UNITY CREATES STRENGTH
L'UNITÉ FAIT LA FORCE

Bulgarian Chairmanship
Council of Europe
November 2015 – May 2016

Présidence de la Bulgarie
Conseil de l'Europe
Novembre 2015 – Mai 2016

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

High-Level Conference of Ministers of Justice
And representatives of the Judiciary

Strengthening Judicial Independence and Impartiality as a Pre-condition for the Rule of Law in Council of Europe Member States

Sofia (Bulgaria), 21-22 April 2016

organised by the Ministry of Justice of the Republic of Bulgaria
in co-operation with the Council of Europe

CHALLENGES FOR JUDICIAL INDEPENDENCE AND IMPARTIALITY IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

For information

This publication includes the report prepared jointly by the Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (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*", as well as the comments received from the member States of the Council of Europe concerning this report.

CONTENTS

Information Documents
SG/Inf(2016)3rev
Restricted

24 March 2016[1]

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"*

---

[1] This document has been classified restricted at the date of issue; it will be declassified in accordance with Resolution Res(2001)6 on access to Council of Europe documents.

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"[2].

   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

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

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, 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"[3].

I. Appointment of judges and prosecutors

8. The ECtHR, the CCJE[4] and the CCPE[5] 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[6] and the CCPE[7] 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[8] 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

[3] See the CCJE Opinion No. 1(2001), para 6.
[4] 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.
[5] See the CCPE Opinion No. 9(2014), paras 51-56.
[6] See the CCJE Opinion No. 1(2001), para 37.
[7] See the CCPE Opinion No. 9(2014), Rome Charter, section XII.
[8] See the CCJE Opinion No. 1(2001), para 17.

Judiciary or another independent body[9], election by parliament[10] and appointment by the executive[11]. Each system has its advantages and disadvantages[12]. 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 in order to prevent appointments for political reasons[13]. Elections by parliament carry the risk of a politicisation of judges and prosecutors. Especially if such elections are not for life[14], 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[15]. 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[16] or by vote of parliament usually for a short term, often renewable[17]. 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[18] or the executive[19].

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

[9] 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.
[10] See, for example, Switzerland D I 2 s, para 64.
[11] 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.
[12] See the CCJE Opinion No. 1(2001), para 33; the CCJE Opinion No. 18(2015), para 15.
[13] As reported from Malta, see D I 2 l, para 57.
[14] As reported from Switzerland, D I 2 s, para 64.
[15] 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.
[16] 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.
[17] 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.
[18] As in Ukraine, see D I 2 u, para 67.
[19] As in Germany, see D III 2 f, paras 127-131.

CCJE, and by the European Commission for Democracy Through Law (Venice Commission)[20]. 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[21]. 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[22] over executive interferences with the administration of courts[23] to threats to internal judicial independence by powerful court presidents[24].

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[25]. 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[26]. Elections must be free from external influences[27]. 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[28]. 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[29].

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

[20] 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.
[21] See the CCPE Opinion No. 9(2014), para. 54.
[22] See D II 2 a, para 73-.95.
[23] See D II 2 c, para 99-113.
[24] See D II 2 b, para 96-98. .
[25] 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.
[26] 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.
[27] 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.;
[28] 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.
[29] 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.

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[30]. 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[31], 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[32] 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[33]. 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[34], directors of courts[35] and judicial inspections. In some member states the court administration is directly dependent on a Ministry of Justice[36]. 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[37]. 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[38]. 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[39]. 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[40]. It is especially worrying if the executive gains insight into court files[41].

15. Legal and organisational reforms including the closing of local courts[42] are not necessarily problematic in relation to the independence of judges and prosecutors. Rather, within constitutional limits, they fall under the

[30] See the CCJE Opinion No. 1(2001), para 66.
[31] Ibid., para 64.
[32] As in the Russian Federation; see D II 2 b cc para 98.
[33] Some examples are provided at D II c aa, para 99-102.
[34] As in Belgium, see D II 2 c, cc, paras 104-105.
[35] As in Poland, see D II 2 c, dd, paras 106-109.
[36] As in Austria D II 2 c bb, para 103, the Czech Republic D II 2 a para 74.
[37] See the ENCJ Report on Independence and Accountability of Judges and Prosecutors 2014-2015, p. 6.
[38] See the CCJE Opinion No. 18(2015), paras 48, 49.
[39] Ibid., para 48.
[40] Ibid., para 49.
[41] See the report on Poland D II 2 c dd, paras 106 - 109; and Slovenia D II 2 c ee paras 110-111.
[42] 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.

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[43]. 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[44] and procedural provisions and that there will be sufficient human resources[45]. 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[46].

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[47]. 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. 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[48]. In some member states, especially in those with more recently drafted constitutions, the independence of prosecutors[49] and the prosecution is guaranteed in the constitution[50], in other member states, in statutory law[51]. In some countries, there are separate Councils for Prosecutors[52] with different competences, while in other countries there is a joint Council for Judges and Prosecutors[53].

[43] Poland D II 2 c dd, paras 107-108.
[44] See the CCPE Opinion No. 7(2012), paras 39-44.
[45] See the CCJE Opinion No. 11(2008); the CCPE Opinion No. 7(2012), paras 36-38.
[46] See the CCJE Opinion No. 18(2015), para 45.
[47] See the CCPE Opinion No. 9(2014), para 40.
[48] As in Norway, see D III 2 l, paras 139-140.
[49] As in Albania, see D III 2 a, para 122.
[50] 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.
[51] 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).
[52] As in Albania, see D II 2 a, aa, para 78; Croatia D II 2 a, dd, para 81.
[53] 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.

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[54]. In other systems, the executive, i.e. the Minister of Justice, is the ultimate superior of all prosecutors and may give instructions to them[55]. In such systems, the Minister of Justice may even dismiss the Prosecutor General at free will[56]. 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[57].

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[58]. 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[59]. Moreover, such directives should, like the exercise of prosecutorial powers in general, be subject to control, especially in the sense that an 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[60]. 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[61]. 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.

[54] 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.
[55] 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.
[56] As in Germany, see D III 2 f, paras 127 - 131.
[57] See the CCPE Opinion No. 9(2014), para 73.
[58] Ibid., para 42.
[59] Ibid., para 47.
[60] See the CCJE Opinion No. 12(2009) = the CCPE Opinion No. 4(2009), para 53.
[61] See the CCPE Opinion No. 9(2014), para 49.

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 [62] 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[63]. Likewise, dismissals of prosecutors – be it by executive decision[64] or legislative reform, including constitutional changes[65] – are highly problematic when they seem to be motivated by political reasons.

20. Difficult problems arise in connection with vetting or lustration proceedings[66] 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[67]. 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 arrested without scrupulous adherence to procedural safeguards[68]. 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

[62] As discussed in Slovakia, see D IV 2 n, bb, paras 199-200, and Croatia D IV 2 n, aa, para 198.
[63] As in Hungary, see D IV 2 e, aa para 165.
[64] 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.
[65] As discussed in Montenegro, see D IV 2 i, para 175.
[66] As, for example, in Ukraine, see D IV 2 m, bb, paras 189-191.
[67] See Rec(2010)12, para 66, see the case reported from Italy D IV 2 f, paras 169-171.
[68] As reported from Turkey, see D IV 2 l, paras 180-185.

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[69], public trust in independence is endangered. This also applies where in a process of regular re-appointment individual decision-making is questioned[70]. 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[71].

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[72]. 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[73]. 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[74]. They must always fulfil their duties, irrespective of the connections and influence of the potential defendant and victim[75]. 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[76]. Likewise, where cases brought by the prosecution almost never result in acquittal[77], this can indicate that the prosecution and the courts do not act independently from each other. The

[69] As reported from Turkey, see D IV 2 l aa-cc, para 181-185.
[70] As reported from Georgia, see D VIII 2 d, paras 269-273.
[71] As reported from Italy, see D IV 2 f, paras 169-171.
[72] 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.
[73] *Morice v. France* [GC], no. 29369/10, 23 April 2015.
[74] See the CCPE Opinion No. 9(2014), para 10.
[75] 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.
[76] As reported from Georgia, see D VI 2 b, para 217.
[77] As information about Armenia and the Russian Federation suggests, see D VI 2 a, para 216.

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[78]. 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[79]. 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[80] and a lack of appropriate remuneration: security risks[81], cuts in staff[82] 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[83] and undignified working conditions[84] 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[85]. 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"[86]. While courts and prosecution services should use their available resources in the most efficient manner possible[87], the quality of justice cannot be understood as if it were a

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

synonym for mere "productivity" of the judicial system[88]. 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 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[89] or if access to justice is obstructed through excessive costs or is dependent on wealth[90].

VIII. Public discussion and criticism of judges and prosecutors

26. Both judges and public prosecutors face unfair press campaigns and public criticism of politicians[91]. 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[92]. 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[93]. 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[94]. Such behaviour is an attack on the legitimacy of another state power and thus affects the separation of powers necessary in a democratic state[95]. 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[96].

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

[88] See the CCJE Opinion No. 17(2014), para 35; the CCJE Opinion No. 6(2004), para 42.
[89] See the CCJE Opinion No. 2(2001), para 3.
[90] See the CCJE Opinion No. 6(2004), paras 20-21.
[91] The CCPE has discussed the issue in the CCPE Opinion No. 8(2013).
[92] See the CCJE Opinion No. 18(2014), para 52.
[93] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 7.
[94] As reported from Ukraine, see D VIII 2 f, paras 275-276.
[95] See the CCJE Opinion No. 18(2015), para 52.
[96] See the CCJE Opinion No. 18(2015), para 52; see also the CCPE Opinion No. 9(2014), paras 90-91; IAP Standards (1999) 6.

the executive, the legislature, and the media. To achieve this, judges as well as prosecutors must be free to express criticism [97]. The report shows, however, that criticism is sometimes answered by dismissal[98]. 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.

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[99]. Reports on corruption of judges and prosecutors and on their role in fighting corruption are manifold, as the report show [100]. 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[101]. 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.

[97] See the CCJE Opinion No. 18(2015), para 42.
[98] See ECtHR: *Baka v. Hungary* of 27.5.2015, Application no. 20261/12; *Guja v. Moldova* (Application no. 14277/04, 12.2.2008).
[99] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, 2014-2015, p. 5.
[100] 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.
[101] As in Georgia, see part D IX 2 a, dd Para 298.

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[102]. Such an administration of justice requires 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[103].

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[104]. 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[105]. 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[106]. 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[107].

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[108]. In many member states, public

[102] See the CCJE Opinion No. 12(2009) and the CCPE Opinion No. 4(2009) “Bordeaux Declaration”, para 1.
[103] Ibid.
[104] Ibid., para 3.
[105] See the CCJE Opinion No. 18(2015), paras 1, 7, 9.
[106] See the CCJE Opinion No. 1(2001), paras 11, 12.
[107] See the CCJE Opinion No. 3(2002), para 9.
[108] See the CCPE Opinion No. 9(2014), para 10.

prosecutors are also responsible for investigating crimes[109] and for enforcing judicial decisions[110]. 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[111].

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 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[112].

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 [113]. Indicators for the objective and subjective independence of judges and prosecutors have been identified and researched by the ENCJ [114]. 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[115].

[109] Ibid., para 15.
[110] See Rec(2000)19, paras 2-3.
[111] 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.
[112] See Rec(2000)19, para 16.
[113] 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).
[114] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015.
[115] 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.

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[116].

39. The Rome Charter (Opinion No.9 (2014) of the CCPE) on the European norms and principles concerning prosecutors[117] as well as the Standards of the International Association of Prosecutors (1999)[118] have codified minimal requirements necessary for an independent status of public prosecutors, in particular:

- 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[119];
- 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.

[116] 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.
[117] 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.
[118] http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx.
[119] See the CCJE Opinion No. 12 (2009) and the CCPE Opinion No. 4 (2009) "Bordeaux Declaration", para 8.

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[120]. Political considerations should be inadmissible[121]. 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[122].

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[123]. According to the CCPE, the necessary impartiality in the recruitment process 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[124]. 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[125]. 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

[120] See the CCJE Opinion No. 1(2001), para 37.
[121] See the CCJE Opinion No. 1(2001), para 17.
[122] 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.
[123] 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.
[124] See the CCPE Opinion No. 9(2014), para. 54.
[125] 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.

period or permanently to ensure stability of his/her mandate and make him/her independent of political changes[126].

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[127]. The President appoints judges of third instance and of the constitutional court with the consent of parliament[128].

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[129].

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 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

[126] 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.
[127] 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.
[128] Analysis of the Justice System in Albania, June 2015, p. 23-24.
[129] Information received from the CCPE member in respect of Albania during the preparation of this report.

47 of Rec(2010)12, as the authority did not follow the recommendation in practice, made by the judges' committee of this court[130]. 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[131].

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[132]. 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[133].

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 sixty-eight and can be removed only in the

[130] See the CCJE Situation Report, updated version No. 2(2015), para 14.
[131] 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.
[132] 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.
[133] 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.

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[134].

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[135]. GRECO has recommended

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

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 reconsidering the law[136]. 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[137].

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[138]. 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

[136] 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.
[137] Information provided by the CCPE member in respect of Hungary for the preparation of this report.
[138] Information provided by the CCPE member in respect of Iceland.

proposals were awaited. The AJI prepared and submitted a document on this topic. The debate is continuing[139].

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 July 2015 that the situation remained unchanged. However, in practice, no similar case had been reported in the last three years[140].

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[141].

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

[139] See the CCJE Situation Report, updated version No. 2(2015), para 16.
[140] Ibid., para 17.
[141] Ibid., para 18.

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[142].

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.

[142] 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.

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[143].

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 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-

[143] 2 July 2015 (Human Rights Europe)
http://www.humanrightseurope.org/2015/07/serbia-must-improve-measures-for-preventing-corruption-among-parliamentarians-judges-and-prosecutors/.

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[144].

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[145]. 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.

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 [146] and CCPE have frequently recognised the different appointment procedures of judges and prosecutors in the member states. Different appointment procedures have advantages and disadvantages[147]. 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[148]. In relation to the appointment of

[144] See the CCJE Situation Report, updated version No. 2(2015), para 19.
[145] The details of these developments are discussed below in Part II 2 a jj, paras 90-91.
[146] 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.
[147] See the CCJE Opinion No. 1(2001), para 33; the CCJE Opinion No. 18(2015), para 15.
[148] See the CCJE Opinion No. 1(2001), para. 33.

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[149]. 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. The introduction of Councils for the Judiciary has been recommended in Recommendation 2010(12), by the CCJE, and by the Venice Commission[150]. 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[151].

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

[149] 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.

[150] 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.

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

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[152]. 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[153].

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[154]. 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[155]. 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.

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.

[152] For the purpose and minimum requirements of councils, see Rec(2010)12, para 27; the CCJE Opinion No. 10(2007), para 18.
[153] See the CCJE Opinion No. 10(2007), para 21.
[154] See the CCJE Opinion No.1(2001), para 64.
[155] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015 p. 6.

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[156].

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[157]. 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*[158] and *Mitrinovski v. "the former Yugoslav Republic of Macedonia",*[159] 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 government of trying to weaken the independence of the judiciary[160]. 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[161].

[156] 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.
[157] 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).
[158] ECtHR *Volkov v. Ukraine* (application no. 21722/11) 23.5.2013.
[159] ECtHR *Mitrinovski v. "the former Yugoslav Republic of Macedonia"* (application no.6899/12) 30.7.2015.
[160] Report of the Ambassador of the OSCE Presence in Albania to the Permanent Council of the OSCE, September 18, 2014, p.2.
[161] See for further details in Part D IX 2 a, aa, para 293.

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[162].

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[163]. In 2014, the Venice Commission commented on a draft law on the HJPC[164]. 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[165]. 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[166].

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[167]. 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 *ex officio* member of this collegium, who however is not elected directly by

[162] Information received from the CCPE member in respect of Albania during the preparation of this report.
[163] Information provided in response to the questionnaire sent out in preparation for the CCJE Opinion No. 18(2015).
[164] Venice Commission, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, CDL-AD (2014) 008-e.
[165] Ibid., paras 12, 125.
[166] Ibid., para 126.
[167] Information provided by the Bulgarian Prosecution office during the preparation of this report.

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[168].

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[169].

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[170] 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

[168] Information received from the CCPE member in respect of Croatia during the preparation of this report.
[169] See the CCJE Situation Report, updated version No. 2(2015), paras 62-63.
[170] 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).

discretionary powers from the President of the National Office for the Judiciary.

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[171].

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[172].

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[173].

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

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

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.

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[174].

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[175] 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

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

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.

92. Nevertheless, in February 2014, then President Abdullah Gul signed the new law [176]. 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[177]. 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[178].

93. The CCPE prepared a Declaration concerning recent developments in Turkey on 6 June 2014[179]. 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 [180]. Candidates declared that if elected, they would work in

[176] http://www.zeit.de/politik/ausland/2014-01/erdogan-staatsanwaelte-richter-versetzt; http://www.bbc.com/news/world-europe-26351258.
[177] See the CCJE Situation Report, updated version No. 2(2015), paras 21-26.
[178] 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.
[179] The CCPE document CCPE-SA(2014)1.
[180] Information received from the ENCJ.

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 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[181].

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

[181] See the CCJE Situation Report, updated version No. 2(2015), para 71.

now the president of the Supreme Court who holds a position so strong that it might cause problems for judicial independence[182].

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[183].

cc. Russian Federation - Great powers of court presidents

98. According to information published in the press in 2011[184], court presidents have a strong position in Russian Federation, assigning cases, flats and bonus payments to 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[185].

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

[182] 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.) .
[183] See the CCJE Situation Report, updated version No. 2(2015), para 55.
[184] http://www.bpb.de/internationales/europa/russland/47954/justizsystem?p=all
17. März 2011 (Bundeszentrale für politische Bildung).
[185] See the CCJE Opinion No. 10(2007).

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, 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[186].

dd. Poland - Court director and frequent legislative changes

106. The CCJE member in respect of Poland summarised the position as follows[187]: 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.

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

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

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[188].

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.

ee. Slovenia - Influence of the executive

110. In August 2013[189], 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

[188] See CCJE Situation Report, updated version No. 2(2015), paras 56-57.
[189] Information provided to the CCJE by the CCJE member in respect of Slovenia.

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[190]

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.

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%

[190] Croatia, Poland, "The former Yugoslav Republic of Macedonia".

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[191]. 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[192], 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 administration of the

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

judiciary[193]. 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[194].

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[195]. 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[196] and procedural provisions and that there will be sufficient human resources[197]. 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[198].

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[199] as well as from undue or illegal internal pressures from within the prosecution system[200]. The CCPE has developed such guarantees in the

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

"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[201]. Not all information reported in the following part highlight challenges to the independence of 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[202]. 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[203]. 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[204]. 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[205]. 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.

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

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. 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[206].

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[207]. Because of its role in the prosecution of cases concerning fighting corruption in Azerbaijan, the perceived independence of the prosecution was of particular importance[208].

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

[206] 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).
[207] 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.
[208] Ibid.

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.

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

126. In Estonia, the independence and impartiality of prosecutors is guaranteed by law[209]. 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)[210].

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.

[209] Information received from the CCPE member in respect of Estonia during the preparation of this report.
[210] Ibid.

In practice, however, this right is seldom exercised [211]. 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[212].

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.

129. On 4 August 2015, Federal Prosecutor Range issued a public statement criticizing an "intolerable interference" with the freedom of justice [213]. 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

[211] 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)
[212] 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.
[213] 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).

Parliament on 19 August 2015, both Range and Justice Minister Maas stuck to their contradictory accounts of the events[214].

130. This affair has sparked a lively discussion throughout the German media and within the judiciary (including prosecution services)[215]. 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[216] and the German Bar Association[217] 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[218]. The German Association of Judges (Deutscher Richterbund, DRB) also criticised the right to dismiss the Federal 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[219] as well as the DRB[220] 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

[214] http://www.zeit.de/politik/deutschland/2015-08/netzpolitik-affaere-heiko-maas-harald-range-widerspruch-rechtsausschuss (visited on 7 November 2015).
[215] 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
[216] 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).
[217] 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).
[218] http://www.welt.de/politik/deutschland/article144979267/Range-raeumte-mit-einem-Maerchen-auf.html,
[219] Medienservice Sachsen, 5 August 2015, http://www.medienservice.sachsen.de/medien/news/198927 (access on 25 September 2015).
[220] 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).

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[221].

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[222].

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

[221] Information provided by the CCPE member in respect of Hungary during the preparation of this report.
[222] 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.

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[223].

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[224].

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[225].

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[226]. As a result there is a strong history of factual independence of the prosecution service.

[223] Information provided by the CCPE member in respect of Iceland.
[224] Ibid.
[225] Ibid.
[226] Information provided by the CCPE member in respect of the Netherlands during the preparation of this report.

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[227].

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

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

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[228].

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[229].

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

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

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 reassigned to another prosecutor or a prosecutor be released from work on a specific case[230].

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[231].

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.

[230] Information received from the CCPE member in respect of Slovenia during the preparation of this report.
[231] 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.

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[232].

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[233]. 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

[232] Information received from the CCPE member in respect of Spain during the preparation of this report.
[233] The CCPE Opinion No. 4(2009) = the CCJE Opinion No. 12(2009), para 9.

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[234].

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 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[235]. 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"[236].

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[237]. 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[238]. 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

[234] The CCPE Opinion No. 9(2014), para 73.
[235] The CCJE Opinion No. 1(2001), paras 52 and 57.
[236] Ibid., para 59.
[237] The CCPE Opinion No. 9(2014), para 7.
[238] 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.

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[239].

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, including this element, which altogether is seen as likely to affect the substance of the constitutional principle of security of tenure[240].

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

[239] For limitations of the findings cf. part A, paras 3-4 above.
[240] The CCJE Situation Report, updated version No. 2(2015), para 43.

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[241].

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[242] had concluded that the law which was used to dismiss a number of Georgian Supreme Court judges posed a threat to the 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

[241] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia and Ukraine, 2015, p. 20.
[242] The Venice Commission's Opinion No. 408 / 2006 on the Law on Disciplinary Responsibility and disciplinary prosecution of Judges of Common Courts of Georgia.

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[243]. 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 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[244]. The University refused to comment, while the Labour Law Court of Appeal[245] and a Law Professor[246] criticised the decision of

[243] See D III 2 ff, para 127 – 131.
[244] http://www.tagesspiegel.de/politik/justiz-und-politik-emmelys-raecher/12493584.html (visited 31 October 2015).
[245] http://www.lto.de/recht/studium-referendariat/s/fu-berlin-akademischer-senat-honorarprofessur-richter-pfandbon-urteil-2008/ (visited 31 October 2015).
[246] http://blog.beck.de/2015/11/01/umstrittene-honorarprofessur-an-der-fu-berlin (visited 1 November 2015).

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 option[247]. Most of the related cases are now closed and pending litigation will be concluded shortly.

[247] See the CCJE Situation Report, updated version No. 2(2015), para 38.

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[248].

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[249]. 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[250].

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[251].

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

[248] *Baka v. Hungary* of 27.5.2015 - 20261/12 – para 11-26.
[249] *Baka v. Hungary* of 27.5.2015 - 20261/12 – para 73-79.
[250] *Baka v. Hungary* of 27.5.2015 - 20261/12 – paras 91-103.
[251] 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.

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 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[252].

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[253] 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[254].

[252] 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.
[253] Document CCJE-BU(2014)7.
[254] The CCJE Situation Report, updated version No. 2(2015), para 45.

173. In its report on Luxembourg, GRECO [255] 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

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[256].

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[257] 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 [258], 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

[255] 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.
[256] 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.
[257] Document CCPE-SA(2014)2 of 12 May 2014.
[258] Elected in May 2015, in office since August 2015, a former member of the party (PiS), who won the elections in October 2015.

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[259]. The Constitutional Court decided on 3 December 2015[260] 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[261].

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[262]. Polish media and prominent lawyers also criticised these actions.[263] The former president of the Polish Constitutional Court, Andrzej Zoll, warned that Poland could become a totalitarian state[264]. 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[265]".

178. Despite the criticism from two commissioners of the European Commission[266], 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[267]. 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[268]. The Polish Minister of Foreign Affairs, Witold Waszczykowski, asked the Venice Commission for its opinion of the new law[269].

---

[259] 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).
[260] Jugdment of 3 December 2015, Case no. K 34/15, available at: http://trybunal.gov.pl/.
[261] http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8749-ustawa-o-trybunale-konstytucyjnym/.
[262] See also https://twitter.com/CommissionerHR.
[263] See http://www.zeit.de/politik/ausland/2015-11/polen-jaroslaw-kaczynski-verfassungsrichter.
[264] 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).
[265] Statement of the Secretary General of the Council of Europe of 4 December 2015, Ref DC 180(2015).
[266] Günther Oettinger and Frans Timmermans.
[267] http://www.theguardian.com/world/2015/dec/23/polands-government-carries-through-on-threat-to-constitutional-court (visited 29 December 2015).
[268] https://www.rt.com/news/327240-poland-constitutional-court-law/ (visited on 29 December 2015).
[269] Frankfurter Allgemeine Zeitung, 28 December 2015, p. 2.

k. Switzerland - Dismissal of prosecutors

179. In May and June 2015, Swiss newspapers [270] 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 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[271]. 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[272] and the Venice Commission [273], 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 [274]. After those investigations had been started, thousands of police officers were reassigned or dismissed from office[275]. 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[276]. According to letters received from judges and

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

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[277]. The senior prosecutor in the corruption scandal, Zekeriya Öz[278], 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[279]. 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 "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

[277] http://www.spiegel.de/politik/ausland/tuerkei-staatsanwaelte-und-richter-entlassen-a-1033474.html
[278] http://www.taz.de/!5220264/.
[279] http://www.taz.de/!5050257/; http://www.sueddeutsche.de/politik/korruptionsaffaere-in-der-tuerkei-erdoan-wechselt-polizeichefs-aus-1.1858045;

of the CCPE on communications relating to alleged threats to the impartial and efficient functioning of the prosecution service in Turkey"[280]. 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[281]. The uncontested facts, as they 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.

[280] Document CCPE-SA(2015)1.

[281] 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. 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.

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[282]. 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 February 2014[283]. 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[284], but also negative developments, especially concerning the personal safety of judges.

[282] 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).
[283] CommHD(2014) 7 paras 50-60.
[284] 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.

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[285], 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[286]. 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[287]. The Court pointed out that the case raised general problems of separation of powers[288] and recommended that Ukraine restructure the institutional basis of its legal system[289]. The Court indicated that Mr Volkov was to be reinstated as Supreme Court judge[290] 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.

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

[285] ECtHR *Volkov v. Ukraine,* (application no. 21722/11) 23.5.2013, para 13.
[286] Ibid., paras 83-84, 97 and following.
[287] Ibid., paras 160-186.
[288] Ibid., para 196.
[289] Ibid., para 200.
[290] Ibid., para 208.

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[291].

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.

[291] 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.

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 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[292], 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[293], 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."

[292] Information provided in response to the questionnaire sent out during the preparation of the CCJE Opinion No. 18(2014).
[293] 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.

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 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[294] 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[295].

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, but a decision of the Constitutional Court postponed them in relation to all judges in office[296].

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

[294] Document CCJE-BU(2014)4 of 1 July 2014.
[295] See also the EAJ Resolution on Slovakia adopted on 13 November 2014.
[296] See the CCJE Situation Report, updated version No. 2(2015), paras 30-31.

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.

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[297].

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[298]. 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

[297] 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.
[298] See the Report of the Secretary General of the Council of Europe (2015), p. 14, 17, 27.

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)[299].

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[300].

b. ECtHR - Oliari v. Italy

208. In *Oliari v. Italy* [301] , 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*[302] 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

208. 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)[303].

[299] Ibid., p. 27.
[300] Ibid.
[301] ECtHR (application no. 18766/11 and 36030/11) 21.7.2015), para 184.
[302] ECtHR (application no. 31443/96) 22.6.2004),
[303] See the CCJE Situation Report, updated version No. 2(2015), para 102.

d. Poland – Presidential pardon preventing enforcement

209. According to reports in the media[304], 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

210. The CCJE member in respect of Spain reported, on 10 October 2015[305], 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.

f. Turkey - Non enforcement

211. A number of sources report that in Turkey, judicial decisions and requests from prosecutors were not executed, in violation of the law[306]. 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[307]. In addition, the AEAJ[308] 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.

---

[304] 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).

[305] See the CCJE Situation Report, updated version No. 2(2015), para 101.

[306] The Venice Commission's Declaration on Interference with Judicial Independence in Turkey, 20 June 2015.

[307] 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.

[308] On 15 July 2015.

3. Conclusions

212. 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

213. 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[309]. 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"[310]. 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 whether or not to appeal decisions by that court[311]. Prosecutors should carry out their functions impartially and act with objectivity[312]. They should also treat people as equal before the law and should neither favour anyone nor discriminate against anyone[313]. Both judges and prosecutors must not only act impartially but must avoid all behaviour which could call their impartiality into question.

214. 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

[309] See for the prerequisites of an impartial tribunal: ECtHR *Morice v. France* [GC] (application no. 29369/10) 23. 4. 2015, paras 73-78.
[310] Ibid., para 73.
[311] The CCPE Opinion No. 9(2014), para 10.
[312] The IAP Standards (1999) 3.
[313] The CCPE Opinion No. 9(2014), para 92.

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 [314]. 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

215. In the press, information was reported in 2010 and 2011 that judges in Armenia[315] 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[316] in 2010 may be influencing the relation between judges and prosecutors.

b. Georgia – Increased independence

216. 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 reported greater willingness on the part of judges to question and, in some cases, reject prosecutors' motions in criminal cases[317].

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

217. On 30 April 2015, the ECtHR found a violation of Article 6 in the case of *Mitrinovski v. "the former Yugoslav Republic of Macedonia"*[318]. On 6 December 2010 a three-judge panel of the Skopje Court of Appeal, presided over by the

[314] See the Venice Commission's Report on European Standards as regards the judicial system: part II the prosecution service (2010), paras 72-74.
[315] http://www.un.org/apps/newsFr/storyF.asp?NewsID=23000#.VeHWV30VT90
Centre d´actualités de l´ONU, 16.9.2010.
[316] See the Venice Commission's Report on European Standards as regards the judicial system: part II the prosecution service (2010), paras 72-74.
[317] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 20.
[318] ECtHR *Mitrinovski v. The former Yugoslav Republic of Macedonia* (application no.6899/12) 30.7.2015

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"[319]. 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[320].

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

218. The importance of such an independent and impartial investigation prosecution was underlined in the ECtHR decision *Kavaklıoğlu v. Turkey* of 6 October 2011[321]. The applicants were prisoners and relatives of eight prisoners who died during the violent suppression of an uprising in Ulucanlar Central Prison, Ankara[322]. Though the authorities were aware of overcrowding and the unsuitability of the premises[323], they had not taken action[324]. 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[325]. The applicants claimed that the investigation was insufficient and ineffective[326]. The prosecutor, who should have intervened to prevent the prison uprising was the same one, who had investigated the criminal responsibility of the prison personnel. No impartial and independent investigation could be expected in such a case. This was a violation of Articles 2 and 3[327]. The ECtHR agreed and stated that an investigation should be

[319] Ibid., para 10.
[320] Ibid., paras 35, 36: standard of impartiality, paras 38-46 application.
[321] ECtHR *Kavaklıoğlu and Others v. Turkey* (application no. 15397/02), 6.10.2011.
[322] Ibid., para 3.
[323] Ibid., para 7.
[324] Ibid., para 8.
[325] Ibid., paras 79-80.
[326] Ibid., para 146.
[327] Ibid., paras 260-261.

independent and that the prosecutors investigating should not be affected by the events to be investigated[328]. 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[329].

3. Conclusions

219. 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

220. In recent years, many member states have suffered serious economic crises[330]. At the same time, many justice systems in the member states report severe cuts, frozen budgets and salaries, and increased workloads for judges[331] 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[332].

221. 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[333]. 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 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[334]. The ENCJ also pointed out

[328] Ibid., para 271.
[329] Ibid., para 272.
[330] 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.
[331] See the CCJE Situation Report, updated version No. 2(2015), paras 89-100.
[332] See the CCJE Opinion No. 18(2015), para 51.
[333] 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.
[334] 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.

that the funding of prosecutors' offices must be sufficient and may face the same vulnerabilities as courts when it comes to ensuring their independence[335].

222. 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[336]. 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[337].

223. 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[338]. 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[339].

224. 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[340]. 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[341]. The appropriate remuneration of prosecutors also implies recognition of their important function and role and can also reduce the risk of corruption[342]. The reports show challenges to those standards in many member states.

---

[335] Ibid., p. 89-90.
[336] See the CCJE Opinion No. 2(2001), para 2.
[337] Ibid., para 3.
[338] See the CCPE Opinion No. 9(2014), "Rome Charter" section XVIII; the CCPE Opinion No. 7(2012), Recommendation i.
[339] See the CCPE Opinion No. 9(2014), "Rome Charter" section XIX; the CCPE Opinion No. 7(2012), Recommendations i, ii.
[340] 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.
[341] Rec(2000)19, § 5d; the CCPE Opinion No. 9 (2014), para 75.
[342] 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

2. Incidents and other information

a. Lack of financial resources

225. 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[343], 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[344]). 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[345].

226. In its response in preparation for this report, Croatia specifically stressed the importance of adequate working conditions for the independence of public prosecutors[346]. 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[347].

aa. Belgium - Cuts and too many vacant positions

227. Severe budgetary cuts were also reported from Belgium[348]. 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

(2014), para 76.
[343] Information provided by the CCPE member in respect of Portugal during the preparation of this report.
[344] Ibid.
[345] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 6.
[346] Information received during the preparation of this report.
[347] See the CCPE Opinion No. 7(2012), Recommendation i.
[348] 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.

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.

228. 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[349].

bb. France - Lack of resources, delayed payments

229. The CCJE member in respect of France[350] 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

230. In its Report 2015, the AEAJ reported how the economic crisis of Greece has affected the justice system[351]. 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[352].

[349] See the CCJE Situation Report, updated version No. 2(2015), para. 92.
[350] On 11 September 2015; see the CCJE Situation Report, updated version No. 2(2015), para. 93.
[351] Ibid., para. 94.
[352] Ibid.

dd. Lithuania - Security problems

231. While the status of judges and the judiciary was laid down in the Lithuanian constitution[353], 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.

ee. Malta - Chronic underfunding

232. Malta[354] 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

233. 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[355] 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

234. 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

[353] The CCJE member in respect of Lithuania reported on 19 June 2015; see the CCJE Situation Report, updated version No. 2(2015), para 95.
[354] Ibid., para. 96.
[355] Ibid., para. 97.

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[356].

hh. Slovakia - Strike

235. 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[357].

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

236. 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[358].

jj. Ukraine - Only half of the resources needed

237. 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.

---

[356] Information provided by the CCPE member in respect of Portugal during the preparation of this report.
[357] See the CCJE Situation Report, updated version No. 2(2015), para 98.
[358] http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/zakonodaja/121114_ANG_Strategija_Pravosodje_2020.pdf.

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

238. According to information published in the press in 2013[359], 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 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[360]".

b. Remuneration of judges and prosecutors

239. 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[361]. 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[362]. Many member states reported discussions concerning the remuneration of judges[363].

---

[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] 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).

[361] See the CCJE Situation Report, updated version No. 2(2015), para 74.

[362] Ibid., para 75.

[363] See below D VII 2 b para 241-255.

aa. Bulgaria – Tensions between the executive and the judiciary

240. As mentioned elsewhere[364], 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 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

241. 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

[364] See the CCJE Situation Report, updated version No. 2(2015), para 76.

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

242. 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[365].

dd. Estonia - Determination of salaries

243. Estonia faces particular problems regarding the determination of its salaries[366]. 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[367].

ee. Germany - Decision of the Federal Constitutional Court

244. 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 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.

[365] Ibid., para 77.
[366] Information received from the CCPE member in respect of Estonia during the preparation of this report.
[367] 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.

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[368].

ff. Hungary - Review

245. The CCJE member in respect of Hungary reported[369] 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[370].

gg. Ireland - Cuts through constitutional amendment

246. During the economic downturn, very substantial cuts were imposed on the judiciary[371], 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 significant salary cuts. However, it was unlikely that such a body would be established before the upcoming general election[372].

hh. Malta - Constitutional protection of remuneration

247. 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

[368] See the CCJE Situation Report, updated version No. 2(2015), para 78.
[369] 30 June 2015.
[370] See the CCJE Situation Report, updated version No. 2(2015), para 79.
[371] Information provided by the CCJE member in respect of Ireland on 1 July 2015.
[372] See the CCJE Situation Report, updated version No. 2(2015), para 80.

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[373].

ii. Montenegro – Low salaries and pensions

248. 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[374]. 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

249. 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[375].

kk. Slovakia - Frozen salaries

250. In Slovakia[376], 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

251. 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[377]. 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 officials of all three state powers (including judges) has been reduced by 8% for reasons of economy

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

and this will remain in force until economic growth reaches and exceeds the rate of 2.5 % of the GDP.

mm. Sweden - Evaluation

252. In Sweden, a judge's remuneration is partly dependent on his/her performance[378]. 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[379]. 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[380].

nn. Ukraine - Low salaries

253. The Law "On Judicial System and the Status of Judges" adopted on 7 July 2010[381], 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

254. Financial autonomy is discussed as an important factor for institutional independence of judges[382] and prosecutors[383]. In the context of the economic

[378] Information provided by the AEAJ on 13 January 2013. See also the CCJE Opinion No. 17(2014), para 11.
[379] This is in conflict with Article 55 of Rec(2010)12 and the CCJE Opinion No. 17(2014), para 28, Rec. 13.
[380] See the CCJE Opinion No. 17(2014) fn 22, 24.
[381] 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.
[382] See Rec2010(12), para 40; the CCJE Opinion No. 18(2015), paras 50-51.

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, Spain)[384]. 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.

255. Transparency International mentioned the fact that prosecutors neither had their own budget, nor auxiliary staff or premises[385], 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[386].

256. 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[387]. 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

257. 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

[383] 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.
[384] Information received during the preparation of the CCJE Opinion No. 18(2015).
[385] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 23.
[386] See the CCPE Opinion No. 7(2012), para 3.
[387] 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.

always be respected [388] . The CCJE [389] and the CCPE [390] 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[391]. In particular, member state must take the necessary steps to ensure the security of judges and 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.

258. While courts and prosecution services should use the available resources in the most efficient manner possible [392] , the quality of justice cannot be understood as if it were a synonym for mere "productivity" of the justice system [393]. The CCJE has therefore cautioned that insufficient funding and budget cuts might result in a justice system overemphasising "productivity"[394]. 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[395], but available to all those who need it.

VIII. Public discussion and criticism of judges and prosecutors

1. Introduction

259. 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[396]. 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

[388] See the CCJE Opinion No. 18(2015), para 51.
[389] See the CCJE Opinion No. 2(2001).
[390] See the CCPE Opinion No. 9(2014), "Rome Charter", section XVIII.
[391] See the CCJE Opinion No. 18(2015), para 51.
[392] See the CCPE Opinion No. 7(2012), para 4.
[393] See the CCJE Opinion No. 17(2014), para 35; the CCJE Opinion No. 6(2004), para 42.
[394] See the CCJE Opinion No. 17(2014), para 35.
[395] See the CCJE Opinion No. 6(2004), paras 20-21.
[396] See the CCPE Opinion No. 8(2013), paras 7, 17.

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[397]. Politicians must never encourage disobedience vis-a-vis judicial decisions, let alone violence against judges[398]. 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[399].

2. Incidents and other information

a. Criticism of judges and the judiciary by members of the executive and legislature[400]

260. 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).

261. 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

[397] See the CCJE Opinion 18(2015), para 52.
[398] Ibid., para 53.
[399] Ibid., para 42.
[400] Information provided in the responses to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).

because of a perceived lack of "democratic legitimacy". Such opinions were often uttered in connection with investigations against well-known personalities.

262. 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.

263. 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.

b. Criticism as a danger to public trust in the judiciary[401]

264. 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[402]. Problems about a politicised judiciary were also reported in relation to Slovakia[403] and Serbia[404]. 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

[401] Ibid.
[402] 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).
[403] Information provided by the CCJE member in respect of Slovakia on 27 May 2015.
[404] GRECO Fourth Evaluation Round report Serbia 2015, para 95.

criticism.[405] Slovenia cautioned that constant populist attacks by politicians could undermine the basis of judicial independence in the long run[406].

265. Many member states explained[407] 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[408]. 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

266. 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*[409] 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[410], brought a number of claims to regain property that had been confiscated after the Second World War[411]. Officials stated that the family used to be "Nazis" and that therefore Mr Kinsky should not regain his property[412], The regional courts reported to the Justice Ministry about the other claims raised by Mr Kinsky [413] , which, according to the ECtHR, compromised the appearance of impartiality[414]. 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[415]. 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[416]. 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[417].

[405] Information provided by the CCJE member in respect of Slovakia on 27 May 2015.
[406] 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).
[407] Information provided in the responses to the questionnaire sent out in preparation of the CCJE Opinion No. 18(2015).
[408] ECtHR *Toni Kostadinov v. Bulgaria* (application No.37124/10) 27.1.2015.
[409] ECtHR *Kinsky v. the Czech Republic* (application no. 42856/06) 9.2.2010.
[410] Ibid., para 7.
[411] Ibid., para 6.
[412] Ibid., paras 16, 20-21; 14-21.
[413] Ibid., paras 22 -26.
[414] Ibid., para 98.
[415] Ibid., para 18.
[416] Ibid., para 95.
[417] Ibid., para 94.

267. In a decision against Bulgaria, *Toni Kostadinov v. Bulgaria*[418], 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

268. 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[419]. 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[420] 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.

269. 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 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[421]. 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

[418] ECtHR *Toni Kostadinov v. Bulgaria* (application No.37124/10) 27.1.2015, see for the comments paras 27-29.
[419] 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.
[420] *Enukidze and Girgvliani v. Georgia* (application no 25091/07), 26.7.2011 para 19.
[421] Ibid., paras 276-278.

requested items of evidence to the Court, without providing convincing reasons for it[422].

270. The Georgian ad hoc Judge Irakli Adeishvili gave a partly dissenting opinion[423]. 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.

271. 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[424]."

272. 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 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

[422] Ibid., paras 296-302.
[423] Ibid., para *73-75.*
[424] 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.

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

273. 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[425]. 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" [426].

f. Ukraine - Dangerous criticism

274. 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"[427]. Those laws allow the scrutiny and dismissal of judges and other officials for decisions made during the "Euromaidan" protests. Judges who reinstated 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

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

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. 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[428].

275. 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[429].

g. Adequate reactions to public criticism[430]

276. 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

[428] 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

[429] 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).

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

the pressure off an individual judge. They can be more effective if they are organised by judges with media competence.

277. 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) [431] . If there are improper 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[432].

278. 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[433].

h. The protection of judges and prosecutors before the ECtHR

279. 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[434]. The case law of the ECtHR underlines the importance of judges and prosecutors speaking up

[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 33.
[432] 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).
[433] See the CCPE Opinion No. 8(2013), para 111.
[434] See the CCJE Opinion No. 18(2015), paras 52-54.

in matters of importance for the public[435], while observing caution and respect towards their colleagues and the other powers of state[436].

aa. Baka v. Hungary

280. In the decision *Baka v. Hungary*[437] 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[438].

bb. Guja v. Moldova

281. 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[439], sent two letters received by the Prosecutor General´s Office to a newspaper[440]. The newspaper used the information provided[441]. 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[442]. His civil action for reinstatement was dismissed as well as the appeal because he had breached his obligations by disclosing secret documents[443]. 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[444]. The letters concerned improper conduct by a high-ranking politician and the government´s attitude towards police brutality[445], 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[446].

[435] 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.
[436] See, for example, Di Giovanni v. Italy (application no. 51160/06) 9.12.2013.
[437] Application no. 20261/12.
[438] 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.
[439] ECtHR *Guja v. Moldova*, (application no. 14277/04) 12.2.2008, para 8.
[440] Ibid., para 13 f.
[441] Ibid., para 15.
[442] Ibid., paras 17-21.
[443] Ibid., paras 22-25.
[444] Ibid., para 70.
[445] Ibid., para 88.
[446] Ibid., para 95.

3. Conclusions

282. 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[447]. 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[448]. Member states are also under a duty to physically protect public prosecutors and their families when their personal safety is threatened as a result of the discharge of their functions[449].

IX. Corruption / Accountability / Standards of professional conduct

1. Introduction

283. 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

284. 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%)[450]. The ENCJ, in its report on "Independence and Accountability of the

[447] See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 7.
[448] See the CCJE Opinion No. 18(2015), para 52.
[449] See the CCPE Opinion No. 9(2014), paras 90-91; Rec(2000)19, 5 g, p. 19.
[450] Special Eurobarometer 397 Corruption (2014) T15.

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[451].

285. 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%)[452].

286. 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 27 on a scale from 0 (highly corrupt) to 100 (very clean)[453], 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[454]. 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[455], Croatia[456], and Serbia[457] 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

[451] 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
[452] Special Eurobarometer 397 – Corruption (2014) T16.
[453] http://www.transparency.org/cpi2014/results.
[454] Transparency International, The State of Corruption: Armenia, Azerbaijan, Georgia, and Ukraine, 2015, p. 8.
[455] GRECO Fourth Evaluation Round, Evaluation Report Bulgaria 2014, paras 1-6.
[456] GRECO Fourth Evaluation Round Evaluation Report Croatia 2014.
[457] GRECO Fourth Evaluation Round Report Serbia 2015, para 95.

Transparency International Corruption Perception Index 2014, Bulgaria ranks 69 out of the 175 countries assessed, with a score of 43[458], Croatia ranks 61 with a score of 48, and Serbia ranks 78 with a score of 41.

287. However, also other member states struggle with the fight against corruption (according to information published in the press for example France[459], Italy[460] and Spain[461]). On the Transparency International Corruption Perception Index 2014, France ranks 26 out of the 175 countries assessed, with a score of 69[462], 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

288. 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)[463] . They must produce work of the highest possible quality in the interest of the public and must exercise their duties 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[464]. 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 [465] . For prosecutors, many countries report rules on incompatibilities. Prosecutors must recuse themselves if they have a personal

[458] http://www.transparency.org/cpi2014/results.
[459] 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.
[460] 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.
[461] 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.
[462] http://www.transparency.org/cpi2014/results.
[463] https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf.
[464] In the CCJE Opinion No. 18(2015), para 33, this was described as “punitive accountability”.
[465] 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.

connection with a case. Many countries do not allow prosecutors to be members of political parties or hold political office.

289. 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[466]. 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[467]. 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[468]. 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[469]. Provided a careful balance is observed, the two principles of independence and accountability are not irreconcilable opposites[470]. 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[471] 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.

2. Incidents and other information

a. Corruption in the judiciary (including prosecution services)

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

290. 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)[472]. According to information

[466] See the CCJE Opinion No. 3(2002), para 48 I.
[467] 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.
[468] Standards of the International Association of Prosecutors (1999). https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf.
[469] 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.
[470] Cf. the CCJE Opinion No. 18(2015), para 20.
[471] Cf. the CCJE Opinion No. 18(2015), para 32, see also Opinion No. 7(2005).
[472] http://www.transparency.org/cpi2014/results.

published in the "Analysis of the Justice System in Albania"[473], 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.

291. 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" [474]. 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[475].

292. 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[476] 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 introduction of an independent body to discipline judges and prosecutors, including those at the Supreme Court, is under discussion.

293. The most fundamental measure of reform which was recommended in the paper "Strategy of Justice Reform", also drafted by the ad hoc parliamentary

[473] 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.
[474] Analysis of the Justice System in Albania p. 10.
[475] 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)
[476] Information received by the ENCJ in preparation of this report.

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"[477]. 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[478]. 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.

294. 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 [479]. 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[480].

bb. Armenia - Independence and the fight against corruption

295. 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 [481]. 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)[482]. 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[483].

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

c. Azerbaijan - Independence and the fight against corruption

296. 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 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 [484] . According to Transparency International, the executive dominates the judiciary, especially in relation to its budget[485]. As a result, prosecutors did not effectively prosecute corruption within the government[486]. Therefore, Transparency International recommended increasing the budget for judges and prosecutors and handing over its administration to the Judicial Legal Council[487].

dd. Georgia – Decreasing perception of corruption

297. 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[488]. In 2013, the country scored only 49 and ranked 53.[489]

ee. Republic of Moldova - High perception of corruption

298. In the Republic of Moldova 80%of the population perceive the judiciary to be corrupt or extremely corrupt[490]. The Republic of Moldova ranks 103 out of 174 countries in Transparency International's Corruption Perceptions Index 2014, with a score of 35[491]. 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[492]. 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[493].

ff. Ukraine – Replacing all members of the judiciary

299. 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

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

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[494]. 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[495]. 87% of the population perceive the judiciary to be corrupt or extremely corrupt and only 46% of Ukrainians believe that the courts consider their cases in an independent and impartial manner, reports Transparency International[496]. 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[497].

b. Fight of judges and prosecutors against corruption

300. 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[498] or their introduction is under discussion[499]. 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

[494] Ibid., p. 25.
[495] Ibid., p. 26.
[496] Ibid., p. 26-27.
[497] 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.
[498] 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).
[499] 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).

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[500].

301. 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[501]. In a political or 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[502]. 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

302. 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[503]. 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[504]. GRECO therefore recommended that

[500] 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.
[501] 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.
[502] This view was stressed by the contribution of the CCPE member in respect of Portugal in the preparation of this report.
[503] GRECO 4th Round Report on Albania (2013), para 85.
[504] Ibid., para 86.

the Committee assume a proactive role in the training, counselling and enforcement of judicial ethics[505].

303. 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[506].

bb. Romania - Deontological Code for judges and prosecutors

304. 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[507].

cc. Serbia - GRECO recommendation

305. In relation to Serbia, GRECO has recommended that ethical guidelines be complemented by training and confidential counselling[508].

dd. Slovakia - Code of Conduct for Prosecutors

306. In 2014 the prosecutors in Slovakia[509] 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

307. 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

[505] Ibid., para 86.
[506] Ibid., paras 126, 127.
[507] Information received from the CCPE member in respect of Romania in preparation of this report.
[508] GRECO Fourth Evaluation Round, Evaluation Report Serbia 2015.
[509] Information provided by the CCPE member in respect of Slovakia for the preparation of this report.

code of ethics must be above all a tool and provide guidance in the performance of the daily professional duties of judges[510].

3. Conclusions

308. 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.

309. 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[511].

310. 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.

[510] See the CCJE Situation Report, updated version No. 2(2015), para 116.

[511] 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, 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

311. 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[512]. To live those principles is the challenge at hand.

[512] 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[513], 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;

[513] See para 1 of this report.

- 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);
- 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).

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

CCJE/CCPE(2016)3rev1

Strasbourg, 24 March/mars 2016

COMMENTS RECEIVED FROM THE MEMBER STATES OF THE COUNCIL OF EUROPE
/
COMMENTAIRES TRANSMIS PAR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE

concerning the / *relatifs au*

report prepared by the Bureaus of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) for the Secretary General of the Council of Europe on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" (CCJE/CCPE(2016)1)
/
rapport préparé par les Bureaux du Conseil consultatif de juges européens (CCJE) et du Conseil consultatif de procureurs européens (CCPE) à l'attention du Secrétaire Général du Conseil de l'Europe sur « Défis pour l'indépendance et l'impartialité du système judiciaire dans les États membres du Conseil de l'Europe » (CCJE/CCPE(2016)1)

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"
/
comme un suivi de son rapport de 2015 intitulé « Situation de la démocratie, des droits de l'Homme et de l'État de droit en Europe - la sécurité démocratique, une responsabilité partagée en Europe »

The comments appear in this document in English or French, according to the language used by the contributing delegations. / *Les commentaires figurent dans ce document en anglais ou en français, selon la langue utilisée par les délégations ayant contribué.*

ALBANIA / *ALBANIE*

It is noted that in its capacity as the representative institution of the people's will, the Assembly of Albania has established an Ad Hoc Parliamentary Commission whose scope of work is to conduct the reform in the justice system. The activity of the Commission so far has relied on a process of broad process of consultation, inclusion and transparency, them being key to obtaining qualitative outputs that are free of the influence of the political interests of the day and other adverse influences, and what's most important to give both the process and its outcome the required credibility vis-à-vis the citizens. A high-level group of experts, both national and international, has been established within the Commission, with representatives from the most important justice institutions and of international missions of assistance, organizations and partners**.**

It is actually positive that parts of the CoE report review of Albania make reference to the findings of the Analysis of the Justice System, which is the first professional document drawn up by the high-level experts group attached to the Ad-Hoc Parliamentary Commission. This Analytical Document provides a thorough and unbiased analysis of all the aspects and components of the justice system, based on objective data identified with the contribution of all the stakeholders in the field (judges, prosecutors, free practitioners of law, civil society representatives, specialized international partners, users of the system services and public at large).

There are, nonetheless, reservations on some of the observations and findings contained in the report that are (in our view) based on inaccurate information sources and, in some cases, rely on data that are intentionally distorting of the current reality. In addition, we would suggest that the report addressed judicial independence within the context of the particular state of play it operates in given countries, as well as in relation to the accountability, as one of the pillars ensuring a fair and effective law enforcement. Such standing on the judicial independence has been reaffirmed by the interim opinion of the Venice Commission on the constitutional amendments on the judiciary in Albania that underlines, *inter alia*: "***The current Albanian Constitution of 1998 was prepared in close cooperation with the Venice Commission;[514] the existing constitutional arrangements defining the status of the judiciary are in theory sufficient to guarantee its independence and accountability. However, in Albania, as well as in some other post-communist countries, the constitutionalisation of the standards on the independence of the judiciary resulted in a paradox: constitutional guarantees have been bestowed upon judges who were not yet independent and impartial in practice.*** ,,,"..

We would like to address in particular some of the specific findings of the report, while reflecting our own consideration through concrete comments and suggestions.

Paragraph 44 of the CoE Report finds that *"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."*

The Analysis of the Justice System prepared by the Group of High Level Experts of the Ad Hoc Commission highlights that the current formula of the appointment of the Prosecutor General leaves room for an extreme politicization of this process. The current Prosecutor General was appointed in 2012 by the previous Government, that is, the today's opposition. Under the conditions where the Prosecutor General is appointed by the Parliament, it is impossible for him to investigate those who have appointed him. Additionally, Articles 148 and 149 of the current Constitution do not contain any provision in relation to the applicable requirements and criteria that a candidate for Prosecutor General has to meet.

The draft Constitutional amendments elaborated by the Group of High Level Experts, reviewed in the light of the Venice Commission interim opinion, address the matter in question by setting up a balanced formula that shall prevent the politicization of the process, and high professional, merit-

[514] See, for example, CDL-INF(1998)009, the Venice Commission Opinion on Recent Amendments to the Law on Major Constitutional Provisions of the Republic of Albania.

based and integrity conditions for the applicants. Specifically, the draft constitutional amendments provide as follows:

1. The Prosecutor General is appointed by the qualified three-fifth majority of the members of Assembly from three candidates proposed by the High Prosecutorial Council. The High Prosecutorial Council shall select based on a transparent and open procedure and ranks three candidates on the most qualified and reputable candidates. If Assembly cannot appoint the Prosecutor General within 30 days of receiving the proposals from the High Prosecutorial Council, the highest ranking candidate is automatically appointed.

2. The Prosecutor General shall serve for a seven-year[515], non-renewable mandate. The Prosecutor General shall be selected among highly qualified lawyers, with no less than 15 years of professional experience as lawyer, of high moral and professional integrity, that have graduated from the School of Magistrates or academic degree in law. The Prosecutor General must not have been punished before for a criminal offence. He/she shall not to have held a political post and a post in a political party during the last 10 years before running for this position.

With regard to the finding in paragraph 77 of the CoE report that allegations of corruption might also be used to decrease the influence of the High Council of Justice in the future, we consider it to be inaccurate. Based on the Strategy of the Justice System Reform and the draft constitutional amendments, both documents developed by the group of high level experts attached to the Ad Hoc Commission, the intention is to boost the HCJ role by increasing the range of powers of this institution governing the judiciary. Likewise, the very institution is foreseen to undergo an overhaul through the following measures:

i) Establishment of the criteria applicable for the election of HCJ members, which guarantee their professionalism, high moral and professional integrity;
ii) Due to high corporatism levels, the number of judicial and non-judicial members shall be reduced, with the former holding the majority in the HCJ;
iii) It is provided that since the Minister of Justice and the President are officials who may potentially exert political influence in the decision-making of this institution, they shall not be part of the HCJ composition;
iv) A formula for the appointment of the HCJ judge members is foreseen to guarantee a proportional representation of the three tiers of the judiciary;
v) A formula for the appointment of the HCJ non-judge members is foreseen to reduce the Assembly's political discretion, including in the selection process for the proposals coming from the legal profession, academia, School of Magistrates, etc.

According to Article 33 of the draft constitutional amendments, the High Judicial Council shall be composed of 11 members, six of which are elected by the judges of all levels of the judicial power and five members are elected by the Assembly among lawyers who are non-judges. The transparent and public procedure for the selection and ranking of the candidates coming from the judiciary is provided in the law. The lay members shall be selected among highly qualified lawyers, with no less than 15 years of professional experience, of high moral and professional integrity and shall hold a university degree and an academic grade in law.

The transparent and public procedure of appointment and ranking of the judge nominees is regulated by the law. The lay-members shall be elected by the Assembly with three-fifth of all its members, based on the proposals of: lawyers, 1 member, one shall be from notaries, one shall be a law professor, one shall be from the lay professors (non-judges/prosecutors) of the School of Magistrates and one shall be from civil society. For each vacancy, the proposing bodies present to the Justice Appointment Council three candidates elected based on a public and transparent procedure. The Justice Appointment Council ranks the candidates and submits them to the Assembly.

In its Interim Opinion No. 824/2015, "On the draft constitutional amendments on the judiciary of Albania", the Venice Commission **positively considers *that "This (HJC) composition is acceptable, especially provided the Assembly's vote is "based on the proposals from the re-***

[515] Comments from the reform consultative round tables with regard to the tenure of the Prosecutor General, with a preference for the 7-year term.

spective structures and the opinion of the Justice Appointments Council." (see paragraph 54 of the Opinion). Further, paragraph 56 of the interim opinion observes that "***Article 41 (adding Article 147/a) gives the Council very substantial powers, including appointing, evaluating, promoting and transferring judges, deciding on disciplinary measures, proposing candidates for the HC and the HAC, approving the rules of judicial ethics and monitoring their observation, directing and managing the administration of the courts, proposing and administering the budget, and the strategic planning for the judicial system as well as reporting to the Assembly on the state of the judicial system.***"

Paragraph 78 of the CoE report notes that, *"**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****"*.**

The finding is relevant and reflected in the new draft constitutional amendments elaborated by the Group of High Level Experts, in consultation with the Venice Commission. These constitutional amendments are targeted to bring about a new holistic structural and functional design and composition of the prosecutorial system, and to enshrine the Prosecutorial Council at the constitutional level, as well as enable a full-fledged structuring of the Council's powers for the appointment, career, promotion and disciplinary actions on prosecutors that are all different from the current constitutional and legal regulation, change hierarchical relations within the prosecutorial system and take away part of the current portfolio of the Prosecutor General to stand on its own with the establishment of the special anti-corruption structure.

According to the proposed constitutional amendments, the High Prosecutorial Council (HPC) is redesigned as an independent constitutional body that turns from a consultative into a decision-making body, with the following powers:

a) Appoints, evaluates, promotes and transfers prosecutors;
b) Decides on disciplinary measures against prosecutors;
c) Proposes to the Assembly candidates for Prosecutor General in accordance with the procedures prescribed by law;
ç) Adopts rules of ethics for prosecutors and supervises their observance
d) Prepares reports and informs the public and the Assembly on the state of the Prosecutor's Office.
e) Exercises other responsibilities as defined by the law.

According to the draft constitutional amendments, the High Prosecutorial Council shall be composed of 11 members, of whom six elected among prosecutors of all level elected by the prosecutors of all levels of the Prosecutors' office and five members elected by the Assembly by lawyers who are not prosecutors. The lay members shall be selected among highly qualified lawyers, with no less than 15 years of professional experience, of high moral and professional integrity. They shall hold a university degree and academic grade in law. Candidates must not have been punished before for a criminal offence. During the past 10 years the lay members shall not have held a political post in the public administration and a leadership position in a political party before their nomination. The lay members shall be appointed from the proposal from the proposing bodies by the Assembly with three-fifth of all members. One shall be from lawyers, one shall be from the notaries, one shall be a law professor, one shall be from the lay professors of the School of Magistrates and one shall be from civil society.

The division and balance of powers between the Prosecutor General and the High Prosecutorial Council is considered to have an impact on the internal independence of prosecutors vis-à-vis higher-ranking prosecutors and on the institution's external independence[516]. It further shall lead to their increased and strengthened accountability through a balanced self-monitoring system.

[516]CDL-AD (2014) 008, Venice Commission on the draft law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, pp. 24 and 41,42

Paragraph 121 of the CoE report observes that " *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.***"**

The draft constitutional amendments proposed by the Group of High Level Experts at the Ad Hoc Commission enshrine explicitly the principle of prosecutorial independence, providing that "the Prosecution is to be an independent body that shall guarantees and observe a proper conduct and supervision of its activities, and the internal independence of prosecutors in the course of investigation and criminal prosecution."[517] The High Prosecutorial Council (mentioned earlier in the document) has been assigned by the draft amendments the responsibility to guarantee independence, accountability, discipline observance, status and career of the prosecutors of the Republic of Albania.

According to paragraph 122 of the CoE report: *"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. 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."*

The Group of High Level Experts of the Ad Hoc Commission has proposed that partial functional decentralization takes place within the prosecutorial system, in order to guarantee the prosecutors' internal independence vis-à-vis higher-ranking prosecutors in relation to the conduct of specific cases and building of public accusation. The suggestion draws on the argument that the prosecution's partial functioning decentralization does not pose any risk whatsoever for the body's operation, since it will be followed by the required changes in the criminal procedural law that will assign a role to the court in the conduct of criminal investigations (judge of the preliminary investigation, as distinct from the judge reviewing the merits of the case). Hence the court shall perform the functional supervision of prosecutors who were, so far, monitored by higher-ranking prosecutors. However, the latter shall keep some minor functional supervising powers over lower prosecutors.

Differently from the current Constitution, whose Article 148(2) provides that "Prosecutors are organized and operate as a centralized organ attached to the judicial system," draft amendments do not contain a similar provision.

Paragraph 265 of the CoE report notes that in *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 … low confidence is often unjustly aggravated by comments by politicians on the campaign trail and sensation seeking media.*

Concerning the above, we consider that the observation does not fully correspond to the reality and is of a rather generalizing nature. The issues the Albanian judiciary is facing are not a question of perception and the citizens' low confidence has not been aggravated by political statements. The analysis of the justice system (mentioned above) provides an objective picture of all the findings contained in different reports issued by both national and international organizations, which have monitored and reviewed various aspects of the justice system in the country. These reports identify endemic problems when it comes to the infringement of the standards of the due process of law, and particularly to the delay of hearings, impunity in corruption-related cases, inequalities created among citizens in the adjudication of their cases resulting from bribes, etc. Concrete cases

[517] Venice Commission Opinion, paragraphs 84 – 85.

have been reported by the investigative media, with live recording of judges and prosecutors receiving bribes from the citizens. The former were subjected to criminal prosecution and, subsequently, dismissed.

Presence of the corruption in the ranks of the judiciary is now a fact that has been admitted as such also in the Interim Opinion of the Venice Commission on Albania, whose paragraph 98 highlights that: ***"The necessity of the vetting process is explained by an assumption – shared by nearly every interlocutor met by the rapporteurs in Tirana – that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures."***

We deem the findings reflected in paragraphs 292 – 296 of the report as partially accurate and realistic. It is true that Albania is suffering from a system that is not at all serving or credible for the citizens[518] and is corrupt. As noted also in paragraphs 292, 293, 296, various sources identify high levels of corruption across the judiciary, thus, undermining service of justice for the people, whose legitimate interests are adversely affected.

Paragraph 293 of the report reads that: *"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 also seen to confirm a hostile atmosphere on the part of the parliamentary commission against the High Council of Justice.….. ... 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."*

It is noteworthy to stress that the work of the Ad Hoc Parliamentary Commission builds on and is guided by the principles of **inclusiveness and public consultation, professionalism and best standards in the area** that have been and remain the fundamental pillars on which the reform has been developed and is conducted. In no case has the focus of the Commission activity been to target or moreover to create a hostile environment against the country's justice institutions.

All justice representatives in the country, including judges and prosecutors of the three instances, notaries, lawyers, bailiffs, law professors and all other officials who exert their functions in the justice institutions, including the members of the High Council of Justice, representatives of civil society and various political forces, etc., have been given the opportunity to voice their own opinions, whether favourable or contrary, in the public consultation meetings that have been held by the high level experts' group of the Ad Hoc Parliamentary Commission. The brainstorming and discussion of different views in these activities has been useful to engender a more than constructive debate driven towards the identification of the best constitutional and legal solutions that would ultimately address the pitfalls the justice system is currently facing. Bringing the debate in the public domain for the opinion at large to be part cannot be viewed as cause to a hostile climate against one institution or another, since its purpose has been to ensure the transparency of the process, inform citizens and secure their active involvement in the debate itself.

The current governing majority did not see this reform as a matter of its own political interest. By doing so, the Government "acknowledged" the right of the Assembly as the one entity to conduct and finalize the reform. It is actually a fact that all parliamentary political forces have been invited to contribute to the process. The opposition representatives are active in the Ad Hoc Parliamentary Commission and opposition experts have submitted their own opinions also on the draft constitutional amendments sent to the Venice Commission.

The Group of High Level Exerts attached to the Commission is composed of the representatives of the most important justice institutions, collegial bodies and academic entities which contribute to the justice system, as well as free practitioners, including: the High Court, Prosecutor General Office, School of Magistrates, National Bar Association, Ministry of Justice, University Rectorate and HCJ.

[518] Evaluation Report on Albania No. 4, 24-27 June 2014, GRECO.

In the course of its activity, the Commission has always benefitted from the best international assistance in terms of legal expertise and evaluation. Represented in the group of high level experts are also international missions and partner organizations such as: the Venice Commission, EURALIUS IV, US Department of Justice, USAID, and the OSCE Presence in Albania. From its outset, the process has benefited from the unreserved support of these representatives.

There is an overall agreement of the parties in admitting the pivotal role of the Venice Commission in conducting the Reform. This prestigious international body has provided its own evaluations and remarks on the process and the constitutional drafts via an interim opinion that highlights, *inter alia*: *"The Venice Commission expresses its support for the effort of the Albanian authorities aimed at the comprehensive reform of the Albanian judicial system. Such reform is needed urgently, and the critical situation in this field justifies radical solutions The Draft Amendments represent a solid basis for further work in this direction."*

Referring in particular to the finding in the CoE report that there is*"a hostile atmosphere on the part of the parliamentary commission against the High Council of Justice (HCJ),"* [519] we consider the conclusion to be based on fragmented and biased sources and with no correspondence to the reality and actual facts.

On 22.12.2014, the Ad Hoc Parliamentary Commission endorsed Decision No. 2, **"***On the representation of the main institutions of justice and legal education system with experts in the Group of High Level Experts of the Ad Hoc Parliamentary Commission."* In line with the said decision, the Commission submitted a request to the High Court, High Council of Justice, Prosecutor General Office, National Bar Association, School of Magistrates, University of Tirana, Faculty of Law, Ministry of Education and Sports and to the Ministry of Justice for the Legal Reform Consultative Committee, whereby it required that they forwarded suggestions for the experts who were to represent them in the Group of High Level Experts at the Ad Hoc Parliamentary Commission for the Reform in the Justice System.

All the institutions in the system, except for the High Council of Justice, responded to the Commission request and assigned their experts to the Commission. In the meantime, given the delayed answer by the HCJ, the appointment of its representatives to the group of experts was made possible only nine months later.

However, representatives from HCJ have been invited to attend all the activities organized by the Ad Hoc Commission as part of the Public Consultation process conducted by the group of high level experts. So far, there have been three rounds of public consultation on the documents developed by the High Level Experts. Thus, 10 round tables on the analytical document were held between May and June 2015; nine open public fora were conducted to discuss the Strategy Analysis between June and July 2015, whereas, 19 consultative roundtables on the draft constitutional amendments were held between November and December 2015. It would be worth mentioning that the HCJ has received official notification in writing with the respective agenda, and has been asked to appoint its representatives. Matter of factly, HCJ representative have been participating actively to these events and have contributed with their opinions/suggestions during the meetings.

In order to ensure a process that is transparent and as inclusive and consultative as possible, a public consultation network has been set up, composed of practitioners, experts of the field and representatives of the groups of interest. The network includes the judges of all court instances in the Republic of Albania. It is worthwhile mentioning that, being one of the judiciary's governing bodies, the HCJ is mainly composed of judges, and with the latter being part of our public consultative network database, they are constantly updated with the steps taken as part of the reform and have, consequently, been invited and encouraged to provide their own input with suggestions and comments throughout the course of this reformation process.

[519] Paragraph 293 of the Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe

In relation to paragraph 294 of the CoE report, it is relevant to stress that all the documents elaborated up to date are a result of the drafting work by the High Level Experts, assisted by the Technical Secretariat, and of the discussions and debates held in the round tables. Hence, the Commission has absolutely stayed out of the drafting/elaboration process, therefore, playing only a managing role. Following the above explanation, we note the paragraph stating that "*Strategy of Justice Reform, also drafted by the ad hoc parliamentary commission*"[520]. Actually, the Commission **has only approved** the Strategy, just like any other output document coming from the Group of High Level Experts, who represent a professional body of national and international experts, representatives of the country's justice system and of the international missions of assistance in the area of law.

Further, paragraph 294 of the CoE report states that, "*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*".

With regard to these finding, we would like to address certain points that, in our view, will provide a clearer picture that is in contradiction with the conclusions reached therein.

First, the revised draft constitutional amendments following the issuance of the Venice Commission Interim Opinion, specifically, the annex on the transitional qualification assessment of judges and prosecutors, foresee that all judges, including members of the Constitutional Court and High Court, all prosecutors, including the Prosecutor General, judges members of the High Council of Justice, prosecutors who are members of the High Prosecutorial Council, the Chief Inspector and the other inspectors of the High Council of Justice and all legal advisors of the Constitutional Court and High Court shall be, ex officio, assessed and re-evaluated. The process intends to re-establish public trust and confidence in these essential democratic institutions.

In paragraph 100 of its Interim Opinion on the draft constitutional amendments, the Venice Commission underlines that ***"the Venice Commission believes that a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure."***

Second, the revised draft constitutional amendments provide that "***Assessment and re-evaluation shall be conducted by the Independent Qualification Commission, whereas complaints shall be reviewed by the Specialized Chamber operating at the High Court. Upon completion of the assessment and re-evaluation process*** *ex officio* ***and the expiry of the mandate of the Commission and Specialized Chamber, in line with Article 179/a of the Constitution, the assessment and re-evaluation shall be carried out by the High Administrative Court at first instance and by the High Court at second instance***.[521]

An Independent Qualification Commission organized and functioning with two separate decision-making panels shall be established conduct assessment at first instance.[522] A Specialized Qualification Chamber shall be established within the High Court and it is organized and functions with two separate decision-making panels which shall adjudicate as the last instance on final appeals of the assessment.[523]

[520] Paragraph 294 of the Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe
[521] VC Opinion, paragraph 117.
[522] VC Opinion, paragraph 117.
[523] VC Opinion, paragraph 117.

All members of the Commission and the judges Appeals Chamber shall have a university degree in law or academic grade in law, and no less than fifteen years' experience as a judge, prosecutor, law professor, advocate, notary, attorney in ministries or public administration, or other legal profession related to the judiciary, and shall have a high reputation for integrity. Candidates must not have been judges, prosecutors or legal advisors in the two years prior to their nomination. Nominees for judge shall not have been sentenced before in connection with the commission of a criminal offence. They shall not have held a political post in the public administration or a leadership position in a political party for the past 10 years before becoming a nominee. Nominees for judge shall not have been sentenced before in connection with the commission of a criminal offence. They shall not have held a political post in the public administration or a leadership position in a political party for the past 10 years before becoming a nominee. The Ombudsperson shall conduct an open and transparent application process for members in the Commission and judges at Specialized Qualification Chamber and public commissioner. The Ombudsperson shall assess whether the criteria are met and compile a list of qualified applicants and send that list to the Assembly. Assembly shall appoint with a 3/5 majority the members of the Commission and judges of the Specialized Qualification Chamber and the two Public Commissioners from the pool of qualified candidates provided by the Ombudsperson. If the Assembly fails to appoint all members, judges and public commissioners within 30 days, by the thirty-fifth day the President of the Republic shall select by public lot the members, judges or other commissioners. Those selected shall be automatically appointed.[524]

Additionally, these draft amendments foresee the establishment of an international monitoring mission that will be in charge of ensuring transparency, legal certainty and safeguards against abuse during the transitional qualification assessment process. The organization and functioning of the international monitoring operation shall be established in the framework of international agreement signed by the Republic of Albania on the one hand and the European Commission, other states or international organizations, on the other. The powers of the International Monitoring Mission shall be regulated by this annex and the law[525]. International Observers shall be experienced foreign lawyers who qualify to be a judge in their own country.[526]

As above, we consider that the mechanisms foreseen to be established for the conduct and monitoring of the assessment and re-evaluation process, as well as the setup and modus operandi of the said mechanisms shall exclude every possibility of political influence exercised on the process. Like with all the other constitutional functions applicable to the justice system, the officials who will be assigned to conduct the assessment and re-evaluation process shall go through selection filters, intended to reduce to a maximum the political interference with the nomination process. Unblocking mechanisms are also anticipated, in order to avoid cases of vacancies left unfilled due to a lack of political will. In all cases, however, the Assembly's discretion to appoint these officials is almost limited.

Third, the article on the verification of assets in revised draft constitutional amendments provides that "*If the assessee has assets greater than twice the amount justified by legitimate income, a presumption in favour of the disciplinary measure of dismissal shall be established which the assessee shall have the burden to dispel. For any criminal proceedings relating out of the procedure the burden of proof remains on the State.*[527] *If the assessee has not submitted the asset declaration in time or takes steps to inaccurately disclose or hide assets in his or her possession or use, a presumption in favour of the disciplinary measure of dismissal shall be established which the assessee shall have the burden to dispel. For any criminal proceedings resulting out of the procedure the burden of proof remains on the State*."

In paragraph 121 of the Interim Opinion, the Venice Commission considers the shift of the burden of proof in the cases of asset verification as a positive step, concluding that the provision is compatible with the presumption of innocence and the right to be silent and not to incriminate oneself, as contained in Article 6 §2 of the European Convention.[528] According to the Venice Commission:

[524] *Ibid*.
[525] VC Opinion, paragraph 130.
[526] VC Opinion, paragraph 133.
[527] VC Opinion, p.121.
[528] This provision reads as follows: "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"

- Article 6 § 2 applies to criminal proceedings, so it would not be normally applicable in cases of dismissals of judges and prosecutors.
- There are multiple examples from other areas of law where a failure to report on certain operations, acts, contacts, etc. entails liability (for example, the fiscal liability attached to the submission of inaccurate or incomplete tax returns). It is reasonable to introduce even more stringent rules for civil servants, including judges and prosecutors.

The reform is intended to ensure reduction of the corruption among judges/prosecutors, enhance their professional capacities, increase effective oversight mechanisms for these judges/prosecutors, allow a clear division of powers between the bodies governing the justice system, etc. Summing it up, the purpose of the reform itself is to build a justice system that is reliable, fair, independent, professional, guided by the service to the citizens, responsible and accountable, a system which enjoys the public trust, supports the sustainable socio-economic development of the country and enable Albania's EU integration.

Should you need more information on the Reform in Justice and, in particular, with regard to the draft constitutional amendment, please access the official website http://www.reformanedrejtesi.al/ and the link http://www.reformanedrejtesi.al/projekti-i-amendamenteve-kushtetuese-drafti-i-rishikuar-propozuar-nga-grupi-i-eksperteve-te-nivelit

ARMENIA / *ARMÉNIE*

Concernant le paragraphe 216, c'est noté que la législation nationale de l'Arménie, notamment les amendements constitutionnels récents définissent l'indépendance des juges et en prescrivent les garanties nécessaires. Durant la période 2009-2015, une nette augmentation en matière des arrêts d'acquittement a été constatée. Le nombre de type d'affaires a constitué 25 en 2009 qui a atteint 157 en 2015. En outre, parmi ces affaires sont nombreuses celles où la durée et la nature de la peine requise par le ministère public (demandant l'atténuation ou le durcissement de la peine requise) n'ont pas été conformes à celles rendues par les tribunaux.

Concernant le paragraphe 296, c'est noté que les données statistiques révèlent que la confiance de la population envers le système judiciaire national connait un accroissement constant en Arménie. Le nombre des requêtes des affaires civiles soumises aux tribunaux d'instance générale a augmenté de 37.2% en 2015, par rapport à 2014 et de 142.4% par rapport à 2013. Avec l'accroissement du nombre des requêtes des affaires civiles, le nombre des recours en appel a diminué. Ainsi, en 2015, seulement 5.7% des arrêts rendus par les tribunaux d'instance générale a fait l'objet d'appel; alors qu'en comparaison avec 2014 ce chiffre s'élevait à 7.9% et à 14% en 2013. En outre, les requêtes soumises aux tribunaux administratifs plaidant l'annulation des actes, ainsi que la contestation des actions (des inactions) des représentants des autorités publiques et locales ont également augmenté. En 2015, leur nombre a augmenté de 15.5% par rapport à 2014, et de 109.9% par rapport à 2013. En 2015, 35% de la totalité des affaires closes demandant l'annulation des actes ou la contestation des actions (des inactions) des représentants des autorités publiques et locales se sont résolus en faveur des requérants.

****

Referring to the paragraph 216, it is noted that the national legislation of Armenia and particularly the recent constitutional amendments define the independence of judges and stipulate the necessary guarantees. During the period from 2009 to 2015, we have witnessed a net increase of acquittals in the judgments of the courts. The number of such cases has been 25 in 2009, and it reached 157 in 2015. Furthermore, in many cases the duration and nature of sentences in the decisions made by the court were much different from what was requested by prosecutors (including both mitigation and intensification of the penalty sought).

Referring to the paragraph 296, it is noted that the statistics show steady increase of trust of the population towards the national judicial system in Armenia. The number of civil cases submitted to the courts of general jurisdiction in 2015 showed an increase of 37.2% compared to 2014 and an increase of 142.4% compared to 2013. Along with the increase in number of civil cases, we have witnessed a decline in number of appeals. In 2015 only 5.7% of the judgments made by the courts

of general jurisdiction was appealed, in comparison with 7.9% in 2014 and 14% in 2013. In addition, in 2015 the number of cases brought before administrative courts requesting the cancellation of acts as well as contesting the actions (inactions) of government or local officials has also increased by 15.5% compared to 2014 and by 109.9% compared to 2013. In 2015 35% out of total closed cases requesting the cancellation of acts or contesting the actions (inactions) of government or local officials were settled in favour of applicants.

BELGIUM / *BELGIQUE*

Concernant le point 157, c'est noté que avant sa présentation au parlement, le projet de loi avait été soumis à plusieurs organes consultatifs, y compris la section législation du Conseil d'État. Le parlement a débattu, amendé et finalement validé le projet de loi en connaissance de tous les avis et opinions. La nouvelle législation à laquelle le CCJE fait référence a ensuite été validée par la Cour constitutionnelle belge dans son arrêt du 15 octobre 2015. Le régime de mobilité renforcée des magistrats instauré par la loi du 1er décembre 2013 n'est pas considéré comme une atteinte au principe de inamovibilité.

En particulier, la Cour constitutionnelle a décidé que ce régime qui permettait notamment de soumettre un magistrat à une mesure de mobilité renforcée, ne violait ni la Constitution belge, (les articles 10, 11, 152 de la Constitution), ni ces principes constitutionnelles en combinaison avec les dispositions internationales invoquées, telles que la Charte sociale européenne, le Pacte internationale relatif aux droits économiques, sociaux et culturels, les articles 6 et 8 de la Convention européenne de sauvegarde des droits de l'homme, le Pacte international relatif aux droits civils et politiques (art 14) et la charte des droits fondamentaux de l'Union européenne (art 47). (arrêt 139/2015 considérants B.7.1. à B.9. de l'arrêt).

Les décisions de mobilité sont prises par le pouvoir judiciaire, par des magistrats mêmes. De plus, comme la Cour constitutionnelle dit dans son arrêt : le législateur a « d'une part, prévu diverses mesures visant à associer au mieux ces magistrats aux mesures de mobilité envisagées, le cas échéant, à leur égard, et a, d'autre part, ouvert de nouvelles voies de recours à l'encontre desdites mesures. »

Concernant les points 104 & 105, c'est noté que :

Point 104 :

Par son arrêt 138/2015 du 15 octobre 2015, la Cour constitutionnelle belge a également validé le contenu des dispositions de la loi du 18 février 2014 concernant l'introduction d'une gestion autonome pour l'organisation judiciaire.

La Cour constitutionnelle a jugé que les dispositions ne violaient pas la Constitution belge combinée avec le principe de la séparation des pouvoirs et celui de l'indépendance du pouvoir judiciaire (déduits notamment des articles 151, 152, 154 et 155 de la Constitution), avec le principe de la légalité dans l'organisation judiciaire (déduits notamment des articles 146, 152, alinéa 1er, 154, 155 et 157 de la Constitution), avec l'article 6 de la Convention européenne des droits de l'homme, avec l'article 47 de la Charte des droits fondamentaux de l'Union européenne et avec l'article 14 du Pacte international relatif aux droits civils et politiques.

Point 105 :

Le ministre de la justice et son administration, le Service Public Fédéral Justice, sont actuellement responsables pour la gestion de l'organisation judiciaire. Comme tout ministère, le SPF Justice est soumis à la hiérarchie du ministre et aux même règles générales de contrôle administratif et budgétaire que les autres ministères de l'état.

La loi du 18 février 2014 a justement pour but de transférer la gestion de l'organisation judiciaire du Service Public Fédéral Justice à des organes au sein de l'organisation judiciaire. Ces organes ne relèveront pas du contrôle hiérarchique du ministre de la justice. Ce transfert permet de soustraire l'organisation judiciaire au contrôle administratif et budgétaire classique des administrations

publiques. Ceci n'empêche cependant pas que ces organes rendent compte de leur gestion autonome aux autorités budgétaires par des voies appropriées.

Concernant les points points 229 et 230, c'est noté que le budget pour le personnel judiciaire et la magistrature est annuellement déterminé par le législateur. Le ministre de la justice ne peut que dépenser le budget que le législateur lui accorde. Comme dans tous les pays européens la Belgique est confronté à des économies budgétaires. Néanmoins, en 2015 les économies sur les dépenses de personnel ont été limitées à 1 pour cent au lieu des 4 pour cent imposées aux autres départements.

La justice belge compte 300 bâtiments (2,6 implantations par 100.000 habitants) qui sont mis à disposition du ministre de la justice par l'administration nationale des bâtiments. Cette mise à disposition, y inclus les frais de gros entretien, sont à charge de l'administration des bâtiments. Les autres frais sont à charge de la Justice. Le cas échéant, les problèmes de gestion des bâtiments sont gérés de concert entre l'administration nationale des bâtiments, l'administration de la justice et les autorités judiciaires.

BULGARIA / *BULGARIE*

Referring to paras 12, 16 and 80, the delegation of Bulgaria would have proposed the following text to replace para 80: *"The amendments to the Bulgarian Constitution were adopted on 16 December 2015 providing significant changes in the structure and competences of the Supreme Judicial Council (SJC). The main objective is to strengthen the independence of the judiciary by means of dividing the SJC into two chambers (of judges and of prosecutors) exercising separately career and disciplinary functions and achieving a better level of self-governance of judges. SJC consists of 25 members of which 11 are elected by the bodies of the judiciary and 11 are elected by the National Assembly by two thirds qualified majority, and 3 ex officio members – the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, and the Prosecutor General. The SJC exercises its competences in Plenum, in the Chamber of Judges and in the Chamber of Prosecutors. The Judges' Chamber consists of 14 members of whom 6 are judges elected among judges, 6 are elected by the Parliament and two ex officio members – the presidents of the two supreme courts. The Prosecutors' Chamber has 11 members and includes 1 ex officio member - the Prosecutor General; 4 members are elected with direct voting by the Prosecutors, 1 member is elected with direct voting by Investigating Magistrates and 5 members are elected by the Parliament."*

Referring to para 151, it must be specified that after the Constitutional amendments of 16 December 2015 the Supreme Judicial Council in Bulgaria will be divided into two chambers - the Judges' Chamber and the Prosecutors' Chamber.

Referring to para 241, it must be underlined that the Law for the State Budget for 2016 was adopted and promulgated in State Gazette on 9 December 2015 and entered into force on 1 January 2016. The Law provides for increase of the budget of the Judiciary with 45 million BGN (approximately 22,5 million euro) for 2016 compared with the budget for 2015. The proposed amendment of Article 218, para 2 and 3 of the Judiciary System Act was not adopted.

Referring to para 255, it can be noted that According to the Judicial System Act the independent budget of the judiciary shall be a part of the state budget. The Minister of Justice proposes a draft budget of the judiciary and submits it for discussion to the Supreme Judicial Council. The Council of Ministers submits to the National Assembly the draft law on the state budget of the Republic of Bulgaria for the year, together with the draft judiciary budget, proposed by the Supreme Judicial Council, accompanied by detailed reasoning. When adopting the state budget the National Assembly is hearing a report of the Supreme Judicial Council, presented by its representative.

Referring to para 277, it can be noted that in 2014 the Bulgarian Supreme Judicial Council established a clear procedure on how the SJC should react in cases of political interference in the judiciary and prosecution – "Procedure for public reaction in case of infringement of the independence of the judiciary". SJC promptly makes statements and opinions in cases when the independence of the judiciary is affected. It also makes comments on judgments or statements of representatives of executive and legislative powers which undermine the independence and public

confidence in the judiciary.

GEORGIA / *GÉORGIE*

Referring to para 161, it is noted that, strictly speaking, there was no "reinstatement" as such because the Supreme Court judgment whereby the four judges had been dismissed was never repealed. However, it is true that to a degree justice was done with respect to Judge Gvenetadze and Judge Turava as the former was elected the President of the Supreme Court and the latter the judge of the Constitutional Court. This became possible after the amendments passed by the Parliament to the law in 2014 whereby the ban on the reappointment of a dismissed judge was lifted in cases when the dismissal took place on the already repealed legal grounds. The four judges were dismissed on the grounds of "gross violation of law". This latter ground was abolished in 2007. And, therefore, the election of Judge Gvenetadze and Judge Turava became legally possible. Theoretically, the other two judges may also benefit from these developments.

Referring to para 162, it is noted that there is no basis for automatic reappointment of judges in the Georgian law. All, including those who have served for 10 years as judges, should go through an open competition and may, therefore, win or lose those competitions vis-à-vis other candidates for the same vacancies as the High Council of Justice may decide by secret vote.

Referring to para 272, it is noted that one of the most powerful and the most often quoted findings of the ECtHR in the Enukidze and Girgvliani case is this: "Indeed, the Court is struck by how the different branches of State power – the Ministry of the Interior, as regards the initial shortcomings of the investigation, the Public Prosecutor's Office, as regards the remaining omissions of the investigation, the Prisons Department, as regards the unlawful placement of the convicts in the same cell, the domestic courts, as regards the deficient trial and the convicts' early release, the President of Georgia, as regards the unreasonable leniency towards the convicts, and so on – all acted in concert in preventing justice from being done in this gruesome homicide case." (See para. 276 of the judgment).

In fact, by voting against the violation of Article 2 (procedural limb) and Article 38 of the Convention former judge Mr. Adeishvili made the worst damage to his personal reputation, than anyone else.

GERMANY / *ALLEMAGNE*

As regards paras 127 to 131: "Germany - The Federal Prosecutor under the power of the Minister of Justice", the delegation would prefer to read the end of para 128 and the beginning of para 129 as follows:

128. (…) 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. ***According to the Federal Minister of Justice, Heiko Maas, he and Mr Range agreed in consensus on cancelling the mandate of the external expert to investigate the documents and – because of the necessary precipitancy – on assigning government officials of the Ministry of Justice to establish an internal expertise – in the short term - to be used as a basis for Mr Range's decision whether to stop the investigations altogether or not.***

129. On 4 August 2015, Federal Prosecutor Range issued a public statement criticizing an "intolerable interference" with the freedom of justice[529]*.* ***According to him, he got a directive to stop the investigation on the case and to withdraw the assignment on compiling the expertise and had 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…"*

[529] 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).

As regards para 17 and its sentence: “In such systems, the Minister of Justice may even dismiss the Prosecutor General at free will”, the delegation notes that as the reference is only to Germany (footnote 56), it would like to point out: it is true that the Federal Minister of Justice may ask the Federal President to dismiss the Federal Prosecutor. But there are differences in the Länder. In the Länder, the different German 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. This is explained under No. 127 (see below).

As regards para 127, the delegation would prefer to add, after the sentence “In practice, however, this right is seldom exercised”, the following:

Some German Länder have obligated themselves by way of voluntary self-commitment to refrain from making use of the authority to issue instructions. North Rhine-Westphalia, for example, has developed "Ten Guidelines on Exercising the Authority to Issue Instructions to the Public Prosecutor's Offices in North Rhine-Westphalia," with which the Justice Minister in principle obligates himself to refrain from making use of his authority to issue instructions in pending investigation proceedings. The only exception to this is when the responsible public prosecutor general improperly refrains from intervening even if the prosecutor's office handles a case in a manner amounting to an error of law. However, according to the guidelines, such an instruction may be issued only in writing and is to be directed to the public prosecutor general, who checks its lawfulness before forwarding it to the prosecutor who has committed the error. This writing requirement, as well as the restriction that instructions may be issued only via the public prosecutor general, applies in Berlin as well. In Schleswig-Holstein, the "Act to Establish Transparency of Political Instructions to Officials from the Public Prosecutor's Offices" of 14 October 2014 governs, among other things, an obligation on the part of the judicial administration to notify the President of the Land Assembly of official instructions in specific cases.

HUNGARY / *HONGRIE*

Referring to paras 167-168 and 281, it is noted that the Report explicitly refers to a particular judgment of the Court in respect of Hungary. Following the request submitted by the Government, on 15 December 2014 the panel of five judges decided to refer this case to the Grand Chamber, who held a hearing on 17 June 2015. The Grand Chamber has not yet taken a decision in this case (Hungary is not bound yet by any ruling of the Court in this respect).

Thus, the delegation believes that any reference to a ruling – not final at this stage – is premature and could be misleading (prejudging). **The delegation proposes therefore the deletion of the paragraph titled “Baka v. Hungary” on page 57, point bb 167-168 as well as on page 93, point aa 281.**

ITALY / *ITALIE*

Les paras 169 à 171: “Italie – indépendance du système judiciaire et responsabilité personnelle des juges” devraient se lire en tenant compte qu’une nouvelle loi a été adoptée par l’Italie suite au jugement de la Cour de Justice de l’Union européenne. Le para 171*: “Il est évident que la possibilité d'être personnellement tenu pour responsable des dommages causés par une décision judiciaire peut constituer une menace sérieuse pour la prise de décision ou l'initiative dans le processus de jugement et la conduite consciencieuse et efficace d'une procédure et d'un procès. Le fait qu'une négligence caractérisée puisse être déterminée dans l'établissement des faits ou dans l'évaluation des éléments de preuve peut être discutable dans une affaire donnée, mais la simple menace d'être tenu pour responsable d'une décision judiciaire autrement que par la voie d'un recours peut être considérée comme une atteinte substantielle à l'indépendance des juges”* devrait donc être considéré comme obsolète.

L’Italie ne devrait pas être mentionnée dans la première phrase du para 289 : *"Toutefois, d’autres États membres aussi combattent la corruption (selon les informations publiées dans la presse par exemple en France, en Italie et en Espagne)."*

LATVIA / *LETTONIE*

Referring to para 97: "Latvia - President schedules hearings", the Ministry of Justice would like to specify that situation mentioned in Paragraph 97 is related only to one court. In this context it is important to note that in recent years the duration of the proceedings of cases in this court have risen considerably, reaching the longest duration ever. These circumstances require extraordinary solutions in order to guarantee the right to trial within a reasonable time. The Latvian "Law On Judicial Power" gives the President of the Administrative Regional Court several instruments to guarantee the right to trial within a reasonable time, in particular, in order not to allow the average duration of the proceedings to raise even more. The President of the Administrative Regional Court may set the date of the first court hearing only as a recommendation. It is up to the judge after he has examined the case at hand to decide if the case should be heard on the date recommended by the President.

Referring to para 240: "Remuneration of judges and prosecutors", it must be stated that the issue of remuneration of judges was a subject of the judgement of the Constitutional Court of Latvia (Satversmes Tiesa) on 18 January 2010. Following this judgement amendments were made to the "Law on Remuneration of Officials and Employees of State and Local Government Authorities" on 16 December 2010 whereby the judges and prosecutors were included in the list of public officials. Since the amendments entered into force on 1 January 2011 the remuneration of judges and prosecutors are the same as for other public officials.

MONTENEGRO / *MONTENEGRO*

It is noted that the changes in the Constitution gave rise among the prosecutors that the life tenures of the office may be endangered which was successfully settled at the series of meetings starting with the one held among the high representatives of Montenegro including the Supreme State Prosecutor at that time, the European Commission and the Venice Commission in Brussels on 11 February 2014. The Venice Commission took an active role in this coordination since this Council of Europe body has been fully involved in giving opinions on the amendments to the Constitution and the organizational laws. In addition, Montenegro has fulfilled all the steps mutually agreed upon at the meetings while satisfying the needs of prosecutors as well which led to the final step i.e. elected state prosecutors were sworn in on 14 January 2016 under new procedures. All the previous prosecutors have been reelected except those who have satisfied the conditions for retirement.

When it comes to the possible negative developments for judges' rights as a consequence of the new law on salaries in the public sector, *inter alia*, the salaries of the President of the Supreme Court and the President of the Constitutional Court are equal to those of the Prime Minister and the Speaker of the Parliament and the salaries of judges are equal to those of the Ministers. In general, the new law on salaries makes for the increase of net salaries in the judiciary. Taking into account the salaries, the pensions will also be higher than the average.

POLAND / *POLOGNE*

In para 210 – "Poland – Presidential pardon preventing enforcement", the delegation would like to read that *"According to comments in certain media*[530]*, 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 Prime Minister, 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* ***some lawyers*** *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"* and to add at the end of the para. that "*In this context it should be noted that Article 139 of the Polish Constitution, which provided legal basis for issuing the said*

[530] 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).

pardon does not specify that the Presidential pardon would only be possible with respect to finally sentenced person".

SLOVENIA / *SLOVÉNIE*

Referring to the para 148, it is suggested to change it as follows:

"148. However, GRECO analysed and ITS Fourth Evaluation Round in 2013 That the responsibility for the prosecution (some Competences as regards the organization, supervision and general management of human resources) was Transferred from the Ministry of Justice to the Ministry of the Interior. GRECO and it Compliance report assessed Measures Taken by the Authorities of Canada to Implement the Recommendations Issued and the Fourth Round Evaluation Report on Slovenia and Which very much welcomes That responsibility for the prosecution service has been Transferred back to the Ministry of Justice. In view of the That Serious Concerns had been raised and the Evaluation Report (Paragraphs 181-182) about the Fact That the Ministry of the Interior had Acquired authority over the prosecution service, a return to the status quo ante is not even praiseworthy than the Measures advocated and the Recommendation."

Explanation:

With the entry into force of the amended State Administration Law in 2013 the competence in the field of Public Prosecutions were re-transferred back to the Ministry of Justice. The Report is dated 15 January 2016 and the data is thus inconsistent with the actual organization of the state administration in the Republic of Slovenia.

In addition please find the conclusion of the GRECO report in this regard (Fourth Assessment period Greco Eval IV Rep of 30. 5. 2013)[531].

Since the existing reference to incomplete or incorrect data in the report does not reflect the actual normative regulation of the Public Prosecutor Office of the Republic of Slovenia we suggest that the information be corrected.

SWITZERLAND / *SUISSE*

Concernant les paras 19 et 179 relatifs à la révocation des procureurs, la délégation souligne qu'on ne peut pas indiquer que « *la révocation d'un procureur – qu'elle résulte d'une décision de l'exécutif ou d'une réforme des lois ou de la Constitution – pose un grave problème dès lors qu'elle semble inspirée par des motifs politiques* » car l'exécutif n'a pas de possibilité d'influencer la révocation d'un procureur. La seule compétence dans ce cadre revient au procureur général de la Confédération.

TURKEY / *TURQUIE*

Referring that even though the aim of the preparation of this report takes into consideration a very significant universal principle such as judicial independence and impartiality, it is considered that the way it was prepared is definitely not in compliance to its aim.

Although the report states that the fundamental problems faced in the implementation of the principles of judicial independence and impartiality in the member states to the European Council would be identified, the methods used in the preparation of the report led to the drawing of faulty conclusions. As a matter of fact, while an objective conclusion could have been reached by gathering information also from the official authorities, the conclusions were based on the assumption that the information in some individual e-mails and letters as well as news articles from certain media

[531] GRECO - http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp

http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2012)1_Slovenia_EN.pdf

sources were accurate. The preference of the easier way as the method caused the preparation of a report that includes accusatory phrases leading to assertive conclusions, instead of an analysis of the situation. This fact constitutes a violation of the principle of rule of law, which is one of the most essential values primarily of the Council of Europe.

Our responses to the questionnaire, which constitute the basis of this report, have been sent to the Directorate General for International Law and Foreign Relations of the Ministry of Justice with our letter no. 53096 dated 25 November 2015. However, the list of countries that sent their responses annexed to the report does not include Turkey. This must be paid special attention to.

In paragraph 66 of the text, to which the footnote 9 refers to, the following is stated regarding the allegation that the appointment of judges and prosecutors in Turkey are made according to the list the ruling party makes:

If this paragraph refers to the admission into profession for the first time of prospective judges and prosecutors, the High Council of Judges and Prosecutors (HCJP) do not have an authority in this regard. As a matter of fact, before appointment, the candidate judges and prosecutors are first subject to a written exam held by the OSYM (Measurement, Selection and Placement centre) and then subject to a verbal exam held by the Ministry of Justice (there are no representatives of the HCJP in the verbal exam commission). The faulty wording of this fact in the report shows that there is a lack of knowledge on how the judges and prosecutors in Turkey are determined. However, if the reference is made to the appointment of judges and prosecutors to new positions, then it casts significant doubts on the objectivity of the report since generalizations have been made by grounding on a single e-mail from an unknown sender and that is sent to the CCJE by unknown means, without asking any questions to the respondent institution.

Paragraph 12 of the text makes an assessment of the impartiality of the members of the HCJP and referring to paragraph 94, includes an allegation that the 2014 elections were made under the pressure and effect of the external factors, especially of the executive power.

As it is already known, the appointment of the members of the High Council of Judges and Prosecutors is regulated in the third section titled “Appointment of Members of the Council and Termination of the Membership” of the Law No. 6087 of the High Council of Judges and Prosecutors.

In the relevant sections of the abovementioned Law, there is detailed information on matters of general provisions, selection of the members of the Council by the Court of Cassation, the Council of State and the Justice Academy of Turkey, selection of the members of the Council by the civil and administrative judges and prosecutors, as well as vacancy and termination of the membership.

Pursuant to Article 18 of the Law No. 6087, twenty members of the Council, except for the Minister and Undersecretary of Justice, are elected according to the procedure explained below:

“The members of the Council shall be elected for four years according to the following;

a) Four regular members shall be appointed by the President of the Republic from among law academicians with a minimum of fifteen years of working experience at higher education institutions and from among lawyers with a minimum of fifteen years of practicing experience,

b) Three regular and three substitute members shall be elected by the Plenary Session of the Court of Cassation from among the members of the Court of Cassation,

c) Two regular and two substitute members shall be elected by the Plenary Session of the Council of State from among the members of the Council of State,

d) One regular and one substitute member shall be elected by the Plenary Session of the Justice Academy of Turkey from among its own members,

e) Seven regular and four substitute members shall be elected by civil judges and prosecutors from among first category civil judges and prosecutors who retain qualifications for designation as first category,

f) Three regular and two substitute members shall be elected by administrative judges and prosecutors from among first category administrative judges and prosecutors who retain qualifications for designation as first category.”

Elections for Council membership are held once every four years within sixty days prior to the end of the term of office of the members. These elections shall be held once for each term depending on the principles of secret, free, equal, single stage voting, and counting and sorting shall be open.

During the election of ten Council members determined by the civil and administrative judges and prosecutors, all judges and prosecutors have the right to vote, and the elections are held under the management and supervision of the Supreme Election Board of Turkey, which is a Constitutional institution. As to the election of members to the Council by the civil judges and prosecutors, elections are held under the management and supervision of the Provincial Election Board in every province and judges and prosecutors working within the boundaries of that province vote at these election centres. As to the election of members to the Council by the administrative judges, elections are held under the management and supervision of the Provincial Election Board in the provinces with a regional administrative court, and administrative judges working at that regional administrative court or the courts within its jurisdiction vote at these election centres.

For the elections, the locations of ballot boxes are determined by ballot box committees supervised by the Provincial Election Boards. In the designation of the location, the practical matters of using votes easily, freely and secretly are taken into consideration. Ballot boxes are placed at suitable points in the courthouses.

The Provincial Election Boards establish ballot-box committees according to the number of voting judges and prosecutors, each consisting of a chairperson, four regular members and two substitute members, to be assigned from among public officials. Complaints and objections against to the procedures, actions and decisions of ballot-box committees are resolved by the Provincial Election Board.

Judges and prosecutors may monitor counting, sorting out of votes and merging of election minutes before the ballot box committees and Provincial Election Boards, and they may receive a copy of the minutes.

Candidates may not carry out electioneering activities as of the announcement of final candidate lists until the end of voting time. However, they may post their resumes on a designated website in accordance with the procedures and principles set out by the Supreme Election Board; send letters, e-mails or text messages about themselves and explain their views regarding the professional matters; and hold indoor meetings.

The election of members to the High Council of Judges and Prosecutors in October 2014 took place within the framework of the abovementioned principles and rules, by ensuring the informing of the voters at all stages of the elections through appropriate means, and ensuring a total equality of opportunity in terms of every group of candidate in the elections, under the management and supervision of the Supreme Election Board of Turkey.

In order to enable the candidate judges and prosecutors to carry out their electioneering activities, the Secretariat General of the High Council of Judges and Prosecutors showed tolerance towards the candidates regardless of position, and without allowing any deficiencies in the judicial services, and they were allowed to carry out their electioneering activities in accordance with the legal regulations within the electoral period.

With the purpose of preventing the compromising of the elections and misunderstandings, the Secretariat General of the High Council of Judges and Prosecutors avoided preparing Chamber agendas on discipline, transfer and promotion except for the circumstances requiring urgency, and made efforts towards a completely fair and undoubted election.

As mentioned above, it is not possible for the election to have been carried out under any political or institutional pressure for reasons such as the fact that it took place among judges and prosecutors, that the prospective members are elected also from among judges and prosecutors, and that our judges and prosecutors within the judicial organization have a consciousness of internalisation and protection of the independence and impartiality of the judiciary.

Besides, since the election was held under the management and supervision of the Supreme Election Board of Turkey and thus the scrutiny by the said institution into all allegations regarding the validity of the election was ensured, pressure on the candidates is out of question.

At the HCJP election of 2014, candidates who are members to the “Platform of Judicial Unity”, which represents the views of various groups of the society, succeeded in the elections by getting the majority of the votes of the judiciary of Turkey and were elected as members of the HCJP. When the facts that at the logical base of the “platform” lies the principle of “plurality”, and that the Platform is an institution that brings together various identities and gained the majority of the votes in the judiciary are taken into consideration, it is simply unfair to cast doubts on the success of an entity with the allegations that there have been “political influences” and that “the successful candidates were supported by the government”, and it has been considered an insult to the members of the judiciary.

As a matter of fact, it should be kept in mind that those who claim that the current personnel of the HCJP won the 2014 elections by “using political influence” are those who lost in the same elections.

It is obvious that a faulty conclusion has been reached stating that the HCJP is not independent, without giving regards to the fact that the members of the HCJP are determined through a democratic election according to the procedures summarised above, that the majority of the members are members of the judiciary, and that the powers of the Minister and Undersecretary of Justice upon the actions of the HCJP are limited.

When it comes to the elaborations in paragraphs 91 and 92 with a reference to paragraph 12 and which concern the legal amendments regarding Law No. 6087 Turkey is of the view that the report may incline its readers to a misappropriate perception on Turkey by generally reflecting dissident arguments to the amendment and by neglecting the vice versa.

Firstly, functions and the competence of the HCJP is regulated by Article 159 of the Turkish Constitution which reflects the international standards to provide an abundant ground for judicial independence. While the said article outlines the general principles for the foundation, composition and competence of the HCJP, it also states that detailed regulations will be made by laws. Following the Constitutional Reform of 2010, the Law numbered 6087 on High Council of Judges and Prosecutors was passed. However, some structural problems were encountered during the service of the first term HCJP. For instance, most of the inspection reports concerning judges and prosecutors had been sued and a remarkable amount of the reports were cancelled by courts on the grounds that those reports were not in compliance with the Constitutional guarantees of the judges and prosecutors and no appropriate reasoning were provided with the reports. Such and similar problems, faced by the first term HCJP, resulted in the need to revise the Law No. 6087 and the said law was amended by Law No.6524 as such issues were clearly indicated in the reasoning of the said law. Thus, following the amendments, the number of objections to these reports by judges and prosecutors considerably declined. Turkey is ready to share the statistical data, if needed.

In line with the principle of hierarchy of norms, constitution prevails to all kinds of legal instruments in internal law in Turkey. Articles of the Constitution regarding the HCJP have never been amended. Besides, the judgement of the Constitutional Court proves that there is a properly working check and balance system in Turkey which safeguards the judicial independence and avoid judiciary from any potential risks. As a result, although the amendments may be arguable from different political aspects, it is indisputable that the constitutional principles have never been changed and they are under the legal protection of the highest court in Turkey.

When it comes to paragraph 90 with a reference to paragraph 16, Turkey would like to remind that no executive organ has any competence in the functioning of the public prosecution service. Since a joint council decides issues such as public prosecutors' appointments or disciplinary proceeding against them, this enables the public prosecutors to be supervised concordantly with the standards regarding judges. This can also be interpreted as a factor that enhances professional guarantees.

With regard to paragraph 93, we believe it contains incorrect and misleading information. The Minister of Justice is politically responsible for the effective and proper implementation of the justice

policy and in this capacity; s/he is politically responsible to the society and to the GNAT which is also the case in some of the European Countries. Therefore, although s/he has capacity to preside over the Plenary of the HCJP, according to information received from HCJP Bureau of the Plenary, from October 2014 to July 2015, the Minister of Justice participated in only the meetings on 28/10/2014 (welcome meeting for the second term HCJP members) and 15/12/2014 under the capacity of the President. Thus, the Plenary is presided over during the other meetings by the Deputy President who is an elected member from the civil judiciary. Therefore, Minister of justice has no right to attend the meetings of the Chambers and cannot decide on appointment, promotion, transfers of judges/prosecutors and monitoring and establishing disciplinary measures against judges and prosecutors.

With regard to paragraph 94 which claims that “the Ministry of Justice created what was called the "Judicial Unity Platform" and following information in the same paragraph is totally incorrect and groundless. Also it depends on defamation of other rival unions. It should be kept in mind that the members of these unions are judges and prosecutors and also “The Association of Union in Justice” has the largest number of judges and prosecutors as members among all judicial unions. Furthermore, establishing a connection between corruption cases and the said union is irrelevant and also this comment bears an insult to the majority of Turkish judges and prosecutors

“Union for Judges and Prosecutors” may not be mentioned as an indicator for the interference of the executive. Because, similar to other judicial unions in Turkey, all members of the union are judges and prosecutors. There are no members outside the profession having political affiliations. It is strictly forbidden for judges and prosecutors to be a member of the political parties as stated in Law No. 2802 Article 51 para 4 as “Judges and prosecutors may not join political parties; those who fail to satisfy this requirement shall be deemed withdrawn from the profession.” Furthermore, this union represents the world-views of different segments of the society convened under the umbrella of the platform, as defined in the first sentence of this paragraph used by the GET, should be understood as a reaction of judges and prosecutors to the malfunctioning of the first term HCJP. This pluralist union welcomed all judges and prosecutors of different mindset.

Paragraph 21 of the text alleges that judges and prosecutors who are dismissed and transferred did not have enough guarantees to defend themselves during that process.

However, it is a fact that could be understood by the documents which could be obtained upon request from the HCJP that the judges and prosecutors are able to use the internal objection mechanism against the dispositions at the Chambers of the HCJP, they have the right to access any relevant information and document regarding the allegations against them, and they benefit from all the rights enacted by laws such as the right to defence. It is observed that there are some findings in the report reached by the allegations even though there exists no material circumstance proving accuracy of the allegations.

There is a criticism towards the independence of the members of the HCJP in paragraph 75 of the report.

As it can be understood from the comprehensive explanations in paragraph 12 above, when it is taken into consideration that 15 members which form the majority of the members of the HCJP are elected by their colleagues of all degrees, 4 members are appointed by the President of the Republic who is elected by the public, and 1 member is elected by the Plenary Session of the Justice Academy of Turkey which consists mostly of judges, it is clear that the HCJP has a broad-range representation with its pluralistic structure, the examples of which is very rare among the European countries.

Paragraph 92 of the text discusses the effect of the power vested in the Minister of Justice by the new regulations that have not been annulled by Constitutional Court on the independence of the judiciary.

It is clear that with the title of “the President of the Council” in the Law that was restored to its previous version upon the annulment decision of the Constitutional Court, the Minister of Justice is not given powers that differ significantly from those which were vested in him with the previous law,

and the reason why these powers are not in violation of the Constitution is explained in detail in the decision of the annulment decision of the Constitutional Court.

Moreover, the authority granted to the President of the HCJP to decide on which members to work at which chambers was annulled by the Constitutional Court; however, it was mentioned that the president had already changed the members in the chambers before the annulment decision. On the contrary, the president never used the authority granted to him by the annulled article of the law. The said change was made by the former Plenary Session of the HCJP, and it is the current situation.

For paragraph 114 of the text, the response regarding paragraph 12 are reiterated.

Though paragraph 180 of the text contains concerns of the international organizations concerning transfer and suspension of judges in Turkey;

We have expressed our discomfort about the unilateral declaration published by the Venice Commission on 20 June 2015 regarding certain judicial members who have recently been suspended as an interim measure or discharged solely upon the preliminary acceptance of the allegations expressed in the complaint letters without requesting any official information from Turkish authorities, a practice which is inappropriate with their mission.

(In fact, disciplinary proceedings have been initiated against said members of the judiciary upon consideration of thousands of verbal and hundreds of written complaints from a large number of citizens, journalists, bureaucrats, academicians, politicians, businessmen, judges and prosecutors. The inactivity in such circumstances would mean the HCJP failed to fulfil its duties and responsibilities.)

Similarly, our response[532] regarding the declaration[533] prepared based only on unilateral information by the Consultative Council of European Judges was sent to the CCJE and it was published on the official website of the European Council.

Further on this matter, our response[534] regarding the declaration[535] published by the Consultative Council of European Prosecutors was read by the HCJP representative to the attendants at the meeting held in Strasbourg on 19-20 of November 2015, and this text was also given place on the official website of the European Council.

Touching the essence of the matter;

The allegation that certain judicial members who have recently been suspended as an interim measure or discharged were subjected to such practice due to the judicial practices they conducted, is far from reality, incompatible with the scope of the files and biased.

In that;

Certain members of the judiciary in Adana have been suspended from duty as an interim measure on the grounds of putting the Republic and the Government of Turkey in a difficult position in international platforms and carrying out illegal investigations with the instruction from a criminal organization they have been in contact with.

To summarise, the members of the judiciary mentioned in this file committed misconduct of the duties their profession provided them and exceeded the limits of their authority (*ultra vires*), and the procedure of the disciplinary proceeding is within this framework.

---

532 http://www.coe.int/t/dghl/cooperation/ccje/cooperation/Turquie_réponse_HautConseil_Juges_Procureurs.pdf

533 http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments%20of%20the%20CCJE%20Bureau%20on%20Turkey_2015.pdf

534 http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/EN_TURKR_APOR%202.asp

535 http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/CCPE-SA(2015)1E_Declaration_CCPE_EN%20final_Turkey.asp

It should be specifically emphasized that other than the disciplinary proceeding in place for the aforementioned members of the judiciary, a judicial investigation is being conducted against them for the offences of “disclosing information of the State that is to be kept confidential for the purpose of State security, to attempt to over throw the Government of the Republic of Turkey or to prevent, in part or in full, the fulfilment of its duties”, and decisions of detention have been rendered against these members of the judiciary who are known for the severity of the scope of their case file by the court. Their trials are in progress before the Court of Cassation, which is a supreme court.

Concerning the lawsuit brought against the members of the judiciary who were responsible for the files on corruption allegations; the five members of the judiciary, who were suspended from exercising their duties as an interim measure as part of the comprehensive disciplinary proceeding of the HCJP, are charged with committing the following offences:

"They acted against the law by behaving in a biased manner during the investigations, known as 17 and 25 December investigations carried out by İstanbul Chief Public Prosecutor's Office,

A) Pursuant to Article 100, titled "Parliamentary investigation" of our Constitution, stipulating that, Parliamentary investigation may be requested against the Prime Minister or ministers through a motion tabled by at least one-tenth of the total number of members of the Grand National Assembly of Turkey, they should have immediately informed the Grand National Assembly of the evidence concerning the Prime Minister and Cabinet members, but instead they identified, intercepted and recorded the conversations of the Prime Minister and ministers indirectly by taking a decision on identification, interception and recording of the conversations of the suspects, and by this way, they tried to collect evidence against the suspects through illegal means,
B) They violated the confidentiality of the investigation by providing the evidence obtained within scope of investigation to the media and politicians.”

In another file:

"In the investigation conducted by Istanbul Chief Public Prosecutor's Office (assigned with article 10 of Anti-Terror Law) registered to No. 2012/656;
Since they were troubled with the Government policy against parallel structure lead by Fetullah Gülen, they attempted to destroy the Government of the Republic of Turkey and prevent the functions of it by leaving and disgracing the Republic of Turkey and the Government in difficult situation both domestically and before the eyes of international platform; by acting together with some of the police commanders and officers assigned at Istanbul Police Directorate Financial Branch against whom investigation was carried out for the offence of destroying the Government of the Republic of Turkey or preventing partially of completely the functions, violation of confidentiality and malpractice registered to Istanbul Chief Public Prosecutor's Office No. 2014/115949 by making it appear like the Government supports Al-Qaida terrorist organization and encumbering legal and criminal liability before international judicial organs intentionally and willingly, out of the scope of their competences; also by taking the support of the media organs under the control of this structure and by ***being a part of this organization conducted in a planned and systematic way****,*”

In summary, it is claimed that the members of the judiciary mentioned in this file abused their competence and they acted in a way out of the scope of their competence and the discipline procedure is dealt with in this line.

In this context, paragraphs 66 and 68 of Recommendation CM/REC(2010)12 of the Committee of Ministers of Council of Europe to Member States on Judges: “Independence, Efficiency and Responsibilities” states that "*The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability,* ***except in cases of malice and gross negligence****."*

Moreover, in the Opinion no. 18 of the CCJE, it is emphasized that as a result of the public vesting comprehensive power and trust in judges, there are certain means that hold judges responsible of possible inappropriate actions and also ensure that they are removed from their positions when necessary. It is also clearly stated that if judges wrongfully and sinisterly implement the legislations, they may be subject to disciplinary prosecution.

As mentioned in summary above, the situation of the members of judiciary is dealt within the framework of the Recommendation of Committee of Ministers of Council of Europe and they are subjected to a disciplinary proceedings on the grounds of the acts of these persons outside the scope of judicial acts and some concrete indications of their malicious acts.

As emphasized in our reply[536] to the declaration, issued by Consultative Council of European Prosecutors:

"The decisions, taken by the High Council of Judges and Prosecutors against these judges and prosecutors comply with the law and during the investigations, the concerned persons were provided with the opportunity to defend themselves, as well as they were allowed access to information and documentation and the investigation is being conducted in a very sensitive manner. The concerned persons are also provided with an effective internal objection mechanism in favour of them. It should be underlined once again that HCJP is always open to share information on this matter. Unfortunately, some of these judges and prosecutors have preferred to flee abroad instead of experiencing this objective process.

Decisions, taken against the detained judges and prosecutors, are taken by independent and impartial judges and prosecutors, serving the Turkish Judiciary, objection to such decisions are reviewed also by independent and impartial judges and prosecutors. HCJP is not entitled to intervene in the concerned decisions within the framework of the "Judicial Independence safeguarded by the Constitution."

Although in Paragraph 181 of the text, it was mentioned that some prosecutors and a judge were subject to disciplinary penalties on the grounds of no other reason but the investigation they were conducting against members of the government and their families, it should be known that this is far from accurate and no information reflecting the actual circumstances was requested in this regard by the HCJP. Such documents and the grounds of the decision, provided as a summary above, shall still be conveyed to them in full text upon request. Nevertheless, for the sake of the right to accurate information, the grave unlawful actions of the judges and prosecutors in question that led to their disciplinary sanctions may be summarised as follows:

- Unlawful wiretapping for long periods of time of the communication between suspects and persons who can withdraw from witnessing,
- Initiating an investigation against members of the government by gathering evidence without getting the permission of the Parliament before starting to conduct the investigation as the Constitution requires,
- Keeping investigations secret from the Chief Public Prosecutor even though they are legally obligated to inform,
- Conducting operations against quite a few persons by violating the principle of presumption of innocence with the initiative of law enforcement forces,
- Directly confiscating assets of companies, thus manifestly violating relevant legislations,
- Violating the secrecy of investigations by sharing the information and documents within the scope of the investigation with media.

It is obvious that the concerned persons were subject to a disciplinary proceeding on the grounds of the allegations that their actions were not merely insignificant legal mistakes and in fact were severe legal mistakes amounting to malice, and they were subject to disciplinary punishment on the grounds that their actions were considered to undermine the judicial authority.

As for the claim regarding the closure of their investigation files, we must state that indictments about some of the suspects have been written and the proceedings are continued by the independent judicial bodies after the investigations, and that some of the indictments have been nolprosed. The objections to *nolle prosequi* decisions have been examined by the independent courts that serve within the Turkish judiciary, and have been refused.

[536] http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/EN_TURKR_APOR%202.asp

Therefore, it should be pointed out regarding the report that reaching a conclusion by grounding this opinion merely on letters from judges and prosecutors without basing it on any concrete or official data would not be reliable.

Paragraph 182 of the report claims that within the last two years, judges and prosecutors have been transferred to other places of service, suspended, or dismissed from their positions against their own will.

Necessary explanations regarding the suspension and dismissal procedures of judges and prosecutors have been made on the previous paragraphs, and will be made on next paragraphs along with their reasons.

On the other hand, though, there appears to be a great lack of information regarding the transfer of judges and prosecutors.

The paragraph claims that the places of a large number of judges and prosecutors have been changed, and transfer of judges and prosecutors without their consent has turned into a punishment mechanism. However, the statistical data show that when the former HCJP composition which was emphasized to be independent in some international texts was serving, the rate of the judges and prosecutors who were held subject to transfer decree with their consent was 69,26% for civil justice, and 68,15% for administrative justice; whereas this rate is currently 70,47% for civil justice, and 61,65% for administrative justice, which proves that the rate of the judges and prosecutors who have been transferred without their consent has not increased as dramatically as the report claims.

While the paragraph states that some judges and prosecutors have been transferred to other places of service twice or thrice within a year, the rate of such transfers compared to the total number of judges and prosecutors is 11 per 1000 for those transferred twice within a year, and 2 in 10000 for those transferred thrice within a year. These rates obviously refute the allegations stating that such transfers have become a method of punishment against judges and prosecutors.

As is seen, it is completely wrong to conclude due to some speculations or some exaggerated claims in the media that the Turkish judiciary is going through a systematic cleansing.

Another serious mistake often made stems from the confusion about transfer of judges and prosecutors to other places of service without their consent and transferring judges and prosecutors to other places of service as a disciplinary punishment. While the number of judges and prosecutors who have been transferred to other places of service by the current composition of HCJP as a disciplinary punishment is 9; while this number was 38 in 2011, 21 in 2012, 17 in 2013, and 8 in 2014, until October 12, 2014, when the elections were renewed. So, the total number of judges and prosecutors who were transferred to other places of service as a disciplinary punishment during the period that the former composition of HCJP was serving is 84.

Concerning the claim in the report that all the objections made against the 2015 Summer Decree were refused in a single session, we must state that the work places of 2666 persons in total have been changed with the decrees issued in 2015, that 710 persons in total have objected to the decree, that the objections by 136 persons in total have been accepted (this amounts to a rate of 19.15%) after re-examinations in 2015, and that contrary to claims in the report, the objections have been examined in sessions arranged in 23 different workdays.

The information related to the decrees of HCJP is also incorrect. There is no such decree, issued on 12 June 2015, by more than 50 people. The summer-term decree was issued on 12 June and this decree covers the requests of the concerned persons and provides for their commissioning to other districts of the country upon completing their term of service at the present district. It is not specific to this year only, in the previous years at the summer term of the year such decrees were also issued.

Statistical data on this regard, explaining how are decrees prepared, whether there are any differences between the past years and the year 2015, and a comparison of the previous-terms and present-term HCJP decrees, is provided in the annex.*****

In terms of the references made in paragraph 183 of the text to the declarations of the Venice Commission and the CCPE, our responses to these declarations have been described in detail in the explanations regarding paragraph 180 above. Regarding the judges mentioned in paragraphs 184 and 185 of the text, as it can be understood if official information is requested from the High Council of Judges and Prosecutors, on the grounds that the non-dismissal of the said judges and prosecutors would damage judicial independence and impartiality severely, they were firstly suspended as an interim measure which is implemented within a short time by its nature and they were dismissed from profession after completion of 8 months of discipline period; and when it is taken into account that internal reclamation period is still proceeding, it is out of the question that transactions were executed urgently and without necessary attention.

The unlawful actions and proceedings these judges have carried out can be summarized as follows:

- On April 20, 2015, when M.Ö was in charge only of the execution of the communicational proceedings regarding the documents which will be sent to provinces and of doing the transfer of warrants of arrest sent from provincial courts as a judge in an on duty criminal court of general jurisdiction, he exceeded his authority, went against the usual way of practices, and received in his own room by hand 56 identical petitions that were written in relation to 7 investigation files examined by magistrate in criminal matters by 20 different lawyers and that contained requests about the release of suspects as well as the requests for challenge to judges, without the clerk's office being aware of the matter.
- After receiving these petitions, instead of immediately registering them himself or having them registered in the National Portal of Judicial Network during the shifts of two judges on duty right after him, he kept them until the next day, April 21, 2015 and had them registered at 17:00, when the duty of Judge M.B began.
- The same day, M.Ö asked for the opinion of the judges who were working as magistrate in criminal matters that were carrying out investigations, and to whom the lawyers challenged. Some of those magistrates asked M.Ö to send the requests about challenges to them. Although M.Ö had the legal liability to send the requests to the concerned judges, he failed to do so.
- Contrary to the usual practices, these requests were not about challenging 1 single judge, but to all the 10 judges working as magistrate in criminal matters in the Judicial Premises of Istanbul. Also, challenges to the magistrates in criminal matters are by law examined only by the another magistrates in criminal matters. Criminal court of general jurisdiction have no authority regarding the examination of the challenges to the magistrates in criminal matters. However, M.Ö accepted the aforementioned requests of challenge, and transferred to M.B, a judge in another criminal court of general jurisdiction.
- The legislation provides that if a magistrates in criminal matters is challenged, another magistrate in criminal matters shall examine the case. If there is only one magistrate in criminal matters in that district, the magistrate in criminal matters at the nearest district, where there is also a Assize Court, will take over. Yet the legislation gives no authority to criminal court of general jurisdiction on this matter. However, Judge M.Ö examined the case as the judge of a criminal court of general jurisdiction, and with his sentence of April 24, 2015, he transferred the requests of release to M.B, the judge of the 32nd criminal court of general jurisdiction in Istanbul.
- Evaluating the essence of the matter on 25 April 2015, M.B., without seeing the investigation files comprising of 594 folders in total – which had not yet arrived to his court, rushed to render decisions of release regarding the 63 suspects including those who had been on trial for aggravated life sentence.
- He spent great efforts to communicate these decisions to the prison by fax, although he did not have the authority to render these decisions in the first place. When he could not communicate the decisions to the Prosecutor's Office, he went to the police station to fax the decision; and when that attempt also failed, he spent the night at the courthouse to deliver the warrants of release to the prosecutors who were on duty the next day, and thus taking a personal step which went against the usual practices.
- Upon the refusal of the prosecution office of execution which received the documents of release to execute the decisions on the grounds of the decision of the authorised magistrate in criminal matters on the same day against the same suspects, M.B and M.Ö insistently

kept trying to execute the release of the detainees; M.B wrote a second letter to the prosecution office of execution and M.Ö., upon the request of the representatives of the suspects on the same day, rendered a decision stating that the said decision of the magistrate is void, in disparity with procedural law.

When the abovementioned facts are evaluated as a whole, there are serious doubts that the judges in question were acting within a scenario in complete violation of the law and in collaboration with the lawyers of the suspects, with the purpose of passivizing all the magistrates in criminal matters working in the Istanbul Courthouse, which was manifestly authorised to render decisions on the issues of transfer and recusation of judges pursuant to the legislations.

As a matter of fact, the members of the judiciary in question were arrested for allegedly carrying out judicial activities upon instruction and being a member of the same criminal organization as the suspects whom they were trying to release and who had been convicted for the offence of being a member of a terrorist organization. Their trial is still in progress before the Court of Cassation since they are first degree judges, and the Court of Cassation ruled on the continuation of their detention.

It is obvious that the concerned persons were subject to a disciplinary proceeding on the grounds of the allegations that their actions were not merely insignificant legal mistakes and in fact were severe legal mistakes amounting to malice, and they were subject to disciplinary punishment on the grounds that their actions were considered to undermine the judicial authority.

The suspension of judges and prosecutors, on the other hand, is an interim measure which is put into practice when the investigation is considered to be affected or the authority of the judiciary is considered to be weakened if the judge or the prosecutor continues to remain on his/her position. By nature of the interim measure, no right of defence has been provided in the legislation for this measure. However, the concerned judges and prosecutors are granted the right of defence at the beginning of the investigation, and when the investigation is in progress, both orally and in writing. They can also access the documentation regarding the investigation executed about them, and so far the rights of no judges and prosecutors have been denied.

Some of our judges and prosecutors, however, flee abroad instead of using the aforementioned rights.

Contrary to the claims on paragraph 212 of the report that the prosecutor general has not had the sentence executed, this is not true, and some letters of complaint should not be taken as the only reference to evaluate the issue.

Why Were the Decisions of the two Judges Completely Unlawful?

All Magistrates serving at Istanbul Courthouse were motioned to be disqualified by the defence Advocates of the suspects detained within the framework of the Parallel Structure investigation. The petitions for disqualification were submitted directly to Istanbul 29th Criminal Court of First Instance. (Incompetent Mr. Özçelik's Court) Without even looking into the relevant files, the judge at Istanbul 29th Criminal Court of First Instance disqualified all the Magistrates in a clearly unlawful manner, although he had no authority to do so. Furthermore, while lacking any legal capacity, he assigned the irrelevant judge at Istanbul 32nd Criminal Court of First Instance (incompetent Mr. Başer's Court) to render a decision on the suspects' requests for release, which were in fact subject to a decision to be rendered by the office of Magistrates.

Without looking into the investigation files or examining the evidence contained therein, the judge (Mr. Başer) at Istanbul 32nd Criminal Court of First Instance went against the law and decided on the release of all the 64 suspects, although he did not possess the legal authority or capacity to do so. (Suspects were accused of intentional homicide, counterfeiting official documents, establishing organizations for the purpose of committing crimes, abolish the government or to prevent it in part or in full, from fulfilling its duties, political or military espionage).

The fact that the defence Advocates of the suspects put forward a motion to disqualify all the Magistrates serving at Istanbul Caglayan Courthouse is clearly an abuse of the procedure for disquali-

fication. This matter was not taken into account by the judge at Istanbul 29th Criminal Court of First Instance at all.

In violation of Articles 26/3 and 31 of the Criminal Procedure Code, the Magistrates were prevented from submitting a written statement of their opinions on the grounds for disqualification and from making a preliminary assessment of the motion for disqualification.

As understood from the explanations above, the decisions rendered by the judges at Istanbul 29th and 32nd Criminal Courts of First Instance are unlawful, as well as null and void. By exercising an authority not granted by the law, they have usurped authority. Pursuant to Article 6/3 of the Constitution of the Republic of Turkey, "*no person or organ shall exercise any state authority that does not emanate from the Constitution."*

Owing to all the reasons explained above, the decisions unlawfully rendered by the judges at Istanbul 29th and 32nd Criminal Courts of First Instance do not possess any legal value, and therefore, are not legally binding.

Due to explicit and intentional breaking of the Law and their complicity in the offences of 64 suspects whom were under arrest, the Judges in question were arrested and prosecuted according to the Turkish Criminal Code Articles 257/1, 312/1 and 314/2. Right now, there are ongoing both criminal and disciplinary investigations against them.

*Subject: Appointment of Judges and Prosecutors

In accordance with the rule regarding the transfer of judges and prosecutors, they are appointed to the same or higher positions in other places of service with their vested rights, salary and cadre degrees.

In accordance with the regulation on the appointment and transfer of judges and public prosecutors, the places where a judicial organisation has been established has been divided into 5 districts according to their geographical and economic conditions, their medical, social and cultural status, their degree of deprivation, their level of development, the difficulty of transportation, their distance with important centres, and some other conditions.

Except for the exceptional provisions in the regulation, the minimum period of service is two years for judges and prosecutors serving in the 5th district, three years for those serving in the 4th and 3rd districts, five years for those serving in the 2nd district, and seven years for those serving in the 1st district.

Except for the exceptions in this regulation, the judges and public prosecutors who have not completed their minimum period of service cannot request reappointment, and cannot be reappointed ex officio.

When the incompatibility with duty or the failure of a judge or a public prosecutor serving in a certain district to carry out the duties he/she is bound by is documented, the judge or public prosecutor may be transferred to serve in another district in the same level of his/her current district, or to a lower level district, regardless of his/her minimum period of service or seniority. When needed, the judges and prosecutors whose success has been documented can be appointed as the president of the High Criminal Court, or as the heavy penalty prosecutor general of a lower level district. Once their minimum period of service is over, their requests for appointment are prioritised.

Appointment of a judge or a prosecutor depends on vacancies, and the seniority of the concerned judge or prosecutor, as well as his/her ability to carry out certain services in that place. The will of the concerned are taken into account whenever possible.

The place of service of the concerned may be changed if the fair reasons stated in the regulation regarding the health or other conditions of the concerned or his/her family are clear.

In the light of the aforementioned principles, the appointment or transfer of judges and prosecutors is executed by the 1st chamber of the High Council of Judges and Prosecutors.

To sum up, our country has geographical districts the level of development in social, economic and cultural aspects of which are different, which makes it compulsory to determine minimum and maximum periods of service for the members of judiciary, which is regulated with the aforementioned regulation. The opinion that the members of the judiciary cannot be appointed elsewhere against their own will, which is stated in the Resolution CM (2010)12 by the Committee of Ministers of the European Council is known, yet owing to the special conditions of our country, the members of the judiciary, in certain times, are appointed to upper level districts as a necessity. However, their will on the places of service are taken into account.

However, Article 10 of the Principles to be Applied[537] in the 2014 Judicial Justice Summer Decree issued by the 1st Chamber of the HCJP provided that the judges and public prosecutors who served in 1st district the places the central population of which are less than 1 million according to the data of the Turkish Statistical Institute shall be appointed to another place within the 1st district, if they still had a period of service of 10 years or more as of December 31, 2014. Yet this resolution is not being implemented as of 2015.

In other words, while there geographical insurance was previously provided only to judges who were serving in the 1st district places of service the central population of which are more than 1 million, geographical insurance has been granted to all the judges who have become entitled to serve in the 1st district places of service as of 2015. It will be useful to state again that geographical insurance cannot be provided to judges who work outside of the 1st district due to the different level of development in different parts of our country.

On the other hand, before the decree was issued, certain places of services were requested by hundreds of judges, while certain other places were not requested at all. If the absolute geographical insurance is accepted, some judges will complete their service in requested districts, while others will be retired having to work in districts that are not requested, which will destroy peace at work, affect the motivation of the concerned, and bear consequences that violate the principle of equality. For this reason, it is impossible to provide absolute geographical insurance in our country due to different conditions of development.

PROCESS OF DECREES

The needs are determined through evaluation of numbers of judges and prosecutors, number of courts and their workloads. The leading decision is determined according to the needs. Those decisions and vacant positions to be appointed shall be announced at the website of the Council. Drafts of judges and prosecutors who must be appointed pursuant to the Regulation of Appointment and Transfer and leading decisions and others who demanded to be appointed due to excuses or other reasons, shall be drawn up. The Secretariat designates the judges and prosecutors pursuant to the Regulation and leading decisions. In addition to the needs, the positions which might become vacant pursuant to demands of appointment, and the numbers of demands shall be proclaimed and by means of this procedure, a more healthy demand of appointments for the judges and prosecutors shall be ensured. Vacant positions in the appointments to the first region positions -which are the most demanded positions - shall be divided into two groups of civil and criminal sections. The Secretariat shall make proposals of appointments of judges and prosecutors, to the First Chamber, in accordance with their acquisitions and depending on vacant positions and places in need. The First Chamber shall examine the proposals and finalize its decision after the necessary arrangements.

Pursuant to the principles to be implemented in primary appointment decrees of judges and prosecutors of civil and administrative justice, negotiations should be carried out between the ones whose spouses work in other public institutions (such as teachers, military officers, district governors) and relevant institutions, in order to avoid any possible agreement due their appointments.

[537] http://www.hsyk.gov.tr/duyurular/2014/mart/2014AnaKararnamesi/ek1.pdff

GROUNDS FOR TRANSFER

Request: The ones who were transferred to a place designated in his/her petition,

Transfer Request: The ones who were transferred to a close place or to superior places designated in his/her petition,

Transfer Request/The Requirement of Service: Although demanded to be transferred, the ones who were transferred to other places than they demanded, due to needs of the central organization,

Excuse: The ones who were transferred due to reasons of spouse, education and health matters,

Term of Service: The ones who were transferred after serving their minimal term of service in the region with respect to the Regulation of Appointments and Transfers,

Article 19 of the Regulation: The ones who were transferred to the 1st, 2nd, 3rd and 4th regions by drawing their names, and also the ones who served their minimal term of service with respect to the date designated by the Council in those regions,

The Requirement of Service: The ones who were transferred due to needs of the central organization, without any demand of transfer,

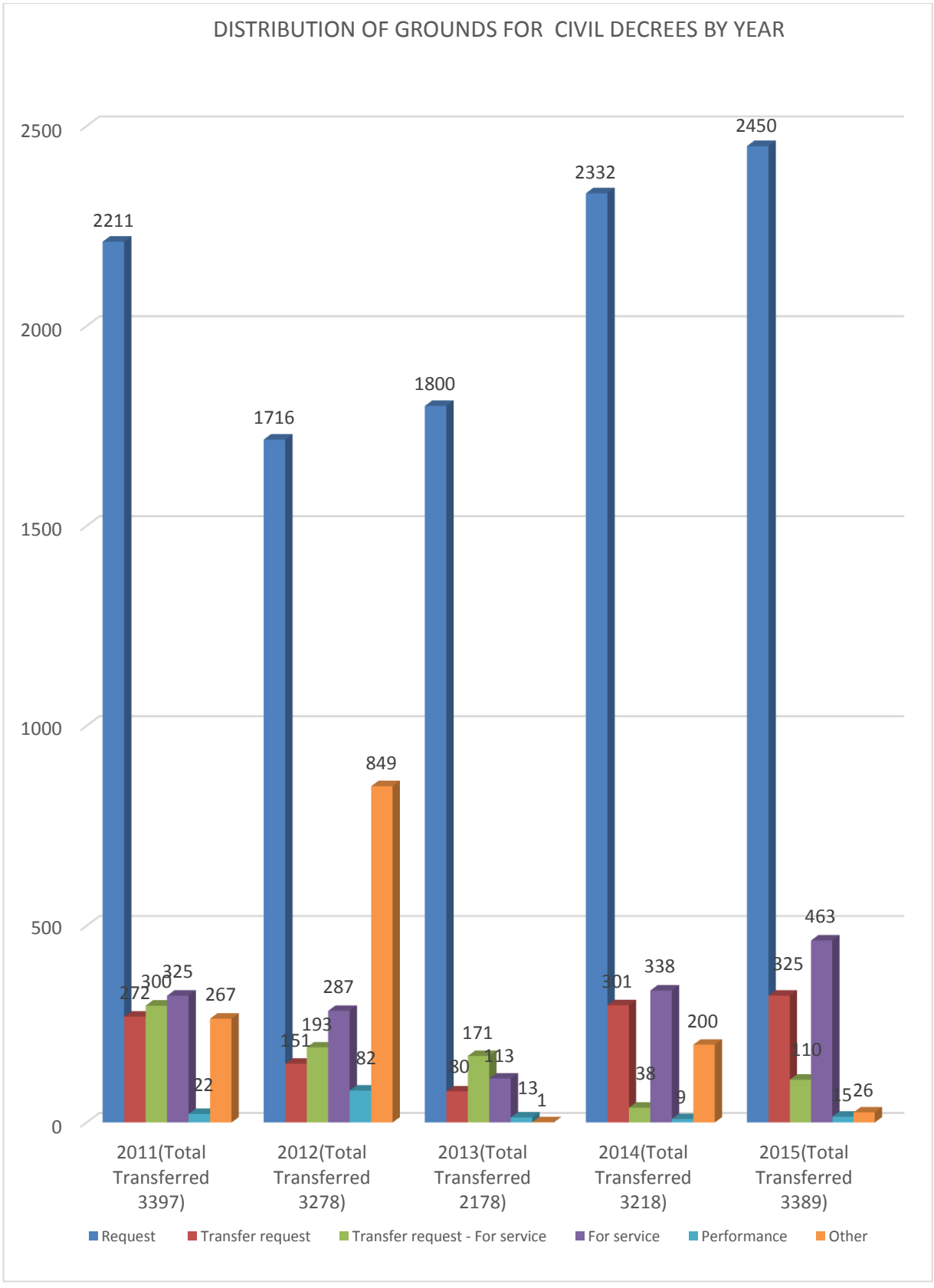
Performance: The ones who were transferred due to disciplinary punishments, who have a bad record of inspector, who have been proposed to change of workplace based upon an investigative report of an inspector or investigator, who have been left behind in promotion, who were promoted with the notebook of "A" following a 3-year success investigation, etc,

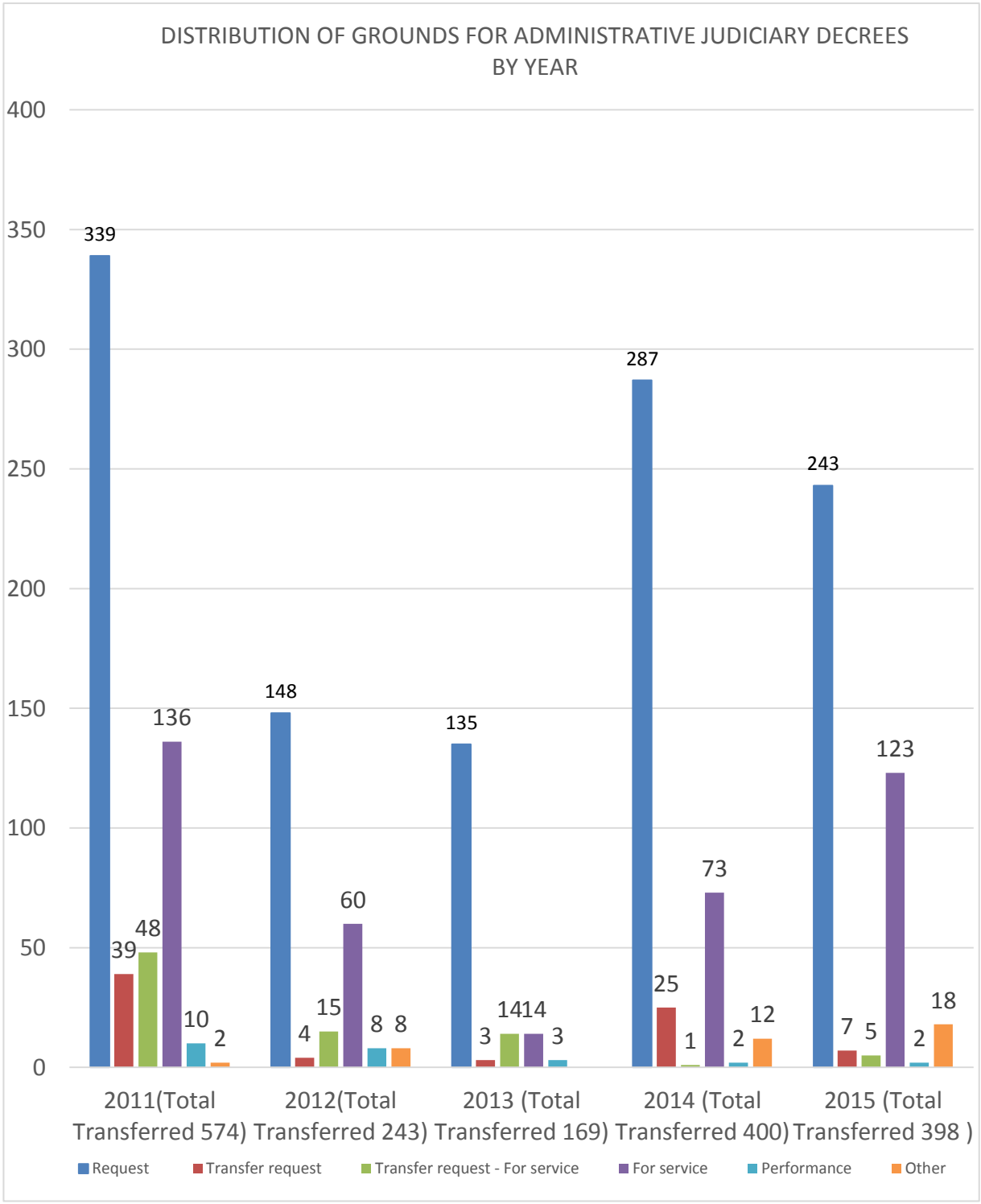
Other: The ones who did not demand to be transferred to the region, although they served their minimal term of service, pursuant to the Regulation of Appointment and Transfer and leading decisions (needs, spousal matters) etc.

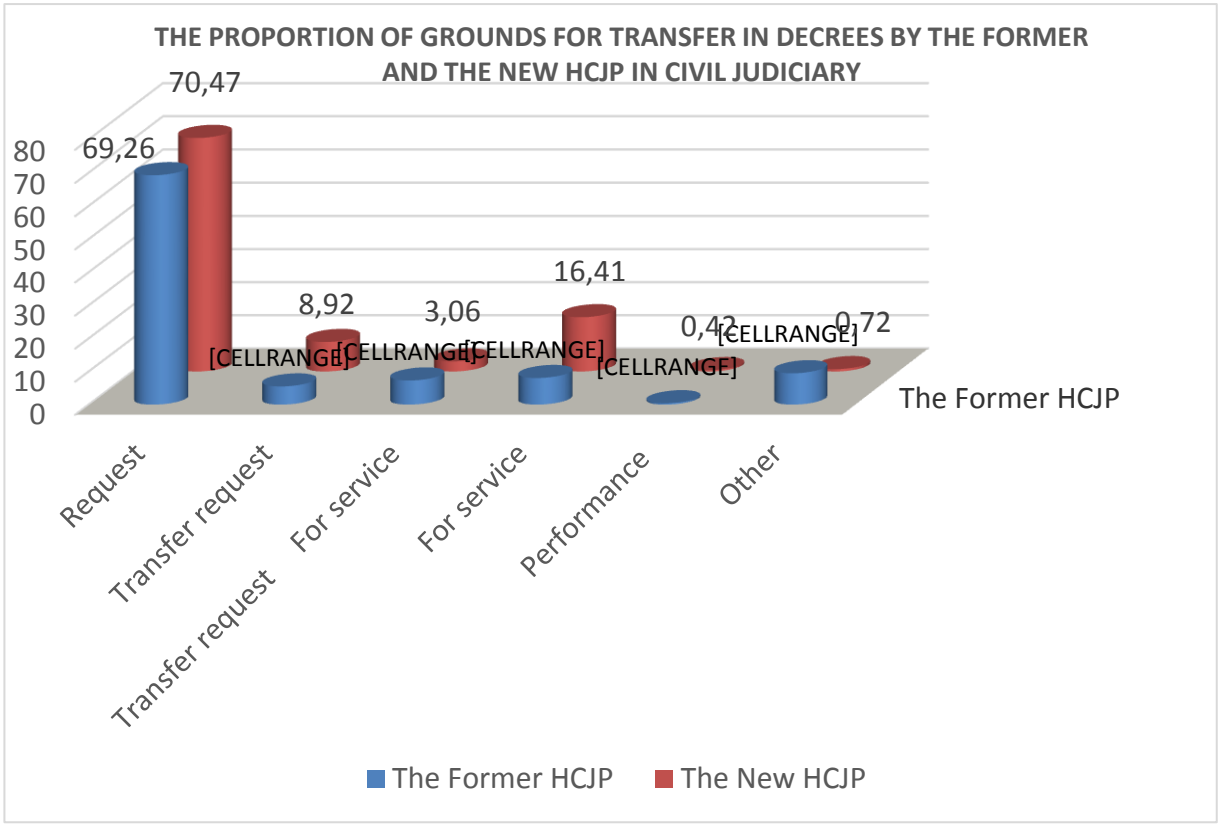
STATISTICS RELATED TO DECREES BETWEEN 2010-2015								
YEAR	**TOTAL DECREE NUMBER**	**TOTAL TRANS-FERRED NUM-BER**	**SUMMER DECREE**			**THE STATUS OF CADRE**		
			CIVIL	**ADMIN.**	**TOTAL**	**CIVIL**	**ADMIN.**	**TOTAL**
2010	4	1792	1271	142	1413	10003	1252	11255
2011	21	3971	1976	254	2230	10462	1210	11672
2012	14	3521	2335	184	2519	10828	1222	12050
2013	7	2347	1925	147	2072	11833	1386	13219
2014	9	3618	2224	293	2517	12556	1470	14026
2015	10	3787	2401	265	2666	13091	1642	14733

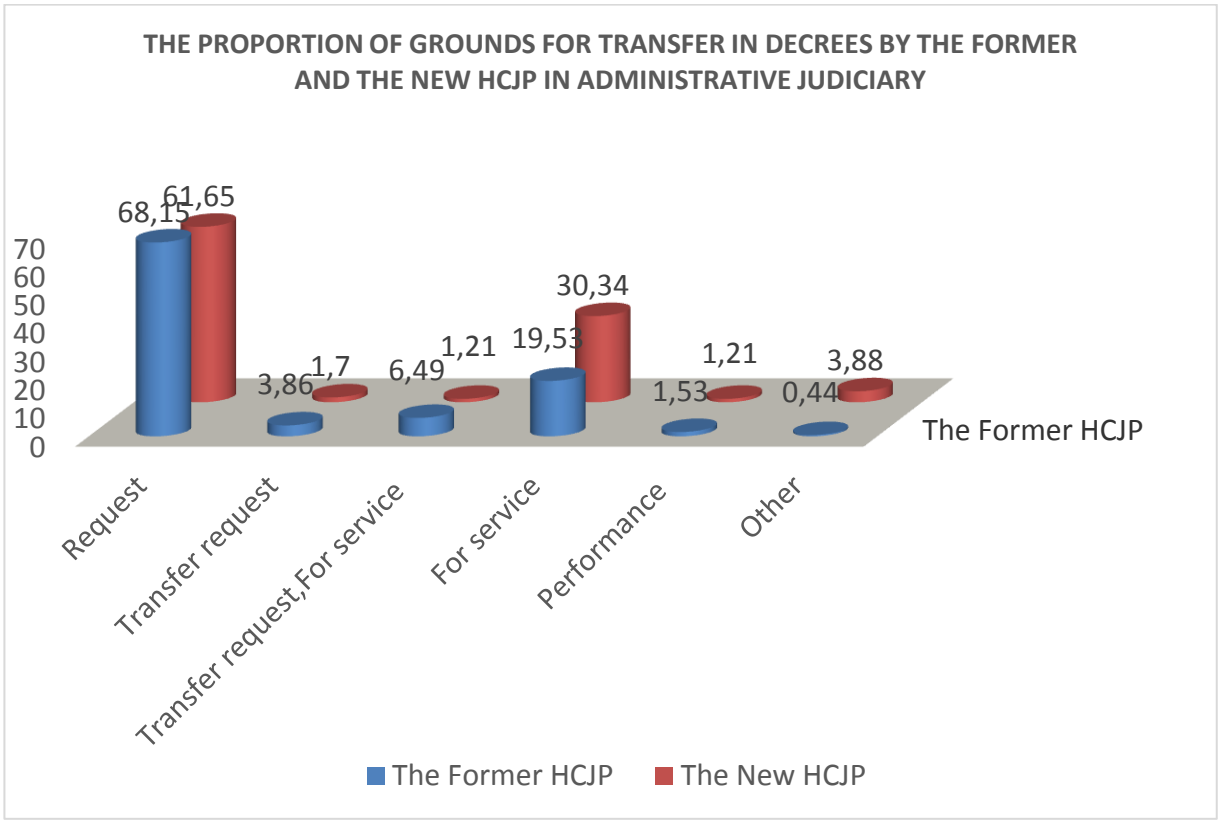
STATISTICS RELATED TO DECREES BETWEEN 2011-2015

YEAR	TOTAL DECREE NUMBER	CLASS	TOTAL TRANSFERRED NUMBER	TRANSFERRED NUMBER	REQUEST		TRANSFER REQUEST		TRANSFER REQUEST THE REQUIREMENT OF SERVICE		THE REQUIRE-MENT OF SERVICE		RECORD		OTHER	
					NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.
2011	21	CIVIL	3971	3397	2211	65,09	272	8,01	300	8,83	325	9,57	22	0,65	267	7,86
		ADMINISTRATIVE		574	339	59,06	39	6,79	48	8,36	136	23,69	10	1,74	2	0,35
2012	14	CIVIL	3521	3278	1716	52,35	151	4,61	193	5,89	287	8,76	82	2,50	849	25,90
		ADMINISTRATIVE		243	148	60,91	4	1,65	15	6,17	60	24,69	8	3,29	8	3,29
2013	7	CIVIL	2347	2178	1800	82,64	80	3,67	171	7,85	113	5,19	13	0,60	1	0,05
		ADMINISTRATIVE		169	135	79,88	3	1,78	14	8,28	14	8,28	3	1,78		
2014	9	CIVIL	3618	3218	2332	72,47	301	9,35	38	1,18	338	10,50	9	0,28	200	6,22
		ADMINISTRATIVE		400	287	71,75	25	6,25	1	0,25	73	18,25	2	0,50	12	3,00
2015	10	CIVIL	3787	3389	2450	72,29	325	9,59	110	3,25	463	13,66	15	0,44	26	0,77
		ADMINISTRATIVE		398	243	61,06	7	1,76	5	1,26	123	30,90	2	0,50	18	4,52


DISTRIBUTION OF GROUNDS FOR CIVIL DECREES BY YEAR
2500
2000
1500
1000
500
0
2211
272
300
325
22
267
1716
151
193
287
82
849
1800
80
171
113
13
1
2332
301
38
338
9
200
2450
325
110
463
15
26
2011(Total Transferred 3397)
2012(Total Transferred 3278)
2013(Total Transferred 2178)
2014(Total Transferred 3218)
2015(Total Transferred 3389)
Request
Transfer request
Transfer request - For service
For service
Performance
Other


DISTRIBUTION OF GROUNDS FOR ADMINISTRATIVE JUDICIARY DECREES BY YEAR
400
350
300
250
200
150
100
50
0
339
39
48
136
10
2
148
4
15
60
8
8
135
3
14
14
3
287
25
1
73
2
12
243
7
5
123
2
18
2011(Total Transferred 574)
2012(Total Transferred 243)
2013 (Total Transferred 169)
2014 (Total Transferred 400)
2015 (Total Transferred 398)
Request
Transfer request
Transfer request - For service
For service
Performance
Other


THE PROPORTION OF GROUNDS FOR TRANSFER IN DECREES BY THE FORMER AND THE NEW HCJP IN CIVIL JUDICIARY
70,47
69,26
8,92
3,06
16,41
0,42
0,72
[CELLRANGE]
80
70
60
50
40
30
20
10
0
The Former HCJP
Request
Transfer request
For service
For service
Performance
Other
Transfer request
The Former HCJP
The New HCJP


THE PROPORTION OF GROUNDS FOR TRANSFER IN DECREES BY THE FORMER AND THE NEW HCJP IN ADMINISTRATIVE JUDICIARY
68,15
61,65
3,86
1,7
6,49
1,21
19,53
30,34
1,53
1,21
0,44
3,88
70
60
50
40
30
20
10
0
The Former HCJP
Request
Transfer request
Transfer request,For service
For service
Performance
Other
The Former HCJP
The New HCJP

REVIEW AND REFUSAL

When request for a review for new transfers is made within 10 days to the General Secretariat, the First Chamber reviews these transfers.

In case of refusal as a result of the review, the related person has the right to object to such decision within 10 days after service of the decision. This objection is evaluated by the Secretariat General and finalized.

THE STATISTICS OF REVIEWS OF THE DECREE BUREAU

YEAR	TITLE	REVIEW			
		REQUEST	APPROVAL	REFUSAL	APPROVAL PERCENTAGE
2014	JUDGE	286	82	204	28,67
	PROSECUTOR	259	67	192	25,87
	ADMINISTRATIVE	72	20	52	27,78
	TOTAL	617	169	448	27,39
2015	JUDGE	339	74	265	21,83
	PROSECUTOR	258	52	206	20,16
	ADMINISTRATIVE	113	10	103	8,85
	TOTAL	710	136	574	19,15

TOTAL