

COUNCIL OF EUROPE PLAN OF ACTION ON STRENGTHENING JUDICIAL INDEPENDENCE AND IMPARTIALITY



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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pour renforcer l'indépendance
et l'impartialité du pouvoir judiciaire*

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At the 1253rd meeting of the Ministers' Deputies, on 13 April 2016, the Committee of Ministers adopted the Plan of Action set out below. Its aim is to identify the ways in which the Council of Europe will guide and support its member States in the implementation of concrete measures needed to strengthen judicial independence and impartiality. As such, the Plan of Action represents a commitment on the part of the Secretary General and of the Council of Europe as a whole to accord the highest priority to working with member States to strengthen further the independence and impartiality of the judiciaries in Europe. The types of remedial action that may be envisaged by member States in order to address the challenges identified are set out in the Appendix to the Plan of Action

GENERAL AIMS

Only an independent and impartial judiciary can provide the basis for the fair and just resolution of legal disputes, particularly those between the individual and the State. In this context, it is recalled that all member States have undertaken, under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to guarantee access to independent and impartial tribunals, whenever civil rights or obligations are in issue or criminal charges are to be determined; and in respect of which the European Court of Human Rights has developed a wide jurisprudence. These principles of independence and impartiality were recalled in Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities.

It is of primordial importance that judicial independence and impartiality exists in fact and is secured by law, and that public confidence in the judiciary, where it has been lost, is restored and maintained. To this end, it is important that a culture of respect for judicial independence and impartiality is propagated in society generally, but specifically amongst the executive and legislature.

The Plan of Action recognises the diversity of legal systems, constitutional positions, and approaches to the separation of powers in the member States of the Council of Europe and implementation of the actions detailed in the Appendix should take full account of this diversity. The urgency of these actions lies in the need to bolster judicial independence and impartiality in cases where existing structures have been identified as failing to guarantee the rule of law and democratic security.

The Plan of Action and its Appendix indicate action that needs to be taken, firstly, to improve, or establish where these are lacking, formal legal guarantees of judicial independence and impartiality and, secondly, to put in place or introduce the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judicial branch in a democratic society based on human rights and the rule of law.

PLAN OF ACTION

The Council of Europe will support all the efforts of its member States aimed at achieving the following results:

A. Establishing effective mechanisms and other measures to fully implement member States' obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms to guarantee access to an independent and impartial tribunal whenever civil rights or obligations are at issue or criminal charges are to be determined; these mechanisms and action including all those that are required to implement the judgments of the European Court of Human Rights which affect the independence and impartiality of the judiciary, particularly with regard to the guarantees provided by Article 6 concerning the right to a fair trial.

B. Improving, or establishing where these are lacking, formal legal guarantees of judicial independence and impartiality and putting in place or introducing the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judicial branch in a democratic society based on human rights and the rule of law.

C. Safeguarding and strengthening the judiciary in its relations with the executive and legislature by taking action to:

- i. ensure the independent and effective working of judicial councils, where they exist, particularly through measures aimed at depoliticising the process of election or appointment of judges;
- ii. ensure an adequate participation of the judiciary in the selection, appointment and promotion of judges, whilst limiting excessive¹ executive or parliamentary interference in this process;

1. "Excessive" means any action taken beyond the existing legal framework that interferes with the processes referred to, to an extent that the independence and impartiality of the judiciary is significantly compromised.

- iii. limit excessive executive and parliamentary interference in the disciplining and removal of judges, particularly as regards disciplinary committees of judicial councils or other appropriate bodies of judicial governance which should be completely free of political or other influence and seen to be so;
- iv. ensure that members of the executive and legislature respect the authority of the judiciary and abstain from improper, non-objective or solely politically-motivated public criticism of individual judges and their judgements as well as of the judiciary in general;
- v. ensure that day-to-day administration of courts is executed in an effective and reasonable manner based on legal regulations, and without undue interference from the executive or the legislature.

D. Protecting the independence of individual judges and ensuring their impartiality by taking action to:

- i. limit interference by the judicial hierarchy in decision making by individual judges in the judicial process and define the powers of the prosecution service in order to ensure that judges are protected from undue pressure and able to freely follow or reject the motions of prosecutors;
- ii. ensure that the rules relating to judicial accountability and the review of court decisions fully respect the principles of judicial independence and impartiality;
- iii. effective remedies should be provided, where appropriate, for judges who consider their independence and impartiality threatened;
- iv. prevent and combat corruption within the judiciary and shield judges from inducement to corruption. In this respect, member States should ensure that the remuneration and working conditions of judges are adequate and that standards of professional conduct and judicial ethics are reinforced;
- v. counter the negative influence of stereotyping in judicial decision making;
- vi. ensure comprehensive and effective training of the judiciary in effective judicial competences and ethics;
- vii. ensure that judges are protected by legal regulations and adequate measures against attacks on their physical or mental integrity, their personal freedom and safety.

E. Reinforcing the independence of the prosecution service by taking action to:

- i. provide appropriate legal guarantees for the recruitment, career development and security of employment or tenure of prosecutors;
- ii. ensure that individual prosecutors are not subject to undue or illegal pressure from outside or within the prosecution service, and that more generally the prosecution service is governed by the rule of law;
- iii. take active measures to prevent and combat corruption within the prosecution service and build public trust in how it works.

F. Building public trust in the judiciary and broader recognition of the value of its independence and impartiality, for example by ensuring transparency in the workings of the judiciary and in its relations with the executive and legislature, and by the judiciary or courts adopting a proactive approach towards the media and to the dissemination of general information, which must be respectful of the rights of the defence and of the dignity of victims.

G. Taking adequately into account society as a whole in the composition of tribunals and the judiciary to increase public trust in the judiciary. To achieve this result, a policy should be considered by member States aimed at ensuring gender equality and representation of society as a whole.

COUNCIL OF EUROPE SUPPORTING MEASURES

The Council of Europe will use all its available tools and mechanisms to assist member States in implementing the necessary reforms through its various organs and bodies, as outlined below. Measures will include Organisation-wide initiatives, including contributions by the competent bodies, as well as support and assistance to member States upon request and in respect of specific national issues and reform agendas.

- i. The Venice Commission will provide its member States with legal advice upon request and within its competence, to help them bring their legal and institutional structures into line with European standards as regards judicial independence and impartiality, including in the adoption of appropriate legal and constitutional guarantees with reference, in particular, to its various opinions and reports in this area and, more generally, in assessing respect for the rule of law;
- ii. The Consultative Council of European Judges (CCJE) will provide specific guidance to member States upon request or if seized of an issue in accordance with its mandate;²

2. The relevant texts to assist member States in this are in particular: Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, as well as the CCJE's opinions, in particular Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society, Opinion No. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy and its European Charter for the Statute of Judges.

- iii. The Consultative Council of Europe Prosecutors (CCPE) will likewise provide specific guidance to member States upon request or if seized of an issue in accordance with its mandate;³
- iv. The Group of States Against Corruption (GRECO) will continue to advise member States within its statutory monitoring operations and country-by-country conclusions on the action needed to reinforce their capacity to promote integrity and fight corruption within the judiciary and the prosecution service, as well as to assess their performance in implementing this advice;
- v. The Council of Europe will assist member States upon request in implementing the relevant recommendations of the Committee of Ministers in the area of combating corruption within the judiciary and the relevant resolutions of the Parliamentary Assembly (Resolution 1703 (2010) on judicial corruption, Resolution 1943 (2013) on corruption as a threat to the rule of law and Resolution 2098 (2016) on Judicial Corruption: urgent need to implement the Assembly's proposals);
- vi. The European Commission for the Efficiency of Justice (CEPEJ) will analyse the functioning of judicial systems, provide comparative data and analysis on the situation of the judiciary and prosecution service in member States within the framework of preparing the bi-annual evaluation reports of the CEPEJ on the efficiency and quality of justice. Amongst other actions, it will also provide advice to member States upon request on the modalities for optimising judicial timeframes and time-management of courts within the framework of the SATURN Group of the CEPEJ and promote the quality of the public service of justice, conducting satisfaction surveys of court users and acting on their results;
- vii. The European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC), and the Steering Committee for Human Rights (CDDH) will provide advice on legal policy as

3. The relevant texts to assist member States in this are in particular: Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, Recommendation Rec (2012)11 of Committee of Ministers to member States on the role of public prosecutors outside criminal justice system and the CCPE's Opinion No. 4 (2009) on the relations between judges and prosecutors in a democratic society, including the "Bordeaux Declaration" and Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the "Rome Charter".

required to the Committee of Ministers with a view to supporting member States on the implementation of the relevant law reforms, particularly in the area of judicial accountability and the review of court decisions;

- viii. Once Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols enters into force, the European Court of Human Rights will provide, upon request and in accordance with Protocol No. 16, consultative opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention, such as the right to a fair trial, by an independent and impartial tribunal, established by law (Article 6);
- ix. Targeted support will be provided within the framework of the Council of Europe co-operation projects with member States, defined jointly with the beneficiary countries and their institutions so as to meet concrete needs. This support will be funded by voluntary contributions from member States, Joint Programmes with the European Union or other appropriate sources. This will include *ad hoc* legal expertise on national law, policy and practice relating to judicial independence and impartiality, including proposals for law reform in this area;
- x. Within the umbrella of the European Programme for Human Rights Education for Legal Practitioners (HELP) and other co-operation projects, the Council of Europe will provide support in the development of relevant training programmes for member States and a framework for their dissemination, including training programmes aimed at the executive and legislature on the importance of judicial independence and impartiality.

TIMEFRAME AND IMPLEMENTATION OF THE PLAN OF ACTION

The Plan of Action is intended to be implemented within a timeframe of 5 years. Progress will be reviewed regularly by the Committee of Ministers based on information submitted by member States, the support and advice the Council of Europe has been called upon to provide, and the findings and analysis of its monitoring and advisory bodies. Good practices will be identified and compiled and made available to member States.

APPENDIX

Explanatory note

This explanatory note describes the detailed action required to be taken by member States within the framework of the Plan of Action on Strengthening Judicial Independence and Impartiality adopted by the Committee of Ministers at the 1253rd meeting of the Ministers' Deputies on 13 April 2016.

The various actions set out below are based on internationally agreed standards reflected in Council of Europe treaties, notably the Convention for the Protection of Human Rights and Fundamental Freedoms and other instruments and texts, including recommendations of the Committee of Ministers and opinions of the Consultative Council of European Judges, the Consultative Council of European Prosecutors, and the Venice Commission.

Three lines of action set out remedial action to be undertaken by member States as appropriate. These lines of action should be supported by the several transversal actions that are indicated in the fourth.

Line of action 1 Safeguard and strengthen the judiciary in its relations with the executive and legislature

Action 1.1

Ensure the independent and effective working of judicial councils or other appropriate bodies of judicial governance

Remedial action by member States

Measures should be taken to de-politicise the process of electing or appointing persons to judicial councils, where they exist, or other appropriate bodies of judicial governance. Members should not represent political factions or be politically partisan in the performance of their functions. They should also not be subject to, or be susceptible to, political influence either from the executive or legislature.

Such measures might include rules on the minimum number of judicial members and procedures for election by their peers (at least half, not taking into account any *ex-officio* members), or on the maximum number of non-judicial members (and how they are elected or selected) whilst ensuring that a majority or at least half of them are judicial members representing all levels of the judiciary; rules on the minimum length of prior judicial experience; rules on ensuring gender equality and representation of society as a whole and rules on character and probity.

Members not appointed or elected by the judiciary should not represent the executive or legislature but should be appointed on the basis of their personal standing and in their own right. It is desirable that the membership of a judicial council should not include persons who hold their position *de facto* by virtue of an executive office or position in the legislature.

The rules governing the composition of judicial councils or other appropriate bodies of judicial governance and how they conduct their business should be transparent and allow foreseeability. The same applies to the process of selecting, appointing and promoting judges. Of particular importance in this respect are the rules aimed at avoiding improper interference by the executive or legislature.

Changes to the legal framework for the operation of judicial councils should not lead to the early termination of the mandates of persons elected under the previous framework, except when the change of the legal framework aims to reinforce the independence of the council's composition.

Action 1.2

Ensure an adequate participation of the judiciary in the selection, appointment and promotion of judges whilst limiting excessive executive or parliamentary interference in this process

Remedial action by member States

Steps should be taken to establish, where they are lacking, procedures for the selection, appointment and promotion of judges that are transparent, based on objective criteria relating to the exercise of judicial office and focused primarily on ability and experience, and free from excessive political interference.

A gender balance in the composition of the judiciary at each level, including at the most senior levels, should be promoted and, more generally, representation of society as a whole.

Action 1.3

Limit excessive executive and legislative interference in the disciplining and removal of judges

Remedial action by member States

No disciplinary action should be taken against a judge without proper investigation and the conclusion of disciplinary proceedings. The disciplinary offences must be defined clearly and precisely. A graduation of the possible sanctions should be provided for and used in practice.

When a judge's official performance gives rise to disciplinary proceedings or to criminal investigations due to malice or gross negligence, it is imperative that such proceedings be carried out in accordance with the necessary full procedural guarantees before an independent, non-political, authority. Sanctions must be applied in a proportionate manner and must not be imposed arbitrarily or for political motives or for any reason not related to the suitability of the judge to exercise judicial office.

Where systems for the assessment of judges' work have been established it must be ensured that unsatisfactory evaluation results lead to dismissal or other punitive sanctions only in clearly defined exceptional circumstances. The term of office of judges must be adequately secured by law.

Disciplinary committees of judicial councils vested with the power to take decisions on the dismissal of judges or on other sanctions must be completely free of political influence and be seen to be so, in order to ensure the requirements of an independent and impartial tribunal.

Action 1.4

Ensure that public criticism of the judiciary by the executive and legislature respects the authority of the judiciary

Remedial action by member States

Steps should be taken to ensure that executive officials and members of the legislature are respectful of judicial decisions and also act so as to be seen by the public to respect such decisions, as well as the dignity of individual judges. Public criticism of particular judicial decisions should be avoided, as should unduly harsh or politically motivated criticism of the judiciary in general or of individual judges. Codes of ethical behaviour for the executive and legislature and any other necessary legal and practical measures should be in place to restrain such interventions, and protect the integrity of the

judicial decision-making process from undue political pressure, intimidation and attacks.

Measures should be in place to prevent inappropriate use of the media by the executive and legislature aimed at discrediting the judiciary as well as to protect the reputation and rights of the judges and to maintain the authority and impartiality of the judiciary bearing in mind the relevant judgments and decisions of the European Court of Human Rights.

A more proactive approach to the media, and more generally with the public, should be adopted by the judiciary with a view to increasing public confidence in the judiciary, avoiding or dispelling misunderstandings about the legal process and individual cases, although any communication must be respectful of the rights of the defence and of the dignity of victims. Consideration might be given to establishing communication services or spokespersons that can answer criticism on behalf of the judiciary and give general explanations of the legal process.

Action 1.5

Ensure that day-to-day administration of courts is executed in an effective and reasonable manner based on legal regulations and without undue interference from the executive or the legislature

Remedial action by member States

The judiciary should be allowed to administer the courts and their business on a day-to-day basis without undue interference by the executive. The role of the executive and the legislature is to establish long-term strategic objectives for the court system and determine and allocate the necessary resources, aiming, *inter alia*, to enhancing its efficiency and contributing to the proper functioning of the courts.

Court inspections, whether conducted by the executive or otherwise, should not entail assessments of the merits or form of judicial decisions. Inspections should under no circumstances serve to induce judges to favour productivity over the proper performance of their role.

Court presidents should not be required to report to Parliament and they should be able to represent the interests of their courts and of the judiciary as a whole without interference by the executive or legislature. Where they are required to report, they should do so only on the general functioning of the court or the judiciary and on the management of resources. This reporting cannot concern the handling of particular cases.

Line of action 2

Protect the independence of individual judges and ensure their impartiality

Action 2.1

Limit interference by the judicial hierarchy in decision making by individual judges in the judicial process

Remedial action by member States

Steps must be taken to ensure that court presidents and superior courts respect the independence of individual judges. To this end, the powers of court presidents and superior courts should be clearly defined in a way that protects the decision-making competence of the individual judge and does not allow court presidents to take decisions that compromise the independence of judges, to prevent benefits becoming a potential instrument of undue pressure.

Cases should be allocated to judges in accordance with objective pre-established criteria. They should not be withdrawn from a particular judge without valid reasons. Decisions on the withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure. Judges should decide on their own competence in individual cases and must be given influence over the scheduling of their own hearings.

The powers of the prosecution services must be defined and delimited in order to ensure that judges are protected from undue pressure and able to freely follow or reject the motions of prosecutors.

Steps should be taken to support the functioning of professional associations of judges in order that they can effectively represent the interests of individual judges and contribute to the openness and transparency of the judiciary.

Action 2.2

Ensure that the rules relating to judicial accountability and the review of court decisions fully respect the principles of judicial independence and impartiality

Remedial action by member States

The sole remedy for judicial errors that are not due to malice or gross negligence must be the appeal process. Judges' interpretation of the law, weighing

of evidence or assessment of facts must not give rise to criminal, civil or disciplinary liability, except in cases of malice and gross negligence. States must take measures to ensure that accountability mechanisms are not used as an instrument of reprisal or pressure against judges in their decision making. They must be organised in a way that ensures respect for the independence of judges and that does not compromise their impartiality.

Effective remedies should be provided, where appropriate, for judges who consider their independence threatened.

Action 2.3

Prevent and combat corruption and promote integrity within the judiciary

Remedial action by member States

Measures must be taken to prevent and combat corruption by ensuring that all allegations of corruption are investigated thoroughly and that alleged perpetrators are prosecuted and, if found guilty, faced with proportionate criminal sanctions. Any judge that is involved in a corruption offence should be subject to a decision taken by an independent body concerning his or her suspension pending the inquiry and trial and, if found guilty, dismissed from office.

To shield judges from inducement to corruption, member States must ensure that the remuneration and working conditions of judges are adequate and that standards of professional conduct and judicial ethics are clearly defined and made public.

Action 2.4

Counter the negative influence of stereotyping in judicial decision making

Remedial action by member States

Measures should be introduced to tackle the harmful impact of stereotyping on judicial decision making. Education and training for judges should be organised to ensure that judicial stereotyping does not compromise the rights of vulnerable groups to access an impartial tribunal. A gender balance in the judiciary should be sought and all efforts should be undertaken to fight gender stereotyping within the judiciary itself.

Action 2.5

Ensure comprehensive and effective training of the judiciary in effective judicial competences and ethics

Remedial action by member States

Judges should receive detailed, in-depth and diversified training to enable them to perform their duties satisfactorily. The quality of initial and in-service training for judges should be reinforced by allocating sufficient resources to guarantee that training programmes meet the requirements of competence, openness and impartiality inherent in judicial office. Training programmes should be subject to frequent assessments by the organs responsible for judicial training.

Candidates for judicial office should receive proper training, including practical training by assisting sitting judges.

Action 2.6

Ensure that judges are protected by legal regulations and adequate measures against attacks on their physical or mental integrity, their personal freedom and safety

Remedial action by member States

Member States should take adequate measures to shield judges effectively from attacks on their physical or mental integrity, their personal freedom and safety.

Line of action 3

Reinforce the independence of the prosecution service

Action 3.1

Provide appropriate legal guarantees and measures for the recruitment, career development and security of employment or tenure of prosecutors

Remedial action by member States

In the appointment of the heads of the prosecution services legal guarantees should be put in place and measures taken to ensure their independence of action and freedom from undue influence within an appropriate framework of democratic accountability.

Recruitment procedures for all prosecutors at all levels should be based on criteria relating to best ability/aptitude.

Prosecutors subject to disciplinary proceedings and action should benefit from appropriate legal guarantees for their protection.

Action 3.2

Ensure that individual prosecutors are not subject to undue or illegal pressure from outside or within the prosecution service, and that more generally the prosecution service is governed by the rule of law

Remedial action by member States

Internal formal rules should be adopted to require that where a superior prosecutor exercises control over the decisions of individual prosecutors, all instructions, orders or directives are regulated by law.

Measures should be in place to guarantee that the initiation and conduct of investigations or prosecutions are free of political influence, particularly where the prosecution service is part of the executive or otherwise under the authority of a minister.

Safeguards should be put in place to prevent conflicts of interest or the abusive use of prosecution powers, including, where they do not exist, the introduction of appropriate codes of professional conduct for prosecutors.

Steps should be taken to develop a culture of openness and transparency whilst ensuring confidentiality in respect of individual cases under investigation or prosecution.

Action 3.3

Prevent and combat corruption within the prosecution service and build public trust in its working

Remedial action by member States

Active measures should be taken to prevent and combat corruption within the prosecution service and safeguard prosecutors against corruption, for example by ensuring their remuneration and working conditions are adequate and that their standards of professional conduct and ethics are clearly defined and made public. Investigations into corruption within the prosecution service should be carried out expeditiously, transparently and in a thorough and impartial manner. Prosecutors found guilty of corruption should face proportionate criminal sanctions, including, where appropriate, dismissal from office.

Transversal actions to be taken by member States

- Ensure openness and transparency in the workings of the judiciary and in all its relations with the executive and legislature with a view, particularly, to building public trust in the judiciary and broader recognition of the value of its independence and impartiality.
- Ensure that member States give full effect to the judgments of the European Court of Human Rights in general and in particular to those on the independence and impartiality of the judiciary and on the fair trial guarantees provided by Article 6.
- Work towards the mainstreaming of a gender perspective into all reforms aimed at strengthening judicial independence and impartiality, including the promotion of gender balance in the composition of the judiciary.
- Consult and inform widely on the implementation of all initiatives undertaken within the framework of this Plan of Action (particularly relevant stakeholders, but also the general public), making use, as appropriate, of court-user surveys.
- Take awareness-raising initiatives, where appropriate, on the importance of *de facto* judicial independence and impartiality to democratic security.
- Include measures to strengthen judicial independence and impartiality into wider policy reform on improving access to justice for everyone.

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