[48] and the prosecution is guaranteed in the constitution[49], in other member states, in statutory law[50]. In some countries, there are separate Councils for Prosecutors[51] with different competences, while in other countries there is a joint Council for Judges and Prosecutors[52].

17. The importance of an independent prosecution service is not yet universally acknowledged in all member states, especially where it is regarded as part of the executive. As the report illustrates, the status of the Prosecutor General is conclusive for the position of the public prosecution service within the organisational structure of a member state. In some systems, the Prosecutor General sits at the top of a hierarchically organised yet autonomous prosecution service. In such systems, the Prosecutor General may have certain duties towards parliament or the executive[53]. In other systems, the executive, i.e. the Minister of Justice, is the ultimate superior of all prosecutors and may give instructions to them[54]. In such systems, the Minister of Justice may even dismiss the Prosecutor General at free will[55]. As the CCPE has stated, politically motivated dismissals should be avoided. This is particularly relevant with reference to Prosecutors General. The law should clearly define the conditions of their pre-term dismissal[56].

18. Within a hierarchical prosecution service, a superior prosecutor must be able to exercise appropriate control over the decisions of the office, subject to proper safeguards for the rights of individual prosecutors[57]. However, such directives can endanger the independence and impartiality of prosecutors. The report illustrates that directives and instructions must be given in a transparent way. Many member states have introduced formal rules which acknowledge this. The introduction of such rules should be encouraged, as well as the establishment of a tradition of independence Instructions by the executive or by a superior level of the hierarchy concerning specific cases are unacceptable in some legal systems. Where the legislation still allows for such instructions, the CCPE recommends that they should be made in writing, limited and regulated by law[58]. Moreover, such directives should, like the exercise of prosecutorial powers in general, be subject to control, especially in the sense that an

[47] As in Norway, see D III 2 l, paras 139-140.
[48] As in Albania, see D III 2 a, para 122.
[49] As in Croatia, see D I 2 d, para 48; Greece (information provided during the preparation of this report), Hungary D III 2 g, para132,; Slovenia D III 2 q para147.
[50] As in Estonia, see D III 2 e, para126; Poland, D III 2 m, paras 141-142; Romania D III 2 o, para 145; and Ukraine (information provided during the preparation of this report).
[51] As in Albania, see D II 2 a, aa, para 78; Croatia D II 2 a, dd, para 81.
[52] As in Belgium, see D II 2 c, cc para 104, Bosnia and Herzegovina, D II 2 a, bb para 79; Bulgaria D II 2 a, cc, para 80, France D I 2 a, ee, para 82; Italy, Romania, Spain and Turkey D II a ll, para 90.
[53] As in Albania, see D III 2 a, paras 120-122; Cyprus D III 2 d, para 125; Hungary D III 2 g, paras 132-133; Slovakia D III 2 p, para 146; Spain D III 2 5, para 149.
[54] As in Austria, see D III 2 b, para 123; Azerbaijan D III c para 124; Estonia D III 2 e, para 126; Germany D III 2 f, paras 127 - 131; Luxembourg D III 2 h para 134; Iceland D III 2 i, para135; Netherlands D III 2 k, para 137.
[55] As in Germany, see D III 2 f, paras 127 - 131.
[56] See the CCPE Opinion No. 9(2014), para 73.
[57] Ibid., para 42.
[58] Ibid., para 47.

unfounded case can be dismissed by the court. Moreover, any person affected, in particular the victims, must have the right to seek a review of a prosecutor's decision not to prosecute. An option can be to allow the victim to bring the case directly to court[59]. Where the prosecutor believes that the instructions run counter to the law or his/her conscience, legal safeguards and an internal procedure should be available[60]. The case studies in this report illustrate a variety of approaches and traditions in respect of the organisation of prosecution services. The report shows the progress made in many member states with respect to introducing formal rules securing the independence of prosecutors in general and the general prosecutor in particular.

IV. Infringement of the security of tenure of judges and prosecutors, their status and their independence in their working environment

19. The independence of judges requires the absence of interference by other state powers, in particular the executive power, in the judicial sphere. In preparation of this report, the bureaus of the CCJE and the CCPE have found manifold intrusions into basic guarantees of security of tenure and freedom of interference from executive and legislative intervention. This begins, as has been shown in part I, above, where the executive can exert direct or indirect influence in the process of appointment of judges, such as where security checks[61] are required without a possibility to challenge their results. It continues where seemingly arbitrary changes of relevant laws are enacted by parliament, e.g. with respect to retirement ages or termination of terms in office of judges duly appointed[62]. Likewise, dismissals of prosecutors – be it by executive decision[63] or legislative reform, including constitutional changes[64] – are highly problematic when they seem to be motivated by political reasons.

20. Difficult problems arise in connection with vetting or lustration proceedings[65] where, on one hand, there may be a desire to improve the standing of judges and prosecutors in the eyes of society as a whole, and to enhance or create public trust in their impartiality and incorruptibility, but where, on the other hand, the rights of office holders and possible public confidence in their independent work have to be observed. In this context, dismissing all or almost all members of the judiciary and prosecution services irrespective of individual responsibility would invariably also concern those whose conduct has not given rise to doubt. In such cases, individual examinations/proceedings are required. Even such examinations must be conducted with great care, observing the principle that, as a rule, judges should not be held liable for their decisions[66]. Therefore, only exceptional cases of intentional violations of the law and of human rights principles should result in the termination of office.

21. Basic principles can be violated when judges and prosecutors are dismissed from office, reassigned to other courts or prosecution offices against their will or even

[59] See the CCJE Opinion No. 12(2009) = the CCPE Opinion No. 4(2009), para 53.
[60] See the CCPE Opinion No. 9(2014), para 49.
[61] As discussed in Slovakia, see D IV 2 n, bb, paras 199-200, and Croatia D IV 2 n, aa, para 198.
[62] As in Hungary, see D IV 2 e, aa para 165.
[63] As reported from Germany D III 2 f, paras 127-131, D IV 2 d aa, para 163; and Switzerland, see D IV 2 k para 179.
[64] As discussed in Montenegro, see D IV 2 i, para 175.
[65] As, for example, in Ukraine, see D IV 2 m, bb, paras 189-191.
[66] See Rec(2010)12, para 66, see the case reported from Italy D IV 2 f, paras 169-171.

arrested without scrupulous adherence to procedural safeguards[67]. If such incidents are reported widely, the public may reach the fatal impression that a legal system disregards judicial independence and the rule of law in a fundamental way. In principle, judges should not be requested to justify their decision-making beyond the reasoning which has to be given in the decision itself. Where decisions on reassignments or replacements of judges, even if given by independent bodies, give the impression that they find their cause in specific judgments[68], public trust in independence is endangered. This also applies where in a process of regular re-appointment individual decision-making is questioned[69]. Likewise, where the law provides for the possibility of individual civil liability for negligence in the process of judicial decisions, this is likely to cause indirect pressure and thereby to prevent independent thinking and adjudicating[70].

V. Effective enforcement of judicial decisions

22. Judicial independence and the right to a fair trial (Article 6 of the ECHR) are in vain if decisions are not enforced. Shortcomings in the enforcement of judicial decisions undermine judicial authority and question the separation of powers[71]. The CCJE and the CCPE have listed a number of cases where the swift enforcement of judicial decisions has been denied.

VI. Impartiality

23. Article 6 of the ECHR guarantees the right to have disputes decided not only by an independent but also an impartial tribunal[72]. Therefore, it is essential that judges show their impartiality in the way in which they decide cases and hold the government accountable if necessary, in the interest of the public. In some countries, prosecutors decide whether or not to initiate or to continue an investigation. Prosecutors conduct the prosecution before an independent and impartial court established by law and they decide whether or not to appeal decisions of that court[73]. They must always fulfil their duties, irrespective of the connections and influence of the potential defendant and victim[74]. Indicators of an impartial functioning of courts and prosecution can be seen in the rate of successful and unsuccessful cases in given constellations. E.g., where the rate of successful cases against the executive in administrative courts is rising, this can indicate less influence of the executive vis-a-vis the courts[75]. Likewise, where cases brought by the prosecution almost never result in acquittal[76], this can

[67] As reported from Turkey, see D IV 2 l, paras 180-185.
[68] As reported from Turkey, see D IV 2 l aa-cc, para 181-185.
[69] As reported from Georgia, see D VIII 2 d, paras 269-273.
[70] As reported from Italy, see D IV 2 f, paras 169-171.
[71] See the Report of the Secretary General of the Council of Europe Report (2015), p. 14, 17, 27, see also the CCJE Opinion No. 13(2010) on the enforcement of judicial decisions.
[72] *Morice v. France* [GC], no. 29369/10, 23 April 2015.
[73] See the CCPE Opinion No. 9(2014), para 10.
[74] The case law of the ECtHR shows cases where this has been in doubt, see, for example, *Enukidze and Girgvliani v. Georgia*, no. 25091/07, 26 April 2011; *Kavaklıoğlu and Others v. Turkey*, no. 15397/02, 6 October 2015.
[75] As reported from Georgia, see D VI 2 b, para 217.
[76] As information about Armenia and the Russian Federation suggests, see D VI 2 a, para 216.

indicate that the prosecution and the courts do not act independently from each other. The cases depicted in the report illustrate situations in which impartiality seems to be impaired, but also examples where the increasing independence of a legal system improves the public perception of the judicial system.

VII. The economic basis of the judiciary (including the prosecution)

24. In recent years, many member states have suffered severe economic crises. At the same time, many judicial systems in the member states report severe cuts, frozen budgets and salaries and increased workloads for judges and prosecutors. In the case of a severe economic downturn, judges and prosecutors, like all other members of society, have to live within the economic position of the society they serve. However, chronic underfunding should be regarded by society as a whole as unacceptable. It undermines the foundations of a democratic society governed by the rule of law[77]. The general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different judicial systems[78]. First, the state must make available appropriate funds to ensure that courts and prosecution offices can work efficiently. Secondly, the remuneration of judges and prosecutors should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions and from the risk of corruption.

25. The incidents depicted in the report vividly illustrate the risks inherent in chronic underfunding[79] and a lack of appropriate remuneration: security risks[80], cuts in staff[81] which reduce the ability of courts to decide cases with the necessary quality and within a reasonable time, cuts in legal aid, which make access to justice more dependent on income, increased workload that endangers the quality of the decisions rendered[82] and undignified working conditions[83] which might reduce public respect for the judges and prosecutors and increase the risk of corruption. Insufficient funding of prosecution offices can lead to inadequate investigations and preparation of trials[84]. This in turn can cause retrials, but also the acquittal of guilty suspects and thus endanger the security of society as a whole. Insufficient funding and budget cuts might result in a judicial system overemphasising "productivity"[85]. While courts and prosecution services should use their available resources in the most efficient manner possible[86], the quality of justice cannot be understood as if it were a synonym for mere "productivity" of the judicial system[87]. The workload of both judges and prosecutors must allow that work is not only done quickly but also with high quality. Moreover, member states must take the necessary steps to ensure the security of

[77] See the CCJE Opinion No. 18(2015), para 51.
[78] See Rec(2010)12, para 32, and the CCJE Opinion No. 2(2001), para 4; Opinion No. 10(2007), para 37; Opinion No. 17(2014), para 35.
[79] As reported from Malta, see D VII 2 a ee, para 233 and Ukraine, see D VII 2 a, jj, para 238.
[80] As reported from Lithuania, see D VII 2 a, dd, para 232.
[81] As reported from Belgium, see D VII 2 a, aa, para 228.
[82] As reported from the Netherlands, see D VII 2 a, ff, para 234.
[83] As reported from Albania, see D IX 2 a, aa para 295.
[84] As reported from the United Kingdom, see D VII 2 a, kk, para 239.
[85] See the CCJE Opinion No. 17(2014), para 35.
[86] See the CCPE Opinion No. 7(2012), para 4.
[87] See the CCJE Opinion No. 17(2014), para 35; the CCJE Opinion No. 6(2004), para 42.

judges and prosecutors and appropriate working conditions reflecting the importance and dignity of the judiciary and the prosecution services. Access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court[88] or if access to justice is obstructed through excessive costs or is dependent on wealth[89].

VIII. Public discussion and criticism of judges and prosecutors

26. Both judges and public prosecutors face unfair press campaigns and public criticism of politicians[90]. Public debate is an essential element of a democratic society. In principle, the decisions and actions of judges and prosecutors are no exception. However, there is a clear line between freedom of expression and legitimate criticism which might even have positive effects on the one hand and disrespect and undue pressure on the other[91]. The report highlights incidents which cross this line.

27. The reported incidents show criticism of a degree which can cause considerable harm to judges and prosecutors. In many member states politicians do make comments that show little understanding of the role of independent judges and prosecutors. The findings of the ENCJ concluded that many judges in EU member states do not feel that their independence is respected[92]. Unbalanced comments are worrisome because they affect the public perception of the judges and prosecutors and can affect the necessary public trust in them. In some cases, such comments have apparently played a role in encouraging violent attacks against judges[93]. Such behaviour is an attack on the legitimacy of another state power and thus affects the separation of powers necessary in a democratic state[94]. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts and prosecution offices are endangered by attacks or intimidations[95].

28. Public debate and also criticism can help identifying and eliminating shortcomings in the performance of judicial systems. Judges and prosecutors should do their part as well and engage in a respectful, fruitful dialogue with the executive, the legislature, and the media. To achieve this, judges as well as prosecutors must be free to express criticism[96]. The report shows, however, that criticism is sometimes answered by dismissal[97]. However, unlike politicians, judges and prosecutors must remain impartial and are therefore not as free to defend themselves against criticism. The report shows ways in which this might be done.

[88] See the CCJE Opinion No. 2(2001), para 3.
[89] See the CCJE Opinion No. 6(2004), paras 20-21.
[90] The CCPE has discussed the issue in the CCPE Opinion No. 8(2013).
[91] See the CCJE Opinion No. 18(2014), para 52.
[92] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 7.
[93] As reported from Ukraine, see D VIII 2 f, paras 275-276.
[94] See the CCJE Opinion No. 18(2015), para 52.
[95] See the CCJE Opinion No. 18(2015), para 52; see also the CCPE Opinion No. 9(2014), paras 90-91; IAP Standards (1999) 6.
[96] See the CCJE Opinion No. 18(2015), para 42.
[97] See ECtHR: *Baka v. Hungary* of 27.5.2015, Application no. 20261/12; *Guja v. Moldova* (Application no. 14277/04, 12.2.2008).

IX. Corruption/ Accountability / Standards of professional conduct

29. Corruption of judges and prosecutors is a problem in some of the member states. Taking bribes is a way in which judges and prosecutors give up their independence[98]. Reports on corruption of judges and prosecutors and on their role in fighting corruption are manifold, as the report show[99]. Public perception of corruption of judges and prosecutors is probably the most serious challenge for public confidence in their impartiality and independence. Fighting corruption, therefore, is one of the most important tasks for all judges and prosecutors. Offences must carry severe consequences including, as a rule, dismissal from office. Investigations into allegations must not be delayed, must be diligent, thorough, impartial, and, as far as possible, transparent, taking into account that the public may suspect that judges and prosecutors hesitate to prosecute or convict one of their peers. At the same time, such measures must respect the procedural rights of judges and prosecutors.

30. In order to establish and maintain public trust, all measures to safeguard against corruption must be taken by the judges and prosecutors. This includes trust-building forms of accountability in the sense that the justice system and its functions, the presumption of innocence, and the necessity to prove guilt, are explained. Some developments were reported which can serve as encouragement[100]. In addition, standards of professional conduct or of judicial ethics can serve as useful guidelines for judges and prosecutors and also as transparent information for the public. The 4th Round Evaluation Reports of GRECO repeatedly recommended that member states introduce ethical guidelines for judges and prosecutors. Parallel to such measures, sufficient means for the judiciary (including prosecution services), salaries, personal protection and means of work, are necessary pre-requisites in order to prevent possible inducements for corruption.

31. Judicial investigations into allegations of corruptions outside the justice system may present particular challenges. First, the highest professionalism is needed to establish the true facts where allegations of corruption may also be used in order to discredit persons involved, and where burden and stress out of proportion to the charge may be caused for defendants. Secondly, in cases where corruption is established, it is the duty of prosecutors and judges to fearlessly prosecute and convict even powerful members of society.

C. General Principles

32. It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice[101]. Such an administration of justice requires

[98] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, 2014-2015, p. 5.
[99] See especially Albania, D IX 2 a, aa paras 291 - 295 and Ukraine, D IX 2 a, ff, para 300. In both countries, politicians seem to ponder the replacement of all judges or at least the introduction of evaluation systems which reverse the burden of proof on the judge.
[100] As in Georgia, see part D IX 2 a, dd Para 298.
[101] See the CCJE Opinion No. 12(2009) and the CCPE Opinion No. 4(2009) “Bordeaux Declaration”, para 1.

independent and impartial judges and public prosecutors who ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected[102].

I. The importance of independence and impartiality

33. Judges and public prosecutors must both enjoy independence in respect of their functions and also be, and appear to be, independent from each other[103]. The impartiality and independence of judges and prosecutors is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. In a democratic state, the powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole[104]. Judges and prosecutors must exercise their duties independently, respecting and preserving this system of checks and balances.

34. Judges must be independent to fulfil their role in relation to the other powers of the state, society in general, and the parties to any particular dispute upon which judges have to adjudicate[105]. Judicial independence is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all individuals (and the other powers of the state) will have equality before the courts[106].

35. The independence of prosecutors is a further safeguard in maintaining the independence of judges, it is crucial in a democratic society and an essential condition for the independence of the entire justice system. Although the task of deciding cases according to the law is entrusted to judges, the public relies on public prosecutors to prosecute crimes before the courts and to appeal court decisions in the interest of the public[107]. In many member states, public prosecutors are also responsible for investigating crimes[108] and for enforcing judicial decisions[109]. Today, public prosecutors face the crucial challenges of international crime and terrorism. Pursuing their important duties, prosecutors must defend the rule of law, respect for human rights and fundamental freedoms. Such duties must be undertaken in an independent way, free from political interference. Excessive powers of the prosecution, as for example in totalitarian systems, where a powerful prosecution service was used to control the judiciary, must be avoided. An over-powerful prosecution service without accountability can endanger judicial independence and the protection of human rights[110].

36. Prosecutors in many systems have a hierarchical relation with the administration (Minister of Justice), which makes it even more important that political influence in

[102] Ibid.
[103] Ibid., para 3.
[104] See the CCJE Opinion No. 18(2015), paras 1, 7, 9.
[105] See the CCJE Opinion No. 1(2001), paras 11, 12.
[106] See the CCJE Opinion No. 3(2002), para 9.
[107] See the CCPE Opinion No. 9(2014), para 10.
[108] Ibid., para 15.
[109] See Rec(2000)19, paras 2-3.
[110] See the Venice Commission's Report on European Standards as regards the independence of the judicial system, Part II - the Prosecution Service, adopted on 17-18 December 2010, paras 72-73.

individual cases is prevented by law; there might be interference of the administration (Minister of Justice), but only in full transparency and openness and only when it is made public and can be controlled by parliament or by the courts. This is especially important in respect of the prosecution of public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law[111].

II. Requirements of impartiality and independence

37. Minimum requirements for the respect of the independence of judges and prosecutors have been identified by the Committee of Ministers, the CCJE, the CCPE and the Venice Commission[112]. Indicators for the objective and subjective independence of judges and prosecutors have been identified and researched by the ENCJ[113]. The legislative, regulatory and institutional frameworks and rules in respect of the status of judges and prosecutors and their guarantees must be seen to ensure their full independence. Security of tenure, proper financial remuneration, a suitable disciplinary status, professional training programmes and appropriate working conditions must be granted. The State must also ensure the safety of judges and prosecutors and avoid them being subject to pressure of any kind in the performance of their duties[114].

38. For prosecutors, the extent of independence varies from one system to another. In some member states, it is regulated very strictly, due to the history of the state and its current position. In some other states, it is a general agreement on a governmental level. It is therefore not necessary to press for a strict legal framework at national level ensuring independence. It is the professionalism of prosecutors that ensures their independence and their place in the central government. Although Rec(2000)19 allows for a plurality of models with regard to the degree of independence of the prosecution service vis-à-vis other state organs, there is a widespread tendency, within the member states of the Council of Europe, to move towards a more independent prosecution service, rather than one subordinated or linked to the executive[115].

39. The Rome Charter (Opinion No.9 (2014) of the CCPE) on the European norms and principles concerning prosecutors[116] as well as the Standards of the International Association of Prosecutors (1999)[117] have codified minimal requirements necessary for an independent status of public prosecutors, in particular:

[111] See Rec(2000)19, para 16.
[112] See the CCJE Magna Carta of Judges (2010); see Rec(2000)19; see the CCJE Opinion No. 12(2009) and the CCPE Opinion No. 4(2009) "Bordeaux Declaration", the CCPE Opinion No. 9(2014) "Rome Charter"; the Venice Commission's Report on the Rule of Law (March 2011).
[113] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015.
[114] See the CCJE Opinion No. 1(2001); Rec(2010)12, Chapter II, V, VI; the CCJE Magna Carta of Judges (2010), paras 2-13; the CCJE Opinion No. 18(2015), para 35; the CCPE Opinion No. 9(2014) Rome Charter, sections XI, XII, XIII, paras 51-64, 68-73, 90.
[115] See the Venice Commission's Report on European Standards as regards the independence of the judicial system, Part II - the Prosecution Service, adopted on 17-18 December 2010.
[116] See the CCJE Opinion No. 12(2009) and the CCPE Opinion No. 4(2009) "Bordeaux Declaration", para 4; see also the indicators developed by the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 79-83.
[117] http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx.

- that their position and activities not be subject to influence or interference from any source outside the prosecution service itself;
- that their career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration, be safeguarded through guarantees provided by the law[118];
- that adequate organisational, financial, material and human resources be put at the disposal of justice.

40. Even more important than formal legal rules is how the powers of state, judges, prosecutors, politicians, victims, defendants, and society as a whole interact in practice. Constitutional guarantees, formal legal rules and institutional safeguards are not in themselves sufficient if the values of independence and separation of powers, which form the basis of such rules, are lacking. Quite often it is not the absence of formal legal guarantees but rather the political practices in the member state that cause concern.

D. Current Concerns and Challenges

I. Appointment of judges and prosecutors

1. Introduction

41. Institutions and procedures guaranteeing the independent appointment of judges and prosecutors are an indispensable condition for an independent and impartial justice system**.** The CCJE has recommended that every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria[119]. Political considerations should be inadmissible[120]**.** The CCJE has also recommended the participation of an independent authority with substantial representation chosen democratically by other judges in decisions concerning the appointment or promotion of judges[121].

42. The CCPE has stated that the recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review[122]. According to the CCPE, the necessary impartiality in the recruitment process

[118] See the CCJE Opinion No. 12 (2009) and the CCPE Opinion No. 4 (2009) "Bordeaux Declaration", para 8.
[119] See the CCJE Opinion No. 1(2001), para 37.
[120] See the CCJE Opinion No. 1(2001), para 17.
[121] See the CCJE Opinion No. 1(2001), para 45, rec. 4; Opinion No. 10(2007), paras 48-51. According to the ECtHR, judicial appointments by the legislature and the executive are permissible as long as the appointed judges are free from influence or pressure when carrying out their adjudicatory role see: *Flux v. Moldova* of 3.7.2007 – 31001/03 - para 27. The notion of separation of powers and its importance for judicial appointment has also been discussed by the ECtHR: see *Volkov v. Ukraine* of 9.1.2013 - 21722/11 - para 109 and *Maktouf and Damjanovic v. Bosnia and Herzegovina* of 18.7.2013 – 34179/08 - para 49. The Venice Commission considers appointment of ordinary judges by vote of Parliament inappropriate (the Venice Commission's Report on Judicial Appointments, 2007, para 12) and recommends appointment by a Council for the Judiciary with a substantial number or majority of members being elected by the judiciary: see the Venice Commission's Report on Judicial Appointments, 2007, para 29.
[122] See the CCPE Opinion No. 9(2014) "Rome Charter", section XII; see also ECtHR *Majski v. Croatia (no. 2)*, no. 16924/08, 19 July 2011.

may be promoted by arrangements for a competitive system of entry to the profession and the establishment of High Councils either for both judges and prosecutors or just for prosecutors[123]. The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office[124]. If governments have some control over the appointment of the Prosecutor General, it is important that the method of selection is such as to gain the confidence and respect of the public as well as of the members of the judicial and prosecutorial system and legal profession. The Prosecutor General should be appointed either for a sufficiently long period or permanently to ensure stability of his/her mandate and make him/her independent of political changes[125].

2. Incidents and other information

a. Albania - Appointment of judges and the General Prosecutor

43. The President of the Republic appoints judges and court presidents on the proposal of the High Council of Justice (HCJ). The HCJ is the authority responsible for the nomination, transfer, discharge, education, evaluation career and control of the judges of first and second instance[126]. The President appoints judges of third instance and of the constitutional court with the consent of parliament[127].

44. According to the Albanian Constitution, the General Prosecutor of Albania is appointed by a simple majority of votes by parliament for a 5-year term. He/she may be reappointed. This regulation is criticized because it does not guarantee the General Prosecutor's independence from the legislature, as the latter can decide the dismissal or re-appointment of the General Prosecutor after the five-year term[128].

b. Austria - Appointment of judges by the executive

45. In many member states, judges are still appointed by the executive with varying degrees of influence of the judiciary. In 2015, the Austrian member of the CCJE provided an example in relation to the appointment of administrative court judges. On 1 January 2014, constitutional reforms in the area of administrative jurisdiction became effective, establishing two federal administrative courts of first instance and an additional nine administrative courts of first instance of the Austrian provinces ("Länder").

46. Amongst others, Article 134 para 2 of the Federal Constitutional Law provides that administrative court judges of the provinces are appointed by the government of the

[123] See the CCPE Opinion No. 9(2014), para. 54.
[124] See the CCPE Opinion No. 9(2014), para. 55, referring to the Venice Commission's Report on European Standards as regards the independence of the judicial system: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, § 34-35.
[125] See the CCPE Opinion No. 9(2014), para 56, referring to the Venice Commission's Report on European Standards as regards the independence of the judicial system: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, § 37. Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 65.
[126] See Sanders, Report on the Individual Evaluation of Judges in Albania, 2014, para 45. http://www.coe.int/t/dghl/cooperation/cepej/cooperation/Albania/Report_Evaluation_Judges_Sanders_EN.pdf visited 5 November 2015.
[127] Analysis of the Justice System in Albania, June 2015, p. 23-24.
[128] Information received from the CCPE member in respect of Albania during the preparation of this report.

province. With the exception of the President and Vice-President, the government has to call for proposals of three candidates (for appointment of new judges) by the plenary assembly of the administrative court (or a committee to be elected by its members). However, these are not formally binding proposals. On the basis of this provision, four new judges were appointed for the Viennese administrative court. Three out of the four had not been proposed by the court's committee. This is not in line with point 47 of Rec(2010)12, as the authority did not follow the recommendation in practice, made by the judges' committee of this court[129]. These members were, however, proposed by a commission consisting of representatives of the judiciary, academia and administration, after an assessment of the candidates.

c. Azerbaijan - Appointment of the Prosecutor General by the President

47. The Prosecutor General is appointed by the president subject to endorsement by Parliament for a five year term renewable once. The Prosecutor General's deputies, chief specialised prosecutors and the chief prosecutor are appointed by the President on the recommendation of the Prosecutor General; territorial and specialised prosecutors are appointed by the Prosecutor General with the consent of the President[130].

d. Croatia - Election of Attorney General by Parliament, appointment of prosecutors by State Attorney's Council

48. The independence and autonomy, as well as the status and appointment of public prosecutors are regulated by the Constitution of the Republic of Croatia. According to the constitution, the State Attorney's Office is an autonomous and independent judicial body. The State Attorney General is elected by parliament for a renewable four-year term, at the proposal of the government following a prior opinion of the relevant committee of the Croatian Parliament. The majority of the State Attorney's Council consists of prosecutors elected for a term of four years in direct elections by all prosecutors and deputy prosecutors. Only the State Attorney General is appointed by the Parliament of the Republic of Croatia. All prosecutors and deputy prosecutors are appointed for life by the State Attorney's Council[131]. GRECO has recommended that it would be preferable if the procedure for the appointment of the prosecutors (and especially the Prosecutor General) could better prevent risks of improper political influence or pressure in connection with the functioning of the prosecution service[132].

e. Cyprus - Appointment of the Attorney General by the President until retirement

49. In Cyprus, the Attorney General, the head of the prosecution system, is appointed by the President of the Republic from among persons who are qualified for appointment as judges of the Supreme Court. He/she holds office until the attainment of the age of

[129] See the CCJE Situation Report, updated version No. 2(2015), para 14.
[130] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Azerbaijan, published on 2 April 2015, p. 30 para 94.
[131] Information received from the CCPE member in respect of Croatia during the preparation of this report. See for the right of an unsuccessful candidate wanted to challenge the Council's decision in court: ECtHR: *Majski v. Croatia (no. 2)*, no. 16924/08, 19 July 2011.
[132] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Croatia, published on 25 June 2014, p. 37.

sixty-eight and can be removed only in the manner and on grounds similar again to those for the removal of a judge of the Supreme Court.

f. Czech Republic - Refusal of Ministry of Justice to nominate winner of competition for Vice-President of High Court

50. The CCJE member on behalf of the Czech Republic stated, on 29 May 2015, that the government had not respected even the limited rules of participation of the judiciary in the appointment procedure. The leader of the most powerful political party and the Minister of Finance had decided that the winner of the competition for the position of the Vice-President of the High Court could not be nominated for this position; the Minister of Justice decided not to nominate him[133].

g. France - Appointments of magistrates by a Council for the Judiciary

51. The CCJE member in respect of France stated, on 11 September 2015, that the independence of judges is relatively well ensured through the intervention of the High Council for the Magistrature (CSM) in the process of appointment and promotion. Although, formally, all appointments of judges are subject to a decree of the President of the Republic, the decision belonged to the CSM for the appointments to the Court of Cassation, for the first presidents of the courts of appeal and for the court presidents. For all other judges, appointment or promotion was proposed by the Minister of Justice, who needed the agreement of the CSM. Thus, responsibilities are shared between the executive and the judicial power to ensure the full independence of the latter.

52. In France, any magistrate can be appointed as judge or prosecutor and can, in the course of his/her career, move from one function to another. The status of judges is nevertheless different: while a judge is independent and irremovable, the public prosecutor is in a hierarchical relationship with the Minister of Justice at the top of this hierarchy; a prosecutor could be moved without his/her consent. In relation to appointments, the CSM has only an advisory role and the Minister has no obligation to follow the opinion of the CSM.

h. Hungary - Election of Prosecutor General by the Parliament

53. In Hungary, the prosecution service is headed by a Prosecutor General elected by the Parliament. The Prosecutor General is elected from among prosecutors for a renewable term of nine years by a 2/3 majority in Parliament on the recommendation of the President of the Republic. According to the view of the member of the CCPE in respect of Hungary, the legitimacy of the Prosecutor General is ensured by election by Parliament[134]. GRECO has recommended reconsidering the possibility to re-elect the Prosecutor General. Moreover, GRECO subsequently criticised the fact that the Prosecutor General continued in office until the re-election of a successor. The 2/3 majority required for the election of a new Prosecutor General made it possible for a minority of parliamentarians to block a candidate. Therefore GRECO recommended

[133] See the CCJE Situation Report, updated version No. 2(2015), para 15.
[134] Information provided by the CCPE member in respect of Hungary for the preparation of this report.

reconsidering the law[135]. The Prosecutor General has the right to appoint prosecutors. Traditionally, a two-step appointment is followed. The first appointment shall be made for three years. The second appointment, thereafter, is for an indefinite term[136].

i. Iceland - Appointment of the Director for an indefinite term and appointment of prosecutors for only five years

54. The Director of Public Prosecutions (DPP) is the highest holder of the prosecution authority. The DPP and his/her Deputy are appointed by the Minister of the Interior for an indefinite period of time[137]. The DPP enjoys the same terms of service and salary – and the same legal benefits – as Supreme Court judges. The appointment requirements and the procedure and grounds for dismissal for the DPP and his/her Deputy are the same as those established for Supreme Court Judges. As from 2015-2016 the District Prosecutor and his/her Deputy are appointed by the Minister of the Interior for an indefinite period of time. All other prosecutors (appointed after 1996) are given a five-year renewable mandate. If an individual has been appointed to a five-year term post, s/he must be informed no later than six months before his/her term of appointment expires whether the post is going to be advertised as vacant. Otherwise, and unless the post holder wishes to resign, the contract is automatically extended by five years. The authorities indicated that, in practice, contracts are systematically extended. GRECO has in its 3th evaluation report of 28 March 2013 recommended that measures be taken to ensure security of tenure for all prosecutors. This recommendation has not yet been implemented.

j. Ireland – Reform of appointments of judges under discussion

55. The CCJE member in respect of Ireland stated, on 1 July 2015, that in Ireland there was a keen interest to see a Council for the Judiciary established on a statutory basis and to establish a greater transparency in the system of appointing and promoting judges. This was further promoted in 2014 by the GRECO country report on Ireland. Its recommendations were fully in accordance with what the judiciary, through the Association of Judges of Ireland (AJI), had been seeking. The government responded to the publication of the report by issuing a statement which accepted the recommendations. As regards appointments and promotion, the government accepted that changes in this area would be appropriate and now detailed proposals were awaited. The AJI prepared and submitted a document on this topic. The debate is continuing[138].

k. Latvia - Executive influence over the appointment of judges

56. The AEAJ reported in January 2013 that in Latvia Parliament refused to re-appoint a judge of a higher instance who had been proposed by the Judicial Qualification Board and the Minister of Justice. This action would appear to conflict with Article 47 of Rec(2010)12, according to which the relevant appointing authority should in practice adopt such a proposal. The observer to the CCJE representing the AEAJ stated on 15

[135] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Hungary, published on 22 July 2015, p. 41, para 177.
[136] Information provided by the CCPE member in respect of Hungary for the preparation of this report.
[137] Information provided by the CCPE member in respect of Iceland.
[138] See the CCJE Situation Report, updated version No. 2(2015), para 16.

July 2015 that the situation remained unchanged. However, in practice, no similar case had been reported in the last three years[139].

l. Malta - Appointment of judges by the government

57. The CCJE member in respect of Malta reported, on 19 May 2015, that judges are still appointed by the government. In a report published on the same day (19 May 2015) by the newspaper "Times of Malta", the government was criticised for the fact that since the election of a labour government in 2013, there had been 10 nominations to the bench, which had been either former Labour officials or persons closely connected to the government. The government was advised in 2013 by a report which it itself commissioned to change the way of appointment of members of the judiciary. To date, however, appointments have remained the sole prerogative of the government[140].

m. The Netherlands - Appointment of Supreme Court Members

58. According to information the CCJE received in preparation of its Opinion No. 18(2015), new members of the Supreme Court are appointed from a list of recommendations drawn up by the Supreme Court. The House of Representatives receives the recommendations and forwards its selection (by secret voting) to the government. Until recently this was a formality: the members of the House automatically followed the recommendation of the Supreme Court. In recent years there has been discussion of this procedure and a tendency to let the House have an active say in the appointment of Supreme Court judges.

n. Norway – Predominant role of the executive

59. The member of the CCJE in respect of Norway highlights the predominant role of the Government in the appointment procedure to be a shortcoming in the Norwegian system for the appointment of judges. The Government is not only vested with the power to appoint judges, but also has the power to appoint the members of its advisory body, the Judicial Appointments Board. The Government decides which of its members is chairperson of the Board. The Government also decides who among the Norwegian judges serve as the three judges who must be members of the Board. The Board recommends and ranks three applicants. The Government is not obliged to follow the Board's ranking. The Government may even choose an applicant who has not received the recommendation of the Board, but only if it has asked for the Board to make a special assessment of the applicant in question. Finally, the Judicial Appointments Board has no tasks to fulfil when it comes to the appointment of the President of the Norwegian Supreme Court; an appointment is to be made by the Government on the basis of consultations between the Government and the Parliament[141].

[139] Ibid., para 17.
[140] Ibid., para 18.
[141] See Nils A. Engstad, "Judicial Independence at the Outskirts of Europe" in: Nils A. Engstad, Astrid Laerdal Froseth, Bard Tonder (eds) The Independence of Judges (2014) Eleven International Publishing, The Hague, 89, 96-97.

o. Poland - Council for Prosecutors suggests candidates for Prosecutor General

60. Poland also has a Council for Prosecutors, the majority of which consists of prosecutors of different levels. The way the Prosecutor General is elected secures both the influence of the Council of the prosecutors as well as an influence of the executive: two candidates are suggested to the President. Candidates are selected by the Council after a public hearing with an absolute majority of the votes. The President then makes a choice between the two.

p. Portugal – Appointment of prosecutors, constitutional judges and the Prosecutor General

61. In Portugal, the appointment, assignment, transfer and promotion of prosecutors as well as disciplinary matters, are dealt with by the High Council of the Public Prosecution Service, which is presided over by the Prosecutor General. Prosecutors are appointed for life; it is a career that runs parallel to the judiciary. At the end of his/her career, a high level public prosecutor may apply to become a member of a Supreme Court (Supreme Court of Justice, Supreme Administrative Court, Court of Auditors). The Constitutional Court has a different way of access. It consists of 13 judges, ten of whom are appointed by the Portuguese Parliament and three co-opted (chosen) by the other judges of the Constitutional Court. The term of office at the Constitutional Court is 9 years. The Prosecutor General is appointed by the President of the Republic on the basis of a governmental proposal for a term of six years. According to the Constitution, prosecutors may not be transferred, suspended, retired or dismissed except as provided by law. The High Council of the Public Prosecution Service does not exercise disciplinary competences over the Prosecutor General; criminal cases against the Prosecutor General are dealt with by the Supreme Court of Justice.

q. Serbia - Reform of appointment of judges and prosecutors necessary

62. In June 2015, Human Rights Europe recommended that Serbia strengthen the independence and role of the High Judicial Council and the State Prosecutorial Council in order to fight corruption and improve its legal system. Amendments of the procedures for the recruitment and promotion of judges, court presidents and prosecutors, in particular by excluding the National Assembly from this process and ensuring merit-based recruitment, as well as continued reform of the system of appraisal of judges' and prosecutors' performance, would help the independence of the prosecution[142].

r. Spain - Appointment of Prosecutor General by the King after consultation with Council of the Judiciary

63. As a hierarchical institution, the Prosecutor General is the head of the Spanish Public Prosecution Service. The Prosecutor General is appointed and dismissed by the King, at the proposal of the Government, after consulting the General Council of the

[142] 2 July 2015 (Human Rights Europe)
http://www.humanrightseurope.org/2015/07/serbia-must-improve-measures-for-preventing-corruption-among-parliamentarians-judges-and-prosecutors/.

Judiciary (CGPJ), as provided for by article 124 (4) of the Constitution. In 2007 and 2009, a number of additional rules were introduced: The Prosecutor General must be a Spanish lawyer of recognised prestige with more than 15 years of professional experience; the proposal of the Government must be subject to consultation with the CGPJ and the candidate must appear before Parliament (Justice Commission) so that the three branches of the State participate in the appointment of the Prosecutor General. The mandate of the Prosecutor General is limited to four years (non-renewable). There is a closed list of objective causes for removal and leave from office so that the Government can no longer dismiss the Prosecutor General at its discretion. Nevertheless, some concerns remain due to the fact that the Prosecutor General is chosen by the Government and leaves office with the Government that proposed him/her.

s. Switzerland - Election of Judges

64. The CCJE member in respect of Switzerland stated, on 2 June 2015, that the judges had traditionally been and were still elected by the Parliament – or even by popular vote – for a certain time in office. They had to apply for re-election and usually were re-elected. For professional judges, however, who were entirely engaged in the judiciary and earned their living in this service, there was a danger of undue political pressure. So far, undue pressure by certain members of Parliament had not led to non-re-elections of judges. That may be due to the fact that there was no single majority political party to impose its political views. Thanks to the plurality of political parties, there was generally a majority for the re-election of a judge or of judges involved in judgments that were considered by some as politically most undesirable. Re-elections were sometimes abused to criticise unpopular judicial decisions indirectly.

65. According to the information received by the CCJE, there is awareness of the potential threat of undue political pressure in the Swiss system of re-election of judges. Still, in view of the inherent stability and broad representation of political groups in the Parliament – on the federal and the cantonal levels – there is no conviction to change the system. Nevertheless, as mentioned in the Situation Report adopted in 2013, the federal Parliament tried to reduce the risk by adopting principles and taking institutional measures for the process of re-election, and one canton recently changed the system and introduced an election for an indefinite time in office (until the age of retirement) linked with the possibility of an impeachment procedure[143].

t. Turkey - Council appoints Judges and Prosecutors

66. In Turkey, appointments of judges and prosecutors are decided upon by the High Council of Judges and Prosecutors (HSYK). In February 2014 and with new elections to the HSYK, the Turkish Ministry of Justice gained greater influence over the appointment of judges and prosecutors[144]. A judge stated in an email to the CCJE that the governing party now sends lists to the HSYK for the appointments of judges and prosecutors.

[143] See the CCJE Situation Report, updated version No. 2(2015), para 19.
[144] The details of these developments are discussed below in Part II 2 a jj, paras 90-91.

u. Ukraine - Prosecutor General elected and dismissed by parliament

67. According to the Ukrainian constitution, the public prosecution of Ukraine shall be headed by the Prosecutor General, appointed to, or removed from, office by the President of Ukraine, subject to the consent of the Verkhovna Rada (parliament). If the Verkhovna Rada takes a vote of non-confidence, the Prosecutor General must resign from office. Public prosecutors are appointed for an indefinite period and may be dismissed only on the grounds of, and in accordance with, the procedure as provided for by law.

3. Conclusions

68. Both the CCJE[145] and CCPE have frequently recognised the different appointment procedures of judges and prosecutors in the member states. Different appointment procedures have advantages and disadvantages[146]. It can be argued that appointment by a vote of Parliament and, to a lesser degree, by the executive can be seen to give additional democratic legitimacy, although those methods of appointment carry with them a risk of politicisation and a dependence on those other powers[147]. In relation to the appointment of the Prosecutor General, the CCJE and the CCPE wish to underline again the importance of introducing a system of appointment which allows him/her to act in a truly independent way. An appointment for a short, renewable term leaves the door open for undue influence from the executive and legislature. A non-renewable, longer term is preferable[148]. As reported, formal rules and Councils of the Judiciary have been introduced in the member states to safeguard the independence of judges and prosecutors. As welcome as the improvements of such rules are, however, formal rules alone do not guarantee that appointment decisions are taken impartially, according to objective criteria and free from political influence. The application of formal rules and the work of institutions responsible for appointment decisions in practice are of crucial importance. For example, the composition of Councils for the Judiciary and the independent behaviour of its members are as important as their introduction. This point in particular will be discussed further at Part D II. Infringements of the status and tenure of judges and prosecutors will be discussed at part D IV.

II. The organisational independence of judges and prosecutors as exercised by Councils for the Judiciary and the administration of courts

1. Introduction

69. Councils for the Judiciary are bodies whose purpose is to safeguard the independence of the judiciary (including prosecution services) and of individual judges and prosecutors and thereby to promote the efficient functioning of the judicial system.

[145] See the CCJE Opinion No. 1(2001), paras 19-23; see also the Venice Commission's Report on Judicial Appointments, 2007, paras 9-17; the CCJE Opinion No. 18(2015), para 15.
[146] See the CCJE Opinion No. 1(2001), para 33; the CCJE Opinion No. 18(2015), para 15.
[147] See the CCJE Opinion No. 1(2001), para. 33.
[148] See the CCPE Opinion No. 9(2014), para 56, referring to the Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, § 37. Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 65.

The introduction of Councils for the Judiciary has been recommended in Recommendation 2010(12), by the CCJE, and by the Venice Commission[149]. The CCPE has also reasoned that the impartiality of decisions concerning the recruitment and career prospects of public prosecutors might be helped by the establishment of High Councils either for both judges and prosecutors, or just for prosecutors[150].

70. The CCJE has developed standards for the composition and functions of Councils for the Judiciary in CCJE Opinion No. 10 (2007). While those standards were developed for judges, they can give food for thought also in relation to the composition of councils for prosecutors. The independence of the judiciary (including prosecution services) can be infringed by weakening the Council for the Judiciary, by reducing its powers, by reducing the financial or other means at the disposal of the Council or by changing the composition of the Council. According to international standards, at least a substantial majority of members of a Council for the Judiciary should be composed of judges and/or prosecutors chosen by their peers from all levels with respect for pluralism inside the judiciary and prosecution service[151]. Moreover, all members, notably judges and prosecutors, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence[152].

71. Judicial independence must not only be secured from interventions from the other powers of state or third parties. Judges must also be free to decide their cases free from internal influence[153]. While Court presidents can play an important role in an independent administration of the judiciary, they must not be allowed to put pressure on individual judges to decide cases in a certain way. According to the information received, this principle is not always respected.

72. Over the last decades, self-administration of the judiciary and prosecution services has increased. Still, the models used in the member states vary. Accordingly, the regulation of court management scores low in the survey on the independence of the judiciary undertaken on EU member states by the ENCJ in 2014/2015[154]. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice.

[149] Rec(2010)12, paras 26-29; the CCJE Opinions No. 1(2001), para 45, and No. 10(2007), the Venice Commission' Report on the Independence of the Judicial System, Part I: the Independence of Judges (para 32), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), recommend the establishment of such Councils.

[150] See the CCPE Opinion No. 9(2014), para. 54.

[151] For the purpose and minimum requirements of councils, see Rec(2010)12, para 27; the CCJE Opinion No. 10(2007), para 18.

[152] See the CCJE Opinion No. 10(2007), para 21.

[153] See the CCJE Opinion No.1(2001), para 64.

[154] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015 p. 6.

2. Incidents and other information

a. Councils for the Judiciary

73. Many member states have introduced Councils for the Judiciary (for example Albania, Belgium, Bulgaria, Croatia, Cyprus, Georgia, Hungary, Italy, Netherlands, Rumania, Slovakia, Slovenia, Spain, "The former Yugoslav Republic of Macedonia"). In other countries, their introduction is currently discussed (especially Ireland, the Czech Republic, to a lesser degree Austria and Germany). Especially in Austria, neither a formal procedure nor a competent authority exists for recourse for judges who feel that their independence is threatened, which is not in line with point 8 of Rec(2010)12.

74. Especially the Czech Republic reported that it still did not have any form of self-government of justice. The new Minister of Justice had even dissolved the commission for the creation of a Council for the Judiciary[155].

75. The composition of a Council for the Judiciary is of great importance for its ability to safeguard judicial independence. A substantial majority should be composed of judges and prosecutors chosen by their peers from all levels with respect for pluralism inside the judiciary[156]. The information received by the CCJE shows that in some member states, the Councils for the Judiciary have been subject to strong political influence. Though in some member states their composition contradicted international standards, especially information from Turkey revealed that the election of judges by their peers is not sufficient to guarantee the independence of a Council for the Judiciary. Even more important is that its members are in fact independent and act independently from the government.

76. The actual independence of a Council for the Judiciary is especially important as, according to the case law of the ECtHR, a Council for the Judiciary, if it takes the decision to dismiss a judge, must meet the same requirements of independence and impartiality as other tribunals according to Article 6. In *Volkov v Ukraine*[157] and *Mitrinovski v. "the former Yugoslav Republic of Macedonia"*,[158] the ECtHR held that if the dismissal of a judge by a Council for the Judiciary does not meet those standards, this can be challenged before the ECtHR.

aa. Albania - High Council of Justice for Judges and Council of Prosecutors

77. The majority of the High Council of Justice (HCJ) consists of judges. It is responsible for example for the appointment, evaluation and promotion of judges. Justice reform has become more and more a matter of open confrontation between the Ministry of Justice and the HCJ - headed by the President of the Republic – who accused the

[155] Information provided by the member of the CCJE in respect of the Czech Republic, 29 May 2015. See the CCJE Situation Report, updated version No. 2(2015), para 61.
[156] For the purpose and minimum requirements of councils, see Rec(2010)12, paras 26-29; the CCJE Opinions No. 1(2001), para 45; No. 10(2007) on the Council for the Judiciary at the service of society, and the Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges, para 32, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).
[157] ECtHR *Volkov v. Ukraine* (application no. 21722/11) 23.5.2013.
[158] ECtHR *Mitrinovski v. "the former Yugoslav Republic of Macedonia"* (application no.6899/12) 30.7.2015.

government of trying to weaken the independence of the judiciary[159]. Allegations of corruption have surfaced which, though they might have substance, might also be used to decrease the influence of the HCJ in the future[160].

78. In Albania, there is also a Council of Prosecutors which, however, has only advisory functions. Prosecutors believe that the Council of Prosecutors should become a decision making body with the power to adopt the decisions on the governance and management of prosecutors' careers[161].

bb. Bosnia and Herzegovina – draft law

79. In Bosnia and Herzegovina, the appointment of judges and prosecutors throughout the country is carried out by a separate judicial body – the High Judicial and Prosecutorial Council (HJPC). The only exception is the appointment of the judges of constitutional courts, which is carried out by the legislature[162]. In 2014, the Venice Commission commented on a draft law on the HJPC[163]. The Venice Commission welcomed the introduction of two subcommittees, one for judges, one for prosecutors, recommending a maximum degree of autonomy for each to ensure that judges and prosecutors would not outvote one another in matters relating to appointments and disciplinary actions[164]. Moreover, the Venice Commission recommended limiting the involvement of the legislative power in the election process of non-judicial/prosecutorial members of the HJPC and having a substantial element or a majority of HJPC members elected by their peers. The Venice Commission also warned that a transfer of competences from the HJPC to Entity parliaments in the appointment of prosecutors could lead to an increased risk of politicisation of the appointment procedure. Furthermore, the Venice Commission recommended that the power of the Parliamentary Assembly to dismiss members of the HJPC (including the President and the Vice Presidents) should be abolished. Finally, a right to appeal to a court of law for HJPC's written decisions regarding appointments, for assessments of judges and prosecutors, as well as for decisions of the disciplinary commission, should be introduced[165].

cc. Bulgaria - Composition of the Judicial Council

80. The Bulgarian Parliament is working on a constitutional amendment concerning the judicial power which, when enacted, would also affect prosecutors[166]. The draft proposes to reorganize the Supreme Judicial Council by separating it into two collegiums, one for judges and one for prosecutors. While prosecutors welcome the change in general, they criticise the composition of the collegium for prosecutors: the members of the prosecution collegium elected by parliament will constitute a majority as compared to the members elected by the general assemblies of the prosecutors and investigating magistrates. Even the participation of the Prosecutor General, as an

[159] Report of the Ambassador of the OSCE Presence in Albania to the Permanent Council of the OSCE, September 18, 2014, p.2.
[160] See for further details in Part D IX 2 a, aa, para 293.
[161] Information received from the CCPE member in respect of Albania during the preparation of this report.
[162] Information provided in response to the questionnaire sent out in preparation for the CCJE Opinion No. 18(2015).
[163] Venice Commission, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, CDL-AD (2014) 008-e.
[164] Ibid., paras 12, 125.
[165] Ibid., para 126.
[166] Information provided by the Bulgarian Prosecution office during the preparation of this report.

ex officio member of this collegium, who however is not elected directly by the magistrates, may at best only guarantee parity between the professional quota (as interpreted in the broad sense) and the representatives of the parliament. This makes any decisions on personnel, disciplinary and organizational issues concerning prosecutors and investigating magistrates dependent upon the dominant opinion of the parliamentary (political) quota.

dd. Croatia - State Attorney's Council with a majority of prosecutors

81. The majority of the State Attorney's Council consists of prosecutors elected for a term of four years in direct elections by all prosecutors and deputy prosecutors. Only the State Attorney General is appointed by the Parliament of the Republic of Croatia. No one may serve as member of the State Attorney's Council for more than two terms of office[167].

ee. France - Composition and judicial appointments by the Council for the Judiciary

82. The CCJE member in respect of France stated, on 11 September 2015, that the independence of judges was relatively well ensured through intervention of the High Council for the Magistrature (CSM) in the process of appointment and promotion. It seemed necessary, however, to look at the composition and appointment procedure of members of the CSM, as well as its competences. Judges were a minority in the CSM. The terms of appointment of members of the CSM were discussed, both with regard to magistrates (which are both judges and prosecutors) and persons from outside of the judiciary. The lack of competence of the CSM in respect of the training of judges, determination of the justice budget and the functioning of the courts were also discussed. A first attempt at constitutional reform of the CSM in 2012 failed. The question seemed to be again on the agenda, but its main aim was not yet clearly defined[168].

ff. Hungary – conflicts with the government

83. After the Fidesz and KDNP had achieved a 2/3 majority in parliament in 2010, the Hungarian judiciary has been the subject to massive changes. The most important criticism expressed in various opinions [169] targeted the very wide and mostly discretionary powers of the President of the National Office for the Judiciary as regards staff management, appointment of court leaders, transfer of judges and cases, as well as the inadequacy of the National Judicial Council to effectively supervise such activities. Most of this criticism has been addressed through repeated amendments to the relevant legislation that significantly strengthened the National Judicial Council and removed some discretionary powers from the President of the National Office for the Judiciary.

[167] Information received from the CCPE member in respect of Croatia during the preparation of this report.
[168] See the CCJE Situation Report, updated version No. 2(2015), paras 62-63.
[169] The main issues of contention are well identified in the relevant opinions of the Venice Commission: Opinion no. 621/2011 on the new Constitution of Hungary (June 2011); Opinion no. 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts (March 2012); Opinion no. 683/2012 on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 (October 2012); Opinion no. 720/2013 on the fourth amendment to the Fundamental Law of Hungary (June 2013).

gg. Malta – No powers

84. The CCJE member in respect of Malta reported, on 19 May 2015, that the composition of the Council for the Judiciary was still being discussed with the government and the judiciary, which includes judges and magistrates. The present Council was composed of a majority of members of the judiciary, but it had no executive powers and could only issue warnings[170].

hh. Portugal – High Council for the Prosecution Service

85. Both the disciplinary and management powers over the Public Prosecution Service staff are executed by the High Council of the Public Prosecution Service, a collegial body pertaining to the Prosecutor General's Office and presided over by the Prosecutor General. The majority within the High Council of the Public Prosecution Service is composed of prosecutors, though it also includes members elected by the Assembly of the Republic and appointed by the Minister of Justice.

ii. Serbia – Majority elected by the Parliament

86. In Serbia, because a majority of members of the Council for the Judiciary is elected by the Parliament, the Council is described as not independent. GRECO has remarked that because of this composition, the appointment and promotion of judges was still untransparent and politicised[171].

jj. Slovakia – Judicial Council

87. The CCJE member in respect of Slovakia stated, on 27 May 2015, that the situation had improved: according to the Constitutional Act on amending and supplementing the Constitution of the Slovak Republic, since 1 September 2014, half of the members of the Judicial Council (JC) were elected by their peers and half of them were: nominated by the Ministry of Justice (3), elected by Parliament (3) and nominated by the President (3). The President of the JC as well as the JC itself were given wider competencies[172].

kk. Spain – General Council of the Judiciary

88. The CCJE member in respect of Spain reported, on 10 October 2015, that in 2013, the General Council of the Judiciary was reformed by Organic Law No. 4/2013, and as a result, the members of this body were appointed subsequently by Parliament through a quota agreement between the main political parties. The General Council of the Judiciary was the organ which handled in Spain such sensitive issues as disciplinary sanctions and professional promotions of judges. With this link so obviously being political, the General Council of the Judiciary could not guarantee the division of powers of the state. Rather to the contrary, its own configuration (being composed of judges and lawyers fully chosen by the political authorities) presented a potential threat to judicial independence.

[170] See the CCJE Situation Report, updated version No. 2(2015), para 65.
[171] GRECO Fourth Evaluation Round report Serbia 2015, para 99.
[172] See the CCJE Situation Report, updated version No. 2(2015), para 66.

89. GRECO's report recommended in the paragraph relating to the judges in Spain the following: to analyse the legislative framework governing the General Council of the Judiciary and its impact on the actual and perceived independence; to envisage in law objective criteria and assessment rules for appointments to senior positions in the judiciary. The Spanish authorities have not yet submitted to GRECO the measures taken to implement these recommendations. The Organic Law No. 7/2015 of 21 July 2015, in force since 1 October 2015, contained elements which would also appear to be contrary to judicial independence. The so-called reform provided a new way in which the President of the General Council of the Judiciary could give obligatory proposals to the Council, thereby weakening its nature and functions as a guarantor of judicial independence. The reform also had negative consequences for the workload of judges[173].

II. Turkey - Executive influence over elections and work

90. In 2014, the CCJE and CCPE received a request for legislative assistance regarding the draft Law to amend the Law on the High Council of Judges and Prosecutors and Related Laws from the Deputy Secretary General of the High Council of Judges and Prosecutors (HSYK) of Turkey. In addition, the CCJE received, on 9 January 2014, a communication of concerns from MEDEL with a letter attached from the YARSAV (Association of Judges and Prosecutors of Turkey) regarding the same draft Law. The EAJ also requested an examination of these amendments. The concern was that these amendments would endanger the independence of the HSYK of Turkey and of the Turkish judiciary (including prosecution services) generally.

91. The CCJE Bureau prepared its expert assessment on 12 February 2014[174] in which it stated that the CCJE was aware of the events in Turkey and various allegations which had been widely reported in many national and international media. The CCJE noted that the main reforms of the proposed package concerned: 1) the powers of and within the HSYK; 2) the organisation and administration of the Turkish Justice Academy; 3) transitional provisions, which would terminate the office of the current office holders. The CCJE emphasised that the influence of the Minister of Justice would be enormously increased, especially with respect to appointments of judges and prosecutors, and allowing the Minister of Justice to intervene in the functioning of the HSYK, that the competence of the HSYK would be reduced, that the internal structure of the HSYK and the powers within the HSYK would be reorganised, the Turkish Justice Academy would be restructured, the HSYK no longer being in charge of the in-service training, and the term of office of all management and other staff of the HSYK would be terminated when the new law would come into force. Accordingly, the CCJE referred to its key standards and other European and international instruments and underlined that it was evident that the proposed amendments would be entirely contrary to these standards. As regards the transitional provisions, the proposal that all the office holders in the HSYK would lose their position when the new law would come into force, regardless of whether their positions would continue to exist, was a radical intrusion of the other powers of state in the central institutions of the judicial power and would manifestly violate judicial independence.

[173] See the CCJE Situation Report, updated version No. 2(2015), paras 67-68.
[174] The CCJE document CCJE-BU(2014)2.

92. Nevertheless, in February 2014, then President Abdullah Gul signed the new law[175]. On 10 April 2014 many of the new provisions were declared unconstitutional by the Constitutional Court. The remaining amendments still raise concern because they allow the Minister of Justice to interfere in the organisation and work of the HSYK, while most recent European standards and, in particular, those defined by the Council of Europe, aim to ensure greater independence of bodies involved in the appointment and dismissal of magistrates, both judges and prosecutors[176]. Moreover, prior to this decision the Minister of Justice had already replaced key members of the administrative staff of the HSYK and reassigned members of the HSYK to other chambers. These decisions were not reversed since the judgment of the Constitutional Court had no retroactive effect[177].

93. The CCPE prepared a Declaration concerning recent developments in Turkey on 6 June 2014[178]. It declared that not all problematic amendments had been annulled by the decision of the Turkish Constitutional Court. The remaining amendments still allowed the Minister of Justice to interfere in the organisation and work of the HSYK, while most recent European standards and, in particular, those defined by the Council of Europe, aimed to ensure greater independence of bodies involved in the appointment and dismissal of magistrates, both judges and prosecutors.

94. Under the new law, in 2014 new members of the HSYK had to be elected. Since 2010, judges and prosecutors have the right to elect the majority of its members. Before the 2014 elections, according to information provided by judges, the Ministry of Justice created what was called the "Judicial Unity Platform", which nominated its own candidates with the financial and human support of the Ministry. According to information received by YARSAV, the Turkish judges Association, police officers distributed leaflets for the government's candidates. The executive promised benefits like a pay rise and promotions[179]. Candidates declared that if elected, they would work in harmony with the executive. According to the information received by the CCJE, the executive put considerable pressure on the elections, stating they would not accept the result if their preferred candidates were not elected. According to information received form former non-governmental candidates, candidates who ran without government support were threatened. The executive's candidates were elected. After the elections, many judges have stated in letters to the CCJE, that the HSYK's work changed in favour of the interests of the government. Former independent candidates were allegedly removed from their positions without explanation. Since the elections, the "Judicial Unity Platform" set up an Association for Judges, the "Association of Unity in Judiciary". The CCJE and ENCJ have received letters from this Association.

mm. Ukraine – Dismissal of members

95. The CCJE member in respect of Ukraine stated, on 19 June 2015, that with the coming into effect of the Law of Ukraine "On Restoration of Trust to the Judiciary" in

[175] http://www.zeit.de/politik/ausland/2014-01/erdogan-staatsanwaelte-richter-versetzt; http://www.bbc.com/news/world-europe-26351258.
[176] See the CCJE Situation Report, updated version No. 2(2015), paras 21-26.
[177] The Venice Commission's Declaration on Interference with Judicial Independence in Turkey, 20 June 2015; see the CCJE Situation Report, updated version No. 2(2015), paras 69-70.
[178] The CCPE document CCPE-SA(2014)1.
[179] Information received from the ENCJ.

April 2014, memberships in the High Council of Justice of Ukraine (HCJ) and the Supreme Qualification Commission of Judges of Ukraine (SQCJ), except for the members appointed according to their position (ex officio, i.e. President of the Supreme Court, Minister of Justice, Prosecutor General) were discontinued. Thereby, the work of two main bodies dealing with issues of appointment and dismissal of judges, disciplinary responsibility and so forth was paralysed. Also the powers of delegates of the Congress of Judges - the supreme body of self-government authorised to appoint members of the HCJ and the SQCJ and judges of the Constitutional Court - were discontinued. Parliament, President, Congress of Judges, Congress of Lawyers, Congress of Representatives of Higher Law Educational Institutions and scientific institutions appoint three members of the HCJ each, and the All-Ukrainian Conference of Prosecutors - two members of HCJ. Nominations of members of the HCJ by the President and the Parliament were delayed until April-May 2015, and by representatives of the legal profession and scientists - until June 2015. Because of this long process of formation of the HCJ, judges in office had no opportunity to retire or to be transferred to other courts, because for such procedures the permission of the HCJ was needed. The quorum of the HCJ has now been constituted, however contrary to the recommendation of the Venice Commission that the majority of the Council for the Judiciary should consist of judges[180].

b. The role of Court presidents

aa. Georgia - Powerful president of the Supreme Court

96. In 2013, the organisation "Neue Richtervereinigung" remarked that after strong political influence decreased in the light of reforms inspired by international organisations and bodies such as the Venice Commission, it is now the president of the Supreme Court who holds a position so strong that it might cause problems for judicial independence[181].

bb. Latvia - President schedules hearings

97. The observer to the CCJE representing the AEAJ stated on 15 July 2015 that while the judge had the right to set the date of the first (initial) court hearing in a specific case, in some of the regional courts (most of all in the administrative regional court), it was in practice the respective president who set the date of the hearings. This was a violation of Articles 4 and 6 of Rec(2010)12[182].

cc. Russian Federation - Great powers of court presidents

98. According to information published in the press in 2011[183], court presidents have a strong position in Russian Federation, assigning cases, flats and bonus payments to

[180] See the CCJE Situation Report, updated version No. 2(2015), para 71.
[181] https://www.neuerichter.de/details/artikel/article/justiz-in-georgien-gescheiterte-reformen-338.html
28. Juni 2013 (Neue Richtervereinigung; Zusammenschluss von Richterinnen und Richtern, Staatsanwältinnen und Staatsanwälten e.V.) .
[182] See the CCJE Situation Report, updated version No. 2(2015), para 55.
[183] http://www.bpb.de/internationales/europa/russland/47954/justizsystem?p=all
17. März 2011 (Bundeszentrale für politische Bildung).

judges. This way, presidents can exert indirect influence on the decision-making process and endanger judges' independence.

c. Administration of Courts

aa. Different approaches in the member states

99. In many countries where a Council for the Judiciary was established, the council is also responsible for the administration of courts (e.g. Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, "The former Yugoslav Republic of Macedonia"). The CCJE has made recommendations on these issues[184].

100. In some North European countries, the administration of the judiciary lies in the hand of an independent agency (Denmark, Iceland, Norway, Sweden, see also Ireland and the United Kingdom). In Denmark, the Court Administration Agency is an agency of the Ministry of Justice but independent from it. Among 11 members of the board, 8 are court representatives, one is a lawyer and two have special management and social competences. In Iceland, the Icelandic Judicial Council administers the district courts while the Supreme Court has an administration of its own. In Norway, the court administration is undertaken by the National Court Administration while appointments are made by the government on the recommendation of the Judicial Appointment Board. In Sweden, the budget, which is drafted by the government and approved by parliament, is spent independently by the National Court Administration. In the United Kingdom, Her Majesty's Courts and Tribunals Service (HMCTS) is a separate agency, with an independent chairman and a board which includes a minority of judges and is responsible for the general administration and for non-judicial personnel of the courts and tribunals. But its budget has to be agreed with the Ministry of Justice and the Treasury (Ministry of Finance).

101. In the Czech Republic, Austria, Estonia, Finland, Germany, Slovakia, and Spain the budget, the administration including technical support (IT) and sometimes also appointments and disciplinary proceedings (Austria, the Czech Republic), are under the responsibility of the government, usually the respective Ministry of Justice. In Spain, the Ministry of Justice and the administrative institutions in the autonomous regions are responsible for the administration and the budget. The General Council for the Judiciary is responsible for appointments, promotions and disciplinary proceedings. It has its own budget to perform its duties.

102. Poland reported that the Ministry of Justice exerted considerable influence through directors of courts and judicial inspections. Such measures become problematic when they allow the executive insight into court records. It is unacceptable if such measures are used to influence the work of judges on pending cases

bb. Austria - Administration by the executive

103. The AEAJ reported on 15 July 2015 that, in relation to the newly established first instance administrative courts in Austria, in some of the Austrian provinces ("Länder"), the president of the administrative court, when exercising his/her administrative task,

[184] See the CCJE Opinion No. 10(2007).

was subordinated to orders of the government of the province. In these provinces (e.g. Vienna), justice administration was significantly influenced by the governments of the provinces, which the AEAJ considered not to be in line with Articles 4 and 7 of Rec(2010)12.

cc. Belgium - Administration by the College with executive influence

104. In Belgium, the administration of courts is undertaken by the Collège des Cours et Tribunaux (College of Courts) and its comités de gestion, (Collège*)* (management committees) according to agreements concluded with the Ministries of Justice and Finance. The law of 18 February 2014 established a system of supervision by the Ministers of Justice and Finance over the management acts of the *Collèges* and the Cassation Court. One of the instruments of this supervision is the management contract. This is a legal concept taken from the law on autonomous public enterprises. The stated objective was to impose priorities on the *Collèges* and the Court, to allocate the means provided to them according to these priorities, and thus to enable the executive to play a significant role in establishing judicial policies. The law allowed the Minister of Justice to replace a decision of the Court *Collège* by his/her own decision, following a request by the Management Committee of a judicial entity. There is also a double supervision set up for cancellation. From one side, the Court *Collèges* could cancel the decision of the Management Committee if it was found to be contrary to a binding instruction or a management plan. In addition, the law created a mechanism for the monitoring and cancellation of decisions of the Court *Collèges* and of the Management Committee of the Court of Cassation. This mechanism took the form of two government commissioners who attend the meetings of the Court *Collège* and the Cassation Court and who have the right of appeal against their decisions to the Minister of Justice. This entire system ignored, if not negated, the independence of the judiciary (including prosecutors) as an organisation. It also included the danger of interference by the executive in the exercise of judicial power. The law of 18 February 2014 has been challenged before the Constitutional Court.

105. On 15 June 2015, the CCJE member in respect of Belgium informed the CCJE that in 2014, the Department of Justice (body within the structure of judiciary) lost autonomy in respect of staff recruitment. The judiciary, in one respect was subordinated to the control of the government administration: no magistrate, clerk or secretary could any longer be appointed, recruited or promoted without the consent of the finance inspectorate, which checks the financial and economic implications of such a move[185].

dd. Poland - Court director and frequent legislative changes

106. The CCJE member in respect of Poland summarised the position as follows[186]: whilst judges were free in exercising judicial functions like sentencing and adjudicating, other areas were strongly influenced by the executive and legislative. The Ministry of Justice exercised strong influence over the administration of the general courts while the Ministry of Finance was responsible for the judicial budget. Presidents of the highest courts gave annual reports in parliament.

[185] See the CCJE Situation Report, updated version No. 2(2015), para 54.
[186] Information provided on 19 June 2015.

107. Ordinary courts (district courts, regional courts and courts of appeals) were independent only in relation to their adjudicating function. The administrative supervision over courts, as well as budgetary authority, was vested with the Minister of Justice. The Minister of Justice delegated his/her powers to court managers (so-called "directors of courts"). Court managers were appointed, dismissed, and promoted by the Minister of Justice; their salary was fixed by the Ministry; bonuses and awards were granted by the Ministry. A legal reform of 2011 (in effect since January 2013) increased the powers of the court managers, while limiting court presidents' control over court operations, especially in relation to the administrative personnel. Court presidents, although formally still superior to court managers, cannot effectively influence court managers accountable to the Minister of Justice. Though the National Council for the Judiciary commented critically on the law, the Constitutional Court ruled in 2013 that entrusting court managers with the competence to manage courts' administrative staff, overriding the court president, was constitutional.

108. The latest amendments to the Law on the organisational structure of ordinary courts concerned mostly the relationship between judges/courts and the Minister of Justice. The independence of courts and judges under the administrative supervision of the executive power was one of the most important problems of the judiciary. The prerogatives of the Polish Minister of Justice also included: launching disciplinary proceedings against judges, secondment of judges (judges were delegated temporarily to the Ministry of Justice), supervision of the National School of Judiciary and Public Prosecution and influence on nominating the Presidents of the courts. The law gave the Ministry of Justice the power to demand case-file from presidents of the courts of appeal. The National Council for the Judiciary argued that this amendment was unconstitutional. The prerogative of the Minister of Justice to demand obtaining files of any case, and in particular when it considered a dispute between an individual and the state, could cause serious doubts as to whether there was a fair trial by an independent and impartial tribunal. In the meantime, the Polish Constitutional Court ruled that the amendment was unconstitutional[187].

109. The political situation in Poland did not help the independence of the judiciary either. Ministers of Justice usually stayed in office only for a short time, twenty five had been in office since 1989. Their actions were often aimed at short-term political benefits and often destabilising the work of courts and generating unnecessary costs. Poland reports that the Ministry of Justice' court managers administer the courts of general jurisdiction according to an act of primary legislation. The law, which is not a "cardinal" or "organic" law and can thus be changed by a simple majority, has been subject to frequent, fundamental changes. Over 50 changes were reported since its introduction in 2001, 7 in 2014 alone. Usually, those changes led to an even greater influence of the Ministry of Justice. The frequency of those changes made consistent, sustainable developments of the judiciary impossible.

[187] See CCJE Situation Report, updated version No. 2(2015), paras 56-57.

ee. Slovenia - Influence of the executive

110. In August 2013 [188], a new Courts Act (CA) entered into force. The Slovenian Association of Judges, Judicial Council, and the Supreme Court had severely criticised the draft and the Legislative and legal service department of parliament which had supported the opinion of the judiciary had only achieved a slight mitigation. The change of the law coincided with the time when the Slovenian courts convicted several politicians and businessmen of corruption and abuse of office. The CA introduced a new Article 65a, according to which the Ministry of Justice establishes a department to exercise control over the administration of justice, in particular with regard to the organization of the management of the courts, control the fulfilment of quality standards in the administration of justice, carry out inspection concerning the application of the Courts Fees Act and to supervise the application of the Court order, and carry out administrative supervision in accordance with the Court order.

111. Inspectors (who shall not be judges, but officials - their qualifications are yet unclear) shall have access not only to registers and documents relating to the management of the courts, but also to files of pending cases. While Article 65a paragraph 5 provides that the department must not infringe the independence of judges, the presumption of innocence and fair trial guarantees, based on previous experiences (when the Ministry of Justice could inspect only files of non-pending cases and only with regard to the application of the Courts Fees Act) the judiciary is convinced that these provisions do not provide sufficient guarantees. Based on the findings of the department, the Minister of Justice may propose the dismissal of presidents of courts or initiate (disciplinary and other) proceedings against a judge. The judiciary believes that the establishment of this department and its powers are unconstitutional in violation of the principle of separation of powers, as it allows the executive to influence and control concrete cases and presidents of courts and to exercise pressure over certain judges.

ff. Closing of local courts[189]

112. In the responses to the questionnaire sent out in preparation of CCJE Opinion No. 18 (2015), member states reported reforms of court districts, which had led to a considerable reduction in the number of local courts: Croatia (abolition of 40 courts), Estonia, Finland, Poland (abolition of 79 courts, 25% of Polish district courts), "The former Yugoslav Republic of Macedonia" (abolition of 16 courts). In some countries, such mergers resulted in the involuntary transfer of many judges. In Germany, in the Land Rhineland-Palatinate, a merger of two courts of appeal failed because of the opposition of the judiciary and also political opposition. The project had been started after an administrative court had decided that the recent promotion of the president of one of the courts had been unlawful and hence he had to leave this post. Following this, the prime minister of the Land introduced the plan to abolish this very court of appeal. Mergers of local courts are often discussed in Germany as well, but often fail because of the resistance from local politicians.

[188] Information provided to the CCJE by the CCJE member in respect of Slovenia.
[189] Croatia, Poland, "The former Yugoslav Republic of Macedonia".

113. In March 2013, the Polish Constitutional Court decided that the law on the organisational structure of ordinary courts that authorised the Minister to establish and dissolve courts by means of a regulation was constitutional. Since 1 January 2013, the Minister of Justice dissolved 79 of the smallest district courts, integrating them in larger entities as their local branches. 25% of all district courts were thus dissolved. In 2014, however, a new law was passed to reactivate most dissolved courts from 1 January 2015 onwards.

3. Conclusions

114. Many member states have introduced Councils for the Judiciary with a variety of competences and memberships. In order to be influential safeguards of the independence of judges and prosecutors, such Councils must have significant competences. Merely advisory functions are not enough. The incidents reported in this part illustrate also that the introduction of a Council for the Judiciary is only useful if its members can work independently from the executive and are not overly politicised. A majority of the members of a Council should be judges or prosecutors elected by their peers. Elections must be free from external influences. Executive influence and pressure, such as those which have allegedly happened in Turkey in 2014, are unacceptable. The executive must not influence the elections or the work of the Council in any way. Only in this case, Councils for the judiciary can work as a safeguard for the independence of judges and prosecutors. The decisions of an independently working Council fall within the scope of "an independent and impartial tribunal" according to Article 6 of the ECHR.

115. Court presidents can be important spokespersons for the judiciary in relation to the other powers of state and the public at large. They can act as managers of independent courts instead of managers under the influence of the executive. However, the CCJE notes the potential threat to judicial independence that might arise from an internal judicial hierarchy[190]. Court presidents must respect that a judge, in particular a judge working in the court he/she presides over, is in the performance of his/her functions no-one's employee. He/she is holder of a State office and the servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary[191], including the president of the court where the judge performs his/her duties. A court president should not have the power to decide questions relating to a judge's remuneration or housing and should never execute his/her duties in a way that puts pressure on a judge or influence him/her to decide a case in a certain way.

116. While self-administration by the judiciary has been introduced or its scope enlarged in many member states, in some countries, Ministries of Justice have exerted considerable influence on the administration of courts through administrative agreements, directors of courts and judicial inspections. In some member states the court administration is directly dependent on a Ministry of Justice. The CCJE has made recommendations on these issues, in particular in relation to the dangers to judicial independence arising from a direct or indirect influence of the executive over the

[190] See the CCJE Opinion No. 1(2001), para 66.
[191] Ibid., para 64.

administration of the judiciary[192]. The presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence. The CCJE considers that, while an insight by external investigators can help to see shortcomings in a particular institution, such as the judiciary, it is vital that the activities of inspectors never interfere with the development of judicial investigations and trials[193].

117. Political changes, and legal and organisational reforms including the closing of local courts are not necessarily problematic in relation to the independence of judges and prosecutors. Within constitutional limits and international standards, they fall under the responsibility of the legislature, which must adapt the legal system to new challenges and social and demographic developments. However, as the CCJE has observed, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice[194]. Such reform must also not be abused to gain insight into court cases or and exert influence over decision-making. Where changes to the system of justice are made, care must be taken to ensure that they are accompanied by adequate financial, technical[195] and procedural provisions and that there will be sufficient human resources[196]. Otherwise there is a risk of instability in the proper administration of justice and the public might perceive (wrongly) that any failings in administering a new system were the fault of judges and prosecutors. That can lead to unnecessary mistrust and conflict[197].

III. The independence of prosecutors within a hierarchical prosecution service

1. Introduction

118. A hierarchical structure is an essential feature of most public prosecution services. In some systems, the Prosecutor General sits at the top of a hierarchically organised yet autonomous prosecution service. In such systems, the Prosecutor General may have certain duties towards parliament or the executive. In other systems, the executive, i.e. the Minister of Justice, is the ultimate superior of all prosecutors and may give instructions to them. In all hierarchical systems, it is essential to develop appropriate guarantees of non-interference to ensure that the prosecutor's activities are free of external pressure[198] as well as from undue or illegal internal pressures from within the prosecution system[199]. The CCPE has developed such guarantees in the "Rome Charter", Opinion No 9 (2014). Relationships between the different layers of the hierarchy must be governed by clear, unambiguous and well-balanced regulations, and an adequate system of checks and balances must be provided for[200]. Not all information reported in the following part highlight challenges to the independence of

[192] See the CCJE Opinion No. 18(2015), paras 48, 49.
[193] Ibid., para 49.
[194] See the Report of the Secretary General of the Council of Europe (2015), p. 17.
[195] See the CCPE Opinion No. 7(2012), paras 39-44.
[196] See the CCJE Opinion No. 11(2008); the CCPE Opinion No. 7(2012), paras 36-38.
[197] See the CCJE Opinion No. 18(2015), para 45.
[198] See IAP Standards (1999) 2.2.
[199] See the CCPE Opinion No. 9(2014), para 40.
[200] Ibid.

prosecutors. Rather, the report describes the variety of approaches taken in the member states.

119. Senior prosecutors must be able to exercise appropriate control over the decisions of the office, subject to proper safeguards for the rights of individual prosecutors[201]. Within such a hierarchic system, the way instructions are given is essential to guarantee both non-interference as well as effectiveness. According to the standards developed by the CCPE in the interest of the public and the individual prosecutor, instructions of a general nature must be in writing and transparent[202]. Instructions by the executive or by a superior level of the hierarchy concerning specific cases are unacceptable in some legal systems. While there is a general tendency towards more independence of the prosecution system, which is encouraged by the CCPE, there are no common standards in this respect. Where the legislation still allows for such instructions, they should be made in writing, limited and regulated by law[203]. Prosecutors should enjoy the right to ask that instructions are put in writing. Where the prosecutor believes that the instructions run counter to the law or his/her conscience, legal safeguards and an internal procedure should be available[204]. The report shows that this is not the case everywhere.

2. Incidents and other information

a. Albania - the status of the Prosecutor General

120. The Prosecutor General reports to parliament on the state of criminality. This report allows the Assembly (and with it the public) to become acquainted with the situation of criminality in the country and to assess the work of the Prosecution Office. The Constitutional Court decided in 2006 and 2008 that parliamentary control tools, (though not also the executive control) can never be used as an instrument to review and evaluate the decisions taken by prosecutors in specific cases. Courts, not parliament, provide control mechanisms for the prosecutor's decisions, including those concerning the non-initiation of proceedings, dismissal of cases and detention.

121. The Prosecutor General is not independent from the government, as he/she must follow and implement recommendations made by the Council of Ministers through the Minister of Justice, who has the power to control the progress of implementing the recommendations and the legality of activities and the regularity of investigations carried out by the Prosecution Office. Furthermore, based on inspection results, the Minister of Justice, where appropriate, submits to the Prosecutor General recommendations to launch disciplinary proceedings. According to the view of the Albanian member of the CCPE, this control/accountability report undermines the independence of the Prosecution Office.

122. The Prosecution Office of the Republic of Albania is an independent institution and is neither part of the executive nor the judicial system. The independence of prosecutors is protected by the constitution. As a centralized body, it operates under the rule that orders and instructions of the senior prosecutor are mandatory for lower prosecutors.

[201] Ibid., para 42.
[202] Ibid., para 46.
[203] Ibid., para 47.
[204] Ibid., para 49.

However, a prosecutor has the right to refuse an order or instruction that is manifestly contrary to the law. The Albanian member of the CCPE believes that this provision needs to be improved so that the prosecutor of lower rank has the right to appeal a supposedly illegal order or instruction to the General Prosecutor.

b. Austria - Discussion of the governmental right to give instructions

123. In Austria, the right of the Ministry of Justice to give instructions to prosecutors has been modified. A council (Weisenrat) has been initiated. However, according to criticism by judges and prosecutors, in fact, the Minister of Justice still has the right to give instructions irrespective of the opinion of the council. Therefore, Austrian judges and prosecutors argue in favour of introducing a general prosecutor to whom the Minister may not give instructions[205].

c. Azerbaijan - Strong influence of the President

124. The president of Azerbaijan has a strong influence over appointments of prosecutors and the right to familiarize him/herself with the investigation and prosecution in specific cases. This strong position has been criticised by GRECO as possibly creating opportunities for improper influence, disguised orders or indirect pressure[206]. Because of its role in the prosecution of cases concerning fighting corruption in Azerbaijan, the perceived independence of the prosecution was of particular importance[207].

d. Cyprus - Right of an independent Attorney General to give instructions

125. In Cyprus, according to the information provided by the CCPE member in respect of Cyprus, the Constitution (Article 113.2) recognised the Attorney General as the head of the prosecution system, entitled to intervene in and supervise any prosecution. The Attorney General is an independent officer in as much as his/her office is not subject to any Ministry. Moreover, unlike the other statutory office-holders (e.g. the Auditor General of the Republic and the Governor of the Central Bank), the Attorney General is not obliged to submit an annual report to the President on the activities of his/her Office. This independence, combined with the security of tenure that the Attorney General enjoys and the qualifications which he/she must possess in order to be appointed to the office, furnishes him/her with a quasi-judicial status which not only arguably generates the special respect of the public, but is also the basis on which courts have on many occasions stressed that his/her discretion is absolute and not reviewable. Therefore, the Attorney General appears to enjoy great independence regarding his/her relationship with both the executive and the judiciary.

[205] Information published in the press: 16.3.2014, Die Presse http://diepresse.com/home/recht/rechtallgemein/1575636/Weisungsrecht-uber-Staatsanwaelte_Reform-entzweit-Juristen (visited December 8, 2015)
6.5.2015, Der Standard) http://derstandard.at/2000015371830/Weisungsrecht-Richter-und-Staatsanwaelte-nicht-gluecklich (visited December 8, 2015).
[206] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Azerbaijan, published on 2 April 2015, p. 29 para 90.
[207] Ibid.

e. Estonia - Prosecution under the supervision of the Ministry of Justice

126. In Estonia, the independence and impartiality of prosecutors is guaranteed by law[208]. The Prosecutor's Office is a government agency within the area of government of the Ministry of Justice. The Minister of Justice exercises supervisory control over the Prosecutors office. In general, the Minister of Justice has no right to affect the decisions of a prosecutor performing functions in criminal procedures. The control is comparable to an internal audit that is carried out to evaluate the work of the prosecution service as a whole, and whether its units individually have performed their functions (e.g. the length of proceedings and reasons for delays)[209].

f. Germany - The Federal Prosecutor under the power of the Minister of Justice

127. In Germany, the Federal Prosecutor (Generalbundesanwalt), the head of the Federal Prosecution Office (Bundesanwaltschaft), is a so-called political civil servant (politischer Beamter), i.e. he/she holds a position which is part of a catalogue of positions where, according to the law, "constant consent with basic political views and aims of the government is necessary". Because of that, the Minister of Justice can ask the Federal President at his/her discretion to dismiss the Federal Prosecutor, if he/she thinks that such consent is no longer existent. Moreover, according to German law, prosecutors have to follow the directives of their superior. As his/her superior, the Federal Minister of Justice can give directives to the Federal Prosecutor. In the Länder, the different German Federal States, prosecutors general are no longer regarded as "political civil servants" but the respective Ministers of Justice, in theory, still have the right to give directives to the General Prosecutors in the Länder. In practice, however, this right is seldom exercised [210]. With respect to this right to give directives, GRECO recommended in 2015 that the right of Ministers of Justice to give external instructions in individual cases should be abolished. At least, further appropriate measures should be taken to ensure that such instructions are subject to adequate guarantees of transparency and equity and – in case of instructions not to prosecute – subject to appropriate judicial control[211].

128. The system came under discussion in a recent case involving the Federal Prosecutor and member of the CCPE in respect of Germany, Harald Range. In spring 2015, journalists, respectively bloggers, of Netzpolitik.org, published documents of the Bundesamt für Verfassungsschutz (BfV, the domestic intelligence service of the Federal Republic of Germany) on its internet-projects. The president of the BfV asked for a criminal investigation on grounds of suspicion of treason against the two bloggers and the unknown informant who had disclosed the documents. The Federal Prosecutor, Harald Range, accordingly opened an investigation in the course of which he asked an external expert, an academic researcher, to investigate whether the published documents had indeed to be classified as state secrets. The press heavily criticised the investigation as a violation of the freedom of the press.

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[208] Information received from the CCPE member in respect of Estonia during the preparation of this report.
[209] Ibid.
[210] Frankfurter Allgemeine Zeitung, August 5th 2015, http://www.faz.net/aktuell/politik/inland/staatsanwaltschaft-richter-fordern-abschaffung-des-weisungsrechts-13735928.html (access on September 25th 2015)
[211] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Germany, published on 28 January 2015, pp. 55 f., para 203-206.

129. On 4 August 2015, Federal Prosecutor Range issued a public statement criticizing an "intolerable interference" with the freedom of justice[212]. According to him, after getting the directive to stop both the investigation on this case and to withdraw the assignment on compiling the expertise, Mr Range complied. According to him, he had not only been given a directive but also been told that he would lose his position in case of refusal. In his statement, Range said that the freedom of press and speech were of great value. However, these fundamental rights did not release journalists from adhering to the law. Examining the lawfulness of such actions was the task of the judiciary (including prosecution services). But this required freedom from any political influence. Judicial independence was as protected as the freedom of press and speech by the German constitution. In his view, influencing an investigation because its possible outcome was politically not opportune was an intolerable interference with the freedom of justice. Thereafter, the Minister of Justice asked the Federal President to dismiss Mr Range as the Federal Prosecutor. The Minister denied having given any directive to withdraw the report or stop the investigation. He argued that Federal Prosecutor Range and he had agreed in an informal conversation to do so. He also denied that Range had been threatened with dismissal. In a non-public session of the committee for law and consumer protection of the Federal Parliament on 19 August 2015, both Range and Justice Minister Maas stuck to their contradictory accounts of the events[213].

130. This affair has sparked a lively discussion throughout the German media and within the judiciary (including prosecution services)[214]. The position of the Federal Prosecutor and the authority of the Minister of Justice to give directives are now under discussion. Some, for example the newspaper Tagesspiegel[215] and the German Bar Association[216] pointed out that the prosecution was part of the executive and not the judiciary. Therefore, the prosecution was under the supervision of the Minister of Justice whose directives needed to be obeyed. In turn, the Minister of Justice would be under the control of the democratically elected parliament. If the authority to give directives would be abolished, a "non-acceptable gap in democracy" would arise.

131. The newspaper "Die Welt" criticised the status of the Federal Prosecutor as a political civil servant who could be dismissed by the Minister of Justice at will. In this situation, no directives needed to be given. Indirect threats and allusions would be enough to guide a Federal prosecutor eager to keep his/ her position[217]. The German Association of Judges (Deutscher Richterbund, DRB) also criticised the right to dismiss the Federal

[212] The exact wording is published in German on Zeit Online, 4 August 2015, http://www.zeit.de/politik/deutschland/2015-08/netzpolitik-range-stellungnahme-dokumentation (access on 25 September 2015).
[213] http://www.zeit.de/politik/deutschland/2015-08/netzpolitik-affaere-heiko-maas-harald-range-widerspruch-rechtsausschuss (visited on 7 November 2015).
[214] http://www.focus.de/magazin/archiv/affaere-minister-will-top-ermittler-bestrafen_id_4876566.html, http://www.zeit.de/politik/deutschland/2015-08/netzpolitik-harald-range-unabhaengigkeit-der-justiz, http://www.taz.de/!5218459/, http://www.welt.de/politik/deutschland/article144979267/Range-raeumte-mit-einem-Maerchen-auf.html, http://www.zeit.de/gesellschaft/zeitgeschehen/2015-08/pressefreiheit-netzpolitik-fischer-im-recht/komplettansicht, http://www.lto.de/recht/hintergruende/h/weisungsrecht-staatsanwalt-justiz-politik-extern-generalbundesanwalt-generalstaatsanwalt/, http://www.swr.de/landesschau-aktuell/rp/interview-mit-zweibruecker-generalstaatsanwalt-hund-uebt-kritik-an-bundesjustizminister/-/id=1682/did=15954840/nid=1682/sk6wiy/, http://www.tagesspiegel.de/politik/streit-um-netzpolitik-org-bundesrichter-erlaeutern-kritik-an-heiko-maas/12157428.html
[215] Tagesspiegel, 7 August 2015, http://www.tagesspiegel.de/politik/staatsanwaelte-und-der-fall-netzpolitik-org-warum-das-weisungsrecht-des-justizministers-bleiben-sollte/12157484.html (access on 25 September 2015).
[216] Frankfurter Allgemeine Zeitung, 5 August 2015, http://www.faz.net/aktuell/politik/inland/staatsanwaltschaft-richter-fordern-abschaffung-des-weisungsrechts-13735928.html (access on 25 September 2015).
[217] http://www.welt.de/politik/deutschland/article144979267/Range-raeumte-mit-einem-Maerchen-auf.html,

Prosecutor. This showed the control of the executive over the prosecutor. The prosecution would adhere to the law and thus be impartial, therefore any control should be done by courts of law and not by politicians. Both the Land of Saxony[218] as well as the DRB[219] introduced draft bills to abolish the authority to give directives to the Federal Prosecutor.

g. Hungary - Guaranteed independence and a strong Prosecutor General

132. According to the Hungarian Constitution, the prosecution service is independent from the government and subordinated to Parliament only. However, the Constitutional Court found that the Prosecutor General has no political responsibility towards parliament and cannot be dismissed by it. The Prosecutor General presents to parliament an annual report but parliament is not entitled to give instructions to the Prosecutor General, not even with regard to the scope of this report. No instruction may be given to a public prosecutor to prosecute or not to prosecute. An instruction like this, as a general rule, would be a criminal offence. Neither the Prosecutor General nor any office of the prosecution service may be instructed, in particular whether to prosecute or not.

133. The prosecution service is managed by the Prosecutor General. The Constitutional Court recognized the Prosecutor General's right to give orders limited by law i.e. the Prosecutor General's decisions may be challenged in court. The organization of the prosecution service is structured in a hierarchical way. Prosecutors perform their duties in subordination to the Prosecutor General. A superior prosecutor's lawful instructions must be obeyed. At the prosecutor's request, instructions shall be given in writing. If the prosecutor finds the instruction incompatible with the rule of law or his/her legal conviction he/she may submit a written, reasoned request to be relieved from the case. In this case the case shall be transferred to another prosecutor or the superior prosecutor handles the case[220].

h. Luxembourg - Supervision by the Minister of Justice

134. GRECO has found that although it is considered to be part of the judiciary of Luxembourg, the prosecution service in Luxembourg has a hierarchical structure. The Minister of Justice supervises all members of the public prosecution service. The Principal State Prosecutor comes under the authority of the Minister for Justice. The Principal State Prosecutor directs and supervises the members of his/her office, the State Prosecutors and their deputies. GRECO has recommended that the prosecution should enjoy greater independence[221].

[218] Medienservice Sachsen, 5 August 2015, http://www.medienservice.sachsen.de/medien/news/198927 (access on 25 September 2015).
[219] Frankfurter Allgemeine Zeitung, 5 August 2015, http://www.faz.net/aktuell/politik/inland/staatsanwaltschaft-richter-fordern-abschaffung-des-weisungsrechts-13735928.html (access on 25 September 2015).
[220] Information provided by the CCPE member in respect of Hungary during the preparation of this report.
[221] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Luxembourg, published on 1 July 2013, pp. 45-46 paras 145, 147.

i. Iceland - Right of supervision which is not used in practice

135. The Act on Criminal Procedure (Article 18) states that the prosecutors do not receive instructions from other authorities regarding the application of public prosecutions, unless specifically provided for in law. The Director of Public Prosecution (DPP) is answerable to the Minister of the Interior although his/her prosecution powers are independent from the Minister and the Ministry. The DPP is formally and administratively linked to the Minister of the Interior, but the DPP is not subject to any instruction from the Minister of the Interior or the Ministry regarding the handling of individual cases. In theory, the Minister of the Interior supervises the exercise of the prosecution authority and may demand reports on particular cases from the DPP. However, the right to request a report is no longer used in practice. In specific cases, i.e. acts of treason and offences against the President of Iceland, the Minister of the Interior is empowered to give the DPP instructions to conduct investigations. However, even in the case of such an exception, where it is formally the Minister who would approve prosecution, he/she would first refer the case to the DPP and follow the latter's advice[222].

j. Ireland - Independence and Supervision of the police which prosecutes summary cases

136. The Director of Public Prosecution (DPP) is independent when making his/her decisions and no-one – including the Government or the police (An Garda Siochana) – can make the DPP prosecute or not prosecute a particular case. A prosecutorial decision can be challenged through the courts by way of application for Judicial Review to the High Court. However the Irish courts have made clear that they would only intervene in relation to a decision by the DPP not to prosecute in a case where it was shown that there was *mala fides* (bad faith) on the part of the DPP or there was an improper application of prosecution policy[223].

137. The DPP has no investigative function. In the Irish criminal justice system, the investigation of criminal offences is the function of the Garda Síochána. The DPP directs and supervises public prosecutions on indictment in the courts and gives general direction and advice to the Garda Síochána in relation to summary cases and specific direction in such cases where requested. Most summary prosecutions brought in the District Court are brought in the name of the DPP by officers of the Garda Síochána. Members of the Garda Síochána who prosecute summarily in the course of their official duties must do so in the name of the DPP and must comply with any directions given by him/her, whether of a general or specific nature. The DPP may assume the conduct of a prosecution instituted by a Garda at any time. General directions governing the conduct of prosecutions in the DPP's name are now issued by the DPP. The first such general direction came into effect on 1 February 2007, outlining the categories of cases in which the decision to institute a prosecution lies solely with the DPP[224].

[222] Information provided by the CCPE member in respect of Iceland.
[223] Ibid.
[224] Ibid.

k. The Netherlands - Transparent relations and history of independence

138. In the Netherlands, there is – as in many other countries – a hierarchical relation between the public prosecution and the administration (Minister of Justice). In the Netherlands, there can be interferences of the administration but only in full openness. This way, the legality of interferences can be controlled by parliament or a judge [225]. As a result there is a strong history of factual independence of the prosecution service.

l. Norway - Weak formal guarantees but strong history of independence

139. Norway has very weak formal guarantees, but a strong history of actual independence of the prosecution service from political influence. *Formally* the King in Council (which means the government) "may prescribe general rules and give binding orders as to how [the director general of public prosecutions] shall discharge his/her duties". However, according to the information supplied by the CCPE member in respect of Norway, *in practice*, this power has never been used to give instructions in individual cases. There have been suggestions to amend the law in accordance with this practice, and it seems realistic that such amendments will be made within the next years. The general attitude is that there is little or no pressure from political authorities on the daily work of the prosecution service. The field of criminal policy in general has, however, become more and more politicized over the last decades.

140. Within the prosecution service, prosecutors at a superior level have the power to give instructions – general or in individual cases – to prosecutors at subordinate levels. The extent to which prosecutors in leading positions can give instructions to other prosecutors at the same level is to some extent controversial and undecided regarding regional prosecutors and police prosecutors. However, the trend seems to be that the growing number of prosecutors at the same level to some extent necessitates the power for the leading prosecutors to give instructions also in individual cases.

m. Poland - No constitutional guarantees

141. The Polish public prosecution services were reformed in 2009. In this reform, the independence of the prosecution was guaranteed. However, there is still no guarantee of the independence of the prosecution service or the Prosecutor General in the constitution. This, according to the information received from the CCPE member from Poland, leaves the door wide open for majorities in parliament to change the relations between the prosecution and the executive at will and to lower the level of independence already achieved. Moreover, a new reform is under discussion which would remove the separation of functions of the Prosecutor General and the Ministry of Justice. Since a separation of the executive and the prosecution and clear rules on the relations between the two institutions are crucial guarantees for independence, this reform would have a negative effect on the independence of the public prosecution[226].

[225] Information provided by the CCPE member in respect of the Netherlands during the preparation of this report.
[226] Information provided by the CCPE member in respect of Poland during the preparation of this report.

142. According to the CCPE member in respect of Poland, another serious risk was the high level of prosecutors being politicized, which made it possible to abuse the prosecution as a political instrument. In relation to the internal independence of prosecutors, the Polish response recommends that interferences of higher ranking prosecutors in the work of lower ranking prosecutors should be minimised and that directives should be noted in the files of the respective case.

n. Portugal – Detailed protection of internal independence

143. The independence of the Portuguese Public Prosecution Service is guaranteed in Article 219, paragraph 2, of the Constitution of the Portuguese Republic and the Statute of the Public Prosecution Service. The Public Prosecution Service is placed in the sphere of the judicial power – not the executive power. The two inextricably linked constituents of the autonomy thus became part of the law: external autonomy (towards other bodies, in particular those of the executive power) and internal autonomy (the autonomy each prosecutor is granted while exercising his/her functions). The external autonomy is protected by the law, which states that the Minister of Justice may give instructions to the Public Prosecution Service only in relation to those civil proceedings in which the State is a concerned party, but not in criminal cases.

144. The internal autonomy is protected by the rules regulating the exercising of prosecutorial functions inside the hierarchical prosecution service. The Constitution prevents the application of the administrative hierarchy rules vis-a-vis prosecutors except for certain directives, orders, and instructions (hierarchical intervention) of their "immediate hierarchical superior". Not even the Prosecutor General – whose appointment involves bodies of the political power (appointment by the President of the Republic on the basis of a Government proposal) – may give instructions in criminal matters in relation to particular proceedings. The sole intervention of the Prosecutor General that is covered by the Criminal Procedure Code is the request for procedural swiftness. Should the legal time-limit applied to criminal investigations be exceeded, the law provides for the Prosecutor General of the Republic to be asked to set a time-limit or adopt organization solutions capable of overcoming the causes of excessive delay. Moreover, the law provides that a public prosecutor may request his/her hierarchical superior to put the order or instruction in writing. Unlike the administrative hierarchy, public prosecutors may refuse to comply with directives, orders or instructions where they consider them to be illegal and seriously contrary to their legal conscience. In this case, the hierarchical superior who has issued the directive, the order or the instruction may either revoke the proceedings or allocate them to another public prosecutor. Within the criminal area, the Portuguese Criminal Procedure Code does not allow interventions while an investigation is being conducted. The law allows a hierarchical intervention solely where the public prosecutor who has directed the criminal investigation decides to dismiss the proceedings at the end of the investigation. In this case, the immediate hierarchical superior may order an indictment to be submitted or the investigation to be pursued. In the latter case, the immediate hierarchical superior shall specify the investigation measures that must be taken and the time-limit for their execution.

o. Romania - Supreme Council of Magistracy as protector of independence

145. According to the Romanian Constitution prosecutors must act according to the principles of legality, impartiality and hierarchical control. The independence of prosecutors is guaranteed by statutory law. Prosecutors must follow the written orders of superior prosecutors. The guarantor of the independence of judges and prosecutors is the Supreme Council of Magistracy**.** Prosecutors may object with the Superior Council of the Magistracy against any interventions from superior prosecutors[227].

p. Slovakia - Independence and directives

146. The public prosecution service of the Slovak Republic is a sui generis office, an independent hierarchical system of state units headed by the General Prosecutor. Their status and role is regulated by the Constitution as well as by statutory laws. Within the hierarchical system of the Public Prosecution Service, individual prosecutors are subordinate to superior prosecutors, and all of them are subordinate to the General Prosecutor. A superior prosecutor has the power to instruct his/her subordinate prosecutor how to proceed with a matter and how to perform their tasks. He/she can also reassign a case to another prosecutor. The instruction given to a subordinate prosecutor shall always be in writing. If a subordinate prosecutor deems such instruction contrary to a legal regulation or to his/her own legal opinion, he/she may address a written request for dismissal of the matter. The protection of rights and legitimate interests of the prosecutors falls within the competence of the prosecutors' self-governing bodies, i.e. the Assembly of Prosecutors and Prosecutor's Councils that are coordinated by the Council of Prosecutors of the Slovak Republic composed of respective Presidents of different Councils of Prosecutors[228].

q. Slovenia - Independence and management by the Ministry of the Interior

147. According to a decision of the Constitutional Court in 2013, the constitution establishes the principle of functional independence of prosecutors which requires the independence of the individual state prosecution offices (i.e. the Office of the State Prosecutor General, the Specialised State Prosecutor's Office, and each District State Prosecutor's Office). According to the decision, prosecutors are guaranteed independence when carrying out their function in specific cases. The State Prosecutor's Office may not be guided by political instructions by the government or any ministry. A prosecutor who performs his/her tasks pursuant to the Constitution and law, may not be given instructions or orders for his/her work in a specific criminal case. General instructions in relation to the uniform application of the law, to prosecution policy, and the information of the public or other prosecution offices, are permitted. Such instructions are issued by the State Prosecutor General and the Head of a District State Prosecutor Office. General instructions must be issued in writing, published in the internal state prosecutors' gazette, and sent to the State Prosecutor General and the State Prosecutorial Council for information. The independence of state prosecutors is safeguarded by the institutes of the "takeover of a case" and the institute of "release from further work" (Articles 170 and 171 of the State Prosecutor's Office Act). These provisions regulate under what circumstances a case may be

[227] Information received from the CCPE member in respect of Romania during the preparation of this report.
[228] Information received from the CCPE member in respect of Slovakia during the preparation of this report.

reassigned to another prosecutor or a prosecutor be released from work on a specific case[229].

148. However, GRECO analysed in its Fourth Evaluation Round 2013 that the responsibility for the prosecution (some competences as regards the organisation, supervision and general management of human resources) was transferred from the Ministry of Justice to the Ministry of the Interior. The level of public confidence in the state prosecutors offices was very low and the transfer of responsibility could lead to a further deterioration of the public image of the prosecution service and increase the fear of the public that prosecutors are vulnerable to improper influence. In this context, the appearance of intervention in the conduct of cases can be as damaging as real interference. GRECO has recommended that the Slovenian authorities ensure that the Ministry of the Interior exercises its authority over the prosecution service in such a way as not to undermine prosecutors' integrity and create risks of improper influence[230].

r. Spain - Independent Prosecutor General and the principle of hierarchical subordination

149. The Constitution states that public prosecutors act in accordance, on the one hand, with the principles of unity of action and hierarchical subordination and, on the other hand, with those of legality and impartiality. The Prosecutor General is the head of the Spanish Public Prosecution Service. The Government, through the Ministry of Justice, may ask the Prosecutor General to introduce motions in court in order to promote and defend the public interest. However, the Prosecutor General is not legally bound to follow such instructions. The answer to that request will be given after consulting the Board of High Prosecutors. In addition, the Government, through the Ministry of Justice, may ask the Prosecutor General to provide information on specific cases being prosecuted, as well as, more generally, on the development of the prosecutorial function. Parliament may also request the Prosecutor General to appear before any of its Chambers to report on matters of general interest.

150. The Prosecutor General has authority to give orders and instructions of a general nature as well as in relation to specific cases. In individual cases, any public prosecutor who receives orders or instructions he/she considers contrary to law or wrongful shall notify the chief prosecutor in a reasoned report. The chief prosecutor, after consulting the relevant board of prosecutors, decides whether or not to ratify the instruction/order. A confirmation of the order must be done in reasoned, written form. It must either expressly relieve the recipient of any liability stemming from his/her performance or entrust the matter to another public prosecutor. Moreover, public prosecutors remain free to orally submit in court any legal argument of their choice even if they are under a duty to reflect in writing the instructions they have received for the specific case[231].

[229] Information received from the CCPE member in respect of Slovenia during the preparation of this report.
[230] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Slovenia, published on 30 May 2013, pp. 41-42, paras 181-182.
[231] Information received from the CCPE member in respect of Spain during the preparation of this report.

3. Conclusions

151. The organisation of prosecutors and the legal framework within which they work can make it easier or more difficult for external forces such as politicians to exert influence, thereby undermining the necessary independence of public prosecutors. The organisation of prosecutors differs in the member states, even though it is hierarchical in all countries which replied to the request of the CCPE. In some countries, there are separate Councils for Prosecutors (e.g. Albania, Croatia, Georgia, Poland, Serbia) with different competences, while in other countries there is a joint Council for Judges and Prosecutors (Belgium, Bulgaria, France, Italy, Romania, Spain, Turkey). In Albania, the prosecution is organised as an independent institution which is neither part of the executive nor the judicial system. In some member states, especially in those with more recently drafted constitutions, the independence of the prosecution is guaranteed in the constitution (Albania, Croatia, Greece, Hungary, Slovenia, Spain), in other member states, in statutory law (Estonia, Romania, Ukraine). In Norway and the Netherlands, legal guarantees are traditionally weak but a strong tradition of independence protects the work of prosecutors.

152. In a State governed by the rule of law, when the structure of the prosecution service is hierarchical, it is particularly important that political influence on the investigation and prosecution of individual cases is prevented. Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively[232]. The case studies in this report illustrate the progress made in many member states with respect to introducing formal rules securing the independence of the prosecution service, as well as the need to strengthen the position of the general prosecutor in some of the member states. Moreover, the case studies illustrate the importance of directives and instructions being given in a transparent way. Directives can endanger independence and impartiality. This is especially the case if the government can give directives to the Prosecutor General and/or remove him/her at will. As the CCPE has stated, politically motivated dismissals should be avoided. This is particularly relevant with reference to Prosecutors General. The law should clearly define the conditions of their pre-term dismissal[233].

IV. Infringement of the security of tenure of judges and prosecutors, their status and their independence in their working environment

1. Introduction

153. The independence of judges requires the absence of interference by other state powers, in particular the executive power, in the judicial sphere. Therefore, it is not acceptable that the executive power is able to intervene in a direct and predominant

[232] The CCPE Opinion No. 4(2009) = the CCJE Opinion No. 12(2009), para 9.
[233] The CCPE Opinion No. 9(2014), para 73.

manner in the functioning of the courts and particularly the selection of judges, their promotion or their transfer, the imposition of disciplinary measures on judges or the dismissal of judges. This is the case, e.g., when powers to deal with those matters are given to the Ministry of Justice. However, such interferences can be equally dangerous if they are executed by a Council for the Judiciary under the predominant influence of the executive. Sometimes, legislation directly endangers the status, independence or security of tenure for judges. Even more so, direct intervention or directives to judges are inadmissible, as well as any actions which may give rise to fear of retaliation for judicial decisions rendered.

154. The security of tenure for judges and their appointment until the statutory age of retirement is a corollary of independence[234]. This implies that a judge's tenure cannot be terminated other than for health reasons or as a result of disciplinary proceedings. However, "the existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and the basis upon which, judges may be disciplined"[235].

155. Likewise, the security of tenure is a safeguard for prosecutors. Prosecutors must feel free and unimpaired in their decisions to commence criminal investigations and to bring suspects to trial[236]. Their duty to prosecute where sufficient evidence to support the suspicion of criminal liability is available should not be subject to interventions by the executive, e.g. by a ministry of justice, neither should their decisions where the law gives them discretion[237]. Where the law provides for directives by the executive, such directives should be subject to judicial control, either in the sense that an unfounded case can be dismissed by the court or in the sense that a refusal to prosecute can be examined by the court on the application of victims of an alleged crime. Moreover, it is not enough that the executive does not put pressure on the prosecution. The executive also has a duty to take the necessary steps to protect judges and prosecutors from the attacks of third parties, in particular criminals. Prosecutors and judges who do not feel safe cannot act independently.

156. While preparing this report, the bureaus of the CCJE and the CCPE have found numerous and manifold intrusions into these principles. Many such incidents touch several of the aspects just mentioned[238].

2. Incidents and other information

a. Belgium

157. According to the CCJE member in respect of Belgium, a reform of the judiciary includes also a new mobility policy to be imposed particularly on judges. The Legislation Section of the State Council has issued a critical opinion about the reform,

[234] The CCJE Opinion No. 1(2001), paras 52 and 57.
[235] Ibid., para 59.
[236] The CCPE Opinion No. 9(2014), para 7.
[237] See also for the importance of the prosecutor's role to investigate impartially: ECtHR *Kavaklıoğlu and Others v. Turkey*, no. 15397/02, 6 October 2015, paras 260-261, 282.
[238] For limitations of the findings cf. part A, paras 3-4 above.

including this element, which altogether is seen as likely to affect the substance of the constitutional principle of security of tenure[239].

b. Croatia: Security of Prosecutors

158. As the contribution from Croatia rightly pointed out, personal security is an important factor for the independence of public prosecutors. Unfortunately, in Croatia, every year public prosecutors receive threats, suffer bodily harm and in 2015 some were killed while performing their duties or in connection with the performance of duties. If there is the slightest reason for a public prosecutor to feel concerned about his/her personal safety, or the safety of his/her family, it is difficult to speak about independence. Therefore, it was necessary to accomplish generally accepted "security" standards, and find a way to oblige the governments to fulfil such obligations.

c. Georgia: Dismissal of Supreme Court Judges

159. According to information by Transparency International, in Georgia, progress has been made since the parliamentary elections in October 2012. A new phase of judicial reform was initiated by the new government in dialogue with representatives of the judiciary; amendments to the Law on Common Courts, even though carried out in a tense environment, increased the independence of the judicial system; the government expressed its political commitment not to interfere with the judicial system and the work of courts. According to Transparency International, Georgia has improved with respect to its problems of corruption. Moreover, the judiciary had increased its independence. The rate of administrative court cases won by private parties against state bodies in Georgia has increased substantially over recent years, from 24 per cent in 2011 to 62 per cent in 2013, suggesting that the judiciary was more willing to challenge executive power. Transparency International also reported greater willingness on the part of judges to question and, in some cases, reject prosecutors' motions in criminal cases; a more prominent role played by judges in judicial appointments; limits on the executive power to interfere in criminal investigations; less pro-government bias in the judiciary's handling of appeals concerning elections; and fewer cases of arbitrary secondment of judges to other courts as compared to four years ago[240].

160. However, the Commissioner for Human Rights of the Council of Europe explained in his 2014 report that judicial independence still needs reinforcement by shielding judges from undue interference. Allegations about flawed criminal investigations and judicial proceedings against former officials call for reforms to enhance the equality of arms, by strengthening the role of the defence and rigorously pursuing the professional development of prosecutors, who are key actors in the justice system.

161. The observer to the CCJE representing MEDEL reported, on 20 July 2015, that MEDEL had been following the case of four judges dismissed from the Supreme Court of Georgia. In 2007, the Venice Commission[241] had concluded that the law which was used to dismiss a number of Georgian Supreme Court judges posed a threat to the

[239] The CCJE Situation Report, updated version No. 2(2015), para 43.
[240] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia and Ukraine, 2015, p. 20.
[241] The Venice Commission's Opinion No. 408 / 2006 on the Law on Disciplinary Responsibility and disciplinary prosecution of Judges of Common Courts of Georgia.

principle of judicial independence, as did the action itself. After discussions in the Georgian parliament and in the High Council of Justice in Georgia, two of the four judges were reinstated. Following the reinstatement of Judges Gvenetadze and Turava, MEDEL called upon the President of the State, Parliament, the Ministry of Justice and the Chairman of the Supreme Court of Georgia to reinstate Tamara Laliasvili and Murman Isaev. To date, the ECtHR has taken no decision on the admissibility of the applications of Tamara Laliashvili and the other judges.

162. Meanwhile, the Board of the association Unity of Judges of Georgia, a group representing part of Georgian judges, by letter of October 2015 to the bureau of the CCJE, questioned the process of reappointment of judges. The tenure of judges is limited to 10 years, which is already problematic, and the tenure of many judges is currently expiring. In the competition opened by the High Council of Justice for vacant positions, according to this letter, interviews were held in which judges were asked about particular judgments rendered. Furthermore, it is alleged that many judges, especially members of that association, are not being re-appointed although they had no disciplinary record. Grounds for the decision not to re-appoint were not given and the adopted practice to extend tenure in order to enable judges to finalise cases pending before them had not been continued.

d. Germany

aa. The Federal Prosecutor General and the Minister of Justice

163. The position of the Federal Prosecutor General and of prosecutors general in the German Länder is described above[242]. The case of Federal Prosecutor General Range who according to him had been given a directive in a specific criminal investigation by the Ministry of Justice and who had followed this directive but afterwards having publicly criticised it as "intolerable interference" with the freedom of justice, vividly demonstrates the dilemma of prosecutors caught between a legal duty to impartially investigate their cases and their hierarchic control by the executive, who, it can be argued, is itself subject to democratic parliamentary control. In the eyes of the public, however, executive influence in the course of justice may be the prevailing impression. This impression is aggravated by the right of the Federal Minister of Justice, which Minister Maas exercised in the case concerning the Federal Prosecutor Range, to ask the Federal President to dismiss the Federal Prosecutor at his/her discretion.

bb. Denial of honorary professorship to a judge because of a decision

164. In 2008, a panel of a labour court in Berlin decided that the dismissal of a woman who worked in a supermarket after 15 years of employment was lawful (so called "Emmely-case"). The woman had embezzled a deposit receipt for empty bottles of low value. The decision was in line with the case law of the Federal Labour Law Court according to which even a minor misdemeanour can justify a termination if it has destroyed the necessary trust of an employer in the employee. The decision caused heavy criticism. The president of the Federal Parliament described it as "barbaric" and "anti-social". The decision was upheld on appeal but reversed by the Federal Labour

[242] See D III 2 ff, para 127 – 131.

Law Court. The judge who was part of the panel that had decided the case at first instance worked part time as a lecturer at the Freie University of Berlin, a public university. After a number of years of successful teaching, the Faculty of Law, as it is the custom in such cases, applied to the Senate of the University to appoint the judge Honorary Professor. Apparently, this application did not receive the necessary majority of votes. According to information published in the press, members of the Senate disapproved of his decision in the Emmely-case [243]. The University refused to comment, while the Labour Law Court of Appeal[244] and a Law Professor[245] criticised the decision of the Senate as an improper reprimand of the judge and a violation of judicial independence.

e. Hungary - Interference with judicial independence by parliament

165. After the 2010 general election, the Hungarian judiciary has been subjected to several changes implemented by amendments of relevant laws. The main issues of contention are well identified in the following opinions of the Venice Commission: Opinion no. 621/2011 on the new Constitution of Hungary (June 2011); Opinion no. 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts (March 2012); Opinion no. 683/2012 on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 (October 2012); Opinion no. 720/2013 on the fourth amendment to the Fundamental Law of Hungary (June 2013). In relation to the latter amendment, the Venice Commission stated that it seriously affected the role of the Constitutional Court and threatened to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances. The removal of the possibility to rely on the earlier case-law of the Constitutional Court is described as unnecessarily interrupting the continuity of its case-law on the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. Limitations on the competence of the Constitutional Court are perpetuated by the 4th amendment.

aa. Change of the retirement age of judges

166. In 2011, the retirement age of judges and prosecutors was changed from 70 to 62 by Article 12 of the Transitional Provisions for the Fundamental Law. With certain exceptions, these provisions required judges who reached the retirement age (62 years at the time but gradually increasing to 65 years) to actually retire regardless of the upper-age limit for judges (70 years). This resulted in forced retirement of 274 judges and prosecutors. The European Commission contested the early retirement, and the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement was incompatible with EU equal treatment law. In July 2012, the Hungarian Constitutional Court declared these provisions unconstitutional. According to subsequent legislation, most of the judges who had been retired had a choice between reinstatement into their previous positions with their previous benefits or a considerable monetary compensation. The CCJE member in respect of Hungary stated, on 30 June 2015, that the majority of judges involved had chosen the second

[243] http://www.tagesspiegel.de/politik/justiz-und-politik-emmelys-raecher/12493584.html (visited 31 October 2015).
[244] http://www.lto.de/recht/studium-referendariat/s/fu-berlin-akademischer-senat-honorarprofessur-richter-pfandbon-urteil-2008/ (visited 31 October 2015).
[245] http://blog.beck.de/2015/11/01/umstrittene-honorarprofessur-an-der-fu-berlin (visited 1 November 2015).

option[246]. Most of the related cases are now closed and pending litigation will be concluded shortly.

bb. Baka v. Hungary

167. The President of the Hungarian Supreme Court, András Baka, publicly criticised the new retirement age of judges, the Nullification Bill and amendments of the Criminal Code. He stressed the importance of judicial independence. The Fundamental Law of 25 April 2011 prescribed that the highest judicial body should be the "Kúria". According to later amendments, the mandate of the president of the Supreme Court was to terminate with the coming into force of the Fundamental law. Accordingly, the mandate of András Baka was terminated on 1 January 2012, three and a half years before its normal expiry. A new president of the "Kuria" was elected. András Baka remained a judge at the "Kúria" but not its president. Moreover, press contacts were now only permitted with the prior consent of the president of the court. A law that entitled former presidents to certain benefits was amended so that only former presidents who had reached retirement age before the amendment came into force could request the benefits. Since András Baka had not reached retirement age, he had no rights to such benefits[247].

168. In its decision of 27 May 2015, the ECtHR held that Baka's rights under Article 6 of the ECHR to defend his rights before an independent tribunal had been violated. Since the termination of his mandate was an effect of the Fundamental law, there was no possibility to challenge the termination of his mandate in court[248]. The Court also held that the applicant's right to freedom of expression under Article 10 of the ECHR had been violated. The Court held that the president's mandate had been terminated as a reaction to his criticism of the judicial reform of the new political majority and was not a necessary consequence of the reorganisation of the Hungarian judiciary. As president of the Supreme Court and the Judicial Council, András Baka had not only a right, but a duty to speak out in a proportional way in relation to reforms of the judiciary[249].

f. Italy - Judicial independence and personal liability of Judges

169. A law (no. 18/2015) was enacted in Italy reforming the basic law n. 117/1988 on civil liability of individual judges. The law broadened general liability and, *inter alia,* changed the so-called "safeguard clause" according to which there was no liability for interpretation of provisions of law or the assessment of facts and evidence[250].

170. Following the assessment of the responsibility of the magistrate, and within two years from the compensation made, the State is obliged to exercise a recourse action, pursuant to Article 7, paragraph 1, l. n. 117/1988, as amended by l. n. 18/2015, in the case of denial of justice or of manifest breach of the domestic law or European Union law, as well as of misrepresentation of facts or evidence, with fraud, malice or

[246] See the CCJE Situation Report, updated version No. 2(2015), para 38.
[247] *Baka v. Hungary* of 27.5.2015 - 20261/12 – para 11-26.
[248] *Baka v. Hungary* of 27.5.2015 - 20261/12 – para 73-79.
[249] *Baka v. Hungary* of 27.5.2015 - 20261/12 – paras 91-103.
[250] cf. http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1988-04-13;117; see the CCJE Situation Report, updated version No. 2(2015), para 123.

inexcusable negligence. The cases of gross negligence provided for in the amended paragraph 3 of Article 2 are the following:

- a clear breach of the domestic law and of the European Union law (in place of the serious violation of the law previously applicable);
- misrepresentation of fact or evidence;
- the statement of a fact the existence of which is indisputably refuted in the dossier, or, conversely, denial of a fact that indisputably exists;
- the issuance of an order affecting personal freedom or property outside of the cases permitted by law or without cause.

171. It is clear that the possibility of being held personally liable for damages for judicial decisions may constitute a serious threat for decision-making, initiative in judging and the conscientious and efficient conduct of proceedings and trials. Whether gross negligence can be seen in finding facts or in evaluating evidence may be disputable in a given case, but the mere threat of being held accountable for a judicial decision other than by way of appeal can be considered a substantial infringement of judicial independence[251].

g. Luxembourg - Reassignment of judges and prosecutors

172. The Group of Luxembourg judges (Groupement des magistrats luxembourgeois) addressed the CCJE, by letter of 2 October 2014, drawing attention to a change in the law on judicial organisation giving power to the President of the Higher Court of Justice to temporarily delegate a judge of a district court to a post of another judge by order made on the submissions of the State Attorney General or following the opinion of the latter. The request was discussed by the CCJE Bureau[252] which emphasised that the tenure of judges was a necessary corollary of their independence and must, like the latter, be guaranteed at the highest domestic legal level by each member state of the Council of Europe. Judges should not receive a new appointment or be moved to another judicial office without their consent, except in cases of disciplinary sanctions or organisational reform of the judicial system. The CCJE member in respect of Luxembourg clarified, on 16 October 2015, that the situation was being resolved, in accordance with the comments of the CCJE[253].

173. In its report on Luxembourg, GRECO[254] commented that, unlike judges (including administrative judges), prosecutors did not enjoy independence and security of office. A prosecutor can be transferred or taken off a case by decision of the Principal State Prosecutor. GRECO recommended that arrangements for ensuring greater independence and objectivity of the prosecution service's decisions be completed

[251] Incidentally, the CCJE member in respect of Spain reported, at the plenary session in October 2015, that in Spain, a law providing for the possibility of personal liability of judges had been repealed.
[252] Document CCJE-BU(2014)7.
[253] The CCJE Situation Report, updated version No. 2(2015), para 45.
[254] GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Luxembourg, published on 1 July 2013, pp. 45-46, para 146.

h. "The former Yugoslav Republic of Macedonia" - Alleged interferences

174. According to information published in the press, the political opposition in "the former Yugoslav Republic of Macedonia" published wiretapped conversations which allegedly report discussions between the prime minister and the secret service on possible interferences to undermine the judiciary (including prosecution services) and rig media coverage[255].

i. Montenegro - Dismissal of prosecutors because of change in the constitution

175. By a letter dated 3 September 2013, representatives of Montenegro sought the opinion of the CCPE on constitutional changes affecting the status of prosecutors and their re-election in Montenegro. The planned change to the constitution and the law led to the termination of office of duly appointed prosecutors. The CCPE concluded[256] that a change in the Constitution and in the law should not lead to a loss of office by prosecutors appointed according to the previous Constitution and law who had not been subject to any sanction duly imposed as a consequence of a serious offence committed previously.

j. Poland: Appointment of constitutional judges and conflict with the Constitutional Court

176. The outgoing parliament in Poland elected five new members of the constitutional court. These persons were to replace judges whose tenure was to end after the then upcoming general election (October 25, 2015). The new President of the Republic, Andrzej Duda[257], refused to have the elected persons take their oath of office. After the general election, the new parliamentary majority took the view that, because the elected persons had not taken their oath of office, their election could be annulled by means of its resolutions. In addition, Parliament passed a law to the effect that the president of the constitutional court would be appointed for three years and that the term in office of the present president of the court was to terminate within three months. During the night of December 2nd, 2015, parliament elected five new judges. The President of the Republic swore in four of the five judges at dawn of 3 December[258]. The Constitutional Court decided on 3 December 2015[259] that the legal basis for electing successors of two of the five judges elected before the general election in October 2015 was unconstitutional. However, with respect to the other three judges who had been chosen to assume offices after the judges whose terms of office ended on 6 November 2015, the provisions regulating their election were ruled constitutional[260].

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[255] See the recommendations of a group of independent senior rule of law experts, engaged by the European Commission, entitled "The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in spring 2015", and also see at http://www.theguardian.com/world/2015/feb/27/fears-macedonias-fragile-democracy-amid-coup-wiretap-claims last visited 3 November 2015.

[256] Document CCPE-SA(2014)2 of 12 May 2014.

[257] Elected in May 2015, in office since August 2015, a former member of the party (PiS), who won the elections in October 2015.

[258] http://www.t-online.de/nachrichten/ausland/eu/id_76222262/-bald-ein-totalitaeres-system-vorwuerfe-gegen-neue-regierung-in-polen.html (visited 25 November 2015); http://www.verfassungsblog.de/polands-constitutional-tribunal-under-siege/#.VmbaM4T5zjA (visited 8 December 2015).

[259] Jugdment of 3 December 2015, Case no. K 34/15, available at: http://trybunal.gov.pl/.

[260] http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8749-ustawa-o-trybunale-konstytucyjnym/.

177. These actions of the new parliamentary majority and the President of the Republic have been criticized by the Commissioner for Human Rights of the Council of Europe[261]. Polish media and prominent lawyers also criticised these actions.[262] The former president of the Polish Constitutional Court, Andrzej Zoll, warned that Poland could become a totalitarian state[263]. The Secretary General of the Council of Europe made the following statement in respect to the decision of the Constitutional Court of 3 December 2015: "I welcome yesterday's decision by the Constitutional Tribunal of Poland which clarifies the legal and constitutional situation. This decision now has to be fully implemented in all its aspects. If there are any doubts about the correct implementation of the decision by the Constitutional Tribunal, the Polish authorities could address the Council of Europe Venice Commission[264]".

178. Despite the criticism from two commissioners of the European Commission[265], Parliament adopted a law on 22 and 23 December 2015. On 28 December 2015, the President signed the amendment into law. According to information published in the press, the amendment requires the 15-member constitutional court to pass most of its rulings with two-thirds of votes rather than the current simple majority, and sets a minimal quorum at 13 judges, as opposed to the nine needed previously[266]. The amendment also introduces an obligatory three-month waiting period between a request to the court and the passing of a verdict, preventing judges from acting swiftly in an emergency[267]. The Polish Minister of Foreign Affairs, Witold Waszczykowski, asked the Venice Commission for its opinion of the new law[268].

k. Switzerland - Dismissal of prosecutors

179. In May and June 2015, Swiss newspapers[269] reported that the Federal Prosecutor had dismissed five of 31 prosecutors who had worked for the prosecution between 15 and 20 years. According to the information published, deficient performance was not the reason for the dismissal. Rather, those prosecutors had made critical comments and had questioned the strategies and decisions of the leadership circle around the Federal Prosecutor. The dismissal was aimed at making an example of one or two of the prosecutors.

l. Turkey - Interferences with basic principles of judicial independence

180. In the course of 2015, the CCJE and the CCPE received numerous communications by judges and prosecutors and by international, European and national associations of judges and prosecutors addressed to the Committees and also to the Council of

[261] See also https://twitter.com/CommissionerHR.
[262] See http://www.zeit.de/politik/ausland/2015-11/polen-jaroslaw-kaczynski-verfassungsrichter.
[263] http://www.t-online.de/nachrichten/ausland/eu/id_76222262/-bald-ein-totalitaeres-system-vorwuerfe-gegen-neue-regierung-in-polen.html (visited 25 November 2015).
[264] Statement of the Secretary General of the Council of Europe of 4 December 2015, Ref DC 180(2015).
[265] Günther Oettinger and Frans Timmermans.
[266] http://www.theguardian.com/world/2015/dec/23/polands-government-carries-through-on-threat-to-constitutional-court (visited 29 December 2015).
[267] https://www.rt.com/news/327240-poland-constitutional-court-law/ (visited on 29 December 2015).
[268] Frankfurter Allgemeine Zeitung, 28 December 2015, p. 2.
[269] http://www.sonntagszeitung.ch/read/sz_10_05_2015/nachrichten/Bundesanwalt-Lauber-raeumt-radikal-auf-und-entlaesst-Mitarbeiter-34662; http://www.aargauerzeitung.ch/schweiz/bundesanwalt-lauber-unbequeme-staatsanwaelte-per-sofort-freigestellt-129288263 (visited 3 November 2015).

Europe on the situation in Turkey. According to this information, judges and prosecutors have against their will been suspended, dismissed from office, arrested and reassigned to new positions[270]. It was also reported that some judges had been arrested because of their decisions. Although the CCJE and the CCPE cannot verify the factual basis of all the complaints brought to their attention, they give a plausible picture which, in the opinion of the CCJE and the CCPE, just like the AEAJ[271] and the Venice Commission[272], raises deep concern with respect to the situation of judges and prosecutors in Turkey.

aa. Pressure on judges and prosecutors

181. According to this information, which is corroborated by information published in the press, in December 2013, corruption investigations were initiated against members of the government and their families[273]. After those investigations had been started, thousands of police officers were reassigned or dismissed from office[274]. In 2014, new members of the High Council of Judges and Prosecutors (HSYK) had to be elected. According to information received by the CCJE, the executive's candidates were elected after the government had put considerable pressure on the electorate. After the elections, so it is argued in letters received by the CCJE, the HSYK's work changed in favour of the interests of the government. Critics argued that the government put pressure on the judges and prosecutors to stop the corruption investigations[275]. According to letters received from judges and prosecutors in Turkey, and also to information from the press, now, all corruption investigations against members of government and their families have been closed. According to the judges who wrote to the CCJE and information published in the press, all prosecutors and one judge who had been involved in the corruption inquiries, had been dismissed from office by May 2015[276]. The senior prosecutor in the corruption scandal, Zekeriya Öz[277], has fled the country to escape imprisonment. The HSYK did not give reasons for the decision to dismiss.

bb. Reassignment without consent, suspension and dismissal from office

182. According to the information published in the press and reported to the CCJE in numerous letters, during the last two years, hundreds of judges and prosecutors were reassigned by HSYK-decisions without their consent to small cities in the provinces, suspended from office or even dismissed[278]. Judges argue that this change of practice has been used to put pressure on judges and prosecutors. Some judges reported that they had already been transferred the second or even third time within one year. The purpose of such transfers allegedly is to punish judges or prosecutors for work the government does not approve of, for example in international or national associations of judges or in cases concerning infrastructure projects. One judge speaks of a

[270] The CCJE Bureau discussed this information and commented on it in the Document CCJE-BU(2015)5.
[271] 15 July 2015.
[272] 20 June 2015.
[273] http://dtj-online.de/tuerkei-korruptionsaffaere-akp-polizei-ergenekon-iran-18125.
[274] http://www.taz.de/!5050257/; http://www.sueddeutsche.de/politik/korruptionsaffaere-in-der-tuerkei-erdoan-wechselt-polizeichefs-aus-1.1858045;
[275] http://www.zeit.de/politik/ausland/2014-01/erdogan-staatsanwaelte-richter-versetzt.
[276] http://www.spiegel.de/politik/ausland/tuerkei-staatsanwaelte-und-richter-entlassen-a-1033474.html
[277] http://www.taz.de/!5220264/.
[278] http://www.taz.de/!5050257/; http://www.sueddeutsche.de/politik/korruptionsaffaere-in-der-tuerkei-erdoan-wechselt-polizeichefs-aus-1.1858045;

"systematic cleansing" of the Turkish judiciary. By a single decree of 12 June 2015, more than fifty judges were reassigned. According to the law, reassignment without consent is a severe disciplinary punishment. However, the 1st Chamber of the HSYK examined and rejected all objections in one session. The 1st Chamber of the HSYK published another decree on 13 June 2015 and some 2600 judges and prosecutors were reassigned without further prior notice and without having been heard. 48 other judges and prosecutors were suspended from office by the 2nd Chamber of the HSYK on 14 July 2015 after the 3rd Chamber had granted permission for disciplinary investigations against 54 judges and prosecutors on 13 July 2015.

183. In its Declaration on Interference with Judicial Independence in Turkey of 20 June 2015, the Venice Commission also reported that it had been contacted by judges and prosecutors from Turkey, bringing to its attention several cases of apparent serious interference with the work of judges and prosecutors in politically sensitive cases. The Venice Commission stresses that measures against judges for their decisions can only be taken if there is sufficient proof that they did not act impartially but for improper reasons. Like the CCJE, the Venice Commission is particularly concerned that the HSYK took immediate and direct action against judges and prosecutors on account of their decisions in pending cases. This practice of the High Council contradicts basic principles of the rule of law. On 5 September 2015, the CCPE prepared the "Declaration of the CCPE on communications relating to alleged threats to the impartial and efficient functioning of the prosecution service in Turkey"[279]. The CCPE explained that these communications alleged that "the rule of law has been suspended in Turkey", and, "contrary to the Constitutional rule", prosecutors, as well as judges and police officers, were increasingly the object of transfers, dismissal from office, and even arrests and prosecution.

184. The CCJE and CCPE are in no position to evaluate the facts of the cases and scrutinise the decisions of the HSYK. However, as in the cases of the arrest and suspension of judges Metin Özçelik and Mustafa Başer (see below at cc) the circumstances of the decisions, especially the high number of judges dismissed within a short time and the speed with which the decisions have been rendered, give reason for concern. The reassignment and suspension of judges requires the strict adherence to procedural safeguards and careful evaluation of facts which must include a hearing of the judges concerned. It seems doubtful that decisions observing these safeguards could be reached within one day

cc. The arrest of judges Metin Özçelik and Mustafa Başer

185. In May 2015, the CCJE received information about the arrest of two judges Metin Özçelik and Mustafa Başer because of their ruling for the release of Samanyolu Media Group CEO Hidayet Karaca and 63 police officers. The two judges were arrested on April 30 and May 1 respectively. On 12 June 2015, the CCJE published a commentary on the case (Document CCJE-BU(2015)5 and in the CCJE Situation Report updated Version No. 2 (2015) paras 40-41), expressing great concern over this possible violation of judicial independence and impartiality[280]. The uncontested facts, as they

[279] Document CCPE-SA(2015)1.
[280] Comments by the CCJE Bureau on letters sent by various judges and international, European and national associations of judges to the Council of Europe and to its Consultative Council of European Judges concerning, inter alia, the suspension and arrest of Judge Özçelik and Judge Başer in Turkey, CCJE-BU(2015)5.

appeared to the bureau of the CCJE, led to the clear inference that these judges may have been removed only or predominantly because of their (intended) decision-making. The CCJE Bureau went on to underline that when the official performance of judges may give rise to criticism or even to disciplinary or criminal investigations, such proceedings must invariably follow the procedure laid down by the relevant acts of the Parliament, in accordance with the due process that was set out in such laws and carried out with the necessary procedural guarantees for all parties involved. To replace such formal proceedings by actions aimed at sanctioning individual judges because of judgments they had rendered, or in order to induce them to render specific judgments would be absolutely unacceptable.

dd. Comments by the Turkish delegation at the plenary session of the CCJE in October 2015

186. By letter of 1 October 2015, distributed at the plenary session of the CCJE in October 2015, the HSYK of Turkey replied to these comments of the bureau of the CCJE. In this letter, the High Council explained that the information submitted to the bureau of the CCJE had only summarized the events in question without commenting on the substance of the allegations raised by the complainants. If such comments had been requested by the bureau of the CCJE, it would have been clearly stated that none of the issues mentioned in the claims were true[281]. In addition, in the plenary meeting on 16 October 2015, the CCJE member in respect of Turkey and member of the HSYK explained that the HSYK was working very hard to establish a completely independent justice system. Difficulties were caused by the fact that a substantial group of judges were acting under the command of an external force, a fact which may be difficult to be understood for external bystanders because it was unique in the present world. For example, in a case where a person had been caught with stolen answers for a central law examination, judges (members of a religious group) had decided not to prosecute which was a clear breach of the law. Incidents like this, he maintained, had contributed to the fact that public confidence in judges and prosecutors has sunk to a low level, and accordingly the HSYK was fighting hard against this trend. He recommended that external observers should also listen to the opinion of other associations, e.g. the bar or the union of bar associations. Finally, he underlined with reference to the letter mentioned above, that "all contributions potentially made by CCJE in line with its mission and the rule of law during the process of action taken by the High Council of Judges and Prosecutors to preserve and maintain confidence in justice having regard to the recent developments in the Turkish judiciary (including the prosecution) will be appreciated and welcomed with gratitude".

m. Ukraine: Reforms and pressure on judges

187. The need to develop clear legal rules for the protection of the personal and institutional independence of judges was stressed already by the Commissioner for Human Rights of the Council of Europe following his visit to Ukraine from 4 to 10

http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments%20of%20the%20CCJE%20Bureau%20on%20Turkey_2015.pdf. See for reactions in the press: http://www.todayszaman.com/anasayfa_ccje-judge-arrests-endanger-impartiality-and-independence-of-judiciary_388283.html; http://dtj-online.de/tuerkei-europarat-bemaengelt-einmischung-in-die-unabhaengigkeit-der-justiz-56541.

[281] The full text of the letter can be found in the Annex of the CCJE Situation Report, updated version No. 2(2015) adopted during the 16th plenary meeting of the CCJE (London, 14-16 October 2015).

February 2014[282]. In 2015, the Council of Europe reported encouraging developments in relation to the law concerning the role of the Council for the Judiciary and the status of judges[283], but also negative developments, especially concerning the personal safety of judges.

aa. Volkov v. Ukraine

188. On 25 May 2013, the ECtHR decided the case of *Volkov v. Ukraine*. The case concerned events of the time before the governmental changes of 2013/2014 in Ukraine, but is reported here as an important recent decision concerning the independence of justice and the separation of powers. Oleksandr Volkov had been a judge since 1983, a Supreme Court Judge since 2003. At the time of his appointment he did not have to take an oath of office. In 2010[284], however, he was dismissed for "breach of oath" by decision of the High Council of Justice (HCJ) and by a vote of Parliament. The ECtHR held that Volkov's right under Article 6 of the ECHR had been violated because his dismissal had not been decided by an independent and impartial tribunal[285]. The dismissal also led to an interference with his right to respect for private and family life (Article 8) that was not justified. There had been no guidelines to define a breach of oath[286]. The Court pointed out that the case raised general problems of separation of powers[287] and recommended that Ukraine restructure the institutional basis of its legal system[288]. The Court indicated that Mr Volkov was to be reinstated as Supreme Court judge[289] which he eventually was.

bb. Law on Lustration

189. The CCJE received a request from the CCJE member in respect of Ukraine on 12 March 2014 for assistance and advice concerning the draft Law "On the Restoration of Trust in the Judiciary of Ukraine", and a representative of the CCJE was invited to participate in the assessment of this draft, which had been produced within the framework of the project "Strengthening the independence, efficiency and professionalism of the judiciary" of the Council of Europe in Ukraine, in March 2014. The draft proposed that judges had to undergo a lustration process if the judges had participated in certain decisions during the "Maidan events" or regarding the elections of the last parliament or if they had issued a decision which was basis of a judgment finding a violation by the European Court of Human Rights. Most of the proposals resulting from the assessment, which concerned improvements to the procedure and regarding the composition and jurisdiction of a newly established commission that would be entrusted to perform this lustration, were followed by the Ukrainian legislator. The legislative proposals remained unchanged.

[282] CommHD(2014) 7 paras 50-60.
[283] For the opinions and documents on Ukrainian draft law, see http://www.coe.int/en/web/kyiv/documents-prepared-by-the-council-of-europe-for-the-attention-of-the-Ukrainian-authorities-since-the-beginning-of-activities-of-the-sasg-for-Ukraine.
[284] ECtHR *Volkov v. Ukraine,* (application no. 21722/11) 23.5.2013, para 13.
[285] Ibid., paras 83-84, 97 and following.
[286] Ibid., paras 160-186.
[287] Ibid., para 196.
[288] Ibid., para 200.
[289] Ibid., para 208.

190. The CCJE was also involved in the drafting of a Joint Opinion of the Venice Commission and Directorate for Human Rights on another proposed Ukrainian lustration law, the Law on Government Cleansing. This concerns many different types of public officials, including judges. Under this proposal, certain high-ranking officials would lose their office automatically, others would do so if they had been in the Communist Party or one of its organisations, or had been convicted on grounds of corruption, or "contributed to the usurpation of power" by the former Ukrainian president, or there was a discrepancy between their assets declared and their income. Again it was not possible to convince the Ukrainian authorities that other means to enforce the liability of judges, such as disciplinary procedures or criminal procedures, should be used. Further, with the involvement of the CCJE in a Joint opinion of the Venice Commission and DG I, the Law on Fair Trial has been assessed. In its transitional provisions this law includes provision for a third lustration of judges. Every judge has to undergo a special assessment including a theoretical and practical test of his/her capabilities and knowledge, which in extreme cases might lead to a dismissal by the competent authorities. In all three assessments, it was underlined that the reform most urgently needed in order to safeguard international standards was a constitutional reform. This should reduce the strong influence of the president and parliament in the appointment and dismissal of judges and in the composition of the High Council of Justice. The work on this important reform is ongoing.

191. The Supreme Court of Ukraine sent its first constitutional motion concerning compliance of provisions of the Law "On Government Cleansing" (so called "lustration") in November 2014. The motion argued that provisions about dismissals of judges who had given judgments concerning the protest actions which took place in Kyiv in 2013-2014 were unconstitutional. It was also noted that these judges would already be subject to possible dismissal according to provisions of the Law "On Restoration of Trust in the Judiciary" and consequently there was a situation of double jeopardy. The motion was accepted for consideration by the Constitutional Court of Ukraine in December 2014.

cc. Pressure on judges in office

192. The CCJE was informed about serious attacks against judges in Ukraine during recent years. The CCJE has reacted to the complaints with various comments recalling the importance of the independence of judges and of their safety[290].

193. On 20 February 2015, the Chairman of the District Administrative Court of Kyiv, Ukraine, addressed a letter to the Secretary General of the Council of Europe alleging that the prosecutors' office and police had searched certain courtrooms, judges and court personnel during the opening hours of their court. He submitted that this action was without legal foundation but with the intent to put pressure on the judiciary, questioning their judgments even though no appeal had been brought against them.

194. On 19 June 2015, the member of the CCJE in respect of Ukraine reported that in February 2014, the President of the Supreme Court of Ukraine appealed with an open letter to Parliament to support an initiative of the President of Ukraine on the adoption

[290] See Document CCJE-BU(2015)4 of 5 May 2015, see also the CCJE Situation Report, updated version No. 2(2015), paras 47-52; these incidents are discussed in detail at Part D VIII 2 f, paras 276-277.

of a law with the aim of strengthening the guarantees of judicial independence, and the protection of the rights and safety of judges and their families. This initiative was started in response to numerous cases where judges had been intimidated, attacked and pressured. Moreover, the letter referred to the terrible case of an armed attack and murder of a district judge of Kharkiv and members of his family. The EAJ on May 17 2014 also received an account of a number of serious incidents from the Association of Ukrainian Judges including assaults on members of the judiciary in which the concerned judge was killed; assaults on judges within and outside the court room, often aimed at directly affecting judicial decision-making; the setting of fire to court buildings; the damaging of court buildings and theft of computers and other property from the courts.

195. In its Decision of 4 June 2015, the Council of Judges of Ukraine noted numerous complaints of individual judges to the Council and concluded that pressure on judges had not decreased. Actions of public organisations and individuals directed at expressing their own attitude to judicial authority were frequently followed by undue influence and attacks, which seemed to grow systematic in character. Also the number of cases where members of Parliament requested information with respect to court cases was said to have increased substantially, although such requests essentially amounted to interventions in the course of justice.

196. Moreover, in Ukraine[291], judges are apparently subject to severe criticism by politicians and the media. This criticism seems to have played a role in encouraging violent attacks against judges. The issue of public criticism and debate as a challenge to judicial independence and impartiality is discussed in detail in part D VIII. Recently, in an interview with the press[292], when asked about judges, the prime minister of Ukraine, Arsenij Jazenjuk, said: "A catastrophe. They cannot be influenced by anything except by cash. My proposal: Replace all of them. We have 9000 judges, but every year 12000 law graduates. Capacities, therefore, are available. However, there is a conflict of values. European experts tell us this would be incompatible with the rule of law. But our judges are incredibly corrupt and do not dream of administering justice. Chances to re-educate them by encouragement are next to zero. There are two proposals for changing the Constitution. My faction demands complete replacement of judicial staff."

197. Further cause for judges' complaints was the adoption of Article 375 of the Criminal Code of Ukraine which allows criminal proceedings against judges. The law is regarded as an attempt to put undue pressure upon judges and courts. With this in mind, the Council of Judges of Ukraine decided to address the Prosecutor General of Ukraine with the proposition to examine the substantive grounds for the initiation of criminal proceedings under Article 375 of the Criminal Code. The Council asked judges to inform the law enforcement agencies about any intervention in their professional performance. On 19 June 2015, the Constitutional Court of Ukraine held that the provisions of the draft law on restriction of immunity of members of parliament and judges were constitutional. According to the draft law, the detention of a judge

[291] Information provided in response to the questionnaire sent out during the preparation of the CCJE Opinion No. 18(2014).
[292] Frankfurter Allgemeine Zeitung, Monday October 19, 2015, p. 2, http://www.faz.net/aktuell/politik/ausland/europa/arsenij-jazenjuk-im-interview-13863497.html visited 4 November 2015.

requires authorisation by the HCJ, while under the current law, the Parliament has to authorise a judge's detention.

n. Security checks of judges

aa. Croatia

198. On 6 July 2015, the Croatian Association of Judges informed the CCJE of planned amendments to the State Judiciary Council Act (SJCA). The Croatian Government proposed to amend Article 55a of the SJCA so that all candidates who apply for judicial appointment will be obliged to give in advance their consent to be vetted by the Secret Service Agency. A candidate cannot be appointed without a positive check from the Security Service Agency, which is part of the executive. Since the investigations of the Agency are confidential, the reasons why a candidate would be rejected because of a negative security check would not be disclosed to the candidate. The Croatian Association of Judges feared that the executive branch would gain influence over decisions over judicial appointments. This contradicted Rec2010(12) Articles 44 and 46, and Article 124 of the Croatian Constitution, according to which the State Judiciary Council (consisting of seven judges, two professors of law and two members of parliament) has exclusive authority to appoint and dismiss judges and presidents of courts and to decide on their disciplinary responsibility. The Croatian Association of Judges, whose concerns are shared by the State Judiciary Council and the Croatian Bar Association, feared that the amendment diminished the hard won influence of the State Judiciary Council. The Croatian Association of Judges also referred to an EAJ Resolution on Slovakia adopted on 13 November 2014.

bb. Slovakia

199. The CCJE received, on 11 June 2014, a request from the CCJE member in respect of Slovakia for legislative expertise asking for an expert assessment of the recently adopted Constitutional Act on amending and supplementing the Constitution of Slovakia (4 June 2014) concerning the so-called "security reliability clearance" that all judges would have to undergo. According to this amendment (Article 154d), all judges must fulfil the criteria of "security reliability". To show that they meet this condition, judges must ask for "security clearance", during which the Slovak Intelligence Services, the police and the National Security Office gather information about the judge and his/her family which is then evaluated by the secret service. Judges who are perceived as "unreliable" are summoned to the Judicial Council, which votes on whether the judge can or cannot remain in office. During this procedure, judges do not have the same rights as during disciplinary procedures. The CCJE Bureau concluded[293] that questioning the tenure of all judges without concrete and reasonable suspicion according to material gathered by the secret service would unduly endanger an essential part of their independence and violate the principle of separation of powers[294].

200. In September 2014, a constitutional complaint was lodged by the President of the Judicial Council. Such security procedures should have started on 1 September 2014,

[293] Document CCJE-BU(2014)4 of 1 July 2014.
[294] See also the EAJ Resolution on Slovakia adopted on 13 November 2014.

but a decision of the Constitutional Court postponed them in relation to all judges in office[295].

3. Conclusions

201. The incidents reported above show various challenges to the independence and impartiality of judges and prosecutors and thereby establish various aspects of undermining public confidence in the independent administration of justice. This begins where the executive can exert direct or indirect influence in the process of appointment of judges and prosecutors, like where security checks are required without a possibility to challenge their results. It continues where seemingly arbitrary changes to relevant laws are enacted by parliament, e.g. with respect to retirement ages or the termination of terms in office of judges and prosecutors duly appointed.

202. Difficult problems arise in connection with vetting or lustration proceedings where, on the one hand, there may be a desire to improve the standing of judges and prosecutors in the eyes of society as a whole, to enhance or create public trust in their impartiality and incorruptibility, and where, on the other hand, the rights of office holders and possible public confidence in their independent work have to be observed. In this context, dismissing all or almost all members of the judiciary (including members of the prosecution) irrespective of individual responsibility would invariably also concern those whose conduct has not given rise to doubt. Therefore, individual examinations seem inevitable. Even such examinations will have to be conducted with great care, observing the principle that, as a rule, judges should not be held liable for their judicial decisions. Therefore, only exceptional cases of intentional violations of the law and of human rights principles should result in a termination of office.

203. In principle, however, judges should not be required to justify their judicial decision-making. Where decisions on reassignments or replacements of judges, even if given by independent bodies, give rise to the impression that they are based on specific judgments, public trust in independence is endangered. This also applies where in a process of regular re-appointment, individual decision-making is questioned. Likewise, where the law provides for the possibility of individual civil liability for negligence in the process of judicial decisions, this is likely to cause indirect pressure and thereby to prevent independent thinking and adjudicating. Moreover, direct and indirect influence exerted by comments of members of the executive or the legislative on judicial decisions or on judges and prosecutors (individually or as a whole) is likely to undermine public trust, to create a climate of intimidation and to even give rise to retaliation and physical attacks.

204. With respect to prosecutors, it is essential to create a climate of public trust to ensure confidence that crimes will be investigated impartially and independently, that general directives, if any, are clear and unequivocal, that individual directives are transparent in order to allow democratic control, that discretion is exercised equally in a transparent and impartial manner and that, in case of dispute, independent courts can decide.

[295] See the CCJE Situation Report, updated version No. 2(2015), paras 30-31.

V. Effective enforcement of judicial decisions

1. Introduction

205. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. Without effective enforcement, members of the public seeking justice may be inclined to resort to violence. Therefore, effective enforcement is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial (Article 6 of the ECHR) is in vain if the decision is not enforced. Shortcomings in the enforcement of judicial decisions undermine judicial authority and call into question the separation of powers[296].

2. Incidents and other information

a. Findings of the 2015 Report of the Secretary General of the Council of Europe

206. In 2015, the Secretary General of the Council of Europe noted shortcomings in the enforcement of court decisions[297]. According to the Report of the Secretary General, enforcement of judicial decisions is unsatisfactory in just under half of the member states of the Council of Europe. A positive trend towards an improvement was observed in about half of this group, where, for example, funding had been increased for the introduction of bailiffs and other measures to ensure effective enforcement had been taken. However, the report points out that a significant number of countries have made no progress in ensuring enforcement, and a very small number exhibit systemic problems with high non-enforcement rates nearly rendering jurisdiction inoperative. The report points out numerous problems which require attention across many member states, as for example the inefficiency of bailiffs, the lack of necessary funds for training enforcement officers or ensuring an equal number of them through-out the territory of a member state, the lack of effective remedy systems for cases of non-execution and non-enforcement in special fields of jurisdiction (for example, restitution of property)[298].

207. The Report also stresses the importance of effective execution of judgments of the ECtHR. Though recent efforts to reduce the number of non-executed Court judgments had been successful, a significant number remain un-executed. In a few cases, domestic agendas and electoral rhetoric have politicised Court judgments, weakening the effort to jointly uphold commonly agreed standards for human rights across the continent[299].

[296] See the Report of the Secretary General of the Council of Europe (2015), p. 14, 17, 27, see also the CCJE Opinion No. 13(2010) on the enforcement of judicial decisions.
[297] See the Report of the Secretary General of the Council of Europe (2015), p. 14, 17, 27.
[298] Ibid., p. 27.
[299] Ibid.

208.

b. ECtHR - Oliari v. Italy

208. In *Oliari v. Italy*[300], the ECtHR stressed in 2015 the importance of implementing final judicial decision and noted the failure of the Italian government to introduce a legal framework for the legal recognition of same sex partnerships in response to a decision of the constitutional court recommending such recognition. Referring to the decision *Broniowski v. Poland*[301] the Court recalled "that, although in a different context, it has previously held that "a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention."

c. Greece - Abolishment of final decisions through legislation

209. With regard to the non-enforcement of final court decisions, the AEAJ mentioned the situation in Greece, where final court decisions were abolished by national laws (enacted in the context of the Economic Adjustment Programmes and Memoranda of Understanding)[302].

d. Poland – Presidential pardon preventing enforcement

210. According to reports in the media[303], in Poland the President of the Republic intervened in criminal proceedings. A former head of an anticorruption office had himself become a defendant in criminal proceedings and had been convicted at first instance to three years in prison. While his appeal was pending, the new Polish government and Parliament, elected in late October 2015, intended to appoint him as a member of the new government. Such an appointment was not possible in the case of such a criminal conviction. The President of the Republic then issued a pardon of this person although it is widely argued that a pardon is only possible after proceedings have been brought to a final decision and there was no room for what in fact amounted to an amnesty pronounced by the president.

e. Spain - Enforcement of decisions by the ECtHR

211. The CCJE member in respect of Spain reported, on 10 October 2015[304], that the Organic Law No. 7/2015 of Spain of 21 July 2015, in force since 1 October 2015, included a provision reinforcing the execution of judgments of the European Court of Human Rights and specifying actions in the case of violation of the rights recognised in the ECHR and its Protocols.

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[300] ECtHR (application no. 18766/11 and 36030/11) 21.7.2015), para 184.
[301] ECtHR (application no. 31443/96) 22.6.2004),
[302] See the CCJE Situation Report, updated version No. 2(2015), para 102.
[303] Frankfurter Allgemeine Zeitung, Nov. 20 and 23, 2015; see also: http://www.t-online.de/nachrichten/ausland/eu/id_76222262/-bald-ein-totalitaeres-system-vorwuerfe-gegen-neue-regierung-in-polen.html (visited 25 November 2015).
[304] See the CCJE Situation Report, updated version No. 2(2015), para 101.

f. Turkey - Non enforcement

212. A number of sources report that in Turkey, judicial decisions and requests from prosecutors were not executed, in violation of the law[305]. Before his arrest the first decision by Judge Mustafa Başer to release Samanyolu Media Group CEO Hidayet Karaca and 63 police officers was not enforced because the decision was at first not written up by the court clerk because of an intervention by the chief inspector responsible for the clerks and because afterwards the prosecutor refused to enforce it[306]. In addition, the AEAJ[307] reports that decisions/judgments of administrative judges were not executed. This clearly violated Opinion 13 of CCJE as well as Article 12 of Rec(2010)12.

3. Conclusions

213. The reported incidents show developments towards more effective enforcement as well as possible violations of the standards described in CCJE Opinion 13 as well as Article 12 of Rec(2010)12. It is particularly worrying if such incidents indicate executive and legislative interferences as in Turkey.

VI. Impartiality

1. Introduction

214. The impartiality and independence of judges and prosecutors is not a prerogative or privilege granted in their own interest, but is provided in the interest of the rule of law and of all those who seek and expect justice. Article 6 of the ECHR guarantees the right to have disputes decided not only by an independent but an impartial tribunal[308]. According to the ECtHR's "settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, [..] and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality"[309]. Therefore, it is essential that judges show their impartiality in the way in which they decide cases and, if necessary, hold the government accountable in the interest of citizens. Prosecutors decide whether or not to initiate or continue a prosecution, conduct the prosecution before an independent and impartial court established by law and decide

[305] The Venice Commission's Declaration on Interference with Judicial Independence in Turkey, 20 June 2015.
[306] Cf. also para 185, above, and Comments by the CCJE Bureau on letters sent by various judges and international, European and national associations of judges to the Council of Europe and to its Consultative Council of European Judges concerning, inter alia, the suspension and arrest of Judge Özçelik and Judge Başer in Turkey, CCJE-BU(2015)5, p. 3.
[307] On 15 July 2015.
[308] See for the prerequisites of an impartial tribunal: ECtHR *Morice v. France* [GC] (application no. 29369/10) 23. 4. 2015, paras 73-78.
[309] Ibid., para 73.

whether or not to appeal decisions by that court[310]. Prosecutors should carry out their functions impartially and act with objectivity[311]. They should also treat people as equal before the law and should neither favour anyone nor discriminate against anyone[312]. Both judges and prosecutors must not only act impartially but must avoid all behaviour which could call their impartiality into question.

215. Indicators of impartial and independent functioning of courts and prosecution can be seen in the rate of successful and unsuccessful cases in given constellations. E.g., where in administrative courts the rate of successful cases against the executive is rising, this could indicate less influence of the executive vis-à-vis the courts. Likewise, where cases brought by the prosecution are dismissed in court or result in acquittal, this indicates that the prosecution and the courts are both acting bona fide and independently from each other. In order to achieve this, excessive powers of the prosecution, as for example in totalitarian systems, where a powerful prosecution service was used to control the judiciary, must be avoided. The Venice Commission in 2010 found that in a few countries, remnants of this system lingered on, endangering judicial independence[313]. Moreover, the effectiveness of a prosecution service and its readiness to investigate shortcomings of the administration, might be seen as an indicator of an independent and impartial prosecution service.

2. Incidents and other information

a. Armenia and Russian Federation - In favour of the prosecution

216. In the press, information was reported in 2010 and 2011 that judges in Armenia[314] and Russian Federation consistently followed the motions of the prosecution and did not pay enough attention to the defendant. In general, if applications brought by the prosecution are almost without exception followed by the courts, this could indicate a lack of impartiality. Either the courts may not examine such motions impartially and thoroughly but willingly follow the view of the prosecution, or the prosecution may be too dependent on the views of the courts as they are perceived and therefore tend to bring only such applications which they deem to be undoubtedly successful. In those two systems, it might be suspected that remnants of the Soviet prosecutorial system identified by the Venice Commission [315] in 2010 may be influencing the relation between judges and prosecutors.

b. Georgia – Increased independence

217. According to Transparency International Georgia has improved with respect to its problems of corruption. Moreover, the judiciary has increased its independence. The rate of administrative court cases won by private parties against state bodies in Georgia has increased substantially over recent years. Transparency International also

[310] The CCPE Opinion No. 9(2014), para 10.
[311] The IAP Standards (1999) 3.
[312] The CCPE Opinion No. 9(2014), para 92.
[313] See the Venice Commission's Report on European Standards as regards the judicial system: part II the prosecution service (2010), paras 72-74.
[314] http://www.un.org/apps/newsFr/storyF.asp?NewsID=23000#.VeHWV30VT90
Centre d´actualités de l´ONU, 16.9.2010.
[315] See the Venice Commission's Report on European Standards as regards the judicial system: part II the prosecution service (2010), paras 72-74.

reported greater willingness on the part of judges to question and, in some cases, reject prosecutors' motions in criminal cases[316].

c. "The former Yugoslav Republic of Macedonia": ECtHR decision

218. On 30 April 2015, the ECtHR found a violation of Article 6 in the case of *Mitrinovski v. "the former Yugoslav Republic of Macedonia"*[317]. On 6 December 2010 a three-judge panel of the Skopje Court of Appeal, presided over by the applicant (including Judges I.L. and M.S.), decided, in second instance, to grant an appeal of a detainee. The panel accepted a proposed bail and replaced an order for detention with an order for house arrest. On 10 December 2010, a five judge panel at the Supreme Court decided that the Court of Appeal had had no jurisdiction to decide the case on the merits. On the same day, a six judge panel at the criminal division of the Supreme Court held that two of the Court of Appeal judges who had participated in the decision, including Mr Mitrinovski, had shown professional misconduct. The president of the Supreme Court, who had participated in both decisions and was a member of the State Judicial Council (SJC), requested that the SJC decide that Mr Mitrinovski and the other judge had committed professional misconduct, and that there were reasonable grounds to believe that the two judges had „exercised the office of judge in an unprofessional and unconscientious manner given that they had voted in favour of the decision of 6 December 2010"[318]. In May 2011, the plenary of the SJC, of which the president of the Supreme Court was part, dismissed Mr Mitrinovski and the other judge from office. Mr Mitrinovski unsuccessfully challenged the president's participation in the decision. The SJC dismissed his appeal by panels consisting partly of Supreme Court Judges. The ECtHR held that the fact that the president who had lodged the request for dismissal was part of the plenary cast objective doubts on the impartiality of the tribunal. Thus, the SJC plenary was not an independent and impartial tribunal[319].

d. Turkey: ECtHR decision Kavaklıoğlu and Others v. Turkey

219. The importance of such an independent and impartial investigation prosecution was underlined in the ECtHR decision *Kavaklıoğlu v. Turkey* of 6 October 2011[320]. The applicants were prisoners and relatives of eight prisoners who died during the violent suppression of an uprising in Ulucanlar Central Prison, Ankara[321]. Though the authorities were aware of overcrowding and the unsuitability of the premises[322], they had not taken action[323]. After the violent suppression of the uprising, criminal proceedings were opened against prison officers for negligence in the performance of their duties. The prosecutor who investigated the death of prison inmates had been involved in previous public investigations concerning the prison and closed the proceedings[324]. The applicants claimed that the investigation was insufficient and ineffective[325]. The prosecutor, who should have intervened to prevent the prison uprising was the same one, who had investigated the criminal responsibility of the

[316] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 20.
[317] ECtHR *Mitrinovski v. The former Yugoslav Republic of Macedonia* (application no.6899/12) 30.7.2015
[318] Ibid., para 10.
[319] Ibid., paras 35, 36: standard of impartiality, paras 38-46 application.
[320] ECtHR *Kavaklıoğlu and Others v. Turkey* (application no. 15397/02), 6.10.2011.
[321] Ibid., para 3.
[322] Ibid., para 7.
[323] Ibid., para 8.
[324] Ibid., paras 79-80.
[325] Ibid., para 146.

prison personnel. No impartial and independent investigation could be expected in such a case. This was a violation of Articles 2 and 3[326]. The ECtHR agreed and stated that an investigation should be independent and that the prosecutors investigating should not be affected by the events to be investigated[327]. Articles 2 and 3 required that public investigations must lead to the identification and punishment of the responsible persons. The authorities should seriously, effectively and impartially investigate what had happened and take all appropriate actions not only to find the guilty persons but also the organisational structures responsible for the events in questions[328].

3. Conclusions

220. Judges and prosecutors fulfil their duty to act impartially if they decide and act without discriminating or favouring one side over the other. The cases depicted above illustrate some possible situations in which impartiality seems to be impaired, but also examples where the increasing independence of a legal system leads to more impartiality in the decision making which, in turn, improves the public perception of the justice system.

VII. The economic basis of the judiciary (including the prosecution)

1. Introduction

221. In recent years, many member states have suffered serious economic crises[329]. At the same time, many justice systems in the member states report severe cuts, frozen budgets and salaries, and increased workloads for judges[330] and prosecutors. In the case of a severe economic downturn, judges and prosecutors, like all other members of society, have to live within the economic position of the society they serve. However, chronic underfunding should be regarded by society as a whole as unacceptable. It undermines the foundations of a democratic society governed by the rule of law[331].

222. The CCJE and the CCPE have both stated that the independence of judges and prosecutors requires economic independence. The general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different justice systems[332]. Especially in times of economic crises, such standards are not always observed. In its survey among member states, the ENCJ also came to the conclusion that pay, caseload and

[326] Ibid., paras 260-261.
[327] Ibid., para 271.
[328] Ibid., para 272.
[329] Iceland introduces a special prosecution service with national and investigative competences to investigate incidents connected to the collapse of the Icelandic banking sector. The office will be merged with the District Prosecution in 2015/2016. Information provided by the CCPE member in respect of Iceland.
[330] See the CCJE Situation Report, updated version No. 2(2015), paras 89-100.
[331] See the CCJE Opinion No. 18(2015), para 51.
[332] See Rec(2010)12, para 32, and the CCJE Opinion No. 2(2001), para 4; Opinion No. 10(2007), para 37; Opinion No. 17(2014), para 35.

resources are important factors with respect to judicial independence and that current regulations on funding of the judiciary scored low as an indicator in its survey on the independence of the judiciary undertaken by the ENCJ in 2014[333]. The ENCJ also pointed out that the funding of prosecutors' offices must be sufficient and may face the same vulnerabilities as courts when it comes to ensuring their independence[334].

223. The CCJE recognised early on that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions[335]. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has no appropriate funds and resources at its disposal in order to perform efficiently[336].

224. The CCPE also stated that prosecutors should have the necessary and appropriate means, including the use of modern technologies, to exercise their mission effectively, which is fundamental to the rule of law[337]. The conditions of service should also reflect the importance and dignity of the office, and the respect attached to it. Prosecution services should be enabled to estimate their needs, negotiate their budgets and decide how to use the allocated funds in a transparent manner, in order to achieve their objectives in a speedy and qualified way[338].

225. Rec(2010)12 states that judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions and from the risk of corruption. It should provide appropriately for sickness pay and retirement pay. Adequate remuneration should be guaranteed by specific legal provision against reduction and there should be provision for increases in line with the cost of living[339]. Recommendation 2000(19) demands that states should take measures to ensure that prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement[340]. The appropriate remuneration of prosecutors also implies recognition of their important function and role and can also reduce the risk of corruption[341]. The reports show challenges to those standards in many member states.

[333] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 6, 24.
[334] Ibid., p. 89-90.
[335] See the CCJE Opinion No. 2(2001), para 2.
[336] Ibid., para 3.
[337] See the CCPE Opinion No. 9(2014), "Rome Charter" section XVIII; the CCPE Opinion No. 7(2012), Recommendation i.
[338] See the CCPE Opinion No. 9(2014), "Rome Charter" section XIX; the CCPE Opinion No. 7(2012), Recommendations i, ii.
[339] See the CCJE Opinion No. 1(2001), paras 61-62, rec. 8; the CCPE Opinion No. 9(2014), para 76 referring to the Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD (2010)040, 3 January 2011, §69, also see: Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 71.
[340] Rec(2000)19, § 5d; the CCPE Opinion No. 9 (2014), para 75.
[341] The Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD (2010)040, 3 January 2011, §69; the CCPE Opinion No. 9 (2014), para 76.

2. Incidents and other information

a. Lack of financial resources

226. Insufficient resources are a serious problem for judges and prosecutors alike. In recent years, member states have suffered from different economic crises. Just as all other parts of society, the budgets of the judiciaries have felt the effects of the economic situation. Discussions on financial problems, especially caused by the economic crisis of recent years, were mentioned frequently in the responses to the questionnaires sent out in preparation of CCJE Opinion No. 18(2015) (Finland, France, Iceland, Ireland, Malta, Montenegro, the Netherlands, Portugal[342], Romania). Access to courts and legal aid were reduced in recent years (Finland, the Netherlands, United Kingdom), the workload increased (Germany, Netherlands) and the justice system was to a certain extent restructured (Finland, Portugal[343]). Though the majority of judges in the survey of the ENCJ did not feel pressured in relation to the outcome of their decisions, many do feel pressured to finish cases within a certain period of time[344].

227. In its response in preparation for this report, Croatia specifically stressed the importance of adequate working conditions for the independence of public prosecutors[345]. In 2012, the CCPE drafted CCPE Opinion No. 7 on the basis of replies to a questionnaire received from 30 member states. A significant number of countries indicated that the budgets allocated to prosecution services were insufficient; a situation bolstered by the current crisis. The CCPE recommended that prosecutors have at their disposal sufficient means in order to fulfil their various tasks[346].

aa. Belgium - Cuts and too many vacant positions

228. Severe budgetary cuts were also reported from Belgium[347]. The policy of reduction of staff and budgets for the judiciary (including prosecution services) has led to competition for funding between different judicial entities. Such reductions undermined the functioning of the judiciary and its ability to fulfil its constitutional mission. Even though they were guaranteed by law, the executive decided to fill only 90% of vacancies, which was even more alarming as the judicial work force expected many positions to open in the next years due to retirements. Staff of the registries were not replaced either. The number of such vacant positions represented from 15% to 20% of the total number provided by law. Because of such cuts, several courts had to reduce the working hours of registries and postpone cases scheduled for hearing until 2017 and beyond. Court buildings were poorly maintained and secured, carrying danger for the health and safety of those who worked there as well as for court users. Computer systems were not modernised. Reports, requests, complaints, warnings and formal notices addressed to the administration received no answer or met with the statement that there was no budget.

[342] Information provided by the CCPE member in respect of Portugal during the preparation of this report.
[343] Ibid.
[344] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 6.
[345] Information received during the preparation of this report.
[346] See the CCPE Opinion No. 7(2012), Recommendation i.
[347] Information provided by the CCJE member in respect of Belgium on 15 June 2015; see the CCJE Situation Report, updated version No. 2(2015), para. 91.

229. The CCBE reported on 10 July 2015 that the Belgian Minister of Justice had admitted in a recent interview that for 100 years, no serious investment had been made in the judiciary. This gave a clear idea of the dilapidated state of the justice system. Discouragements and frustrations of all stakeholders and by implication lack of confidence of the court users became real problems[348].

bb. France - Lack of resources, delayed payments

230. The CCJE member in respect of France[349] reported that, as in many European countries, the justice system was severely affected by the budgetary difficulties. The budget of the judiciary (which includes prosecution services) escaped the drastic cuts imposed on other public services because the prison system absorbed a substantial share of the budget for the judiciary. Nevertheless, the courts lacked human resources, including judges, prosecutors and staff. Material resources were insufficient and the computer equipment was often inefficient and old and replaced very late. Court budgets also did not allow ensuring the timely payment to persons providing particular services, including experts, who often received their fees many months late. This situation not only discouraged qualified professionals from lending their support to the judiciary but it also discouraged judges to seek the assistance of professionals when preparing their decisions.

cc. Greece - The effects of the economic crises

231. In its Report 2015, the AEAJ reported how the economic crisis of Greece has affected the justice system[350]. According to this information, the state's budget for the justice system for 2015 amounted to 561 million Euros, 0.36% of the overall state budget. Budgetary restrictions of the last years did not provide adequate conditions ensuring the protection of human rights and fundamental freedoms. Contrary to the standards of the Council of Europe, an efficient operation of the national justice system was not possible. Moreover, amendments of procedural provisions were made with the aim to accelerate judicial procedures. Especially in taxation cases, access to justice and effective judicial protection (especially for economically weaker individuals) was no longer guaranteed[351].

dd. Lithuania - Security problems

232. While the status of judges and the judiciary was laid down in the Lithuanian constitution[352], and the judiciary had total independence from the executive and legislative branches, the Lithuanian judiciary faced grave problems due to lack of funding. Lack of funds made it impossible to provide adequate security in most of the courts, except the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania.

[348] See the CCJE Situation Report, updated version No. 2(2015), para. 92.
[349] On 11 September 2015; see the CCJE Situation Report, updated version No. 2(2015), para. 93.
[350] Ibid., para. 94.
[351] Ibid.
[352] The CCJE member in respect of Lithuania reported on 19 June 2015; see the CCJE Situation Report, updated version No. 2(2015), para 95.

ee. Malta - Chronic underfunding

233. Malta[353] reports a chronic underfunding of its judiciary. As regards the overall number of members of the judiciary, the CCJE member in respect of Malta reported on 19 May 2015 that the European Union had pointed out that this number in Malta was one of the lowest in the EU and that it should be doubled. This opinion was submitted over a year ago, and nothing had been done since. Judges repeatedly complained that each of them had, essentially, to do the job of two judges. The Government said it intended to appoint jurists to help judges with their decisions and thus speed up the process of delivery of judgments. There was, however, much work for an individual judge, and hence the need for more members of the judiciary.

ff. The Netherlands - Increased workload

234. Though public trust in the judiciary was relatively high, as was the level of the perceived independence of the judiciary, the CCJE member in respect of the Netherlands[354] pointed to a number of developments which can at least be partly linked to an economisation of justice as, for example, reduced access to justice (higher court fees, restrictions on legal aid, reducing the "judicial domain" by transfer of powers to the public prosecution; important budget cuts for the public prosecution) and an increased workload of judges. The latter had a negative impact on the quality of work, as was reflected in a manifest that approximately 700 judges signed and in a recent report of an audit commission that visited all the courts of the country.

gg. Portugal – cuts because of economic crisis

235. In Portugal, severe budget cuts and external pressure from international financial institutions may have resulted in a weakening of democratic and human rights protection, thus affecting good governance as well as the administration of justice and public services, leading to the devaluation of trust in institutions, including courts. Furthermore, the Public Prosecution Service was not financially independent, but relies on the good will of the Government in place. Thus, there is ground to dispute whether sufficient funds are allocated to the Public Prosecution Service to carry out its widespread functions, including in criminal cases. The number of active public prosecutors and clerks is still considered to be insufficient. There is also concern about further problems due to a major reorganisation of the Portuguese court system. Many courts were closed and justice services have been concentrated in a reduced number of cities, posing problems as regards access to justice by the general public[355].

hh. Slovakia - Strike

236. The CCJE member in respect of Slovakia reported on 27 May 2015 that the permanent lack of financial, technical and personal resources and increasing backlogs in the courts of all instances had led to a strike by the higher judicial staff and administrative employees in February 2015[356].

[353] Ibid., para. 96.
[354] Ibid., para. 97.
[355] Information provided by the CCPE member in respect of Portugal during the preparation of this report.
[356] See the CCJE Situation Report, updated version No. 2(2015), para 98.

ii. Slovenia - Cuts affecting projects to improve efficiency and training

237. According to information received in preparation for CCJE Opinion No. 18(2015), the Slovenian government's austerity package in 2013 imposed deep spending cuts on the justice system as a result of fiscal consolidation of public finances. Representatives of the judiciary complained that the cutbacks were decided in a hurry and without a proper understanding of the judiciary's needs or the potential consequences of the cuts. The budget adopted for 2013 among other measures also reduced funding for the judiciary by 7.5% and lowered the average wage of judges and public officials. Some cuts affected the project Lukenda (a temporary project aimed at improving efficiency in the justice system and reducing court backlogs). The government prolonged the Lukenda project to a limited extent, but aims to achieve the same objective by other measures implemented under the "Strategy for Justice 2020" project[357].

jj. Ukraine - Only half of the resources needed

238. The CCJE member in respect of Ukraine stated, on 19 June 2015, that at the end of 2013, the State Judicial Administration of Ukraine addressed the governing bodies concerning the modification of the state budget for 2014 as only about 50% of the necessary amount of allocations had been provided to the judiciary. In 2014, the financing of the justice system was somewhere at the level between 2011 and 2012. For 2015, only a third of the sum requested by the State Judicial Administration has been put in the state budget.

kk. United Kingdom – Cuts in the number of State Prosecutors in England and Wales

239. According to information published in the press in 2013[358], nearly a quarter of the Crown's state prosecutors have been cut as part of budget savings. Many in the justice system, including senior judges, expressed grave concerns about the state's performance in some criminal trials. Investigations carried out by the Bureau of Investigative Journalism into the Crown Prosecution Service (CPS) found deep cuts to CPS legal teams: In the last three years the CPS lost 23% of its barristers (202), 22% of its solicitors (518) and 27% (296) of its higher court advocates, according to replies to Freedom of Information requests made by the Bureau. Staff employed to organise witnesses was cut by 43%. As a consequence of inefficiencies within the CPS, the rate of cases in which homicide trials failed rose. An increasing number of trials was jeopardised by CPS failings. One of the problems often cited is the Crown's increasing lack of preparation for trials. CPS barristers are said to arrive in court without having had sufficient time to prepare. Consequently, their cases will often be thrown out. According to the information in the press, judges are increasingly expressing their exasperation in court. One senior judge described the CPS's performance as a "disgrace", another as "a lamentable state of affairs" and a third told the CPS that the court would "not put up with this kind of disdain". Michael Turner QC, chair of the

[357] http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/zakonodaja/121114_ANG_Strategija_Pravosodje_2020.pdf.

[358] https://www.thebureauinvestigates.com/2013/07/27/new-figures-reveal-the-cps-has-lost-more-than-20-of-its-legal-teams/ (visited on 7 December 2015); http://www.theguardian.com/law/2013/jul/27/staff-cuts-cps-delays-errors (visited on 7 December 2015).

Criminal Bar Association reasoned that "the supposed budget cuts have resulted in no savings at all for the criminal justice system. At the end of the day if weaknesses are leading to breakdowns and re-trials then the tax payer ends up spending more money in the long run[359]".

b. Remuneration of judges and prosecutors

240. Several countries facing economic crisis have opted for a cut in the salaries of public officials, including judges. Regardless of the rationale behind such measures, judicial remuneration cannot be reduced by a greater proportion than that of other public officials. Otherwise this would violate the principle of equality established as a general principle of law and it would contradict Article 54 of Rec(2010)12[360]. In the CCJE Situation Report of 2013, reductions in the income of judges were reported in Cyprus, the Czech Republic, Germany, Ireland, Italy, Latvia, Portugal, Slovakia, Slovenia and Spain. Since then, there have been no claims and no reports on developments from Italy, Latvia, Portugal and Spain[361]. Many member states reported discussions concerning the remuneration of judges[362].

aa. Bulgaria – Tensions between the executive and the judiciary

241. As mentioned elsewhere[363], the Supreme Judicial Council of Bulgaria (SJC) addressed the CCJE in a letter of 16 November 2015, in relation to a problem concerning the remuneration of judges and prosecutors. According to Article 117 of the Bulgarian Constitution, the judiciary shall be independent and have its own budget. The SJC makes a proposal for a budget for the judiciary each year and controls the implementation of the budget. The SJC requested that the CCJE review the refusal of the Minister of Finance to implement Article 218 para 2 of the Judiciary System Act as well as a draft law amending Article 218 para 2 and 3 of the same Act. Article 218 para 2 of the Judiciary System Act provides that the remuneration for the lowest position of judge, prosecutor, and investigator shall be set at the double amount of the average monthly salary of budget-funded employees (as indicated by the data collected by the National Institute of Statistics). On September 17th 2015, the SJC decided to increase the remuneration of the magistrates by November 1 2015 by about 12% in order to comply with the Judiciary System Act. So far, remuneration has been paid out of savings made by the judiciary, but for 2016, the increased salaries make an increase of the judicial budget necessary. However, the Minister of Finance has informed the SJC that an increase of the budget would not be possible in the next three years. Consequently, the SCJ should review its decision. In the draft Law for the State Budget, the budget for the judiciary for 2016 was not increased; no funds were made available for the increased remuneration. The proposed funds were also not sufficient to guarantee a normal functioning of the judiciary and the reform policies approved by the government and parliament before. In the same draft law for the

[359] https://www.thebureauinvestigates.com/2013/07/27/new-figures-reveal-the-cps-has-lost-more-than-20-of-its-legal-teams/ (visited on 7 December 2015); http://www.theguardian.com/law/2013/jul/27/staff-cuts-cps-delays-errors (visited on 7 December 2015).
[360] See the CCJE Situation Report, updated version No. 2(2015), para 74.
[361] Ibid., para 75.
[362] See below D VII 2 b para 241-255.
[363] See the CCJE Situation Report, updated version No. 2(2015), para 76.

State Budget for 2016, an amendment of Article 218 para 2,3 of the Judiciary System Act was introduced. The draft law provides that the minimum remuneration of a judge, prosecutor and investigator shall be determined each year by the Law for the State Budget. The SCJ sees this as a violation of the Bulgarian Constitution and of European standards.

bb. Croatia - The importance of remunerations and pensions

242. As the CCPE member in respect of Croatia stressed in preparation of this report, salaries should be fixed and the reduction of salaries should be avoided. The unilateral reduction of salaries could have direct effects on the independence of prosecutors. Moreover, pensions needed to be sufficient to guarantee a dignified life for retired prosecutors. The contribution from Croatia stressed that due to numerous restrictions concerning conflict of interest, as part of efforts directed at the preservation of independence and impartiality, law abiding public prosecutors spent their life bound by the duties of senior judicial officials. Once retired, such prosecutors often found themselves at the margins of society. Therefore, a dignified life after the term of duty should be secured via a pension system.

cc. Czech Republic - Supreme Court decision against cuts

243. The CCJE member in respect of the Czech Republic reported, on 29 May 2015, that judges had been successful in their plea against the state, and that the Supreme Court had decided that the cuts of their salaries were unlawful. The salaries of judges increased and the state had to return a part of the cut money to them. However, politicians (and journalists) used this occasion for serious attacks in the press against judges[364].

dd. Estonia - Determination of salaries

244. Estonia faces particular problems regarding the determination of its salaries[365]. The law only states eight ranks of prosecutors and links this rank to a scale. The salary a prosecutor of a certain rank receives is, however, prescribed by governmental decision. Therefore, the salary system, which was an important guarantee of prosecutors' independence, was in fact in the hands of the executive and not the legislative powers. The system was different for judges whose salary was directly regulated by law. Salaries of judges were raised in recent years while salaries of prosecutors were frozen in 2012-2014. The gap between the salaries still exists. Because of it, many prosecutors decided to become judges. The gap between the salary of the Prosecutor General and other top ranking lawyers discouraged many suitable candidates from applying[366].

ee. Germany - Decision of the Federal Constitutional Court

245. In its decision of 5 May 2015, the German Federal Constitutional Court decided cases concerning the remuneration of judges in some of the Länder (federal states) in the

[364] Ibid., para 77.
[365] Information received from the CCPE member in respect of Estonia during the preparation of this report.
[366] The Prosecutor General is appointed by the Government after the proposal of the Minister of Justice having the support of the Legal Committee of the Parliament.

years between 2003 and 2012. The court held that there was a constitutional right of remuneration adequate to the position held (Article 33(5) of the German Constitution). Acts of Parliament regulating this remuneration could only be reviewed as to whether remuneration was evidently inadequate. Indicators for this were the following: significant difference over a period of several years between judges' remuneration and the salaries of other public employees; significant differences compared to developments of general wage levels over some years; significant differences compared to general price indexes; inadequate steps of remuneration following rank and promotion; significant differences of remuneration among the Länder. The court held that there was a presumption of inadequate remuneration if at least three of these five indicators were fulfilled. Further elements considered were: qualification and responsibility, other benefits (e.g. medical coverage), comparison to positions outside the public service (e.g. practicing lawyers), but also budgetary restrictions. According to the court, in order to ensure the consideration of these parameters, Parliament was under a duty to give reasons for the relevant legislation[367].

ff. Hungary - Review

246. The CCJE member in respect of Hungary reported[368] significant progress in the adoption of a judicial career progression model. The objective was to present a final draft career model for adoption by the Government in October 2015. The draft was prepared in cooperation with the National Office for the Judiciary, the National Judicial Council, the Hungarian Association of Judges and the Union of Court Employees in partnership with the Kuria. An expert body was set up to coordinate efforts and conduct intensive consultations with stakeholders. The initiative had the general support of the judiciary. As a first step in a comprehensive review of the remuneration framework for the judiciary, the salaries of clerks to judges (entry-level judicial officials without independent authority) and court secretaries (advanced-level judicial officials with independent authority in designated cases) were increased by 10% from July 2015[369].

gg. Ireland - Cuts through constitutional amendment

247. During the economic downturn, very substantial cuts were imposed on the judiciary[370], in common with all others who were paid from public funds. At first, the Constitution contained a specific prohibition on the reduction of the remuneration of a judge during his/her term of office. Notwithstanding that the great majority of judges, on a voluntary basis, signed up to the cuts, a proposal to amend the Constitution was put to the people and approved in a referendum in October 2011. As the Irish economy began to recover from the recent crisis, the government had, on a very slow and gradual basis, begun the exercise of unwinding financial emergency provisions legislation. This unwinding would be of benefit to the judiciary, but progress in this area was likely to be very slow. The Association of Judges of Ireland (AJI) advocates the establishment of an independent body to deal with the remuneration levels and terms of service of members of the judiciary, as well as amelioration of the very

[367] See the CCJE Situation Report, updated version No. 2(2015), para 78.
[368] 30 June 2015.
[369] See the CCJE Situation Report, updated version No. 2(2015), para 79.
[370] Information provided by the CCJE member in respect of Ireland on 1 July 2015.

significant salary cuts. However, it was unlikely that such a body would be established before the upcoming general election[371].

hh. Malta - Constitutional protection of remuneration

248. The CCJE member in respect of Malta reported, on 19 May 2015, that the salary of judges was guaranteed by the Constitution, but their take-home pay was increased by allowances. It was not yet established whether such allowances could be reduced by the government or whether they were also guaranteed by the Constitution. This uncertainty was seen as diminishing the independence of the judiciary[372].

ii. Montenegro – Low salaries and pensions

249. On 27 February 2015, the Association of Judges of Montenegro addressed the CCJE and requested its advice vis-a-vis the issue of salaries of judges, especially since the Ministry of Finance of Montenegro had drafted a new law on salaries in the public sector, which allegedly contained serious negative developments for judges' rights. The Bureau discussed this request and prepared its response of 14 April 2015 recalling European standards[373]. In its response to the questionnaire sent out in preparation of CCJE Opinion No. 18 (2015), Montenegro explained that pensions of judges are extremely low, and do not reach even half of the amount of judicial salaries.

jj. Portugal – Significant cuts in the remuneration of judges and prosecutors

250. The economic crises of the last years and pressure from international institutions led to significant cuts in the wages of prosecutors and judges in the last four years[374].

kk. Slovakia - Frozen salaries

251. In Slovakia[375], the increases of salaries of judges are still suspended despite official declarations about positive developments of the Slovak economy. Moreover, forthcoming changes in judges' social security scheme could cause significant cuts in the pensions of judges.

ll. Slovenia - Two Constitutional decisions

252. The salaries of judges have given rise to controversy in Slovenia over the past few years. The Constitutional Court ruled twice in favour of judges[376]. According to the decisions, judges should be treated in a manner comparable to officials of the two other branches of power. However, due to the current economic situation, the law, which adjusted the salaries of judges with the other two branches of power, has been 'frozen' until the economic situation improves, so de facto the salaries of judges remain at an unconstitutional level. Since 1 June 2012, the remuneration of the

[371] See the CCJE Situation Report, updated version No. 2(2015), para 80.
[372] See the CCJE Situation Report, updated version No. 2(2015), para 82.
[373] See the CCJE Situation Report, updated version No. 2(2015), paras 83-84.
[374] Information provided by the CCPE member in respect of Portugal during the preparation of this report.
[375] Information provided by the CCJE member in respect of Slovakia on 27 May 2015; see the CCJE Situation Report, updated version No. 2(2015), para 85.
[376] Information provided in response to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).

officials of all three state powers (including judges) has been reduced by 8% for reasons of economy and this will remain in force until economic growth reaches and exceeds the rate of 2.5 % of the GDP.

mm. Sweden - Evaluation

253. In Sweden, a judge's remuneration is partly dependent on his/her performance[377]. However the employer must not let the result depend on what the judge decided in a certain case. Therefore, the yearly increase of remuneration could vary between 1-5 % (or more) within the same court. No salary raise at all was used as a disciplinary action towards a "disobedient" judge[378]. According to the information provided by the CCJE member in respect of Sweden, however, there are safeguards in place to ensure that a judge's independence is not threatened[379].

nn. Ukraine - Low salaries

254. The Law "On Judicial System and the Status of Judges" adopted on 7 July 2010[380], provided for a gradual increase in the salaries of judges to ensure a sufficient level of remuneration of judges according to the European standards. Thus, since 1 January 2014, the official salary of the judge of a local court had to be equal to 12 minimum wages, and since 1 January 2015 – to 15 minimum wages. However, at the end of 2014, the provision on the increase of the official salary was cancelled, and therefore in 2015, the official salary of the judge of a local court remained at the level of 2013 - 10 minimum wages. Besides, the Law provided for a restriction in 2015 on the maximum amount of remuneration of judges of 7 minimum wages, including the official salary of the judge and a bonus for being placed in an administrative position, length of service and other additional payments. The Council of Judges of Ukraine repeatedly appealed to the governing bodies of the state to reconsider these innovations as they directly contradicted the Constitution of Ukraine and the European standards concerning the principles of judicial remuneration. Since April 2015, such restrictions were cancelled at the legislative level. Changes also concerned the provisions on pensions of retired judges. Thus, the above-mentioned law reduced the level of the monthly life-long maintenance of retired judges from 80% to 60% of the monthly maintenance of the judge. Since 1 June 2015, such payments stopped in general.

c. Budgetary autonomy

255. Financial autonomy is discussed as an important factor for institutional independence of judges[381] and prosecutors[382]. In the context of the economic crisis and the increasing debates for institutional independence, claims for an independent budget of the judiciary have been raised in some of the member states (Iceland, Ireland,

[377] Information provided by the AEAJ on 13 January 2013. See also the CCJE Opinion No. 17(2014), para 11.
[378] This is in conflict with Article 55 of Rec(2010)12 and the CCJE Opinion No. 17(2014), para 28, Rec. 13.
[379] See the CCJE Opinion No. 17(2014) fn 22, 24.
[380] Information provided by the CCJE member in respect of Ukraine on 19 June 2015; see the CCJE Situation Report, updated version No. 2(2015), para. 88.
[381] See Rec2010(12), para 40; the CCJE Opinion No. 18(2015), paras 50-51.
[382] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 89-90.

Spain)[383]. It is important to note in this context that budgetary control of the courts often lies with the government and parliament (for example Austria (with the exception of the Administrative Court and the Constitutional Court), Cyprus, Croatia, the Czech Republic, Denmark, Estonia, Georgia, Iceland, Italy, Luxembourg, Malta, Portugal, Slovakia, Switzerland, United Kingdom). In other countries, where there is more dialogue over the budget between the judiciary and the government, there is still a significant influence of the government over the budget, for example in Bosnia and Herzegovina, Belgium, Bulgaria, Finland and Slovenia, the government still has some influence over the budget.

256. Transparency International mentioned the fact that prosecutors neither had their own budget, nor auxiliary staff or premises[384], as a negative factor in fighting corruption through an independent prosecution service. The CCPE has discovered in the responses to a questionnaire sent out in preparation for CCPE Opinion No 7 (2012) that the competence for establishing a budget was in most cases shared between the prosecution service and the ministry of justice; often the ministry of finance was also directly involved. Approximately half of the states indicated that the budgets of their prosecution services were governed by the system of management by results including such objectives as efficiency and productivity[385].

257. Hungary and Slovakia reported in preparation of this report that the public prosecution services have their own separate budget in the State Budget. Spain criticised the fact that the Public Prosecution Service did not have an independent budget since it was integrated in the Ministry of Justice budget or depended on the Regions' budgets[386]. Furthermore, the prosecutors' training was provided by the Centre for Legal Studies which is attached to the Ministry of Justice. Its budget and programmes were established by the Ministry after consultation with the prosecution services

3. Conclusions

258. The incidents depicted above vividly illustrate the risks inherent in chronic underfunding and a lack of appropriate remuneration. As the CCJE has stated, it is accepted that, within constitutional limits, decisions on the funding of the system of justice and the remuneration of judges must ultimately fall under the responsibility of the legislature. However, European standards should always be respected[387]. The CCJE[388] and the CCPE[389] have made recommendations about the funding of the judiciary. In the case of a severe economic downturn, judges and prosecutors, like all other members of society have to live within the economic position of the society they serve. However, chronic underfunding should be regarded by society as a whole as unacceptable. This is because chronic underfunding of the justice system undermines the foundations of a democratic society governed by the rule of law[390]. In particular, member state must take the necessary steps to ensure the security of judges and

[383] Information received during the preparation of the CCJE Opinion No. 18(2015).
[384] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 23.
[385] See the CCPE Opinion No. 7(2012), para 3.
[386] See also GRECO Fourth Evaluation Round, Corruption prevention in respect of members of the parliament, judges and prosecutors. Evaluation Report Spain, published on 15 January 2014, p. 36.
[387] See the CCJE Opinion No. 18(2015), para 51.
[388] See the CCJE Opinion No. 2(2001).
[389] See the CCPE Opinion No. 9(2014), "Rome Charter", section XVIII.
[390] See the CCJE Opinion No. 18(2015), para 51.

prosecutors, and appropriate working conditions reflecting the importance and dignity of the judiciary, including prosecution services. Moreover, member states must provide adequate remuneration and pensions to judges and prosecutors.

259. While courts and prosecution services should use the available resources in the most efficient manner possible[391], the quality of justice cannot be understood as if it were a synonym for mere "productivity" of the justice system[392]. The CCJE has therefore cautioned that insufficient funding and budget cuts might result in a justice system overemphasising "productivity"[393]. The workload of both judges and prosecutors must allow that work is not only done quickly but also with high quality. Access to justice should also not be obstructed through excessive costs. The costs of court and legal aid should be regulated in a way that makes access to justice not dependent on wealth[394], but available to all those who need it.

VIII. Public discussion and criticism of judges and prosecutors

1. Introduction

260. Both judges and public prosecutors face unfair press campaigns and public criticism by politicians. The CCPE has discussed the issue in CCPE Opinion No. 8 (2013). The CCPE examined, in particular, the proper balance between the fundamental rights to freedom of expression and to information as guaranteed by Article 10 of the ECHR and the right and duty of the media to inform the public regarding legal proceedings, and the rights to presumption of innocence, to a fair trial and to respect for private and family life as guaranteed by Articles 6 and 8 of the ECHR[395]. In its Opinion No. 18(2015), the CCJE noted that public debate is an essential element of a democratic society. In principle, the judiciary and decisions and actions of judges and prosecutors are no exception. However, unlike politicians, judges and – up to a certain degree – prosecutors must remain impartial and are therefore not as free to defend themselves against criticism. Moreover, there is a fine line between freedom of expression and legitimate criticism (which might even have positive effects) on the one hand, and disrespect and undue pressure on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings. Neither should individual judges be personally attacked[396]. Politicians must never encourage disobedience vis-a-vis judicial decisions, let alone violence against judges[397]. Moreover, judges as well as prosecutors must be free to express criticism when it is necessary in the interests of the public. For example, therefore, courts may criticise legislation or the failure of the legislative power to introduce what the court would regard as adequate legislation, as long as this is done in respectful way[398].

[391] See the CCPE Opinion No. 7(2012), para 4.
[392] See the CCJE Opinion No. 17(2014), para 35; the CCJE Opinion No. 6(2004), para 42.
[393] See the CCJE Opinion No. 17(2014), para 35.
[394] See the CCJE Opinion No. 6(2004), paras 20-21.
[395] See the CCPE Opinion No. 8(2013), paras 7, 17.
[396] See the CCJE Opinion 18(2015), para 52.
[397] Ibid., para 53.
[398] Ibid., para 42.

2. Incidents and other information

a. Criticism of judges and the judiciary by members of the executive and legislature[399]

261. According to reports by the respective members of the CCJE, in most member states, politicians criticise decisions of courts (the Czech Republic, Malta, Poland, Slovakia, Slovenia, Turkey), especially those by constitutional courts (Austria, Cyprus, the Czech Republic, Germany, Slovenia). Specific comments that the judiciary should exercise judicial restraint or moderation are relatively few (they were mentioned by Germany, Slovenia, Switzerland, sometimes in the United Kingdom). Other member states mentioned more severe criticism by politicians with respect to judges (Romania, Slovakia, Slovenia, Ukraine, "The former Yugoslav Republic of Macedonia"). However, many member states deny that politicians or other relevant groups make comments which show disrespect against courts or judges (Azerbaijan, Denmark, Estonia, Iceland, Luxemburg, Malta, the Netherlands, Norway, Sweden, and Switzerland).

262. Cyprus and the United Kingdom note that the notion of an independent judiciary is a concept which the media and politicians often find difficult to understand in practice. The United Kingdom reports that public opinion oscillates between approval that "judges keep powerful executives in check" and the reproach that "unelected judges tell elected politicians what to do". Georgia affirmed this notion by reporting that comments by politicians on the role of the judiciary very much depended on how happy the respective politician was with the outcome of a particular case. France reported that public opinion (as reported by the media) was not always favourable to judges because of a perceived lack of "democratic legitimacy". Such opinions were often uttered in connection with investigations against well-known personalities.

263. In Hungary, the Ministry of Justice announced that it would undertake a systematic analysis of the case law. However, the effects – if any - of this initiative are as yet unclear. It is reported that politicians sometimes urge judges to decide more according to "public feeling" and show more "empathy for the parties" (Cyprus, Poland). Malta, Poland, Slovakia and Slovenia also report that judges are accused of working too slowly. Malta reports that such criticism is particularly unjust because according to EU recommendations, the number of judges needs to be doubled to cope with the workload.

264. Croatia, Slovakia and Slovenia specifically report that they had made considerable progress as regards compliance with European standards on the independence of the judiciary from the 1990s. After joining the EU, these states, however, report a critical and sometimes even hostile atmosphere among politicians towards judges and the judiciary. Politicians claim that judges belong to a secret, untouchable society. In Croatia and Slovakia, parliamentarians, members of the government and academics close to the government often harshly criticise the judiciary, especially the Council of Justice, and disciplinary proceedings. According to their opinion, both should be in the hands of parliament or laymen rather than of independent judges.

[399] Information provided in the responses to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).

b. Criticism as a danger to public trust in the judiciary[400]

265. Albania, Ukraine and "The former Yugoslav Republic of Macedonia" admitted that the low confidence of the public in the judiciary caused problems. Shortcomings, for example backlogs, delays and cases of corruption, do still exist despite efforts of the judiciary to improve the situation. Albania specifically bemoans the politicisation, limited accountability of the judiciary to the public, and considerable degree of corruption within the Albanian judiciary and notes that inter-institutional cooperation is lacking[401]. Problems about a politicised judiciary were also reported in relation to Slovakia[402] and Serbia[403]. However, responses from Albania, as well as reports from other countries (Croatia, Poland, Slovakia, Slovenia), suggest that politicians often criticise the judiciary in order to divert public opinion from instances of possible misgovernment by the state or to gain populist points rather than to address specific shortcomings of the judiciary in the public interest. Thus, the information suggests that low confidence is often unjustly aggravated by comments by politicians on the campaign trail and sensation seeking media. Slovakia reports low self-confidence among judges as a result of public criticism.[404] Slovenia cautioned that constant populist attacks by politicians could undermine the basis of judicial independence in the long run[405].

266. Many member states explained[406] that politicians and the media comment on procedures and decisions in criminal cases (Cyprus, France, Germany). Some countries mention the comments of politicians (but also of the media and NGOs) on pending cases (Bulgaria, Croatia, France, the United Kingdom). Bulgaria reported that the ECtHR found that a Bulgarian politician had violated the presumption of innocence with his comments[407]. Some member states stress that politicians often lack sufficient knowledge of the facts (Poland) and aim at gaining populist points by criticising the judiciary (Slovenia). Poland comments that politicians, the media, and NGOs show a lack of understanding of the role of an independent judiciary in such incidents. Malta comments that the judiciary had a particularly bad relationship with the press which reported wrongly and irresponsibly. Appeals by the government and the courts to the press to act more responsibly have not been heeded.

c. Comments by politicians and Article 6 of the Convention

267. Comments of politicians against judges or the parties to a legal procedure can call a court's independence into question. In *Kinsky v. the Czech Republic*[408] this constituted a violation of the applicant's right to a decision by an independent and impartial tribunal. Mr Kinsky, who used to be the owner of Czech land[409], brought a number of

[400] Ibid.
[401] Information provided by the CCJE member in respect of Albania in response to the questionnaire sent out in preparation of the CCJE Opinion No. 18 (2015).
[402] Information provided by the CCJE member in respect of Slovakia on 27 May 2015.
[403] GRECO Fourth Evaluation Round report Serbia 2015, para 95.
[404] Information provided by the CCJE member in respect of Slovakia on 27 May 2015.
[405] Information provided by the CCJE member in respect of Slovenia in response to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).
[406] Information provided in the responses to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).
[407] ECtHR *Toni Kostadinov v. Bulgaria* (application No.37124/10) 27.1.2015.
[408] ECtHR *Kinsky v. the Czech Republic* (application no. 42856/06) 9.2.2010.
[409] Ibid., para 7.

claims to regain property that had been confiscated after the Second World War[410]. Officials stated that the family used to be "Nazis" and that therefore Mr Kinsky should not regain his property[411], The regional courts reported to the Justice Ministry about the other claims raised by Mr Kinsky[412], which, according to the ECtHR, compromised the appearance of impartiality[413]. The minister of culture stated, after Mr Kinsky had been successful in one case, that judges who decided not to dismiss the lawsuit had to bear the full responsibility[414]. The ECtHR decided that the statements by politicians, and the media coverage of the proceedings, created a negative atmosphere that was unacceptable in a system based on the rule of law[415]. The Court disapproved of the attempts by the government to influence the judiciary and agreed with the applicant that the independence and impartiality of the Czech tribunal was doubtful[416].

268. In a decision against Bulgaria, *Toni Kostadinov v. Bulgaria*[417], the ECtHR found a violation of the presumption of innocence in Article 6 (2) of the ECHR. In this case, the Minister of the Interior had commented that the applicant was guilty before he had been brought before a court.

d. Georgia - Criticism of a decision and the reappointment of a judge

269. In September 2015, the Georgian Minister of Justice made comments about the reappointment of a judge who had served as an ad hoc judge at the ECtHR[418]. On 26 July 2011, the ECtHR found in *Enukidze and Girgvliani v. Georgia* that Georgia had violated the rights under Article 2 (procedural limb) and Article 38 of the parents of Sandro Girgvliani. In January 2006, the young man had been found dead with a cut throat[419] after having been abducted and severely beaten up. The investigation was first undertaken by the Ministry of the Interior, then by the Tbilisi City Prosecutor's Office. Four men were arrested, all senior officers of the Ministry of the Interior. Mr Girgvliani's parents asked many times for access to the evidence but were unsuccessful. They were also left in an informational vacuum as regards the progress of the investigation. The applicants made numerous unsuccessful requests to the courts to have specific items of the collected evidence examined in court. The Georgian courts found the accused guilty and sentenced them to imprisonment for terms between 7,5 and 6,5 years. Following a presidential pardon in November in 2008, they were released on parole in September 2009.

270. The ECtHR found that the investigation into Mr Girgvliani's assault and killing had lacked integrity and efficiency, which had irreparably undermined its effectiveness. During the trial, Mr Girgvliani's parents had been deprived of the opportunity to

[410] Ibid., para 6.
[411] Ibid., paras 16, 20-21; 14-21.
[412] Ibid., paras 22 -26.
[413] Ibid., para 98.
[414] Ibid., para 18.
[415] Ibid., para 95.
[416] Ibid., para 94.
[417] ECtHR *Toni Kostadinov v. Bulgaria* (application No.37124/10) 27.1.2015, see for the comments paras 27-29.
[418] Information published in the press in Georgian: http://www.interpressnews.ge/ge/politika/346730-girgvlianis-saqmis-mosamarthle-irakli-adeishvilis-uflebamosileba-aghar-ganuakhlda.html?ar=A; see with a brief English translation: http://www.interpressnews.ge/en/justice/72438-the-judge-of-the-girgvliani-case-not-reappointed.html?ar=A (visited on 7 December 2015). Information was also provided by Judge Irakli Adeishvili in a letter of 24 September 2015 addressed to the CCJE.
[419] *Enukidze and Girgvliani v. Georgia* (application no 25091/07), 26.7.2011 para 19.

prepare their position and participate effectively in the trial. The Court found it particularly regrettable that the Georgian courts had disregarded the applicants' allegation that the investigative authorities had destroyed or concealed evidence. Moreover, the Court held that the punishment given to the four perpetrators, namely the prison sentences and the way they had been imposed in practice, had been inadequate. Therefore, the Court found a violation of Article 2 of the Convention under its procedural limb[420]. Furthermore, the court found that Article 38 (authorities' obligation to cooperate with the Court) had been violated because the Georgian Government had been late, and had partly failed to submit a number of requested items of evidence to the Court, without providing convincing reasons for it[421].

271. The Georgian ad hoc Judge Irakli Adeishvili gave a partly dissenting opinion[422]. He did not consider that the case merited a finding of a violation of Article 2 (procedural aspect) and Article 38 of the Convention. According to him, the majority of the Court had deviated from the principle of subsidiarity because it had acted like a court of appeal in relation to the decisions of the Georgian Courts. To him, according to the Georgian procedural law applicable then, the domestic courts could not have initiated any investigation or collection of evidence. This would have been the duty of the prosecution. Moreover, the judge argued that the application of Article 38 in the present case deviated from previous decisions of the ECtHR.

272. In Georgia, after ten years of service, a judge must reapply for a position for life. This is itself a problem in relation to the security of tenure necessary to ensure the personal independence of a judge. Judge Adeishvilis's reappointment was denied by the High Council of Justice of Georgia in September 2015. A few days later, on 24 September 2015, the Minister of Justice, Ms Tea Tsulukiani, made the following statement in parliament: "I would like to welcome the decision the High Council of Justice of Georgia adopted couple of days ago not to renew the judicial authority of Mr Irakli Adeishvili. Yes, he was sent to Strasbourg by the previous government and was proving that nobody killed Sandro Girgvliani, he fell down and cut the throat on the bushes. Yes, such judges should go. But it will not be a violent policy over judges. We should simply allow them to finish their term but no one should hope that they will be appointed for life." According to her, the former chairman of the Supreme Court had promised these judges including the judges of the Girgvliani case, that they would be reappointed for life after their tenure of 10 years expired. "It will not happen and I together with my co-fighters promise that. Let such judges finalize their tenure but they will not decide of the fate of our children because they proved that they do not have the skills[423]."

273. In an e-mail dated 29 October 2015, the Registrar of the ECtHR stated that the President of the Court had taken note of the statement of the Minister of Justice. Moreover, the registrar pointed out that according to Article 2 of the 6th Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, ad hoc

[420] Ibid., paras 276-278.
[421] Ibid., paras 296-302.
[422] Ibid., para *73-75.*
[423] Information published in the press in Georgian: http://www.interpressnews.ge/ge/politika/346730-girgvlianis-saqmis-mosamarthle-irakli-adeishvilis-uflebamosileba-aghar-ganuakhlda.html?ar=A; see with a brief English translation: http://www.interpressnews.ge/en/justice/72438-the-judge-of-the-girgvliani-case-not-reappointed.html?ar=A (visited on 7 December 2015). Information was also provided by Judge Irakli Adeishvili in a letter of 24 September 2015 addressed to the CCJE.

Judges are entitled to the same protection as elected Judges of the Court. In that context, Article 3 of the Protocol specifies that immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

e. Romania - Prime Minister criticises prosecution

274. On 18 September 2015, the Romanian anti-corruption prosecutors asked the judicial regulator to look into whether Prime Minister Victor Ponta had damaged the independence of the judiciary (including the prosecution) by making disparaging comments on social media after being indicted. Ponta was indicted on charges of forgery, money-laundering and being an accessory to tax evasion concerning his activity as a lawyer before holding public office[424]. Ponta has repeatedly dismissed the accusation. In a Facebook post he said the country's only problem was "the obsession of a totally unprofessional prosecutor to assert himself in his career by inventing and imaging untrue deeds and situations from 10 years ago." He did not refer to any prosecutor by name. "Because of his job, the comments made by Ponta have a distinct impact on public opinion and are of a nature to undermine and hurt the institution where the prosecutor is working, as well as the independence of the judiciary" (including the prosecution), the anti-corruption prosecuting agency DNA said in a statement. "These comments question the objectivity with which criminal cases are undertaken as well as prosecutors' moral and professional probity, which can gravely touch on the independence of the DNA" [425].

f. Ukraine - Dangerous criticism

275. In response to the questionnaire drawn up in preparation of CCJE Opinion No. 18 (2015), and also in letters addressed to the CCJE, the Ukrainian member of the CCJE as well as the Ukrainian Association of judges and Mr Pavlo Vovk, President of the District administrative Court of Kyiv, reported serious public and political criticism of the judiciary. The judiciary had already been heavily attacked because of decisions and alleged corruption during the Yanukovich regime. Now, after "Euromaidan", judges were mobbed for not swiftly deciding vetting procedures against judges and other officials according to the laws "on restoration of trust in judiciary of Ukraine" and "on government cleansing"[426]. Those laws allow the scrutiny and dismissal of judges and other officials for decisions made during the "Euromaidan" protests. Judges who re-instated officials or released officials or judges convicted e.g. under both laws had been severely pressured and threatened by politicians who accused those judges of "confusing the rule of law". They threatened that those judges should be "thrown out of the window," if cases were not decided to their liking. Representatives of the Ministry of Justice said that together with members of parliament, they came "to talk" with a judge who had not decided a case according to their wishes. The situation was aggravated by violent protesters who inter alia burned tyres in front of court houses, locked judges and their staff inside courts, disturbed hearings with loud music and insulted and physically threatened judges and their staff.

[424] http://www.zeit.de/politik/ausland/2015-07/korruptionsverdacht-rumaenien-victor-ponta.
[425] http://uk.reuters.com/article/2015/09/18/uk-romania-corruption-ponta-idUKKCN0RI1F920150918.
[426] See for more details on the lustration law above at D IV 2 m, bb, paras 189-191.

A judge who acquitted a mayor was physically threatened and pressurised into write a letter of resignation and then together with the court president thrown into a rubbish bin. The judge died because of the injuries suffered after the fall. The police did not adequately protect judges in such incidents[427].

276. According to the information provided by the member of the CCJE in respect of Ukraine, in February 2015, the Council of Judges of Ukraine addressed an open letter to the public authorities of Ukraine and to leading international organisations. They urged the recipients to react to the menacing situation for the judiciary in Ukraine. Judges who worked on appeals of officials dismissed on the basis of lustration laws, were pressured and threatened by certain groups and individuals while the media expressed strong criticism of certain cases. Representatives of the Ministry of Justice of Ukraine and some MPs even threatened judges with dismissal and declared they would hold judges responsible for rendering decisions they did not approve of[428].

g. Adequate reactions to public criticism[429]

277. France (and also Slovenia) noted that it is often difficult or even impossible for judges to react adequately to such criticism for fear of appearing to endanger their impartiality. France's response recommends that an independent institution should react (on behalf of the judiciary) to such misguided statements. In Romania, apparently, the Council for the Judiciary issues press statements in reaction to such statements and even the Constitutional Court urged politicians to exercise more caution in their statements. In Poland, the Supreme Court defended judges against accusations by an opposition party of falsifying local election results. "The former Yugoslav Republic of Macedonia" stressed the importance of its Academy of Judges, which offers seminars to help judges to resist pressure from politicians and the media, as well as on how to resist offers of bribery. Following this analysis, the CCJE stated in Opinion 18 (2015): Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism. Individual judges who have been attacked often hesitate to defend themselves (particularly in the case of a pending trial) in order to preserve their independence and to demonstrate that they remain impartial. In some countries, councils for the judiciary or the Supreme Court will assist judges in such situations. These responses can take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence.

278. According to the information gathered by the CCPE in preparation of Opinion No. 8(2013) on the relationship between prosecutors and the media, prosecutorial associations may intervene in some respondent states if a prosecutor is criticized by the media for reasons connected with criminal proceedings (Albania, Belgium, Bulgaria, Germany, Italy, Latvia, Portugal, Spain, Sweden)[430]. If there are improper

[427] See also The Resolution on the Security of Judges in Ukraine by the European Association of Judges, Regional Group of the International Association of Judges, 2014 http://www.iaj-uim.org/iuw/wp-content/uploads/2014/05/EAJ-Resolution-on-judges-security-in-Ukraine_Limassol-2014-amended.pdf

[428] For a further example of recent criticism by the Prime Minister concerning all members of the judiciary of Ukraine see above at Part C, IV 2 j cc, Frankfurter Allgemeine Zeitung, Monday October 19, 2015, p. 2, http://www.faz.net/aktuell/politik/ausland/europa/arsenij-jazenjuk-im-interview-13863497.html (visited on 4 November 2015).

[429] Information provided in the responses to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).

[430] Analysis of the replies to the questionnaire circulated with the view to preparation of the Opinion No. 8(2013) of the CCPE, Document CCPE-GT(2013)2, para 33.

media campaigns against the prosecution service or individual public prosecutors, the institutions, different from public prosecutors' associations, having the power to reply may include labour unions (Austria), the Ministry of Justice (Belgium and France), the Press Council (Germany), the High Council for the Judiciary (Italy), trade union of magistrates (Monaco), the Superior Council of Magistracy (Romania), or the High Council of Judges and Prosecutors (Turkey). In general, the hierarchy of the prosecution system may intervene[431].

279. Following this analysis, the CCPE held in its Opinion 8 (2013) that any reaction to untrue or unfair media coverage should preferably come from the head or a spokesperson of the prosecution office and, in major cases, by the Prosecutor General or the highest authority in charge of the service or the highest state authority. Such an institutional reaction minimises the need for the prosecutor concerned to make use of his/her right of response guaranteed to every person, and the risk of excessive "personalisation" of the conflict[432].

h. The protection of judges and prosecutors before the ECtHR

280. As the ECtHR has expressed in its decisions, members of the judiciary must be free to criticise the other powers of the state. As long as criticism is undertaken in a climate of mutual respect, it can be beneficial to society as a whole. Ireland mentioned in its response to the questionnaire sent out in preparation of CCJE Opinion No. 18(2015), that politicians sometimes criticise judgments, but that courts criticise legislation or the failure of the legislator to introduce adequate legislation. There are, however, also cases where a judge's criticism is answered with pressure and even dismissal. This is unacceptable, as CCJE Opinion No. 18 (2015) explained[433]. The case law of the ECtHR underlines the importance of judges and prosecutors speaking up in matters of importance for the public[434], while observing caution and respect towards their colleagues and the other powers of state[435].

aa. Baka v. Hungary

281. In the decision *Baka v. Hungary*[436] of 27 May 2014, the ECtHR held that a judge's right to freedom of expression under Article 10 of the ECHR can be violated in such a situation. As a president of the Supreme Court and the Judicial Council, András Baka, the applicant in that case, had not only a right, but a duty to speak out in a proportional way in relation to reforms of the judiciary[437].

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[431] Analysis of the replies to the questionnaire circulated with the view to preparation of the Opinion No. 8(2013) of the CCPE, Document CCPE-GT(2013)2, para 35; n Macedonia, for example, in May 2015, in a press release, the prosecution office defended its working methods and investigations against allegations of a political party accused of illegal wiretapping Independent MK, 2 May 2015, http://www.independent.mk/articles/17019/Public+Prosecutor's+Office+Responds+to+SDSM+Allegations+in+Wiretapping+Case (visited on 3 November 2015).

[432] See the CCPE Opinion No. 8(2013), para 111.

[433] See the CCJE Opinion No. 18(2015), paras 52-54.

[434] See also ECtHR *Albayrak v. Turkey*, (application no. 38406/97) 31 1. 2008; *Kudeshkina v. Russia*, (application no. 29492/05) 26 2,2009; *Guja v. Moldova*, (application no. 14277/04) 12. 2.2008; *Pitkevich v. Russia* (dec.) (application no. 47936/99) 8 2. 2001; *Poyraz v. Turkey* (application no. 15966/06) 7 12. 2010.

[435] See, for example, Di Giovanni v. Italy (application no. 51160/06) 9.12.2013.

[436] Application no. 20261/12.

[437] ECtHR *Baka v. Hungary* (application no. 20261/12) 27.5.2015 - para 91-103. See for a summary of the decision above at D IV 2 e bb, paras 167-168.

bb. Guja v. Moldova

282. Though the facts of the case happened in 2002 and 2003, they can help illuminate the importance of freedom of expression within a prosecution service. In 2003, the applicant, who used to be the Head of the Press Department of the Prosecutor General´s Office[438], sent two letters received by the Prosecutor General´s Office to a newspaper[439]. The newspaper used the information provided[440]. In March 2003, the applicant was dismissed after he had admitted forwarding the letters in an attempt to fight corruption and the abuse of power[441]. His civil action for reinstatement was dismissed as well as the appeal because he had breached his obligations by disclosing secret documents[442]. The ECtHR decided that Article 10 had been violated. While employees had a duty of loyalty, reserve and discretion to their employer, Article 10 still applied to the workplace[443]. The letters concerned improper conduct by a high-ranking politician and the government´s attitude towards police brutality[444], all important matters which the public had a legitimate interest in. The sanction of dismissal could have a serious chilling effect on the other employees from the Prosecutor´s Office, as well as other civil servants and employees when it came to reporting any misconduct[445].

3. Conclusions

283. Public debate and also criticism is a necessary element in a democratic society and can help identify and eliminate shortcomings in the performance of judges and prosecutors. Judges and prosecutors should do their part as well, and engage in a respectful, fruitful dialogue with the executive, the legislature, and the media. Judges and prosecutors should also discuss adequate reactions to criticism by politicians and the media. However, the reported incidents show criticism at a level which can cause considerable harm to judges and prosecutors. In many member states politicians do make comments that show little understanding of the role of an independent justice system. The findings of the ENCJ also came to the worrisome conclusion that many judges in EU member states do not feel that their independence is respected[446]. Unbalanced comments are worrisome because they influence the public perception of judges and prosecutors and can negatively affect public trust in them. In the case of Ukraine, such comments have apparently played a role in encouraging violent attacks against judges. Such criticism is unacceptable and violates international standards. Moreover, the executive and legislative powers are under a duty to provide all necessary and adequate protection where the functioning of the courts is endangered by attacks or intimidation directed at members of the judiciary, including prosecution services[447]. Member states are also under a duty to physically protect public

[438] ECtHR *Guja v. Moldova*, (application no. 14277/04) 12.2.2008, para 8.
[439] Ibid., para 13 f.
[440] Ibid., para 15.
[441] Ibid., paras 17-21.
[442] Ibid., paras 22-25.
[443] Ibid., para 70.
[444] Ibid., para 88.
[445] Ibid., para 95.
[446] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 7.
[447] See the CCJE Opinion No. 18(2015), para 52.

prosecutors and their families when their personal safety is threatened as a result of the discharge of their functions[448].

IX. Corruption / Accountability / Standards of professional conduct

1. Introduction

284. Corruption in then justice system is a problem in some member states. Even the appearance of corruption undermines the necessary trust in the judiciary. Reports on corruption of judges and prosecutors and on their role in fighting corruption are manifold.

a. Corruption

285. Eurobarometer 397 found in its survey in 2013 that overall 23% of inhabitants in EU member states assumed that the taking and giving of bribes was widespread in courts. The perceptions in the member states differed widely, however. In Finland (3%), Denmark (5%), Germany (8%), and Sweden (9%) the public still had great confidence in their courts. Most negative were perceptions in Bulgaria (58%), Slovenia (58%), Croatia (57%) and Slovakia (56%) [449] . The ENCJ, in its report on "Independence and Accountability of the Judiciary and of the Prosecution", Performance Indicators 2015, reported inter alia that a survey among professional judges of some member states showed significant percentages of judges who believe that, in their country, during the last two years individual judges had accepted bribes as an inducement to decide cases in a specific way[450].

286. Public prosecutors hold a crucial position in the fight against corruption. On the one hand, they must fearlessly investigate and prosecute instances of corruption. On the other hand, corruption of prosecutors themselves must be prevented. As with judges, not only actual instances of corruption undermine public trust. Even the perception of corruption must be prevented in order to secure the necessary trust in the prosecution offices and their ability and willingness to fight crime and hold members of all powers accountable. Eurobarometer 397 researched the public perception about the giving and taking bribes in relation to public prosecutors in EU member states in 2013. According to this survey, 19% of EU citizens believed that giving and taking bribes was not uncommon with respect to public prosecutors. Again, numbers differed widely between member states and were lowest in Finland (2%), Denmark (7%), Sweden (9%), and Germany (11%). The mistrust – whether deserved or undeserved – was greatest in Slovenia (45%), Croatia (44%) and Lithuania (36%)[451].

287. According to the Transparency International Corruption Perception Index 2014, many member states experience high levels of perceptions of corruption. Russian Federation, for example, ranks 136 out of the 175 countries assessed, with a score of

[448] See the CCPE Opinion No. 9(2014), paras 90-91; Rec(2000)19, 5 g, p. 19.
[449] Special Eurobarometer 397 Corruption (2014) T15.
[450] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, cf.
http://www.encj.eu/index.php?option=com_content&view=article&id=178:ind-and-acc-&catid=34&Itemid=252
[451] Special Eurobarometer 397 – Corruption (2014) T16.

27 on a scale from 0 (highly corrupt) to 100 (very clean)[452], Albania ranks 110 with a score of 33, Armenia ranks 94 with a score of 37, Azerbaijan 126 with a score of 29, Bosnia and Herzegovina ranked 80 with a score of 39. Transparency International stresses that respect for the rule of law and the fight against corruption requires a committed executive, an active and vibrant civil society willing and able to demand accountability and a strong and independent justice sector that is able to prosecute corruption cases impartially. According to their findings, all these elements are underdeveloped for example in Albania, Armenia, Azerbaijan, Georgia, Republic of Moldova and Ukraine[453]. The judiciary (including prosecution services) in these countries is described as often weak, politicised and perceived as corrupt. GRECO describes a lack of public trust also in relation to Bulgaria[454], Croatia[455], and Serbia[456] and made a number of recommendations. Slovakia also reports low self-confidence of judges as a result of low social status and constant criticism. According to the Transparency International Corruption Perception Index 2014, Bulgaria ranks 69 out of the 175 countries assessed, with a score of 43[457], Croatia ranks 61 with a score of 48, and Serbia ranks 78 with a score of 41.

288. However, also other member states struggle with the fight against corruption (according to information published in the press for example France[458], Italy[459] and Spain[460]). On the Transparency International Corruption Perception Index 2014, France ranks 26 out of the 175 countries assessed, with a score of 69[461], Italy ranks 69 with a score of 43, and Spain ranks 37 with a score of 60. Corruption undermines the trust of the public in the justice system, and makes judges and prosecutors an easy target for blackmail and pressure. Sometimes, the line between corruption and pressure is a fine one. Therefore, not only must judges receive adequate remuneration and be provided with appropriate working conditions. In proven cases of corruption heavy sanctions, as a rule dismissal from office, are appropriate because being immune to corruption is the corner stone on which trust of the public in the judges and prosecutors can be built. The examples provided further below on a country by country basis may underline this picture.

b. Standards of ethical and professional conduct

289. Judges and prosecutors must work according to high standards of ethical and professional conduct, as set out in CCJE Opinion No. 3 (2002) and in the Standards of the International Association of Prosecutors (1999)[462]. They must produce work of the highest possible quality in the interest of the public and must exercise their duties

[452] http://www.transparency.org/cpi2014/results.
[453] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 8.
[454] GRECO Fourth Evaluation Round, Evaluation Report Bulgaria 2014, paras 1-6.
[455] GRECO Fourth Evaluation Round Evaluation Report Croatia 2014.
[456] GRECO Fourth Evaluation Round Report Serbia 2015, para 95.
[457] http://www.transparency.org/cpi2014/results.
[458] http://www.faz.net/aktuell/korruptionsverdacht-sarkozy-dem-richter-vorgefuehrt-13022142.html According to information published in the press on 2 July 2014, investigations were initiated against former president Sarkozy. The investigations were due to the suspicion that Sarkozy and his lawyer Thierry Herzog had attempted to gain information about a pending procedure. In exchange, Sarkozy allegedly promised the leading prosecutor a position in Monaco.
[459] See for an article on demonstrations in Italy protesting an allegedly slow, corrupt and biased justice system http://www.tagesschau.de/ausland/justiz-italien-101.html.
[460] http://www.wochenblatt.es/1000003/1000000/0/33445/article.html; article of 20 November 2014 (Wochenblatt online) on the Spanish judge responsible for investigations in the most important corruption cases.
[461] http://www.transparency.org/cpi2014/results.
[462] https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf.

in compliance with the law and disciplinary rules. Violations of such rules can be punished according to the law after having been proven in a thorough procedure before an independent and impartial tribunal[463]. In addition, standards of ethical and professional conduct can provide guidance to judges and prosecutors. This way, judges and prosecutors work towards maintaining and developing the trust of the public which is essential in a democratic society bound by the rule of law. GRECO 4th Round Evaluation Reports repeatedly recommended that standards of ethical and professional conduct cover all judges, and that member states introduce ethical guidelines[464]. For prosecutors, many countries report rules on incompatibilities. Prosecutors must recuse themselves if they have a personal connection with a case. Many countries do not allow prosecutors to be members of political parties or hold political office.

290. Codes of conduct should address basic principles of professional conduct and should recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities[465]. Such principles should be clearly distinct from the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence[466]. Sanctions for violations of rules of conduct, if any, must be proportionate and not arbitrary or ambiguous (so as to avoid them being used to retaliate or discipline judges and prosecutors for their decision-making). In many member states, judges and prosecutors have adopted codes of professional ethics. Organisations like the International Association of Prosecutors have also developed such standards[467]. The notion that judges and prosecutors, in order to establish and maintain public confidence, must in some way show accountability, can be regarded as, in principle, widespread among member states[468]. Provided a careful balance is observed, the two principles of independence and accountability are not irreconcilable opposites[469]. A constructive dialogue with the public, directly or through the media can be of crucial importance in improving the knowledge of the public about the law and increasing their confidence in the judiciary[470] and in prosecution services. Thereby, it can be ensured that public perceptions of the justice system are accurate and reflect the efforts made by judges and prosecutors.

[463] In the CCJE Opinion No. 18(2015), para 33, this was described as "punitive accountability".
[464] GRECO Fourth Evaluation Round, Evaluation Report Estonia 2013. In relation to Serbia, GRECO recommended that ethical guidelines should be complemented by training and confidential counselling.
[465] See the CCJE Opinion No. 3(2002), para 48 I.
[466] In ECtHR *Albayrak v. Turkey*, no. 38406/97 para 10, 38, 31 January 2008 a judge's critical opinions and unconventional ways were punished by reassignment "for undermining the honour and dignity of the judiciary as well as respect for his own position as a judge." The ECtHR decided that there had been a violation of Article 10. The case shows that great care must be taken that such rules are not abused to silence critical voices within the judiciary.
[467] Standards of the International Association of Prosecutors (1999).
https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf.
[468] To familiarise themselves with the concept of accountability is also a task for countries where judicial corruption is not an issue. Only recently, the Lord Chief Justice of England and Wales, when addressing the plenary session of the CCJE in London on 15 October 2015, underlined the need for the judiciary to account for their work to society. The CCJE, in its Opinion No. 18(2015), has dealt extensively with accountability of the judiciary, CCJE Opinion No. 18(2015) V, paras 20 – 33. The text which follows is taken from this opinion.
[469] Cf. the CCJE Opinion No. 18(2015), para 20.
[470] Cf. the CCJE Opinion No. 18(2015), para 32, see also Opinion No. 7(2005).

2. Incidents and other information

a. Corruption in the judiciary (including prosecution services)

aa. Albania - Corruption - the main problem of the legal system

291. According to Transparency International's Corruption Perceptions Index 2014, Albania ranks 110 out of the 175 countries assessed, with a score of 33 on a scale from 0 (highly corrupt) to 100 (very clean)[471]. According to information published in the "Analysis of the Justice System in Albania"[472], a substantial document prepared by an ad hoc parliamentary commission including foreign experts, there is a high perception of corruption in the judiciary and prosecution. The judiciary including prosecution services has been ranked as the most corrupt institution in Albania. The Report also reported that judges pay bribes to be appointed or transferred to posts in Tirana or other major cities.

292. The report says: "Unofficial data suggest that public corruption payment cycle begins with the Judicial Police, corrupt officers who accept payment to destroy evidence at the crime scene. Further, according to these data, corrupt prosecutors accept payment for not starting a case or not to bring charges to the court and corrupt judges delay the appointment of the first session or condition the final decision waiting for bribery. Generally, the bribery is not given directly but through the mediation of a third person, which is often a close relative of the family of the judge or prosecutor, a mutual friend or a lawyer. Generally, there are unofficial data from the public of a well-defined structure of figures paid for various services and predetermined division of illegal benefits between the judge and the prosecutor"[473]. According to information published in the press, some police officers are said to suppress evidence for relatively small sums. Some prosecutors are said not to prosecute a crime for sums between 1000 and 2000 Euros, while some judges give favourable judgments for 60,000 up to 80,000 Euros. Judges supposedly pay between 100,000 and 300,000 Euros to be promoted or just to be transferred to bigger cities, where they can claim higher bribes[474].

293. While there might be good reason to assume that the promotion of judges is in certain cases connected to corruption, the presentation of these allegations without prior warning in live broadcasting is by Albanian insiders[475] also seen to confirm a hostile atmosphere on the part of the parliamentary commission against the High Council of Justice (HCJ). At present, the HCJ has no legal competence to initiate investigations and disciplinary procedures in cases of alleged corruption. The reform of the legal system is, as insiders criticise, not in the hands of the judiciary and the HCJ but undertaken by the parliamentary commission. According to sources in Albania, the

[471] http://www.transparency.org/cpi2014/results.
[472] Ad Hoc Committee for the Reform of Justice System, set up by decision nr.96/2014, dt. 27/11/2014 of the Albanian Parliament, Chapter VIII; confirmed in a meeting of members of the European Network of Councils of the Judiciary with members of the High Council of the Judiciary of Albania on September 25, 2015.
[473] Analysis of the Justice System in Albania p. 10.
[474] Frankfurter Allgemeine Zeitung August 26th 2015; the Wirtschaftsblatt of June 10th 2015 mentions bribes between $ 100,000 and 300,000 to gain a favourable post in the judiciary; cf. http://wirtschaftsblatt.at/home/nachrichten/europa_cee/4751559/Korruption_300000-US-Schmiergeld-fur-einen-Richterposten; http://www.balkaneu.com/alarming-figures-corruption-albanian-justice-system/, 10 June 2015 (Independent Balkan News Agency)
[475] Information received by the ENCJ in preparation of this report.

introduction of an independent body to discipline judges and prosecutors, including those at the Supreme Court, is under discussion.

294. The most fundamental measure of reform which was recommended in the paper "Strategy of Justice Reform", also drafted by the ad hoc parliamentary commission, is to create "a corps of judges and prosecutors with high ethical-moral and professional integrity, improving the performance evaluation and re-evaluation system and their ethics" [476]. The paper recommends that the evaluation of judges should not concentrate on professional performance but should pay more attention to an ethical evaluation. Moreover, there should be disciplinary measures for violations of rules of ethics by judges and prosecutors[477]. Taking into account experiences in Ukraine, the Strategy on Justice reform paper recommends introducing "an ad hoc mechanism that will be tasked to conduct the evaluation of professional knowledge, moral, ethical and psychological integrity of judges and prosecutors, combined with a special verification of their assets, with the burden of proof resting on the verified subjects, providing all necessary procedural guarantees to the evaluated judge or prosecutor." Especially a reversal of the burden of proof seems to be problematic. In a discussion with representatives from the ENCJ, an insider expressed concern that, as in Ukraine, politicians may wish to take over the HCJ and replace all judges.

295. GRECO has stated that the existing legal framework (corruption of parliament, judges, prosecutors) was undermined by numerous and frequent amendments, often subject to contradictory interpretation[478]. Public perception of corruption of both judges and prosecutors comes with poor, undignified working conditions for judges which contribute, according to GRECO, to an increased risk of corruption[479].

bb. Armenia - Independence and the fight against corruption

296. 82% of the people of Armenia believe that corruption in the public sector is a problem or a serious problem, with the judiciary (including the prosecution) and the civil service perceived to be the sectors most affected by corruption[480]. Armenia ranks 94 out of the 175 countries assessed by Transparency International's Corruption Perceptions Index 2014, with a score of 37 on a scale from 0 (highly corrupt) to 100 (very clean)[481]. Moreover, it seems that the prosecution services fail to prosecute corruption offences. During the first half of 2013, only two cases were adjudicated for bribe-taking, and only six files for bribery were opened. In total, for all 31 types of corruption offences, only 48 cases were adjudicated in the same period. Maybe as a consequence, 70% of the population in Armenia consider that the judiciary is not free from governmental influence[482].

c. Azerbaijan - Independence and the fight against corruption

297. According to Transparency International's Corruption Perceptions Index 2014, Azerbaijan ranks 126 out of the 174 countries assessed, with a score of 29. 58% of

[476] Strategy on Justice Reform July 2015 p. 40.
[477] Ibid., p. 41.
[478] GRECO 4th Round Report on Albania (2013), para 2.
[479] Ibid., para 80.
[480] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 12.
[481] Ibid.
[482] Ibid., p. 13.

the population in Azerbaijan believe that corruption in the public sector is a problem or a serious problem, with the judiciary (including prosecutors) perceived to be among the sectors most affected by corruption[483]. According to Transparency International, the executive dominates the judiciary, especially in relation to its budget[484]. As a result, prosecutors did not effectively prosecute corruption within the government[485]. Therefore, Transparency International recommended increasing the budget for judges and prosecutors and handing over its administration to the Judicial Legal Council[486].

dd. Georgia – Decreasing perception of corruption

298. According to Transparency International, in Georgia, public perception of corruption decreased. 70% of the population believed in 2013 that corruption had decreased. Georgia ranks 50 out of 175 countries, with a score of 52[487]. In 2013, the country scored only 49 and ranked 53.[488]

ee. Republic of Moldova - High perception of corruption

299. In the Republic of Moldova 80%of the population perceive the judiciary to be corrupt or extremely corrupt[489]. The Republic of Moldova ranks 103 out of 174 countries in Transparency International's Corruption Perceptions Index 2014, with a score of 35[490]. In 2014, several judges were convicted for taking bribes. However, since the cases were of minor importance, Transparency International still reports a general perception that the judiciary successfully protects its members[491]. Transparency International reports a lack of clear sanctions in case of corruption. The judiciary, especially its self-regulatory bodies were too weak to hold their own members and the government effectively to account[492].

ff. Ukraine – Replacing all members of the judiciary

300. According to Transparency International's Corruption Perceptions Index 2014, under the Yanukovych regime, Ukraine ranked 142 out of 174 countries, with a score of 26. Transparency International's Global Corruption Barometer 2013 suggests that 95%of the population believed that corruption levels had either worsened or stayed the same over the previous two years, with the judiciary and the police being perceived as the sectors most affected by corruption[493]. In relation to the Yanukovych regime, Transparency International reported executive interference in the judiciary, in the form of alleged politically motivated appointments and removal of judges. This in turn diminished the ability of the judiciary to hold the executive to account through effective judicial review, since the courts were highly politicised[494]. 87% of the population perceive the judiciary to be corrupt or extremely corrupt and only 46% of

[483] Ibid., p. 15.
[484] Ibid., p. 16.
[485] Ibid., p. 16.
[486] Ibid., p. 18.
[487] Ibid., p. 19.
[488] http://www.transparency.org/cpi2014/results.
[489] Transparency International, Global Corruption Barometer, 2013; Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 9.
[490] Ibid., p. 22.
[491] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 23.
[492] Ibid.
[493] Ibid., p. 25.
[494] Ibid., p. 26.

Ukrainians believe that the courts consider their cases in an independent and impartial manner, reports Transparency International[495]. Meanwhile, significant steps to fight corruption in the public sector have been undertaken by, e.g., replacing members of the police force and prosecuting allegations of corruption. Fighting corruption within the judiciary, however, proves to be a difficult endeavour. Replacing all members of the judiciary would appear to be contrary to European principles with respect to independence and security of tenure, because the assumption that every member of the judiciary is corrupt would appear not to be sufficiently founded. On the other hand, individual investigations and examinations of allegations of corruption will take time and may not result in the desired immediate increase in public confidence[496].

b. Fight of judges and prosecutors against corruption

301. In many member states, strong and courageous attempts to fight corruption are being undertaken. In some member states, for example, special offices and agencies for the fight against corruption have been introduced [497] or their introduction is under discussion[498]. Attempts to fight corruption cause further challenges for the justice systems: Whilst the fight against corruption at all levels of public administration is absolutely mandatory if sufficient evidence can be established, it may also happen that allegations of corruption are being used to initiate investigations and criminal proceedings in order to discredit the persons accused. Such may be the case where allegations are made in the context of political controversies, in election campaigns, but also against executives of large companies, etc. Defendants in such investigations often claim that allegations and supporting evidence are fabricated, that they are being brought forward to damage political opponents or competitors, and that prosecutors or judges who deal with and pursue them are in fact supporting the opposing side. In this context, also official anti-corruption campaigns may be conducted and used because of political or commercial motives[499].

302. Even in countries where corruption of judges and prosecutors is not an issue, it is often alleged that investigations are not proportional to the underlying suspicion, that drawing prominent suspects into the limelight may damage their image and standing without sufficient cause, that bringing them into a position to defend themselves causes burden and stress which are out of proportion to the charge[500]. In a political or

[495] Ibid., p. 26-27.

[496] In a recent interview with the German Frankfurter Allgemeine Zeitung (Monday, 19 October 2015) Frankfurter Allgemeine Zeitung, Monday October 19, 2015, p. 2, http://www.faz.net/aktuell/politik/ausland/europa/arsenij-jazenjuk-im-interview-13863497.html (visited 4 November 2015) Prime Minister Jazenjuk expressed the view that Ukrainian judges „cannot be influenced by anything except by cash“, that they were “incredibly corrupt” and did not “dream of administering justice”, but that replacing all of them, according to European experts, would be incompatible with the rule of law; see Part D IV 2 m cc para 196.

[497] France: http://www.fcpablog.com/blog/2013/12/3/france-creates-a-new-anti-corruption-office.html (visited 4 November 2015), http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm visited 4 November 2015; Romania: http://www.deutschlandfunk.de/rumaeniens-antikorruptionsbehoerde.1310.de.html? dram:article_id=236588 (visited on 4 November 2015).

[498] Cyprus: http://www.sigmalive.com/en/news/local/130735/kapardiscyprus-needs-coordinated-actions-against-corruption and http://www.parikiaki.com/2015/06/cyprus-needs-to-set-up-an-independent-authority-against-corruption/ (both visited on 4 November 2015).

[499] To list examples would be beyond the scope of this report. Examples can be found in the media reports in recent years, e.g. concerning Romania, Hungary, Turkey.

[500] Again, to list examples would be beyond the scope of this report. Well known is the case of former president of the IMF Strauss-Kahn who was later acquitted. In Germany, federal president Wulff had been accused of accepting illicit advantages; he resigned after the charge had been filed with the court; the charge was later reduced to having accepted a hotel invitation in the value of some 750 Euros, of which he was afterwards acquitted.

media environment where such views and controversial allegations are exchanged through the media, it is essential that prosecutors and judges show extreme professionalism, diligence, thoroughness and care in assessing the evidence and, above all, absolute impartiality and independence[501]. Otherwise, the necessary fight against corruption may harm the trust of the public in the justice system which is necessary to safeguard its independence.

c. Standards of professional conduct, Code of Ethics

aa. Albania - Code of Ethics

303. In Albania, a Code of Judicial Ethics was adopted by the National Judicial Conference (NJC) in 2000 and amended in 2006. It applies to judges and court officials and consists of general rules, rules on exercising judicial duties and extrajudicial activities and implementation provisions. Central to the Code is the duty of a judge to protect and uphold the independence and impartiality of the judiciary, respect and implement the Constitution and the law, and act in such a way as to increase public confidence in the judiciary[502]. The Code of Judicial Ethics sets out rules for professional and extra-professional conduct of judges and, although its text is not available on an official web site, all judges are aware of its content. However, according to the understanding of GRECO, the body in charge of the interpretation of the Code - the Ethics Committee - has had a low profile and been mainly tasked with issuing ethical performance certificates to judges in connection with a promotion, upon their request. The Committee has no say in the training of judges and does not offer guidance to prevent violations[503]. GRECO therefore recommended that the Committee assume a proactive role in the training, counselling and enforcement of judicial ethics[504].

304. The Association of Prosecutors adopted a Code of Conduct in 2005. However, since membership of the Association of Prosecutors is voluntary and only half of Albanian prosecutors are members, not all of them are bound by the Code. Moreover, its Commission is not operational and, since its establishment, has not considered any breaches of ethical rules. Therefore, GRECO recommended in 2013 that a set of clear ethical standards/code of professional conduct applicable to all prosecutors be elaborated and properly enforced; and that guidance, counselling and mandatory in-service training be made available to prosecutors on ethics, conflicts of interests and corruption prevention within their own ranks[505].

bb. Romania - Deontological Code for judges and prosecutors

305. In Romania, the Deontological Code for judges and prosecutors requires judges and prosecutors to protect the independence of justice and to exercise their profession with objectivity and impartiality. Respect for the provisions of the deontological code represents a criterion for the evaluation of judges and prosecutors[506].

[501] This view was stressed by the contribution of the CCPE member in respect of Portugal in the preparation of this report.
[502] GRECO 4th Round Report on Albania (2013), para 85.
[503] Ibid., para 86.
[504] Ibid., para 86.
[505] Ibid., paras 126, 127.
[506] Information received from the CCPE member in respect of Romania in preparation of this report.

cc. Serbia - GRECO recommendation

306. In relation to Serbia, GRECO has recommended that ethical guidelines be complemented by training and confidential counselling[507].

dd. Slovakia - Code of Conduct for Prosecutors

307. In 2014 the prosecutors in Slovakia[508] adopted a Code of Conduct which provides a set of rules on ethics and the conduct of prosecutors, to ensure and guarantee their professionalism, independence, impartiality, honesty, integrity and fairness. This act, in addition to clear rules, provides enforcement mechanisms and the opportunity to get advice on ethics.

ee. Spain – Working Group on code of ethics

308. The CCJE member in respect of Spain reported, on 10 October 2015, that following the report by GRECO of 2013, where it recommended that a code of ethics be adopted by judges and put at the disposal of the public, the General Council of the Judiciary of Spain had set up a working group to develop a code of ethics for the judicial career. This working group considers that the code of ethics must be above all a tool and provide guidance in the performance of the daily professional duties of judges[509].

3. Conclusions

309. Public perception of corruption in the justice system is probably the most serious challenge for public confidence in the impartiality and also independence of judges and prosecutors. Fighting corruption among judges and prosecutors, therefore, is one of the most important tasks for all members of the judiciary and of the prosecution services. Investigation must be undertaken thoroughly and with due respect for procedural safeguards. Offences must carry severe consequences including, as a rule, dismissal from office. Investigations into any allegations must not be delayed, must be diligent, thorough, impartial, and, as far as possible, transparent. They should take into account that there may be suspicion among the public that prosecutors and judges may be especially lenient when it comes to members of their own profession.

310. In order to establish and maintain public trust, all measures to safeguard against corruption must be taken by the judiciary and the prosecution services. This includes trust-building forms of accountability in the sense that the justice system and its functions, the presumption of innocence, and the need to prove guilt are explained. In addition, codes of conduct or of judicial ethics can serve as useful guidelines for judges and prosecutors and also as transparent, accessible information for the public. Parallel to such measures, sufficient funding, salaries, personal protection and work facilities, are necessary pre-requisites to prevent possible inducements for corruption[510].

[507] GRECO Fourth Evaluation Round, Evaluation Report Serbia 2015.
[508] Information provided by the CCPE member in respect of Slovakia for the preparation of this report.
[509] See the CCJE Situation Report, updated version No. 2(2015), para 116.
[510] The programs introduced in Singapore may serve as an example. Singapore, which for a long time has been regarded as susceptible to corruption, has combatted corruption by stricter laws, sufficient salaries and stiff sanctions. Cf., e.g. Chua Cher Yak, Singapore's three-pronged program to combat corruption: enforcement, legislation and adjudication,

311. Judicial investigations into allegations of corruption outside the judiciary and the prosecution itself may present difficulties. First, the highest degree of professionalism is needed in order to establish the true facts where allegations of corruption may also be used in order to discredit persons involved, and where burden and stress may be caused for defendant which can be out of proportion to the charge. Secondly, in cases where a case of corruption is established, it is the duty of prosecutors and judges to fearlessly prosecute and convict even powerful members of society, in the general public interest.

http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047818.pdf; cf. also https://www.cpib.gov.sg/education/strategic-considerations/strong-anti-corruption-lawadministrative-measure. Currently, public and investors' perception of the rule of law in Singapore are satisfactory, cf. http://info.worldbank.org/governance/wgi/pdf/c193.pdf, http://info.worldbank.org/governance/wgi/index.aspx#home. It has to be noted, however, that with respect to the independence of the judiciary in Singapore, there are controversial views, cf., e.g., http://thehearttruths.com/2013/01/29/is-there-legalised-corruption-in-singapore/

E. Epilogue

312. This report has shown numerous incidents of challenges and concerns with respect to independence and impartiality of judges and prosecutors. These incidents can in some way or other be found in many, if not in all member states of the Council of Europe. Concerning as this picture is, it should not give rise to resignation. Rather, the bureaus of the CCJE and the CCPE encourage all those who bear responsibility, in particular the legislature, the executive and all judges and prosecutors to continue in their efforts to ensure the existence of an independent, well regarded and trusted judiciary and prosecution services in all member states. Constitutional guarantees, formal legal rules and institutional safeguards are indispensable, but they are in themselves not sufficient if the values of independence and separation of powers, which form the basis of such rules, are lacking. All parties concerned must act according to a culture of independence and mutual respect to create and sustain this basis. What is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed[511]. To live those principles is the challenge at hand.

[511] See the CCJE Opinion No. 1(2001), para 6.

APPENDIX

No questionnaire was prepared or sent out by the CCJE or the CCPE to the member states or to individual CCJE/CCPE members for the purposes of the preparation of this report. The CCJE used information generally available on the situation of the judiciary in the member states[512], as well as information received from the CCJE members in respect of the following countries: Belgium, the Czech Republic, France, Germany, Hungary, Ireland, Lithuania, Malta, The Netherlands, Poland, Slovakia, Switzerland, Turkey and Ukraine. Information provided by the following observers of the CCJE was also used in the preparation of the report: Association of European Administrative Judges (AEAJ), Council of Bars and Law Societies of Europe (CCBE), the European Network of Councils for the Judiciary (ENCJ) and the Association "Magistrats européens pour la démocratie et les libertés" (MEDEL).

The CCPE used information provided by its members on the situation of prosecutors in the following countries: Albania, Andorra, Bulgaria, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Iceland, Ireland, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Turkey and Ukraine.

The Report has been prepared on the basis of the following legal instruments and documents:

- the Report by the Secretary General of the Council of Europe on the "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe" (2015);
- CCJE Opinions, including the Magna Carta of Judges;
- the CCJE Situation Reports on the judiciary and judges of 2011, 2013 and 2015;
- CCPE Opinions, in particular the Rome Charter;
- the 2014-2015 Report of the European Network of Councils for the Judiciary (ENCJ) on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators (2015);
- the Report by the Secretary General of the Council of Europe on the "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe" (2014);
- the 2013-2014 Report of the European Network of Councils for the Judiciary (ENCJ) on Independence and Accountability of the Judiciary;
- European Network of Councils for the Judiciary Distillation of guidelines, recommendations and principles (report 2012-2013);
- the Venice Commission: Report on the Rule of Law (March 2011);
- Recommendation Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system;
- the Venice Commission's Report on the Independence of the Judicial System, part I: the Independence of Judges, part II: the prosecution service (March 2010);

[512] See para 1 of this report.

- the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability;
- the Venice Commission, Judicial Appointments, Opinion No. 403/2006, (March 2007);
- the Bangalore Principles of Judicial Conduct (2002) and the Commentary on The Bangalore Principles of Judicial Conduct (2007);
- the International Association of Prosecutors (IAP) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999), adopted and annexed by the UN Commission on Crime Prevention and Criminal Justice in 2008 in a Resolution (E/CN.15/2008/L.10/rev.2, E/2008/30, Res 2008/5);
- the European Charter on the Statute for Judges (1998);
- the UN Basic Principles on the independence of the judiciary (1985).