

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

CCJE-BU(2017)11

Strasbourg, 7 February 2018

## **BUREAU OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

### **Report on judicial independence and impartiality in the Council of Europe member States in 2017**

**Prepared by the Bureau of the CCJE  
following the proposal of the Secretary General  
of the Council of Europe**

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## List of abbreviations

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

*“Nothing is possible without individuals, nothing is durable without institutions”  
Jean Monnet*

## **I. Introduction: scope, purpose and limitations of the report**

1. The report has been prepared by the CCJE Bureau following the proposal by the Secretary General of the CoE to “develop the methodology and establish a regular in-house evaluation mechanism on the independence and impartiality of the judiciaries of the CoE member States”<sup>1</sup>.
2. Since the proposal of the Secretary General was to establish an evaluation mechanism which would be regular, the CCJE’s 17<sup>th</sup> plenary meeting<sup>2</sup> decided to issue such a report on a regular basis. The present report is therefore the first in the forthcoming series of reports, and it highlights concerns about and challenges to judicial independence and impartiality in member States in 2017<sup>3</sup>.
3. The report provides a summary of information submitted by CCJE members and observers, as well as by judicial bodies and associations, concerning alleged infringements in member States of standards governing judicial independence and impartiality. It includes the requests for legislative assistance submitted to the CCJE and the comments prepared in response. The report is also based on information contained in the judgments of the European Court of Human Rights, opinions of the Venice Commission, reports of the Human Rights Commissioner and of the Parliamentary Assembly and documents of other relevant bodies of the Council of Europe.
4. The CCJE Bureau wishes to signal certain limitations concerning the report. First of all, in accordance with the CCJE Terms of Reference for 2016-2017 and the corresponding decision of the CCJE plenary meeting in 2016<sup>4</sup>, the report does not contain ratings or rankings of member States’ performance, and it does not constitute a monitoring process or mechanism.
5. Secondly, the report does not claim to be a comprehensive and systematic research. For the preparation of the report, given the limited time and resources available, statistically representative surveys or similar exercises could not be conducted. Therefore, the reported concerns and challenges to judicial independence and impartiality are not based on thorough and exhaustive research.

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<sup>1</sup> See the 2016 Report by the Secretary General of the Council of Europe “STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW. A security imperative for Europe”, page 7 (under proposed actions and recommendations).

<sup>2</sup> Held in Strasbourg on 8-10 November 2016.

<sup>3</sup> It should be noted that some of the current problems have roots in the previous years, therefore they are described in the present report, and in addition, since this is the first regular report, some other challenges to judicial independence and impartiality originating before 2017 are also referred to.

<sup>4</sup> See the report on the 17<sup>th</sup> plenary meeting of the CCJE on 8-10 November 2016 in Strasbourg (document CCJE(2016)5, para 5).

6. Thirdly, the CCJE Bureau emphasises that it is not in a position to verify and confirm the factual basis of the events which are reported to have taken place. The Bureau has, however, taken great care to mention only information it considered credible and important. The report, therefore, must not be understood as a compilation of facts established by full and complete evidence.
7. In addition, the CCJE Bureau wishes to specify that the purpose of the report is not to point to persons or institutions that may bear responsibility for the alleged infringements. Listing the reported challenges and information concerning specific member States is not meant to criticise them; such listing is done in order to illuminate the overall picture. The overriding aim of the report is to show, where possible, where concerns about and challenges to the independence and impartiality of judges may be found, in which ways they may occur and what their effects on the justice system can be. Public trust in judges may be undermined not only in cases of real, existing and convincingly established infringements, but also where there are sufficient reasons to cast doubt on judicial independence and impartiality.
8. It should also be noted that if some countries, out of 47 member States of the CoE, are not mentioned in the present report, this should not be interpreted in a positive or negative sense as regards judicial independence and impartiality in those countries; it only means that no information has been provided to the CCJE as regards those countries.
9. In accordance with the proposal of the Secretary General to focus on judicial independence and impartiality, the categories of alleged infringements are those related to:
  - a) the functional independence: appointment and security of tenure of judges;
  - b) the organisational independence: Councils for the Judiciary and the administration of courts;
  - c) impartiality of judges, codes of ethics and professional conduct and disciplinary measures;
  - d) the economic basis for smooth functioning of the judicial system;
  - e) judges and media: public discussion and criticism of judges.
10. The Council of Europe has established an extensive regulatory framework intended to guarantee judicial independence and impartiality as one of the pillars for the rule of law. Numerous instruments have been adopted which set out the requirements for achieving these fundamental objectives.
11. The CCJE Bureau underlines the importance of examining any alleged infringements in the context of the ECHR and the case law of the ECtHR. In doing so, the CCJE Bureau emphasises that the right to a fair trial is secured through an independent and efficient judiciary and the proper exercise of judicial duties and responsibilities.
12. In examining the alleged infringements, the CCJE Bureau has taken into consideration the European Charter on the Statute for Judges (1998) and Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities. The CCJE Bureau has also relied on its Opinions and the Magna Carta for Judges embodying the fundamental principles of the judicial profession (2010). Further, the CCJE Bureau has taken into account the UN Basic Principles on the Independence of the Judiciary (1985) and the

## **II. Overview of relevant European standards**

### **A. Functional independence: appointment and security of tenure of judges**

13. The above-mentioned European and international documents underline that candidates for judicial office should be selected according to objective criteria based on merit, and that the selection should be undertaken by an independent body. If a person or body outside the judiciary, such as the head of state, has the authority to appoint judges, the proposal of the independent body should generally be followed by the appointing authority.
14. 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 if the executive power is able to intervene in a direct manner in the functioning of competent institutions, particularly with regard to the selection of judges, their promotion or transfer, the imposition of disciplinary measures on judges or their dismissal. This may happen, for example, if the powers to deal with those matters are transferred from the Council for the Judiciary to the Ministry of Justice. Sometimes, legislation may directly endanger the status, independence or security of tenure of judges.
15. The ECtHR and the CCJE have recognised the importance of institutions and procedures guaranteeing the independent appointment of judges<sup>5</sup>. The CCJE has recommended that every decision relating to a judge’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<sup>6</sup>. Political considerations should be inadmissible<sup>7</sup> irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature.
16. There are different appointment procedures of judges in the member States. These include, for example: appointment by a Council for the Judiciary or another independent body<sup>8</sup>, election by parliament<sup>9</sup> and appointment by the executive<sup>10</sup>. Formal rules and Councils for the Judiciary have been introduced in the member States to safeguard the independence of judges and prosecutors. However, as welcome as such developments may be, formal rules alone do not guarantee that appointment decisions are taken impartially, according to objective criteria, and free from political influence. The influence of the executive and legislative powers on the appointment decisions

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<sup>5</sup> See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, paras 19-23; see also the Report of the Venice Commission on Judicial Appointments, 2007, paras 9-17.

<sup>6</sup> See CCJE Opinion No. 1(2001), para 37.

<sup>7</sup> Ibid., para 17.

<sup>8</sup> For example, in Albania, Croatia, France, Portugal.

<sup>9</sup> For example, in Switzerland.

<sup>10</sup> For example, in Austria, the Czech Republic, Latvia, Malta.

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

17. The security of tenure for judges and their appointment until the statutory age of retirement are a corollary of independence<sup>11</sup>. 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 a consideration of the body and method by which, and the basis upon which, judges may be disciplined"<sup>12</sup>.

### **B. Organisational independence: Councils for the Judiciary and the administration of courts**

18. Councils for the Judiciary are bodies the purpose of which is to safeguard the independence of the judiciary and of individual judges, and to promote thereby the efficient functioning of the judicial system. Their introduction has been recommended in Rec(2010)12, by the CCJE and by the Venice Commission<sup>13</sup>. Over recent years, many European legal systems have introduced Councils for the Judiciary. The report highlights challenges ranging from external influence over such Councils to executive interferences with the administration of courts.
19. 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 its disposal or by changing its composition. Such Councils must have significant competences in order to be influential safeguards of the independence of judges. Mere advisory functions are not enough. 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 chosen by their peers from all levels with respect for pluralism<sup>14</sup>. Elections must be free from external influences. The executive must not influence the elections or the work of the Council in any way. Establishment of a Council for the Judiciary is only useful if its members can work independently from the executive and are not politicised. Only an independent Council for the Judiciary can secure the independence of judges by rendering decisions which fulfil the requirements of "an independent and impartial tribunal" according to Article 6 of the ECHR<sup>15</sup>.
20. 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

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<sup>11</sup> See CCJE Opinion No. 1(2001), paras 52 and 57.

<sup>12</sup> Ibid., para 59.

<sup>13</sup> See Rec(2010)12, paras 26-29; 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 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010), recommend the establishment of such Councils.

<sup>14</sup> For the purpose and minimum requirements of councils, see Rec(2010)12, para 27; CCJE Opinion No. 10(2007), para 18.

<sup>15</sup> 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.

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<sup>16</sup>. Court presidents must respect that a judge, in particular a judge working in the court he/she presides over, is no one's employee in the performance of judicial functions. A judge is the 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<sup>17</sup>, 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 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.

21. The member States use different models for the administration of the judiciary. The report identifies certain challenges and concerns. While self-administration by the judiciary has been introduced or its scope enlarged in many member States, still, in some countries, Ministries of Justice have certain degree of influence over the administration of courts. Accordingly, the regulation of court management scores low in the survey on the independence of the judiciary undertaken on the European Union member States by the ENCJ in 2014/2015<sup>18</sup>. 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<sup>19</sup>. 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<sup>20</sup>. 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<sup>21</sup>. It is especially worrying if the executive gains insight into court files.
22. Legal and organisational reforms including the closing of local courts are not necessarily problematic in relation to the independence of judges. Rather, within constitutional limits, they fall under the responsibility of the legislature, which must take action to adapt the legal system to new challenges, especially social and demographic developments. However, as the CCJE has observed, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice. 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<sup>22</sup> and procedural provisions and that there will be sufficient human resources<sup>23</sup>. Otherwise there is a risk of instability in

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<sup>16</sup> See the CCJE Opinion No. 1(2001), para 66.

<sup>17</sup> *Ibid.*, para 64.

<sup>18</sup> See the ENCJ Report on Independence and Accountability of Judges and Prosecutors 2014-2015, p. 6.

<sup>19</sup> See the CCJE Opinion No. 18(2015), paras 48-49.

<sup>20</sup> *Ibid.*, para 48.

<sup>21</sup> *Ibid.*, para 49.

<sup>22</sup> See the CCPE Opinion No. 7(2012), paras 39-44.

<sup>23</sup> See the CCJE Opinion No. 11(2008); the CCPE Opinion No. 7(2012), paras 36-38.



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<sup>24</sup>.

### **C. Impartiality of judges, codes of ethics and professional conduct and disciplinary measures**

23. Article 6 of the ECHR guarantees the right to have disputes decided not only by an independent but also an impartial tribunal. 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.
24. Judges, as long as they are dealing with a case or could be required to do so, should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties<sup>25</sup>.
25. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing<sup>26</sup>.
26. As regards codes of ethics and professional conduct, they have some important benefits: firstly, they help judges to resolve questions of professional ethics, giving them autonomy in their decision-making and guaranteeing their independence from other authorities. Secondly, they inform the public about the standards of conduct it is entitled to expect from judges. Thirdly, they contribute to give the public assurance that justice is administered independently and impartially<sup>27</sup>.
27. The CCJE would like to stress that, in order to provide the necessary protection of judges' independence, any statement of standards of professional conduct should be based on the following two fundamental principles:
28. i) firstly, it should address basic principles of professional conduct. It 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. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not in itself constitute a disciplinary infringement or a civil or criminal offence;

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<sup>24</sup> See the CCJE Opinion No. 18(2015), para 45.

<sup>25</sup> See CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 23.

<sup>26</sup> *Ibid.*, para 24.

<sup>27</sup> *Ibid.*, para 44.

29. ii) secondly, principles of professional conduct should be drawn up by the judges themselves. They should be self-regulatory instruments generated by the judiciary itself, enabling the judicial authority to acquire legitimacy by operating within a framework of generally accepted ethical standards. Broad consultation should be organised, which could also be responsible for explaining and interpreting the statement of standards of professional conduct<sup>28</sup>.
30. The effectiveness of the judicial system also requires judges to have a high degree of professional awareness. They should ensure that they maintain a high degree of professional competence through basic and further training, providing them with the appropriate qualifications<sup>29</sup>.
31. The standards of conduct applying to judges are a precondition for confidence in the administration of justice<sup>30</sup>, and the public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system<sup>31</sup>. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias<sup>32</sup>, and with due respect for the principle of equal treatment of parties<sup>33</sup>. Judges should not reach their decisions by taking into consideration anything which falls outside the application of the rule of law<sup>34</sup>. Judges should both be mindful of and be able to perform their obligations under Article 6.1 of the ECHR to deliver judgment within a reasonable time<sup>35</sup>. Judges should behave in such a way as to avoid conflicts of interest or abuses of power<sup>36</sup>. Judges should conduct themselves in a respectable way in their private life<sup>37</sup>.
32. As regards participation of judges in public debates of a political nature, there is a need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality<sup>38</sup>.

#### **D. The economic basis for the smooth functioning of the judicial system**

33. Efficiency of judges and of judicial systems is a necessary condition for the protection of every person's rights, compliance with the requirements of Article 6 of the ECHR, legal certainty and public confidence in the rule of law<sup>39</sup>. Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in

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<sup>28</sup> Ibid., para 48.

<sup>29</sup> Ibid., para 25.

<sup>30</sup> Ibid., para 8.

<sup>31</sup> Ibid., para 22.

<sup>32</sup> Ibid., para 23.

<sup>33</sup> Ibid., para 24.

<sup>34</sup> Ibid., para 23.

<sup>35</sup> Ibid., para 26.

<sup>36</sup> Ibid., para 37.

<sup>37</sup> Ibid., para 29.

<sup>38</sup> Ibid., paras 31-33.

<sup>39</sup> See Rec(2010)12, Article 30.

accordance with the standards laid down in Article 6 of the ECHR and to enable judges to work efficiently<sup>40</sup>.

34. Underfunding of the judicial system may reduce the ability of courts to decide cases with the necessary quality and within a reasonable time. Cuts in legal aid may make access to justice more dependent on income. Insufficient funding and budget cuts might result in a judicial system overemphasising “productivity”<sup>41</sup>. While courts should use their available resources in the most efficient manner possible, the quality of justice cannot be understood as if it were a synonym for mere “productivity” of the judicial system<sup>42</sup>. The workload of judges 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 appropriate working conditions reflecting the importance and dignity of the judiciary. 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<sup>43</sup> or if access to justice is obstructed through excessive costs or is dependent on wealth<sup>44</sup>.
35. The independence of judges also requires economic independence which should be stipulated by law. Undignified working conditions might reduce public respect for the judges and increase the risk of corruption. 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. The payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration while working, should also be guaranteed. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges. The same proposal appears in CCJE’s Opinion No. 1(2001) and in the European Charter on the Statute for Judges.
36. Even in times of economic crisis, the legislative and executive powers of various member States should understand that a significant reduction in judges’ salaries is a potential threat to judges’ independence and to the proper administration of justice, and may jeopardise (objectively and subjectively) judges’ work. Such measures, if necessary, should always be limited in time<sup>45</sup>.
37. Some European countries facing an 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.

## **E. Judges and media: public discussion and criticism of judges**

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<sup>40</sup> Ibid., Article 33; see also CCJE Opinion No. 2(2001).

<sup>41</sup> See CCJE Opinion No. 17(2014), para 35.

<sup>42</sup> Ibid.; see also CCJE Opinion No. 6(2004), para 42.

<sup>43</sup> See CCJE Opinion No. 2(2001) on the funding and management of courts with reference to the efficiency of the judiciary and Article 6 of the ECHR, para 3.

<sup>44</sup> See CCJE Opinion No. 6(2004), paras 20-21.

<sup>45</sup> See CCJE Opinion No. 2(2001), para 12.

38. As regards judges' relations with the media, "while the freedom of the press is a pre-eminent principle, the judicial process has to be protected from undue external influence... The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions"<sup>46</sup>.
39. "There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field... Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the ECHR. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information"<sup>47</sup>.
40. The CCJE is also vigilant with regard to situations in which the media could be used by other powers (whether these be the state or private institutions or persons) to exercise pressure or exert influence on judges. A powerful or sustained criticism exercised by the media against a particular judicial decision may constitute such pressure. In particular, it is not acceptable that the media be used by other state or private entities, in particular political institutions, to directly attack individual judges' decisions.
41. The CCJE has commented in depth on the sensitive relations between judges and the media<sup>48</sup>. The executive and legislative powers should not comment on judges' decisions in a way which could undermine the independence of, or public confidence in, the judiciary<sup>49</sup>.
42. Thus, there is a clear line between, on the one hand, freedom of expression and legitimate criticism which might even have positive effects, and, on the other hand, disrespect and undue pressure on judges<sup>50</sup>. In some member States, politicians have made comments that showed little understanding of the role of independent judges and prosecutors<sup>51</sup>. The ENCJ has concluded that many judges in the European Union

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<sup>46</sup> See CCJE Opinion No. 3(2002), para 40.

<sup>47</sup> Ibid.

<sup>48</sup> See CCJE Opinion No. 7(2005) on justice and society, paras 22 to 55.

<sup>49</sup> See Rec(2010)12, Article 18.

<sup>50</sup> See CCJE Opinion No. 18(2014), para 52.

<sup>51</sup> See the Joint Report of the CCJE/CCPE Bureaus on challenges for judicial independence and impartiality in the member states of the Council of Europe, 2016, document SG/Inf(2016)3rev, para 27.

member States do not feel that their independence is respected<sup>52</sup>. Unbalanced comments are troublesome because they affect the public perception of judges 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<sup>53</sup>. Such behaviour is an attack on the legitimacy of another state power and thus affects the separation of powers necessary in a democratic state<sup>54</sup>. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations<sup>55</sup>.

### **III. General issues concerning judicial independence and impartiality<sup>56</sup>**

43. The EAJ<sup>57</sup>, having formally acknowledged the essential work provided, since 2000, by the CCJE in protecting and consolidating the independence of the judiciary as a paramount factor for the rule of law, protection of human rights and well-functioning democracy, provides the following general observations.
44. In its perspective, the problems regarding the independence of judges as a whole are very serious and worrisome in several European countries. But as a general observation, there is no strong commitment of member States to strengthen the rule of law; in some member States, it is even the opposite.
45. The International Association of Judges (IAJ), of which the EAJ is one of four Regional Groups, undertook a monitoring of its 85 members worldwide on the situation of the judiciary in these countries. One question to be answered was: "Has the situation regarding the judiciary in your country improved, worsened or remained the same during the last 5 years?" Associations of judges of five European countries answered with "improved", of 18 other European countries with "remained the same", however, of other 18 European countries with "worsened". Budgetary restraints and excessive workload followed by undue pressures from politicians were named as the main areas of concern. Lack of confidence and problems with internal judicial independence were identified as further problems.
46. The EAJ stresses that the trust in the judiciary is the most important element to guarantee the effective implementation of the rule of law. It is foremost in the accountability of the judges themselves by delivering a unbalanced, impartial justice on a high level of quality in a reasonable time. Nevertheless, trust could very easily be hampered or even destroyed by undue critics. The EAJ has, once again, seen in the last year that in several member States, the Rec(2010)12 was not followed<sup>58</sup>. The EAJ

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<sup>52</sup> See the ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report 2014-2015, p. 7.

<sup>53</sup> See the Joint Report of the CCJE/CCPE Bureaus on challenges for judicial independence and impartiality in the member states of the Council of Europe, 2016, document SG/Inf(2016)3rev, para 27.

<sup>54</sup> See CCJE Opinion No. 18(2015), para 52.

<sup>55</sup> Ibid.

<sup>56</sup> Please note that all information which is referred to in this Chapter was submitted to the CCJE in April-August of 2017.

<sup>57</sup> Observer to the CCJE.

<sup>58</sup> Which provides that "if commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary.

expresses its particular concern about corrosive commentaries by politicians or the media, seeking to influence the determination of cases.

47. To provide concrete examples, the EAJ points out to the "enemies of the people" remark by a British tabloid newspaper following the UK High Court's decision in the Brexit case; the allegation by a senior British parliamentarian that "unelected judges" on the UK Supreme Court were "meddling" with the running of a democratically elected parliament; the US President's reference to a "so-called judge"; the recent suggestion by an Irish government Minister on a TV program that senior judges should not be involved in the judicial appointments process "because they will just appoint their friends" and the Turkish government's suggestion that the Greek Supreme Court has been "encouraging the impunity of criminals" and "providing shelter and protection to putschists". Also the comments of the Polish Prime Minister, some of the Polish ministers and foremost the chair of the government party are far beyond fair criticism, according to the EAJ.
48. The ENCJ<sup>59</sup> reports that almost all ENCJ members<sup>60</sup> and observers - in total 23 entities - applied the ENCJ indicators<sup>61</sup> to their judicial systems. The outcomes are primarily meant to be used by the judiciary in each country to reflect on its strengths and weaknesses and to address them. Whilst improved, the data must be used with care, because it remains difficult to capture very diverse legal systems in indicators.
49. It can be concluded – largely consistent with the 2014/2015 results – that:
  - There is still much room for improvement with respect to independence as well as accountability.
  - The outcomes for subjective (perceived) independence are ambivalent. The perspective of court users is largely lacking, leading to low scores, whilst corruption is also an issue. On the other hand, citizens in general and judges are positive about judicial independence and in nearly all countries the trust in the judiciary is higher than the trust in the other state powers.
  - With regard to objective independence, funding of the judiciary is generally not well secured, and judiciaries are dependent on discretionary decisions by governments. Court management is still often in the hands - directly or indirectly - of Ministries of Justice.
  - With respect to accountability, outcomes vary considerably among countries. Generally, external review of the judiciary and (disclosure of) external functions of judges get low scores. External review is a complicated issue, because, if it is not

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They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal", para 18.

<sup>59</sup> Observer to the CCJE.

<sup>60</sup> Membership of the ENCJ is open to all national institutions of member States of the European Union which are independent of the executive and legislature, or which are autonomous, and which ensure the final responsibility for the support of the judiciary in the independent delivery of justice.

<sup>61</sup> In 2013, the ENCJ started an ambitious project which aimed to develop indicators for the independence and accountability of the EU justice systems. The ENCJ Report on Independence and Accountability 2013-2014 of the Judiciary was adopted by the ENCJ General Assembly and established the methodology for the performance indicators.

commissioned by the judiciary itself, it opens the door for outside interference with the judiciary and thus detracts from independence.

50. One of the ENCJ indicators with respect to subjective independence concerns the perceptions of judges themselves of their independence. To gather this data, a survey among the judges of Europe was conducted by the ENCJ for the second time. This time, in total 11712 judges from 26 countries participated. The first time in 2014/2015, 5878 judges from 20 countries took part. The survey was conducted at the end of 2016. Some information was asked about the personal characteristics of the respondents: gender and experience. Gender has no impact on the score about the independence of the judges in the country. The impact of gender on the opinions about specific aspects of independence is also limited, although differences exist among countries and some countries jump out. The impact of experience is overall small, but in some countries substantial. There is a general tendency that very experienced judges score their independence higher than less experienced judges.

51. The main findings are the following:

- As to the overall perception of independence, on a 10-point scale the respondents rate the independence of the judges in their country between 6.5 and 10 on average per country. Five countries have scores between 6.5 and 7.
- When judges experience inappropriate pressure, the three most given answers as to who exerts this pressure are: court management including the court president (25%), closely followed by parties (24%) and their lawyers and, at wider distance, the media (16%).
- As to the prevalence of bribes, three categories of judiciaries can be distinguished: (i) judiciaries in which nearly all judges believe that no bribes are accepted; (ii) judiciaries in which a small percentage (less than 4%) of judges believe that bribes are accepted, and 10 - 20% are not sure whether or not bribes are accepted; and (iii) judiciaries in which a higher percentage of judges believe that bribery occurs and many more than 20% (up to 55%) are uncertain whether or not bribes are accepted.
- The appointment and promotion decisions about judges are major issues, with 22% of judges (average across countries) believing that appointment decisions are not based on merit and experience and 38% believing this to be the case for promotion decisions.
- The impact of the media on the decisions of judges is large in most countries and is increasing. The influence of social media is much smaller than that of the traditional media, but it is increasing in nearly all countries.
- 22% of all participating judges feel that the judiciary is not respected by government and parliament, with 34% thinking the same about the traditional media. The differences among judiciaries are very large. The lack of respect shown in the social media is generally seen as less problematic.

- On average, 33% of the judges do not believe that Councils for the Judiciary have the appropriate mechanisms and procedures in order to defend judicial independence effectively.
- Judges were asked what would contribute most to the independence of the judiciary in their country. The responses were very consistent: better working conditions regarding workload were mentioned most often, with working conditions regarding pay, including pensions and retirement age, in the second place, and appointment and promotion based on ability and experience in the third place.

## IV. Country specific issues concerning judicial independence and impartiality<sup>62</sup>

### A. Functional independence: appointment and security of tenure of judges

52. The CCJE member in respect of **Andorra** states that, once appointed, judges cannot be removed from the office except for disciplinary reasons. However, any appointment is made for a term of 6 years. Renewal of the mandate is automatic except in the case where a judge has been sanctioned for very serious disciplinary misconduct, or for two serious violations during the period of his/her mandate.

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53. The AEAJ reports that in **Austria**, the selection procedures for new judges vary within Austrian Federal Provinces (“Länder”). No uniform procedure or criteria exist, except of one provision on constitutional level<sup>63</sup>. Selection procedures, done by the administrative authorities of the governments of the provinces, often lack transparency. There exists neither a right to challenge the decision of these administrative authorities, nor the selection procedure (nor are reasoned decisions made available to applicants).
54. Selection practice of some of the selecting administrative authorities in the Länder (e.g. recently in Vienna and Lower Austria) shows that they do not strictly follow the recommendations of the judges committee<sup>64</sup>, because not the first (out of three) proposed candidate is selected (but number two or three, although the first choice would have been available). The possibility to challenge their decision would be specifically relevant to ensure sufficient external independence of judiciary.

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<sup>62</sup> Please note that all information which is referred to in this Chapter was submitted to the CCJE in April-August of 2017.

<sup>63</sup> Article 134, para 2, of the Federal Constitutional Law foresees that administrative judges of the provinces are appointed by the government of the province. With exception of the President and Vice-President, the government has to call for proposals of three candidates (for appointment of new judges) of the plenary assembly of the administrative court (or of a committee to be elected by its members). It is not a formally binding proposal.

<sup>64</sup> See Rec(2010)12, para 47.



55. Regarding the selection of court presidents, the AEAJ points out that no provision exists. The provision in the Austrian Constitution (proposal of three candidates for appointment of judges) is explicitly not applicable in the case of selection and appointment of court presidents. Therefore, the selection and appointment remains in the full (discretionary) power of the executive power. This is not in line with European standards because the procedures for the appointment of court presidents should follow the same path as that for the selection and appointment of judges<sup>65</sup>.

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56. The CCJE member in respect of **Croatia** states that the newly elected government has a plan to introduce changes to the judicial system, through a so-called reform of judiciary. The plan, among other things, expresses the ambition to propose to the parliament completely new laws: Law on Courts and Law on the State Judicial Council. The drafts were already prepared and discussions in the drafting committee were almost completed. Serious concerns were expressed by representatives of the judiciary, the State Judicial Council (SJC) and the Association of Croatian Judges (ACJ) in respect of the proposed changes.

57. According to the Croatian Constitution, judges, including presidents of courts, are appointed by the SJC. In the draft law on the SJC, it is proposed that “when applying for appointment, candidates have to give a statement that they accept to be checked by the Secret Service. The Secret Service will make an evaluation of the candidate chosen for appointment and report if there are security obstacles to their appointment”. If a candidate is negatively evaluated, the SJC has no power to appoint such a candidate and the candidate has no legal remedies to challenge the security evaluation. The risk of such a procedure is that a body outside the judiciary and controlled by the executive would have a decisive role in the appointment of judges. The ACJ has challenged this before the Constitutional Court.

58. The draft law on the HJC puts asset declarations online with open unlimited access. However, the ACJ has pointed out that anyone with a legal interest in receiving access to asset declarations may obtain that information from the HJC.

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59. The CCJE member in respect of **the Czech Republic** states that the situation has not changed from the last evaluation, and that there are still problems with the transparency of the selection of judicial candidates and with the appointment of judges<sup>66</sup>. Length of the tenure is strictly fixed until 70 years of age.

60. The MEDEL reports that the Union of Judges of the Czech Republic believes that there is a need to change the judicial selection process and to make sure that it is unbiased.

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<sup>65</sup> See CCJE Opinion No. 19(2016), part V, para 8.

<sup>66</sup> See the CCJE’s Situation Report on the judiciary and judges in the Council of Europe member States, 16 October 2015 (document CCJE(2015)3), para 15: “The CCJE member in respect 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 successful candidate, following the selection process for the position of Vice-President of the High Court, could not be appointed for this position; the Minister of Justice decided not to appoint him”.

Over the past years, two competing models took turns: the traditional model involving a judicial trainee and a new model concerning the established position of an assistant judge. The traditional model has been losing its appeal since the official age to become a judge was raised to 30. Assistant judges are expected to have professional specialisation depending to a large extent on the specialisation and classification of “their judge”, yet they too lack both the adequate salary and any real prospects of their future career. It is the presiding judges of regional courts who have the main say in staffing issues: it depends on them whether they launch a selection procedure for a vacant office of a judge open to legal practitioners too or recommend an existing judicial trainee or an assistant judge to be appointed. This is a fundamental issue which, in the future, should be clearly regulated by law<sup>67</sup>.

61. According to the MEDEL, another issue is the selection of judicial officers. In the Czech Republic, it is regulated by the instruction of the Ministry of Justice. This form of legislation has proven to be inadequate also due to the fact that the instruction has been subject to various changes over the past years. The Union of Judges believes that the selection of judicial officers should also be regulated by law which couldn't be freely amended at the discretion of the Ministry of Justice. Currently, judicial officers are selected based on the selection procedure announced by the Ministry of Justice. The Union of Judges considers it inappropriate and incorrect that the selection committee should be appointed by a single entity<sup>68</sup>.
62. The AEAJ reports that, as regards the selection of judges, no objective selection procedure so far exists. Each regional court has its own selection criteria. The Minister of Justice tried to change the situation and issued a decree (which will enter into force on 1st January 2018) which should unite the selection criteria. This, according to the AEAJ, violates Rec(2010)12 (para 44), because such procedural requirements should be transparent, objective and (regarding the decree) be determined by law (including consultations with representatives of the judiciary in this law-making-process).

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63. The CCJE member in respect of **Georgia** states that, until 2013, judges were appointed for 10 year term. In 2013, the amendments to the Constitution of Georgia regarding lifetime appointment of judges became effective. According to these amendments, judges are first appointed for a 3 year evaluation period. After the successful completion of this period, they are appointed by the High Council of Justice for lifetime (can serve until age of 65).
64. 3 years after the aforementioned amendments, in 2016 and 2017, the High Council of Justice appointed 21 judges for life upon their successful completion of the 3 year evaluation period. All judges who completed the evaluation period were appointed.
65. This rule does not apply to the Supreme Court judges, who are currently nominated by the President of Georgia and elected by the parliament for a term of 10 years.
66. The 3 year evaluation period rule has been criticised by the Venice Commission on a number of occasions. In addition, the Constitutional Court of Georgia issued a

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<sup>67</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 28.

<sup>68</sup> Ibid.

judgment in 2017 declaring the provisions concerning the 3 year evaluation period null and void in relation to those judges who already have minimum experience of 3 years as acting judges. This decision takes effect after 1 July 2017, which means that judges who have 3 year experience or more as acting judges will be appointed directly for life.

67. Meanwhile, the Constitutional Commission established by the government of Georgia has been drafting a new revised Constitution. The Venice Commission was consulted and issued an Opinion<sup>69</sup> in June 2017 on the draft of the revised Constitution. The Venice Commission noted that, in the draft Constitution, while the principle of appointment for life (until retirement age) applied to all judges, the Supreme Court judges would be appointed for not less than 10 years. Thus, this principle would not apply to the judges of the Supreme Court. The Venice Commission recommended extending life tenure, in unequivocal terms, to the Supreme Court judges<sup>70</sup>.
68. According to the draft Constitution, the Supreme Court judges are elected by the parliament upon submission of the High Council of Justice, and not by the President as in the current Constitution. Earlier, the Venice Commission considered that it would be preferable to transfer the right to propose candidates to the High Council of Justice<sup>71</sup>. In this sense, this amendment appears to follow the previous recommendation of the Venice Commission. In the current context, however, the Commission recalls that as a general rule, in the appointment of judges, including judges of the Supreme Court, the judicial council should have a decisive influence<sup>72</sup>. Moreover, in its report on the independence of the judicial system, the Venice Commission considered that “appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy”<sup>73</sup>.
69. The Venice Commission, despite being “conscious that the current High Council is subject to a lot of criticism in Georgia”, states that “this should, however, not prevent it from playing its role also as regards the nomination of Supreme Court judges but rather be a reason to reform the legislation on the Council. Consequently, the Venice Commission recommends that the draft Constitution be amended so as to give the High Council of Justice the power to appoint Supreme Court judges with a view to fully guaranteeing their independence, or, having regard to the new more restricted role of the President in the draft Constitution, give to the President as the Head of State the power to appoint judges upon the proposal of the High Council of Justice”<sup>74</sup>.

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<sup>69</sup> Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), CDL-AD(2017)013-e.

<sup>70</sup> See the Venice Commission, CDL-AD(2017)013-e, para 79.

<sup>71</sup> See the Venice Commission, CDL-AD(2010)028, Report on Judicial Appointments, para 87.

<sup>72</sup> *Ibid.*, para 25.

<sup>73</sup> See the Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System, Part I: The Independence of judges, para 31.

<sup>74</sup> See the Venice Commission, CDL-AD(2017)013-e, para 80.

70. At the same time, the draft Constitution sets the minimum number of Supreme Court judges which is welcomed by the Venice Commission as constituting “visibly a further guarantee for the independence of this high court”<sup>75</sup>.

71. It was reported in the media that, on 29 May 2017, the High Council of Justice elected the new Chairman of the Tbilisi Court of Appeals for a term of five years. The position became vacant after the former Chairman resigned due to a court dispute between two companies where he allegedly had personal interests. Shortly before the discussions on the new Chairman’s candidacy were launched, the “Coalition for Independent and Transparent Judiciary”, uniting 34 civil society organisations, issued a statement criticising the forthcoming decision of the High Council of Justice. Simultaneously, its representatives held a protest rally accusing the Council of choosing a person known to be susceptible to political pressure.

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72. The CCJE member in respect of **Luxembourg** states that, although announced in recent years, the establishment of a Council of Justice which will be in charge of the appointment and promotion of judges is still awaited. The judges are currently appointed by the Minister of Justice. For senior judges, the appointment is made on the proposal of the Superior Court of Justice.

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73. The CCJE member in respect of **Montenegro** states that the Judicial Council is an independent and autonomous body, the primary role of which is the appointment and dismissal of judges. This appears to have had a positive impact on the appointment of judges, strengthening of their responsibility and a higher quality of their work.

74. Previously, the procedure of appointment and dismissal of judges used to be under the jurisdiction of the parliament. As such it was exposed to direct political influence and the will of party majority which resulted in numerous and justified objections by European bodies, after which a consensus of parliamentary parties was reached that the model should be changed. This has been done with the transfer of the procedures for judges’ appointment, dismissal and status-related issues to the Judicial Council, which was at first established by the law, and since 2007, by the Constitution of Montenegro and Constitutional amendments of 2013.

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75. The CCJE member in respect of **Norway** states that the predominant role of the government in the appointment procedure is a shortcoming in the Norwegian system for the appointment of judges. The government is not only vested with the power to appoint judges, but also has the power to appoint the members of its advisory body, the Judicial Appointments Board, and to decide which one of them will be the chairperson of the Board.

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<sup>75</sup> Ibid., para 78.

76. The government also decides who of the Norwegian judges will be the three judges to be members of the Board. The Board recommends and ranks three candidates. The government is not obliged to follow the Boards' ranking. The government may even choose a candidate 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 candidate in question.
77. The Judicial Appointments Board has no role to play when it comes to the appointment of the President of the Norwegian Supreme Court; the appointment is made by the government.

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78. The President of the National Board of IUSTITIA, one of the associations of judges of **Poland**, addressed the CCJE, by letter of 29 July 2016, on behalf of all associations of judges in Poland, requesting an opinion with respect to the decision of the President of Poland to refuse to appoint as judges ten candidates presented by the National Council of the Judiciary. The courts in question were regional administrative courts, regional courts, appellate courts and district courts.
79. The Polish associations of judges referred to Article 179 of the Polish Constitution, according to which judges are appointed by the President of Poland on the motion of the National Council of the Judiciary. The associations emphasised that the decision made by the President was without any reasoning, and that the decision would make the process of judicial appointment less transparent and more susceptible to political influence. Furthermore, according to the Polish associations of judges, the decision violated the principle of tripartite division of powers and the right to access to court.
80. Having reviewed this request and all available information on the subject, the CCJE Bureau published its comments on 26 October 2016. The CCJE Bureau emphasised that it considered that the decision of the President not to appoint as judges ten candidates presented by the National Council of the Judiciary was not in accordance with the CoE standards for judicial independence. The President of Poland should have followed the National Council's advice by appointing the nominated candidates as judges. He did not provide reasons for the decision not to appoint, and such lack of transparency in the procedure was not in line with the Council of Europe standards for judicial independence.
81. The CCJE Bureau also noted that the CCJE member in respect of Poland, in her response to the request from the Polish associations of judges, expressed the hope that a proper solution could be found through a dialogue between the judiciary and the President of Poland. The CCJE Bureau found this approach to be consistent with CCJE Opinion No. 18 (2015), underlining that the rule of law was best protected when the three powers of state acted with mutual respect. The CCJE Bureau emphasised in particular that each of the three powers of state depended on the other two to work effectively<sup>76</sup>. In this respect, the CCJE Bureau reiterated that, when an unwarranted interference does occur, the powers of the state should loyally cooperate to restore the balance and so the confidence of society in the smooth functioning of public

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<sup>76</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 31.

institutions<sup>77</sup>. This should be done with the best interest of the rule of law in mind, and in accordance with the principles for judicial independence as outlined by the Council of Europe.

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82. The MEDEL reports that in **Serbia**, the unique situation that occurred in mid-2012 when judges and prosecutors helped the Serbian state and judiciary to overcome, in a legal way, the shortcomings of the 2009 re-election and of the 2011 review of the re-election, did not develop in the right way. Those members of the judicial councils (judges' and prosecutors') who did not succeed in the re-appointment process and its review, remained in their positions. This affected negatively the enthusiasm of judges and prosecutors, as well as their confidence in the possibility to influence the developments in the judiciary<sup>78</sup>.
83. The MEDEL goes on to mention that it seems that the High Judicial Council is not managing the court system properly or protecting judicial independence. According to the recommendations of Serbia Judicial Functional Review, the vacant judicial and court staff positions are not being filled<sup>79</sup>.

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84. The President of the Association of Judges of **Slovenia** states that Slovenia is the only state in Europe, where Supreme Court judges are elected by Parliament. Despite many proposals for the amendment of the Judicial Service Act and recommendations to this effect by GRECO, the Ministry of Justice and the government have not reacted. In the spring of 2017, it happened for the second time that the candidate for the Supreme Court judge's position was not elected apparently because of his decision in a particular case, notwithstanding his uncontested professional references and the proposal of the Judicial Council. This practice of the parliament would appear not to be in line with the fundamental principle of the rule of law, separation of powers and independence of the judiciary in a modern democratic state.

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85. The CCJE member in respect of **Switzerland** states that the country has a strong tradition of direct democracy. Judges have been, and still are, elected by popular vote or by parliament. Accordingly, they are usually elected for a fixed period of time, mostly for 4 or 6 years. They have to be re-elected after the completion of this period, which may cause problems as regards security of tenure. As they have to be elected in a political process, candidates for the judiciary have to be supported by a political group, which may be criticised from a formal point of view as regards independence.
86. In fact, the judiciary in Switzerland is still perceived as a "public service", a public function to serve the public. As such, it is felt that judges should represent, to a certain extent, the sensitivities of the major groups of the population and that, through support by a certain political party, the convictions and attitudes of candidates are better

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<sup>77</sup> Ibid., para 43.

<sup>78</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 25.

<sup>79</sup> Ibid.

known. As a rule, judicial decisions are accepted regardless of the election procedures. Problems arise when the known affiliation of judges to political parties is perceived as having a determining impact on their decisions. The party membership of judges is mentioned in the press and this has an impact on perception of the role of the judiciary.

87. The limited term of office is also problematic from the point of view of independence. Up to now, re-election has in fact been assured. Whereas the candidates, when they first run for office are usually supported by one of the political parties, re-election is largely perceived as mandatory, therefore, the majority of parties support a judge, even when he/she may be criticised by one group. A non-re-election without disciplinary problems would most certainly cause a public scandal. Polls show a very high confidence in the courts.

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88. The CCJE Bureau adopted, on 20 July 2016, a statement following the attempted “coup d’état” in **Turkey** mentioning that it had received several reports that a large number of judges in Turkey had been dismissed, and that some had even been detained without any procedure prior to such decisions. The Bureau of the CCJE reiterated that irremovability of judges was an essential element of judicial independence and urged the Turkish authorities to limit suspensions of members of the judiciary to those against whom a concrete suspicion existed of involvement in the attempted “coup d’état”, to guarantee respect for the principles of due process for such judges, and as regards other judges, to respect their independence and irrevocability.
89. The plenary meeting of the CCJE also adopted, on 10 November 2016, a statement concerning the judiciary in Turkey mentioning that, during the plenary meeting, the European Association of Judges (EAJ) and the Association of European Administrative Judges (AEAJ) submitted a request to the CCJE, which had also previously been communicated to delegations and distributed more widely, for measures to be taken in view of the critical situation affecting the independence of the judiciary in Turkey. The CCJE, recalling its Bureau’s statement of 20 July 2016, listened carefully to the information provided by the Turkish delegation in the course of the plenary meeting, and, after consideration of the issue and discussion in the plenary, took note of the concerns and the request of the EAJ and the AEAJ that action be taken, and, in spite of the information provided by the Turkish delegation, fully shared the concerns expressed by its members and observers. The CCJE welcomed the attempts of the Parliamentary Assembly (PACE) of the CoE and of the Venice Commission to obtain further reliable information about the situation of the rule of law in Turkey and declared that the CCJE was available to support any useful action.
90. In addition, the CCJE Bureau wishes to express its concerns as regards the additional information below reported by the CCJE observers – EAJ and AEAJ – as well as by the Venice Commission and the PACE.
91. The EAJ reports in 2017 that, to summarise the basic facts since 15 July 2016 and after the state of emergency then established in Turkey, more than 4000 judges and prosecutors, a quarter of the total, have been dismissed. The vast majority are held in overcrowded prisons and some of them are even held in solitary confinement. Only a fraction has heard formal charges so far mostly for vague and abstract reasons.

According to the EAJ, several basic fundamental rights guaranteed under Articles 5 and 6 of the ECHR are being clearly ignored<sup>80</sup>.

92. The EAJ further reports that the platform, created by four European judges organisations - AEAJ, EAJ, Judges for Judges and MEDEL - to assist the Turkish judiciary, has urged very recently the Turkish authorities to make possible the observation of the court hearings by international observers, to guarantee that the European Prison Rules are respected in all detention centres and, finally, to release the unduly detained judges and prosecutors and to return the unduly seized assets to these persons. Also the CoE and the EU were requested to convince the Turkish authorities to fulfil the requirements based on common and basic European values and, in any case, to establish mechanisms and support initiatives which make international observations of trials possible<sup>81</sup>.
93. The AEAJ has drawn specific attention to the ongoing situation of the judiciary in Turkey and alleged that mass dismissals (more than 4000 judges and prosecutors) and mass arrests (approximately 2450 judges and prosecutors) have been made. The AEAJ states that dismissal decisions are neither based on a fair trial, nor issued in an individualised way and lack basic requirements of a judicial decision. The AEAJ continues that the arrest decisions against judges and prosecutors lack fundamental rights granted under Articles 5 and 6 of the ECHR and the emergency legislation is excessive<sup>82</sup>.
94. The Venice Commission, also cited by the AEAJ, concluded that “the decision-making process which led to the dismissals of public servants<sup>83</sup> was deficient in the sense that the dismissals were not based on individualised reasoning, which made any meaningful *ex post* judicial review of such decisions virtually impossible”<sup>84</sup>. “Collective dismissals “by lists” attached to the decree laws (and similar measures) appear to have arbitrarily deprived thousands of people of judicial review of their dismissals. The Venice Commission is particularly concerned by the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws”<sup>85</sup>.
95. The AEAJ indicates that the practice of enforced transfers of judges to other (remote) courts and sudden removal from certain cases<sup>86</sup> is still in place. The AEAJ also refers to the case of Mustafa Karadag, chairman of the Union of Judges, who was transferred to a remote court. The transfer was not on a voluntary basis and done without giving any substantial reasons<sup>87</sup>.

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<sup>80</sup> See the report of the EAJ of 31 August 2017 for the CCJE members.

<sup>81</sup> Ibid.

<sup>82</sup> See the report of the AEAJ of 21 August 2017 for the CCJE members.

<sup>83</sup> Including judges: see Venice Commission, Opinion on Emergency Decree Laws CDL-AD(2016)037, footnote 59.

<sup>84</sup> Ibid., para 140.

<sup>85</sup> Ibid., paras 227-228.

<sup>86</sup> See the report of the AEAJ of 21 August 2017 for the CCJE members referring to e.g. <http://www.hurriyetdailynews.com/turkeys-board-of-judges-prosecutors-temporarily-suspends-four-for-ordering-release-of-gulen-suspects.aspx?pageID=238&nID=111576&NewsCatID=509>

<sup>87</sup> See the report of the AEAJ of 21 August 2017 for the CCJE members.



96. The AEAJ mentions that the mass dismissals and arrests without proper individualised accusations have “a chilling effect” within the judiciary<sup>88</sup>. This means that those judges, who are still in office, fear being subjected to such arbitrary measures themselves. These judges can no longer be seen to be independent, as the pressure is too high on them<sup>89</sup>.
97. Most recently, PACE, at its autumn session of 2017, “reiterates its deepest concern about the scope of measures taken under the state of emergency” and calls on the Turkish authorities “to put an immediate end to the collective dismissal of judges and prosecutors, as well as other civil servants, through decree laws and ensure that those who have already been dismissed will have their cases reviewed by a “tribunal” fulfilling the requirements of Article 6 of the ECHR”<sup>90</sup>.
98. Judges and prosecutors in Turkey who were dismissed following the failed coup attempt in 2016 are able to seek redress before the Turkish Council of State. The European Court of Human Rights, while stressing that this conclusion did not prejudice a possible re-examination of the question of the effectiveness of the remedy in question and the ability of the national courts to establish consistent case law compatible with Convention requirements, has since found that the remedy before the Council of State is a priori accessible and that there was no evidence to suggest that it was not capable of providing appropriate redress<sup>91</sup>.

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99. The CCJE member in respect of **Ukraine** states that the judicial reform, which significantly changed the structure of the judicial system in Ukraine and the procedures regulating appointment, dismissal and accountability of judges, has resulted in a wave of retirements of judges of first instance and appeal courts. This transitional period of the reforms has resulted in a number of challenges as regards capacity. The general lack of judges in the courts affected is at almost 40% and this has negatively affected the whole judicial system because the caseload of serving judges has become so heavy that it does not allow treating duly all cases. This leads to unreasonable lengths of proceedings within the courts.
100. The process of solving the long-standing problem of appointment for an indefinite period of judges whose five-year term of office has expired, remains slow. The long-term initial appointment of judges could be applied, because the required training for a new judge must be no less than a year and a half, and this reflects in fact the existing rule for the appointment of judges.
101. The manner of securing the guarantees necessary in connection with the appointment of judges would appear to comply with international standards. However, judicial independence remains at risk and cases can be identified where the independent

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<sup>88</sup> Ibid., also referring to Venice Commission, Opinion on Emergency Decree Laws CDL-AD(2016)037, para 147 et seq.

<sup>89</sup> See the report of the AEAJ of 21 August 2017 for the CCJE members.

<sup>90</sup> See the PACE Resolution 2188 (2017) Provisional version “New threats to the rule of law in Council of Europe member States: selected examples”, paras 12 and 12.4.

<sup>91</sup> See ECtHR Çatal v. Turkey (application 2873/17), 10 March 2017.

activities of the judiciary have been interfered with or attempts have been made to that end.

102. In particular, on 14 April 2017, the High Council of Justice received 104 applications relating to the intervention in justice. And, according to the monitoring of the Council of Judges of Ukraine, 153 applications of judges on interfering in their activities were reported during 2015-2017.
103. The facts mentioned in the applications are systematically explained by certain leaders of judicial authorities and by the representatives of judicial self-government in the appeals to the law enforcement agencies and to the executive power, but they are often left without adequate response.
104. Some litigants, with a view to obtaining a judgment in their favour, rather than using the right to appeal and cassation, address law enforcement agencies with a claim that the judgment in their case is unlawful and it is an offence to have adopted it. This is followed by strong public statements of representatives of the legislative and executive authorities as well as other organisations suggesting judicial corruption and incompetence on the part of judges.
105. Mention should be made of the fact that the Supreme Court has been liquidated by the Law on the Judiciary and the Status of Judges from 2 June 2016, all sitting Supreme Court judges dismissed, and a competitive selection procedure undertaken for the appointment of 120 new Supreme Court judges. The process included input by a new body, the Public Integrity Council (PIC), tasked also by law with advising on the integrity of the candidates. The process and the role in particular of the PIC was not without controversy. The new bench was announced in July 2017.
106. The AEAJ reports that so far a probationary period of a fixed term of 5 years is provided by Ukrainian law for newly appointed judges. After renewal and final appointment (previously by the Ukrainian parliament, now by the Ukrainian High Council of Justice) the mandate of a judge is permanent. Within this period of time to wait for a final appointment, there is a prohibition to work as judge.
107. The AEAJ points out that the situation has improved because the High Council of Justice took up to decide on judicial appointments. Previously in some cases, the Ukrainian parliament denied taking decisions and therefore delayed appointment of judges after the termination of the 5-years term.

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108. The CCJE member in respect of **the United Kingdom** states that judges enjoy substantial security of tenure. By statute, judges in the Supreme Court, Court of Appeal, and High Court hold office during good behaviour, but may be removed on the address of both Houses of Parliament. In practice, the dismissal of a judge under these provisions requires an address to the Crown by both Houses of Parliament. This process has not been invoked for over 250 years.
109. Other judges enjoy less security: thus circuit judges may be removed by the Lord Chancellor, with the agreement of the Lord Chief Justice, for incapacity or misbehaviour, and similar provisions apply to district judges. "Misbehaviour" is not

defined. There is a compulsory retirement age of 70 for all judges, although judges may be invited to continue sitting on a part-time basis until the age of 75.

110. The Lord Chancellor, other ministers of the Crown, and all those with responsibility for matters relating to the judiciary or otherwise to the administration of justice, are required by the Constitutional Reform Act of 2005 to uphold the continued independence of the judiciary. There is a perception among some judges that this duty is not always performed satisfactorily.

## **B. Organisational independence: Councils for the Judiciary and the administration of courts**

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111. The AEAJ reports that in **Austria**, in some of the provinces (“Länder”) no legislation exists that the president of the administrative court is not subordinated to orders of the government of the province. In these provinces (e.g. Vienna), justice administration is done by the governments of the provinces to a great extent. The AEAJ emphasises that this fact is not in line with the Rec(2010)12 (points 4 and 7).

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112. The CCJE member in respect of **Bulgaria** states that in 2015-2016, amendments to the Constitution and the Judicial System Act were adopted concerning the organisation of the judiciary. The amendments were adopted following an extensive discussion of the Judicial System Reform Strategy aimed at strengthening the judiciary, its proper functioning and independence and an effective right of access to court, and in the light of the recommendations of the Venice Commission and of the CCJE<sup>92</sup>.
113. The law changes the composition and the authority of the Supreme Judicial Council (SJC). Following the amendments, the SJC, which was a one-chamber institution before, is now divided into two separate colleges for judges and prosecutors, respectively. This model prevents the participation of members who represent prosecutors and investigation magistrates in deciding personnel and disciplinary matters concerning judges and vice versa. The plenary decides common issues and the colleges concentrate upon the issues related to their professional group.
114. The latest EU Report on progress in Bulgaria under the Co-operation and Verification Mechanism pointed out that the “SJC is the key institution governing the Bulgarian judiciary and concrete results in terms of judicial reform rest heavily on a well-functioning SJC, both in terms of professionalism and transparency... This needs to be accompanied by a broader commitment of all state actors to judicial independence and loyal cooperation among institutions. A non-political and professional working climate inside of this institution, focusing on the priorities of judicial reform, is essential. The series of controversies and infighting that have marred the SJC over the past years have fuelled suspicion of external influence and affected public confidence in the

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<sup>92</sup> Reference to the Venice Commission and CCJE recommendations is made in the motives to the Judicial System Act Amendment Law.

judiciary<sup>93</sup>. Therefore, one of the most significant tests for 2017 will be the election of the new Council, both for members appointed within the magistracy and those appointed by Parliament. It will be important that these elections are carried out, and seen to be carried out, in an open and transparent manner following a serious debate on the merits of the respective candidates. Then the newly elected college will have to develop a track record of impartial and professional decision-making in key areas<sup>94</sup>.

115. Consequently, the EU recommended to “ensure a transparent election for the future SJC, with a public hearing in the National Assembly before the election of the members of the parliamentary quota, and giving civil society the possibility to make observations on the candidates<sup>95</sup>.”
116. The MEDEL reports that “in June 2017, judges will elect their peers who will sit on the next SJC. For the first time, a direct election will take place, enabling all judges to cast their vote. The BJA (Bulgarian Judges Association) has serious concerns about the forthcoming election process on account of claims, from judges at different courts throughout Bulgaria, that long before the official launch of the election campaign, the chief judges of several courts of appeals have instructed the judges in all courts within the respective judicial districts to endorse *en block* pre-approved candidates arguing that diversification, at the level of appellate districts, is desirable and will thus be achieved. Judges from various judicial districts have also voiced suspicions about potential vote rigging on account of the failure of the SJC to select an adequate and reliable system for remote electronic voting that guarantees ballot secrecy. The SJC rolled out the system in breach of transparency requirements and failed to respond to the queries that arose in the wake of the experimental electronic voting at the end of 2016. These suspicions were further deepened by the refusal of the SJC to allow an independent expert assessment of the system prior to the forthcoming election<sup>96</sup>.”
117. Furthermore, the MEDEL reports that “in the spring of 2016, further amendments to the Judiciary Act were enacted as part of the ongoing reform... whereby new powers were granted to the general assemblies of courts, mostly relating to the involvement of judges in court management and the nomination of applicants for court presidents. Other important amendments concerned the performance evaluation and career development of judges and disciplinary proceedings. However, these amendments failed to bring about a radical improvement in judicial governance. The reform has been met with overt resistance by the majority of current SJC members. Thus, once the enacted legislative amendments had come into force, the anti-reform majority at the SJC set about obstructing their application. On several occasions, court presidents who had failed to receive the endorsement of the general assemblies of judges, were elected court presidents. The SJC has further elected to turn a blind eye to the new provisions on the promotion and performance evaluation of judges. The majority of the

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<sup>93</sup> Bulgaria consistently figures among the EU Member States with the lowest perceived independence of justice. 2016 EU Justice Scoreboard, pp. 35 - 36.

<sup>94</sup> See the Report from the European Commission to the European Parliament and the Council “On Progress in Bulgaria under the Co-operation and Verification Mechanism”, Brussels, 25.1.2017 COM(2017) 43 final, p. 8.

<sup>95</sup> Ibid.

<sup>96</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 9.

members of the Chamber of Judges has also consistently ignored publicly available information about alleged corruption and poor judicial governance<sup>97</sup>.

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118. The CCJE member in respect of **Cyprus** states that, with the Judicial Council responsible for the appointment of judges of first instance courts and specialised courts, as well as for their promotion, transfer and disciplinary control, the administration of courts is under the direct and sole responsibility of the Supreme Court. To that end, the Supreme Court is assisted by the Chief Registrar and his/her staff, while the lower courts have their own registrars and staff. Only the buildings and court houses come under the responsibility of the Ministry of Justice, which otherwise is not involved in the administration of justice.

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119. The CCJE member in respect of the **Czech Republic** states that there is still no Council for the Judiciary. The administration of the courts is provided by the Ministry of Justice.
120. The MEDEL reports that it has been a long-standing priority of the Union of Judges of the Czech Republic to promote the change of the judiciary administration and organisation model. The Union of Judges has repeatedly highlighted the inevitable question of establishing the High Judicial Council as an independent authority having the necessary powers to ensure high quality, responsible and continuous administration of courts, as well as an adequate protection of the independence of courts and judges from the increasing pressure of the executive power. From the perspective of the proper functioning of the judicial system in the Czech Republic, the existing judicial model, which is subject to public administration and headed by the Ministry of Justice, has been long perceived as inadequate. The change of the judiciary administration and organisation model would set the Czech judiciary free from its dependence on election cycles. The High Judicial Council should be a professional institution coordinating any necessary changes; it would be independent from elections and any ensuing changes. Presently, the executive power is not showing any particular interest to establish such an authority, and it also offers no solutions to pressing issues<sup>98</sup>.
121. One example, according to the MEDEL, is the need to recodify the existing procedural rules. The civil and criminal codes of procedure were written down a long time ago under different circumstances and they do not meet today's needs. While a new codification has been put in place for the substantive law, the procedural law does not comply with the new codes and is waiting for a fundamental change. Any such legislative planning is in the hands of the Ministry of Justice, and, unfortunately, it is influenced by election cycles<sup>99</sup>.

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<sup>97</sup> Ibid.

<sup>98</sup> See the MEDEL Report of 2017 on Justice in Europe, pp. 27-28.

<sup>99</sup> Ibid., p. 28.

122. The AEAJ reports that in the Czech Republic, unlike in other Eastern European countries, judicial administration is executed by the Minister of Justice. This circumstance is perceived by the members of judiciary as inadequate protection (inter alia this brings dependence on election cycles; actions to meet stressing needs of judiciary come only reluctantly, e.g. to draft a consistent legislation for court procedures). No judiciary council exists yet, although this has been demanded by Czech members of judiciary over the last years.
123. The AEAJ mentions that the perceived and repeatedly stressed need to have a specific body, which would increase the protection of independence of the judiciary against the increasing pressure of executive power, should be taken seriously and should be implemented by the national legislative and executive powers. Thus the level at which judicial independence would be safeguarded in the Czech Republic would be strengthened in line with European standards<sup>100</sup>.

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124. The CCJE member in respect of **Georgia** states that the High Council of Justice consists of 15 members out of which 9 are judges and 6 are non-judge members. Eight judge members are elected by the conference of judges. The Chief Justice of the Supreme Court is the head of the Council *ex officio*. Five members are elected by the parliament and 1 member is appointed by the President of Georgia.
125. The administration of courts, except the Supreme Court, is under the responsibility of the High Council of Justice. The Supreme Court handles its administration independently. The High Council of Justice has a separate budget. The Ministry of Justice is not involved in the court administration in any way. However, the Ministry of Justice has the power to prepare and initiate, through the government, legislative amendments concerning all issues related to reforms of the judiciary. One of the key issues currently under discussion is to ensure the active involvement of court representatives in the discussion of all draft laws related to reforms of the judiciary.
126. The existing case distribution and management system is widely considered to be defective and does not ensure a balanced workload for judges. At present, the main challenge for the judiciary is to implement an electronic case distribution system which should ensure the random distribution of cases among judges.

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127. The CCJE member in respect of **Iceland** states that, on 1 January 2018, the new law on courts comes into force where judicial levels will be three, instead of two. From that time, the Judicial Council, currently dealing with district courts, will be responsible for the administration of all courts.

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128. The CCJE member in respect of **Luxembourg** states that they are still awaiting the reform introducing the Council of Justice which, although promised for almost 10 years,

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<sup>100</sup> See CCJE Opinion No. 10(2007) on the Council for the Judiciary at the service of society, Summary A(a).

has still not taken place. They are confident that this reform will take place before the end of the current parliament's mandate (end of 2018).

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129. The MEDEL reports that the judiciary system in the **Republic of Moldova** is currently undergoing a radical change from an organisational point of view. The Law on the reorganisation of the courts of 1 July 2016 provides for the merging and reduction of the courts of first instance, from 44 to 15, so that in each court there are at least 9 judges. In Chisinau, all 5 courts merge into one court, and the specialised courts (district commercial court and military court) cease their activity. The New Judicial Map is operational from 1 January 2017. At the same time, the specialisation of judges in the courts of first instance is being implemented. The high workflow, the imbalance in the workload of the courts, the overworking of judges and courts' staff have repercussions on the capacity, lead to delays, a high number of sessions per day, to the length of proceedings which could negatively affect the quality of the act of justice<sup>101</sup>.

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130. The CCJE member in respect of **Montenegro** states that, as regards the relations between the Judicial Council and the system of the administration of courts, the latter is organisationally independent, and the management of this system is under the responsibility of the president of each court separately. The exception is in relation to the authorisation of the Judicial Council to establish workplaces, the amount and criteria for salaries court staff, as well as the criteria and manner of establishing the variable part of salaries for the same categories of employees.

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131. The CCJE member in respect of **Norway** states that the Norwegian Courts Administration is headed by a board and its day-to-day work is managed by a "managing director". The members of the board perform their duties in addition to their ordinary occupation. The board consists of nine members: three judges from the ordinary courts, one judge from the land consolidation courts, two representatives elected by the parliament (the *Storting*), one representative from among the court executives, and two practising lawyers.
132. The Council of Europe recommends that not less than half of the members of a council for the judiciary should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary<sup>102</sup>. The Norwegian model is not in line with the recommendation in this respect as the majority of the board are not judges.
133. Furthermore, the government decides which judges to appoint as members of the board. They are not chosen by their peers. There are no provisions requiring the government to consult judges or judges' associations prior to appointing members of the judiciary to the board. The government also decides which member of the board is to be its chairperson. Both the CCJE and the Venice Commission recommend the body

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<sup>101</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 19.

<sup>102</sup> See Rec(2010)12, para 27.

itself to elect its chair<sup>103</sup>.

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134. The Chairman of the National Council of the Judiciary of **Poland** addressed the CCJE, by letter of 3 April 2017, requesting an opinion with respect to the draft Act amending the 2011 Act on the Polish National Council of the Judiciary and certain other acts. The CCJE was requested to assess the compliance of the proposed changes with international standards on the independence of judges.
135. Having urgently reviewed this request and all available information on the subject, the CCJE Bureau adopted its Opinion on 7 April 2017. The CCJE Bureau emphasised that was concerned that the draft Act would be a major step backward from real judicial independence in Poland.
136. The Bureau of the CCJE was deeply concerned, in particular, by the implications of the draft Act for the constitutional principle of separation of powers as well as that of the independence of the judiciary, as it effectively meant transferring the power to appoint members of the National Council of the Judiciary from the judiciary to the legislature. In order to fulfil European standards on judicial independence, the judge members of this Council should continue to be chosen by the judiciary.
137. In addition, the proposed division of the Council into two Assemblies and the proposed new procedure for appointment of judges may infringe judicial independence insofar as the legislative and executive powers would have a decisive role in the procedure for appointing judges and trainee judges, and this would hamper the work of the Council and weaken its role as a constitutional body and as a guardian of judicial independence.
138. The Bureau also underlined that the pre-term removal of the judges currently sitting as members of the Council would not be in accordance with European standards on judicial independence.
139. This draft Act was also criticised by the OSCE<sup>104</sup> and other national and international actors. Nevertheless, it was adopted by the parliament. On this occasion, the CCJE Bureau urgently adopted, on 17 July 2017, a statement deeply regretting the adoption of this Act and reiterated its concerns mentioned above.
140. In the same statement, the Bureau also emphasised that the parliament adopted another Act that would give the Minister of Justice (the Prosecutor General at the same time) the power to dismiss court presidents and substitute them within the next six months after the entry into force of this new law. This would be a major setback for the rule of law and for judicial independence in Poland.

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<sup>103</sup> See CCJE Opinion No. 10(2007), para 33; and Venice Commission's Opinion No. 403 / 2006 on Judicial Appointments, adopted by the Venice Commission at its 70<sup>th</sup> plenary session on 16-17 March 2007, para 35.

<sup>104</sup> See Final Opinion of 5 May 2017 of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) on draft amendments to the Act on the National Council of the Judiciary and certain other Acts of Poland.



141. Furthermore, the Bureau was deeply concerned, in the same statement, by yet another draft Act on the Polish Supreme Court, recently submitted to the parliament by a group of members of the Law and Justice Party. According to the draft Act, all current judges of the Supreme Court, except a group of judges indicated arbitrarily by the Minister of Justice, would be transferred into retirement on the day following the entry into force of this Act.
142. According to the draft Act, the Supreme Court would be subordinated to the Minister of Justice regarding the Court's organisation and its human resources. The Minister of Justice would also be empowered with an exclusive competence to nominate candidates for judicial office holders in the Supreme Court. If adopted, the Act would further undermine the separation of state powers, the rule of law and the independence of the judiciary in Poland. New judges would be appointed to the Supreme Court under decisive political influence.
143. The Bureau concluded that the draft Act on the Polish Supreme Court and the suggested pre-term removal of the Supreme Court judges ran contrary to European standards on judicial independence, and therefore strongly recommended to the Polish authorities not to adopt and not to introduce the proposed amendments to the law.
144. The adoption of these two Acts in the beginning of July 2017, as well as the consideration of draft Act on the Polish Supreme Court provoked massive protests and demonstrations in Poland, including not only the Polish judiciary but the public at large, and was also strongly criticised by the CoE, the EU and range of international, i.e. ENCJ<sup>105</sup>, CCBE<sup>106</sup>, EAJ, AEAJ, and national, i.e. Italian High Council for the Judiciary<sup>107</sup>, actors.
145. In particular, the CoE Secretary General sent a letter, dated 18 July 2017, to the Speaker of the Polish parliament concerning the draft Act on the Supreme Court. The Secretary General wrote that he was particularly concerned by the provisions of the draft which would terminate the mandate of all judges of the Supreme Court, except those specifically selected to continue their mandate.
146. The Secretary General also stressed that the draft law should be taken in conjunction with other texts adopted recently in Poland on the judiciary, which also raised concerns, and referred to the above-mentioned Acts. He added that given the role played by the judiciary, both the executive and the legislature must be particularly cautious when considering legislative amendments directly affecting the judiciary's independent functioning. The Secretary General appealed to the parliament to uphold the CoE standards and not to proceed hastily<sup>108</sup>.
147. The CCJE Bureau followed all these developments with a great attention and stayed in a daily contact with the Polish judiciary. On 28 July 2017, the President of the Polish Judges Association IUSTITIA informed the CCJE that the Polish President announced

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<sup>105</sup> See the statement of the Executive Board of the ENCJ, 17 July 2017.

<sup>106</sup> The President of the CCBE wrote a letter on this subject to the President of Poland on 18 July 2017.

<sup>107</sup> See the Resolution approved by the Italian High Council for the Judiciary (Consiglio Superiore della Magistratura), 20 July 2017.

<sup>108</sup> <http://www.coe.int/en/web/portal/-/secretary-general-raises-concerns-over-polish-draft-law-on-supreme-court> .

that he was vetoing the Acts on the National Council of the Judiciary and on the Supreme Court. He explained that in theory, the Polish parliament could challenge the President's veto. "Law and Justice" party had a simple majority in the parliament but needed a three-fifths majority if it decided to reject President's decision. The letter mentioned that it would be hard to achieve but they might try it anyway.

148. However, in the letter, a strong concern was expressed about that the President did sign into law the above-mentioned Act on the organisation of common courts giving the Minister of Justice the power to dismiss court presidents, substitute them and other powers in the court administration and management. Additional concern was expressed in the letter as regards the two vetoed Acts and what would be the follow-up, and if new drafts were to be prepared, would they be in line with European standards. The CCJE Bureau decided to closely follow this difficult situation.
149. By a letter of 3 October 2017, the Chairman of the National Council of the Judiciary of Poland addressed the CCJE, requesting an opinion on the new Draft Act on the National Council of the Judiciary prepared by the President of Poland.
150. In its official Opinion, adopted and published on 12 October 2017, the CCJE Bureau emphasised that the most significant concerns caused by the previous draft<sup>109</sup> - the selection methods for judge members of the Council and the pre-term removal of the current judge members – remained valid in the new draft as well.
151. The only significant change in the new draft was the requirement of a majority of 3/5 in the Sejm<sup>110</sup> for electing 15 judge members of the Council. However, as the CCJE Bureau emphasised, this did not change in any way the fundamental concern of transferring the power to appoint members of the Council from the judiciary to the legislature, resulting in a severe risk of politicised judge members as a consequence of a politicised election procedure. This risk may be said to be even greater with the new draft, since it provided that if a 3/5 majority cannot be reached, those judges having received the largest number of votes would be elected.
152. Furthermore, since the President of Poland proposed, as in the previous draft, that the Sejm also elected 15 judge members of the Council, in addition to 4 ex officio members of the Council and 6 members presently elected by Parliament from among MPs, this effectively meant that almost all members of the Council would be elected by the Parliament. Such a proposal clearly contradicted the CoE's standards, as the Bureau pointed out, having referred to the CCJE Opinions and a number of other important sources<sup>111</sup>.

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<sup>109</sup> Adopted by the Parliament and later vetoed by the President.

<sup>110</sup> Lower house of the Polish Parliament.

<sup>111</sup> Not less than half the members of Councils for the Judiciary should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary, see Rec(2010)12, para 27. The Venice Commission has particularly advocated that judicial members of a Council for the Judiciary should be elected or appointed by their peers, see the Report on the Independence of the Judicial System, Part I: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para 32. The OSCE/ODIHR also underlined that if the legislature, rather than the judiciary, appoints the fifteen judge representatives to the Judicial Council, this would jeopardise the independence of a body whose main purpose is to guarantee judicial independence in Poland, see Final Opinion on 5 May 2017 of the

153. As regards the term of office of members of the Council, the new draft foresaw, similarly to the previous one, the pre-term termination of the mandate of the 15 judges currently the members of the Council. They would serve in the Council only until the election of the new 15 members by the Sejm.
154. The Bureau underlined that a member of any Council for the Judiciary, which is a constitutional body entrusted with a mission of fundamental importance for the independence of the judiciary, should only be removed from office following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge. The procedure in the case of pre-term removal should be transparent and any risk of political influence should be firmly excluded, which was not the case either in the previous or in the new draft.
155. Furthermore, this provision interfered with the guarantees of the Article 6 of the ECHR insofar as the current members of the Council would seemingly not be able to challenge the termination of their mandates before a judicial body other than the Polish Constitutional Tribunal, the independence of which from the legislative and executive powers has been questioned<sup>112</sup>. In this respect, the Bureau of the CCJE also referred to the Grand Chamber judgment of the ECtHR<sup>113</sup>.
156. As a conclusion, the Bureau recommended that the Draft Act be withdrawn and that the existing law remain in force. It stressed that, alternatively, any new draft proposals should be fully in line with the CoE standards regarding the independence of the judiciary.
157. As regards the new draft law on the Supreme Court, the CCJE Bureau, even though it has not adopted an official Opinion, still examined the issue emphasised certain concerns, including in relation to the proposed lowering, in the new draft, without any justification, of the retirement age to 65 years, and voluntary retirement age of 60 years for female judges. Such a change would result in a pre-term removal of approximately 40 per cent of the Supreme Court judges. They are the most experienced judges. It would also be a differential treatment amounting to gender discrimination.
158. The possibility of extending mandates beyond 65 by individual decision by the President of Poland would also be a risk to independence. The prospect of a possible extension would leave judges, who hope to benefit from such a decision, more disposed to please the executive, or it would look like that to the public which is equally problematic. It is certainly contrary to the Council of Europe standards that an elected politician can take discretionary decisions on which judges are allowed to stay in office.

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OSCE/ODIHR on draft amendments to the Act on the National Council of the Judiciary and certain other Acts of Poland, para 12.

<sup>112</sup> See *inter alia* the report adopted by the Venice Commission at its 108th Plenary Session, 14-15 October 2016 on the Act on the Polish Constitutional Tribunal (especially para 123): [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e) ; see also information note by the co-rapporteurs of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe from their fact-finding visit to Warsaw 3 to 5 April 2017 (especially para 27). <http://website-pace.net/documents/19887/3136217/AS-MON-2017-14-EN.pdf/a1215706-4f9a-40dd-af40-e1e03209d0a4>

<sup>113</sup> See ECtHR *Baka v. Hungary*, 23 June 2016.

159. As regards the extraordinary complaints and reopening of final court decisions, in European practice, the possibility of extraordinary complaint to revise a legally binding judgment is severely restricted and accessible only to the parties to the original proceedings. Reopening of final court decisions may exist only in very exceptional circumstances and subject to detailed safeguards, paying due respect to the principle of *res judicata* and legal certainty.
160. According to the new draft, such complaints would be submitted to the Supreme Court. Complaints may be submitted *inter alia* by the Parliament or by the Prosecutor General whose office is part of the Ministry of Justice, the Minister exercising also the power of the Prosecutor General.
161. The CCJE Bureau is not informed of any other procedures for reopening of final decisions in the Polish procedural laws. The CCJE Bureau is concerned by the fact that a reopening procedure can be initiated by members of the Parliament, and that lay judges in these procedures are to be elected by the Senate. Again, the CCJE Bureau is concerned by the attempts to politicise the Polish judiciary.
162. Furthermore, the new disciplinary chamber, as a special chamber within the Supreme Court, will have a chilling effect on judicial independence. Including in this chamber of civil society representatives and lay judges appointed by the Parliament (in practice by the ruling party), will bring a political dimension to what should be an independent process. Disciplinary proceedings should be conducted by an independent authority or a court<sup>114</sup>. It seems likely that such a set-up would fail the independence test, and the outcome would be a procedure compromised by political influence.
163. The inclusion of lay judges also at the second instance level of disciplinary proceedings means that the flaw at first instance would not be remedied on appeal.
164. As regards rules of procedure of the Supreme Court, according to the CoE standards, the judiciary should be involved in all decisions which affect the practice of judicial functions (e.g. the organisation of courts, procedures, other legislation). This should be an internal matter for the Supreme Court. As regards determining the number of Supreme Court judge positions, the executive may have a better picture of the financial situation, but the Supreme Court should be consulted. There is a risk that this will just be used by the executive to justify further forced resignations.
165. The CCJE has also been informed that, first, approximately 600-700 positions are currently vacant in Poland, waiting to be appointed whenever the executive gains control over the National Council of the Judiciary. These positions remain vacant in addition to offices vacant as a result of judges being seconded to the Ministry of Justice. The total number amounts to approximately 1000 vacant positions. This amounts to 10 per cent of the total number of available positions. In addition, 40 per cent of judicial offices in the Supreme Court to be replaced after the governmental take-over of the National Council of the Judiciary must be taken into account. In the eyes of the CCJE Bureau, this causes very serious concerns.

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<sup>114</sup> See Rec(2010)12, para 69.

166. The MEDEL reports that the situation of justice in **Portugal** is still strongly linked to the new organisation of the judicial system that entered into force in September 2014. New management instruments were put in place, specialised courts were spread to the whole country, some courts in smaller towns were closed and the country was divided in new judicial districts where a judge appointed by the Superior Council of Magistracy has administrative competence, having a prosecutor coordinating the intervention of prosecutors<sup>115</sup>.
167. The new government that came out of the parliamentary election of 4 October 2015 (from the Socialist Party, with the support of the Communist Party and the Left Block – all previously in the opposition) announced its intention to step back in some of the reforms mainly in what concerned the courts that were shut down and the creation of specialised courts that were concentrated in bigger cities, saying that it was a violation of the population's right for an access to justice<sup>116</sup>.
168. Following that announcement, on 1 January 2017, an amendment to the law of the organisation of the judicial system entered into force, reopening as regular 20 of the previously closed courts and 23 of the courts that had been transformed into "proximity sections" (where no public judicial acts were carried out), as well as creating 7 new family law specialised courts and giving back competence in that area to 25 courts that had lost it<sup>117</sup>.
169. Connected to the modifications in the judicial organisation, the process of changing the Statutes of Judges and Prosecutors has been long and has not yet ended. There are many issues crucial to judges, such as the correct and clear definition of the competences of president judges and coordinator prosecutors in the new judicial circumscriptions, the compatibility of the new judicial organisation and the hierarchy of prosecutors<sup>118</sup>.
170. The President of Portugal, elected in January 2016, devoted some attention to the judicial system and made efforts in order to promote dialogue between the main professions (judges, prosecutors and lawyers) so a "Pact on Justice" could be achieved between all of them. After a standstill due to elections that were held in the Portuguese Lawyers Order, conversations have been going on common concerns and solutions that could be found<sup>119</sup>.

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171. The CCJE member in respect of **Romania** states that the organisational independence in the judiciary is complete. The Superior Council of Magistracy covers both judges and prosecutors, having also disciplinary powers, when referred to by the Judiciary Inspection, an independent body itself, being free from any interference.

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<sup>115</sup> See the MEDEL Report of 2017 on Justice in Europe, pp. 21-22.

<sup>116</sup> Ibid., pp. 21-22.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

172. A thorough legislative reform of the judiciary in Romania put into practice four codes: Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, introducing new institutions, such as the Judge of Rights and Freedoms, the Preliminary Chamber Judge within the new Code of Criminal Procedure, cassation recourses, admission of guilt agreement etc., which involved also the modification of the Regulation for the organisation and administration of courts by the Superior Council of Magistracy. The positive aspects of this large justice reform in Romania are reflected also in the reports of the Cooperation and Verification Mechanism prepared by the European Commission.
173. However, the CCJE was informed, on 16 October 2017, of a recent Memorandum for the Rejection of the Amendments to the "Laws of Justice" signed by 3600 Romanian magistrates (judges and prosecutors) and addressed to the Government of Romania, Prime Minister and Minister of Justice.
174. The Memorandum states that the Minister of Justice proposed a set of amendments to the "laws of justice" (Law 303/2004, Law 304/2004 and Law 317 / 2004), without impact studies and without prior consultation on key legislative issues. The draft was communicated to the Superior Council of Magistracy.
175. In its meeting of 28 September 2017, the Plenum of the Superior Council of Magistracy issued a negative opinion on the whole set of amendments, taking into account the votes cast in General Assemblies of judges and prosecutors, held in numerous courts and prosecutor's offices, where they, in overwhelming proportion, rejected the amendments.
176. Among other aspects, the negative votes referred to: 1) all substantive changes to the legislation; 2) reorganisation of the Judicial Inspection, as a legal personality structure within the Ministry of Justice; 3) appointments at the top of the judiciary (the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice (HCCJ), first deputy and his deputy, the chief prosecutor of the National Anti-Corruption Department (DNA), his deputies, the chief prosecutors of the Prosecutor's Office attached to HCCJ and the DNA, and others); 4) proposed amendments regarding the magistrates' liability regime, susceptible of violating the independence of the judiciary; 5) change of the magistracy recruiting system - the changes are regarding the promotion to a higher court/higher prosecutor's office; 6) maintenance of the actual *status quo* regarding the budget of the courts of justice which is administered by the Ministry of Justice; 7) establishment within the Prosecutor's Office, attached to HCCJ, of a specialised directorate with exclusive jurisdiction to carry out criminal prosecution for the acts committed by judges and prosecutors, regardless of their nature and gravity.
177. The Memorandum emphasises that in 2017, Romania is still subject to the Cooperation and Verification Mechanism (MCV)<sup>120</sup>, 10 years after its accession to the European Union, precisely in order to align its justice system with those of the states with historical democratic traditions. Thus, the return to legislative regulations existing before 1989, the restoration of political control over the judiciary, the unjustified extension of the duties of the Minister of Justice are not acceptable. According to the

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<sup>120</sup> European Commission Decision 2006/928/CE of 13 December 2006.

Memorandum, all these substantive changes proposed by the Minister of Justice flagrantly violate the Cooperation and Verification Mechanism.

178. By Decision no. 2 of 11 January 2012, the Constitutional Court of Romania considered that, by being a member of the European Union, Romania has the obligation to apply this mechanism and follow the recommendations established in this framework.
179. In view of the will of the overwhelming majority of magistrates, the Memorandum asks to withdraw the amendments and to initiate and develop a concrete and effective dialogue with magistrates, the Superior Council of Magistracy, professional associations of judges and prosecutors, in order to improve the legislative framework, after carrying out appropriate impact studies and after presenting serious and credible motives regarding the proposed changes, in order to modernise the justice system, in line with the Cooperation and Verification Mechanism.

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180. The President of the **Slovenian** Association of Judges (SAJ) addressed a letter to the CCJE in October 2013 explaining that the Ministry of Justice had established the Department for the control of the organisation of the court administration - the so-called "judicial inspection". Despite sharp objections by the SAJ, the Judicial Council and the Supreme Court, and letters from some international bodies, there was no amendment of the Courts Act in 2015. At the end of 2016, the Ministry of Justice adopted Rules of the Department for the control of the organisation of the court administration and nominated a detached judge as the Head of the Department.
181. The Department started its work in 2017. The inspectors - officials from the Ministry of Justice (non-judges) - will inspect the data of the 40 oldest open criminal and civil cases in all 11 District Courts in Slovenia. They have the possibility to have an insight into the files of pending cases. On the basis of these insights, the Ministry of Justice will assess the adequacy of the organisation of the court administration of each particular court. Furthermore, it will be able to make a proposal for the dismissal of the court president and for a disciplinary procedure against the judge.
182. It should be noted that under Slovenian law, the assessment of the work of court presidents is within the competence of the Judicial Council and the assessment of judges' work is within the competence of the Personal Council of the respective higher court. The SAJ is convinced that the current situation is contrary to the fundamental principles of the rule of law, separation of powers and independence of the judiciary in a democratic state.

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183. The MEDEL reports that the judicial system in **Spain** "basically emanates and is still going on since 19<sup>th</sup> century". It is still ruled by the Judiciary Organic Act enacted in 1985. However, except for the establishment of the new High Courts of Justice (Tribunales Superiores de Justicia) in each regional government (Comunidades

Autónomas), this Act actually keeps on being ruled by the ancient judicial regulation founded in 1870 by the First Spanish Republic<sup>121</sup>.

184. There have been several attempts to improve and reform such an old system, but none of the Ministers of Justice has had real political will, consensus or ability to reach such a deal. All efforts to improve have been isolated and scarce reforms have only come down to detail, none of them have provided a veritable global change and a real improvement. As a result, there is an ancient judicial system that needs to be adjusted<sup>122</sup>.
185. Such current situation has led to negative reports from different international organisations. For example, GRECO criticised the Spanish system ruled by the Judiciary General Council (CGPJ) about members' elections. The report also warned about the judicial independence, and outlined that political power cannot interfere on judiciary related issues. Furthermore, GRECO mentioned that the anti-corruption measures have not yet been implemented: it analyses the legislative framework of the CGPJ and the rules about high members of the judiciary evaluation and nomination<sup>123</sup>. "In sum", there is "a real problem with judicial independence"<sup>124</sup>.
186. International institutions have outlined this problem. The EU has taken into account this issue as well. In April 2017, the annual report about the state of justice in the EU countries was made public<sup>125</sup>. Spain appears seventh to last EU State in judge/inhabitant ratio, and as third State whose population considers that justice is not independent. It must be added that, according to the study made by the EU, the first reason about lack of independence identified by the population is the government interferences. Furthermore, according to the Barometer of Spanish Lawyers, a high percentage of the population (81%) has a bitter conclusion: "All the governments, whatever their political colour was, have had more interest on controlling justice than providing it with sufficient tools and ways in order to improve it"<sup>126</sup>.

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187. The CCJE member in respect of **Sweden** states that the Central Courts Administration in Sweden (Domstolsverket, DV) is a public authority among others, led by a Director General appointed by the government. DV has the same status with regard to subordination and autonomy vis-à-vis the government as any other public authority. DV has observer status with the ENCJ.
188. It should be emphasised that Swedish constitutional tradition differs from that of most of other countries, in that the government may not give instructions to a public authority for how to decide a particular case or how to apply the law. Nevertheless, DV has a wide range of administrative responsibilities, such as providing and managing court buildings, administering a common IT system and providing educational opportunities

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<sup>121</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 12.

<sup>122</sup> Ibid.

<sup>123</sup> GRECO's fourth evaluation report about corruption prevention related to members of parliament, judges and prosecutors.

<sup>124</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 12.

<sup>125</sup> COM (2017) 167 final.

<sup>126</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 12.



for judges. Some of its tasks may be seen as particularly sensitive from the point of view of the independence of courts, such as allocating funds from the state budget to each court and ultimately deciding on the remuneration of judges.

189. There is a discussion, primarily still among members of the judiciary, whether DV should preferably be governed by a board composed of a majority of judges rather than by a Director General. Such a measure would bring Sweden closer to having a Council for the Judiciary in line with European standards.

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190. The CCJE member in respect of **Switzerland** states that Councils for the Judiciary have been instituted in a minority of the Cantons. They are unknown at federal level.

191. At federal level, the administration of courts - above all the recruitment of staff, but also e.g. information technology - is organised by the courts themselves. The budget for infrastructure (staff, buildings, computing etc.) is voted by parliament, upon direct proposals by the courts. Most of the Cantons have a similar organisational independence of the judiciary.

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192. The AEAJ states that in **Turkey**, the High Council of Judges and Prosecutors (HSYK) was no longer an independent organ, but under broad political influence. According to the AEAJ, this has recently been confirmed by the ENCJ, when it suspended the observer status of HSYK in December 2016. This decision was founded on the conviction that the HSYK was not an institution that was independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice. There were no signs that the new Council of Judges and Prosecutors would have a different setting in order to regard it as independent. The new Council shows even more relevant deficiencies<sup>127</sup>.

193. The CoE Commissioner for Human Rights stated on 7 June 2017 that “following the recently adopted constitutional amendments, which changed the system for its formation, Turkey’s new Council of Judges and Prosecutors (HSYK) is sworn in today. With four members appointed directly by the President of Turkey and seven members elected by Parliament without a procedure guaranteeing the involvement of all political parties and interests, I am concerned that the new composition of the HSYK does not offer adequate safeguards for the independence of the judiciary and considerably increases the risk of it being subjected to political influence. To avert such risk, European standards foresee that at least half of the members of judicial councils that are in charge of overseeing the professional conduct of judges and prosecutors (including appointments, promotions, transfers, disciplinary measures and dismissals of judges and public prosecutors) should be elected by the judiciary from within the profession. Against this background, I will follow the work of the HSYK and the extent to which it ensures in practice adherence to the rule of law and the independence of the judiciary, without which there can be no effective protection of human rights in

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<sup>127</sup> See Venice Commission Opinion on the amendments to the Constitution, CDL-AD(2017)005, adopted by the Venice Commission on 10-11 March 2017, para. 114 et seq.

Turkey"<sup>128</sup>. Thus, the membership of the HSYK and the procedure for election of its members are contrary to the CCJE standards.

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194. The CCJE member in respect of **Ukraine** states that following the judicial reform in 2016, according to the constitutional amendments, the representation of judges in the High Council of Justice is brought to 50%, and the President of the Supreme Court is an *ex officio* member of that Council. However, today, the High Council of Justice, which was formed by reorganising of the ex-High Council of Justice, operates as a part of the ex-High Council of Justice, which actually started its work in August 2015 and continues to perform its functions until the completion of the term of office of the current structure (till 30 April 2019). In other words, it is a transition period in Ukraine, which could constitute a threat to the guarantee of the independence of the institution that decides on the selection and career advancement of judges and which does not correspond to the principle of "majority judges elected by their peers".
195. The AEAJ reports that a judicial reform was initiated in 2016, which is still ongoing. Reasons were said to be a change of the system and a generally perceived high percentage of corruption within judiciary in Ukraine. As a first step of the judicial reform, the three High Cassation Courts (including also the High Administrative Court of the Ukraine), located in Kyiv and competent to decide as third instance, were abolished. Application to the newly created Supreme Court of the Ukraine (which is also designed as a cassation instance and should start operating soon) was opened, no automatic transfer took place. The relevant laws may be interpreted that those judges, who are not eligible (due to formal selection criteria) to apply to the new Supreme Court - as a minimum - have a right to be transferred (whereas also provisions exist concerning the right to be transferred to "an equal court" in case of liquidation of courts, which is argued by some to be the new Supreme Court). In any case, the legal framework does not provide details; there are no provisions concerning the procedures/criteria for those judges of the High Cassation Courts, who are not eligible to apply to the newly created Supreme Court or have not been selected. Thus regulations with transparent and predictable standards for transfers of these judges in line with basic standards of rule of law are needed.

### **C. Impartiality of judges, codes of ethics and professional conduct and disciplinary measures**

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196. The **Albanian** government continued judicial reforms as a part of the requirements of the European Union following the attainment of the EU candidacy status by Albania.

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<sup>128</sup> See at [http://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset\\_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-monitoring%2Fturkey%3Fp\\_p\\_id%3D101\\_INSTANCE\\_IK6iqfNE1t0Z%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_pos%3D1%26p\\_p\\_col\\_count%3D2](http://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-monitoring%2Fturkey%3Fp_p_id%3D101_INSTANCE_IK6iqfNE1t0Z%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D1%26p_p_col_count%3D2)

On 30 August 2016, the Law on the Transitional Re-Evaluation of Judges and Prosecutors (the so-called Vetting Law) was adopted with the stated aim of strengthening the judicial system, improving its image and fighting corruption. The law put in place a vetting process consisting of several background checks of judges and prosecutors to determine whether they had any links to individuals involved in organised crime and to re-evaluate their professional qualifications.

197. The opposition party voiced its disagreement with the adoption of this law. A request to suspend the law was made to the Constitutional Court of Albania on the grounds that it was unconstitutional and contrary to the ECHR. On 28 October 2016, the Constitutional Court requested an *amicus curiae* brief from the Venice Commission on the conformity of the law with international standards, including the ECHR.
198. The Venice Commission concluded in its *amicus curiae* brief<sup>129</sup> that every judge in Albania, including all judges of the Constitutional Court, according to the Vetting Law, would be subject to re-evaluation. Therefore, a conflict of interest may affect the position of all Constitutional Court judges. The disqualification of these judges because of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law as regards its conformity with the Constitution. That in turn would undermine the prospect of a functioning judicial review of legislation. This situation could be considered by the Constitutional Court as an “extraordinary circumstance” which might require departure from the principle of disqualification in order to prevent a denial of justice<sup>130</sup>.
199. As regards the involvement of the organs allegedly under the control of the executive power in the process of re-evaluation of judges from the point of view of judicial independence, an analysis of the text of the law showed that, despite the involvement of such bodies in the investigation process and the initial search for evidence, the evaluation and assessment of any information or evidence gathered by them rested with the Independent Commission and the Appeal Chamber. These both possessed the characteristics of judicial bodies and had the power to verify themselves the evidence gathered by the executive organs. On this basis, it could be concluded that the system put in place by the law did not as such seem to amount to an interference with the judicial powers<sup>131</sup>.
200. As to whether the lack of possibility for judges undergoing the vetting process to challenge the decisions given by the re-evaluation institutions before domestic courts was in breach of the Article 6 of the ECHR, the Venice Commission considered that the answer to this question depended on the qualification of the Appeal Chamber in the Constitution and the Vetting Law. For the Venice Commission, those legal texts provided sufficient elements to conclude that the Appeal Chamber could be considered as a specialised jurisdiction which presents judicial guarantees to the persons affected by the vetting procedure. The rights and safeguards contained in the legislative and constitutional scheme seemed extensive<sup>132</sup>.

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<sup>129</sup> Adopted by the Venice Commission the at its 109<sup>th</sup> Plenary Session (Venice, 9-10 December 2016), CDL-AD(2016)036-e.

<sup>130</sup> See the Venice Commission CDL-AD(2016)036-e, 9-10 December 2016, para 61.

<sup>131</sup> *Ibid.*, para 62.

<sup>132</sup> *Ibid.*, para 63.

201. As to whether the provisions of the law concerning the background assessment were contrary to the Article 8 of the ECHR, it had to be taken into consideration that the background assessment had the purpose to verify the declarations of judges being assessed with a view to determining whether they had had inappropriate contacts with persons involved in organised crime. As such, this was a legitimate aim in view of the second paragraph of Article 8. For the Venice Commission, the essential consideration was that the working group, which had a main role in the background assessment and was composed primarily of security personnel, functioned under the supervision and control of the re-evaluation bodies and that all the relevant material before the working group should be available to them. The Venice Commission was of the opinion that while the background assessment was undoubtedly obtrusive, it may not necessarily be seen as an unjustifiable interference with the private or family life of judges contrary to the Article 8 of the ECHR<sup>133</sup>.

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202. The CCJE member in respect of **Andorra** states that the High Council of Justice has recently approved a compendium of obligations and ethical values for judges, magistrates and prosecutors, which are of a non-disciplinary nature.

203. On the other hand, the law provides for a disciplinary procedure. The High Council of Justice is the body responsible for the investigation and application of sanctions which may be imposed for minor, serious or very serious misconduct up to the final termination of functions.

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204. The CCJE member in respect of **Bulgaria** states that judges are formally independent and impartial either from the government or from the parliament, and there is no official supervision of the presidents of courts regarding judicial decisions of judges of their courts. There is a code of ethics adopted by the Supreme Judicial Council<sup>134</sup>.

205. The EAJ reports in 2017 on a requirement in Bulgaria that judges make a declaration to the Supreme Judicial Council of all activities including membership of a professional organisation. The EAJ is of the opinion that, as internationally recognised, the right of judges to join professional associations is designed to support the independence of judges and is recognised by international legal principles. Therefore, this new requirement to register membership in professional organisations within the Supreme Judicial Council, responsible for recommending the promotion and career development of judges, has a chilling effect deterring the exercise of this right. Moreover, there is no apparent purpose in including membership of a judicial association since such membership is confined to judges, and involves no conflict with the judicial function in an individual case. The introduction of an obligation to register membership of judicial association is inconsistent, according to the EAJ, with the policy agreed in Sofia of strengthening judicial associations rather than undermining them. The EAJ insists that following the «Sofia Policy» is a matter of principle, not least because of the Declaration, adopted on 21 April 2016 in Sofia at the conference by the Ministers of

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<sup>133</sup> Ibid., para 64.

<sup>134</sup> There are no further developments regarding the situation of judges as described in the Situation Report on the judiciary and judges in the Council of Europe member States, updated version n° 1 (2013) adopted during the 14th plenary meeting of the CCJE (Strasbourg, 13-15 November 2013).

Justice of all member States of the CoE, and expressions of commitments to the CoE Plan of Action on Strengthening Judicial Independence and Impartiality<sup>135</sup>.

206. By letter of 5 October 2017, the Bulgarian Judges Association requested the opinion of the CCJE with respect to certain amendments of 11 August 2017 of the Bulgarian Judicial System Act, Art 230 (1) concerning:
- the provision requiring the judges and prosecutors to declare their membership in professional organisations;
  - the provision calling for removal of judges and prosecutors from their office following a public criminal charge against them concerning premeditated crime.
207. The Bulgarian Judges Association indicated that the amendments imposed restrictions on the freedom of association and had a chilling effect on judicial independence. Furthermore, according to the Bulgarian Judges Association, the provision concerning removal of judges following a public criminal charge against them, opened a wide avenue for arbitrary and unsanctionable interventions from the prosecution authorities in order to remove judges from the bench, including judges in pending criminal cases to which the same prosecution authority was a party. No judicial remedies would be available to judges who have been removed from office.
208. The Bulgarian Judges Association also indicated that the amendments were adopted in haste, without any public discussion, not even with the Bulgarian judiciary. The Bill was submitted to the Parliament on 4 July 2017 and was adopted in the first reading on 27 July 2017.
209. The Bureau of the CCJE recalled that the CoE Committee of Ministers has recognised the essential role of judges' associations in ensuring judicial independence and the rule of law, as well as in protecting the interests of judges. In that respect, judges should be free to form and join professional organisations. Judges may freely join such organisations which may operate at national or international level, be authorised to take part in discussions with the competent institutions on matters related to their purpose, and participate in the training of judges<sup>136</sup>.
210. Moreover, the CCJE emphasised the role of judges' associations in a democracy based on the rule of law and that judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society<sup>137</sup>. The right of judges to freely form and join associations was also endorsed by the General Assembly of the United Nations as one of the fundamental principles<sup>138</sup>.
211. Therefore, the CCJE Bureau, in its Opinion adopted and published on 2 November 2017, encouraged the Bulgarian authorities to initiate a process for repealing the

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<sup>135</sup> Adopted at the 1253<sup>rd</sup> meeting of the Committee of Ministers on 13 April 2016 (document CM(2016)36final).

<sup>136</sup> See Rec(2010)12, para 25, and the Explanatory Memorandum to the Recommendation, para 33.

<sup>137</sup> See CCJE Magna Charta of Judges of 2010 (fundamental principles), para 12.

<sup>138</sup> See the Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras 8-9.

provision requiring the Bulgarian magistrates to declare their membership in professional organisations.

212. As regards the provision calling for removal of judges from their office following a public criminal charge against them, the CCJE Bureau underlined that judges should be criminally liable in ordinary law for offences committed outside their judicial office. Furthermore, judges who, in the conduct of their office, commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process<sup>139</sup>.
213. However, criminal liability should not be imposed on judges for unintentional failures in the exercise of their functions. The CoE Committee of Ministers stated that the interpretation of law, assessments of facts and weighting of evidence carried out by judges to determine cases, should not give rise to criminal liability, except in cases of malice. When exercising judicial functions, judges should be held criminally liable only if the fault committed was clearly intentional<sup>140</sup>.
214. The CCJE Bureau also recalled the UN Basic Principles on the Independence of the Judiciary, stating that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. A charge or complaint made against a judge in his/her judicial and professional capacity, shall be processed expeditiously and fairly under an appropriate procedure. The judge shall furthermore have the right to a fair hearing<sup>141</sup>.
215. The CCJE has previously emphasised the need for fair trial requirements in disciplinary proceedings against judges. Such proceedings should be determined by an independent authority or tribunal, e.g. by an independent Council for the Judiciary, operating a procedure guaranteeing full rights of defence. The arrangements regarding disciplinary proceedings should be such as to allow an appeal from the initial disciplinary body to a court<sup>142</sup>. Furthermore, disciplinary sanctions against judges must not violate the presumption of innocence<sup>143</sup>. The need for caution in the recognition of criminal liability for judges, and in the recognition of such disciplinary sanctions as suspension and removal from judicial office, arises from the need to maintain judicial independence and freedom from undue pressure<sup>144</sup>.
216. Based on the aforementioned principles, the CCJE Bureau concluded that the suspension or removal of judges from office should not automatically be a disciplinary reaction generally imposed on judges alleged of having committed criminal actions, even for alleged cases of intentional or premeditated crimes. Each case should be dealt with individually, by an independent body, respecting all fair trial requirements, including the right to appeal, the presumption of innocence and the requirement of proportionality of sanctions.

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<sup>139</sup> See CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paras 51-54.

<sup>140</sup> See Rec(2010)12, para 67.

<sup>141</sup> See the UN Basic Principles on the Independence of the Judiciary, paras 17-18.

<sup>142</sup> See CCJE Opinion No. 3(2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 77.

<sup>143</sup> As enshrined in the ECHR Article 6 § 2.

<sup>144</sup> See CCJE Opinion No. 3(2002), para 51.

217. Therefore, based on these concerns, the CCJE Bureau, in its Opinion adopted and published on 2 November 2017, encouraged the Bulgarian authorities to initiate a process for repealing this provision.

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218. The CCJE member in respect of **Cyprus** states that judges are completely independent and impartial both from the government and parliament and are mutually functionally independent from each other. There is no specific code of ethics, but the Constitution prescribes that any judge may be removed on the ground of misconduct. Judges are expected to maintain the highest possible professional conduct as explained in the Council of Europe and other international instruments. They can be removed only by the Judicial Council for misconduct under the rules established for that purpose and after a hearing similar to that in a criminal trial.

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219. The CCJE member in respect of **the Czech Republic** states that there is no code of ethics. Disciplinary offences are decided upon by a special tribunal of the Supreme Administrative Court without the possibility of appeal.

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220. The CCJE member in respect of **Georgia** states that the disciplinary process and grounds for disciplinary responsibility of judges are not fully foreseeable. The law does not define clearly what constitutes a disciplinary misconduct and what does not. Moreover, forms of responses to violations, such as sanctions and modalities of imposing sanctions, should be improved to provide a fair and effective response to disciplinary offences.

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221. The CCJE member in respect of **Iceland** states that judges shall observe impartiality, discharging their judicial functions independently. There is no formal code of ethics. Regarding disciplinary measures, a person who considers that a judge has committed an infringement against his/her rights in the discharge of their judicial functions, can lodge a written complaint with the Committee on Judicial Functions.

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222. The CCJE member in respect of **Luxembourg** states that the Joint General Assembly of the Superior Court of Justice and the Administrative Court adopted, on 16 May 2013, a compendium of ethical principles for judges. The compendium constitutes a tool for internal self-regulation of the judiciary and does not confer any rights to the third parties.

223. At present, disciplinary proceedings are governed by the law of 7 March 1980 on the judicial organisation. The establishment of the Council of Justice should clarify the rules and procedures. It should be noted that in a recent judgment (No. 16 of 16 February

2017), the Court of Cassation decided that a cassation appeal was not possible against a decision of the Superior Court of Justice, taken in disciplinary proceedings, before the same Superior Court of Justice, sitting in cassation proceedings.

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224. The CCJE member in respect of **Malta** states that a member of the judiciary is independent of the executive and of other members of the judiciary, and each member alone decides on a case assigned to him/her. Judges of the superior courts have jurists assigned to them to help in the decision-making, but the decision is ultimately that of the judge. There exists a code of ethics, and all members of the judiciary are expected to conform with its terms. Any breach can be reported to an independent Commission composed of five members who, after investigating the case, may issue a warning, impose a fine, suspend the member for a limited period of time or propose their dismissal, depending on the gravity of the breach. There is no reference to a possible appeal before a court of law, although in the one case which has arisen, a judicial review was asked for and allowed (although, on the merits, the challenge was deemed to be without basis).
225. Once appointed, a member of the judiciary in Malta cannot be removed from the office unless a request is made by the Chief Justice or the Minister of Justice to the Commission for it to investigate a particular member; if the Commission finds no basis for dismissal, the matter stops there, but if the Commission decides that the member should be dismissed, the matter is taken before the parliament, who alone may decide to remove the said member, but only if two-thirds of the members of parliament agree.

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226. The CCJE member in respect of the **Republic of Moldova** states that judges take decisions in an independent and impartial manner - they are obliged by law to be impartial - and act without any restrictions, influences, pressures, threats or interventions, neither direct nor indirect, from any competent judicial or administrative authority.
227. However, the latest report of one of the leading NGOs in the Republic of Moldova, specialising in human rights reporting and representation before the ECtHR, states that “firstly, the process of selection and promotion of judges raised concerns in the past three years, due to disregard of procedures, selective approaches and issues with candidates’ integrity. Secondly, issues regarding the lack of transparency and deficient decision making process of the Superior Council of Magistracy (SCM) have come to the fore. Thirdly, there are worrying trends regarding the use of criminal justice against some judges and reduced transparency of courts. Unfounded criminal cases against judges are a severe means of intimidation of judges, with potential grave consequences for judicial independence in the Republic of Moldova for years to come. Closed hearings in high profile cases set up a dangerous precedent and pre-conditions for selective justice and significantly reduce judiciary’s accountability. Lastly, the absence of reforms in the judiciary will undermine all the other reforms, especially economic and anti-corruption reforms”<sup>145</sup>.

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<sup>145</sup> See the Report on “Independence and Accountability of Moldova’s Judiciary under Threat” of the Legal Resources Centre from Moldova (LRCM), January 2017, p. 1.



228. The report continues that the “Moldovans’ trust in judiciary is very low. According to the latest polls, 89.6% of the population does not trust the judiciary (no trust at all – 65.3% and not too much trust – 24.3%)<sup>146</sup>.
229. Also according to European Union sources, the Moldovan judiciary is affected by negative public perception and “perceived political interference in the judiciary and law enforcement is a systemic impediment to social and economic development”<sup>147</sup>. Some judges have been reportedly prosecuted for their decisions (for example the judge who annulled the decision of the Central Election Commission rejecting the holding of a referendum on amending the Constitution requested by a political party) and the same has happened to lawyers engaged in high-profile cases<sup>148</sup>.
230. By letter of 12 January 2017, the President of the Constitutional Court of the Republic of Moldova requested an *amicus curiae* brief from the Venice Commission on the criminal liability of judges, notably regarding Article 307 of the Criminal Code of the Republic of Moldova<sup>149</sup>.
231. By further letter of 2 February 2017, the President of the Constitutional Court informed the Venice Commission about the initiation of judicial proceedings against another judge on the same grounds as in the request of 12 January 2017. The President of the Constitutional Court also sent to the Venice Commission a statement of 1 February 2017 made by several NGOs (Human Rights Embassy, “Promo-Lex” Association, Legal Resource Centre of Moldova and Institute for European Policies and Reforms),

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<sup>146</sup> Institute for Public Policies, Public Opinion Barometer, October 2016: <http://www.bop.ipp.md/result?type=bar> .

<sup>147</sup> See the European Commission, Joint Staff Working Document. Association Implementation Report on the Republic of Moldova, 10 March 2017, p. 3.

<sup>148</sup> The Captured State: Politically Motivated Prosecution in Moldova And Usurpation of Power by Vladimir Plahotniuc, Open Dialog, 22 May 2017, pp. 9-10 and 16-17; and the PACE Monitoring Committee, Information note by the co-rapporteurs on their fact-finding visit to Chisinau and Tiraspol (27-29 June 2016), Co-rapporteurs: Ms Valentina Leskaj (Albania, SOC) and Mr Ögmundur Jónasson (Iceland, Group of the United European Left), AS/Mon(2016)27 declassified, 14 September 2016, paragraph 29.

<sup>149</sup> The challenged provision, Article 307 of the Criminal Code of the Republic of Moldova no. 985-XV of 18.04.2002, amended by Law No. 277-XVI of 18.12. 2008, which entered into on 24.05.2009 and was then amended again by Law No. 207 of 29.07.2016, p. 178 (Law no. 985-XV of 18.04.2002), reads as follows:

**“Article 307. Issuance by a judge of a sentence, decision, ruling or judgment that is contrary to the law**

(1) The wilful issuance by a judge of a decision, sentence, ruling, or court order contrary to the law shall be punished by a fine in the amount of 650 to 1150 conventional units or by imprisonment for up to 5 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.

(2) The same action:

a) involving a charge of a serious, especially serious or exceptionally serious crimes;

[Letter b) excluded by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

c) causing severe consequences;

shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years.

[Art. 307 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]”.

which called the criminal proceedings against the judges an attack on the independence of the judges of the Republic of Moldova<sup>150</sup>.

232. Three questions were addressed to the Venice Commission:

Does the Article 307 of the Criminal Code comply with European standards on the functioning of democratic institutions, more particularly:

1. Is it possible for a judge to incur criminal liability for his or her interpretation of the law, ascertainment of facts or assessment of evidence while reviewing a case brought before him or her?
2. Is it possible for the quashing by a higher court of a decision of a lower court to serve as a ground for determining the illegality of that decision?
3. Does the challenged provision secure the independence and impartiality of judges in a state governed by the rule of law?<sup>151</sup>

233. The Venice Commission emphasised that “in order to hold a judge personally liable for his or her decisions, it is not sufficient to refer to the fact that the decisions have been overturned by a higher court [...] Using the fact that a decision of a lower court has been quashed by a higher court as a ground in itself for the determination of the illegality of that decision, is not in accordance with European standards”<sup>152</sup>. The Venice Commission went on to conclude that “the answer to these questions may be summarised as follows:

- important as the freedom of judges in the exercise of their judicial function may be, this does not mean that judges are not accountable. A balance must be struck between their immunity as a means to protect them against undue pressure and abuse from other state powers or individuals (functional immunity) and the fact that a judge is not above the law (accountability);
- while judges may be subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence;
- judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. The principal remedy for such mistakes is the appellate procedure;
- criminal and disciplinary liability are not mutually exclusive: disciplinary sanctions may still be appropriate in case of a criminal acquittal; also, the fact that criminal proceedings have not been initiated due to the failure to establish criminal guilt or the facts in a criminal case, does not mean that there was no disciplinary breach by the judge concerned, precisely because of the different nature of these liabilities;
- if a judge’s misconduct is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but criminal guilt;

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<sup>150</sup> See amicus curiae brief for the Constitutional Court on the criminal liability of judges, adopted by the Venice Commission at its 110<sup>th</sup> Plenary Session (Venice, 10-11 March 2017), CDL-AD(2017)002-e, para 6.

<sup>151</sup> Ibid., para 7.

<sup>152</sup> Ibid., paras 44-45.

- in conclusion: only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability”<sup>153</sup>.

234. The Venice Commission concluded that “finally, criminal liability of judges may be compatible with the principle of the independence of judges, but only pursuant to the law. The law in question must not be in conflict with the overriding principle of the independence of judges. This is a question that the Constitutional Court will have to pronounce itself upon”<sup>154</sup>.

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235. The CCJE member in respect of **Monaco** states that a compendium of judicial ethics norms is being drafted.

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236. The CCJE member in respect of **Montenegro** states that, in the previous phase of legislative reforms, a special accent was put on the issue of responsibility within the field of knowledge, professionalism and ethical grounds of all judges, prosecutors and lawyers. The code of ethics for judges is in compliance with international standards, while the Law on Judicial Council and judges introduced the institute of disciplinary prosecutor, competent for conducting investigations into complaints aimed at establishing disciplinary responsibility on the part of judges. Within the scope of a programme funded by the European Union, the Council of Europe is implementing a two-year project entitled “Responsibility in the Judiciary”, with the main aim of strengthening the capacity of the Judicial Council, especially commissions founded by the Council regarding the application of codes of ethics for judges, the system of integrity of judges, as well as their disciplinary responsibility<sup>155</sup>.

237. When implementing new legal regulations on the disciplinary responsibility of judges, it appears that the criteria for minor, more serious and the most serious violations of judges are set too high, meaning that it is difficult to initiate proceedings for establishing disciplinary responsibility on the part of judges. Therefore, it is necessary to initiate changes to the Law on Judicial Council and Judges, with the aim of arriving at a more precise identification of the responsibilities of judges, or disrespect of procedural and material norms by judges, to be followed by adequate proceedings.

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238. The CCJE member in respect of **the Netherlands** states that a legislative proposal on the reform of disciplinary measures is under debate in parliament. The bill proposes to expand the number of disciplinary measures. Amendments were submitted in a first parliamentary debate. Some of them would appear to be contrary to the general principles of independence of the judiciary (e.g. the irremovability of judges). Due to the current cabinet negotiations, the debate on the bill has been temporarily suspended.

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<sup>153</sup> Ibid., para 53.

<sup>154</sup> Ibid., para 54.

<sup>155</sup> EU/CoE Joint Programme entitled “Accountability of the Judicial System in Montenegro”, 1 November 2016 - 31 October 2018.

239. The issue of constitutional review remains unresolved; in the Netherlands, judges cannot declare formal acts unconstitutional. To a large extent, this is resolved by the important impact, also in litigation, of international treaties, like the ECHR. However, some politicians are of the opinion that this impact should be reduced. A proposal has been introduced by members of parliament to change the Constitution in such a way that judges would not be able to test the conformity of formal acts with international treaties. The Dutch Council of State and the Dutch Council for the Judiciary issued very critical opinions on this. The proposal was not likely to be successful and has been withdrawn, but its concept is a cause of concern.

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240. The CCJE member in respect of **Norway** states that the Norwegian Government decides which judges to appoint as members of the Supervisory Committee for Judges, which is the independent disciplinary body for judges. There are no provisions requiring the government to consult judges or judges' associations prior to the appointment. The government also decides who will be the chairperson of this Committee.

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241. The CCJE member in respect of **Romania** states that the impartiality of judges is guaranteed by the Codes of Civil Procedure and Criminal Procedure, the Code of Judicial Conduct for judges and prosecutors, and through disciplinary actions, and that such impartiality is clearly stipulated by law. There is also a judicial control over decisions issued by the Superior Council of Magistracy (SCM) at the level of the High Court of Cassation and Justice.

242. However, the CCJE was informed of a draft law on the reform of the judiciary in Romania considered in 2017. If the inspection service has a role in disciplinary matters, which is the case in Romania, and these responsibilities are moved to the Ministry of Justice, that would risk compromising the independence of the disciplinary investigations.

243. The MEDEL reports that memorandum regarding the judiciary was signed by over 80% of the courts in Romania outlining serious problems affecting the entire judicial system and the solutions to them. Some of these problems include violation of human rights and due process during criminal investigations, lack of technological and human resources, unclear legislation, involvement of the intelligence agencies in the judiciary and other issues. The Supreme Court identified a set of serious abuses of the anti-corruption prosecutors against judges in some cases, ranging from violating the secrecy of deliberation to the right to defence and the lawyer-client privilege. This raises again the problem of vulnerability of judges in front of abusive prosecutors, who can prosecute judges even for their rulings. According to MEDEL, the SCM had not done anything to support the independence of the judiciary in these cases, and the judiciary inspection did not investigate the prosecutors' abuses identified by the Supreme Court<sup>156</sup>.

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<sup>156</sup> See the MEDEL Report of 2017 on Justice in Europe, pp. 23-24.

244. The MEDEL reports that in **Serbia**, in 2014, the amended court network entered into force: the number of basic courts was increased for 32 (starting from 2010, there had been only 34 basic courts, compared to 138 basic courts before 2010). Despite the amendments in the network, the caseload is distributed unevenly among the judges, not only among different courts of the same type and rank, but among the departments of the very same court<sup>157</sup>.

245. The MEDEL mentions that the Rule Book of evaluation of judges' work seems to be based on the cult of statistics, ignoring the quality of judicial decisions and justice. Neither the evaluation process nor the system of disciplinary responsibility take into account the working conditions (especially workload) of a relevant judge, nor are they comparing the work of a single judge with the work of other judges in similar situation<sup>158</sup>.

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246. The CCJE member in respect of **Switzerland** states that it is generally expected that judges should behave in a proper way, so as to merit the confidence of the public. However, codes of ethics are going to be elaborated by professional organisations of judges and courts.

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247. The CCJE member in respect of **Turkey** refers to a project on strengthening judicial ethics, co-financed by Turkey, the European Union and the CoE, and implemented by the CoE, that the partners of the project include the High Council of Judges and Prosecutors (main beneficiary) and the Presidency of the Turkish Justice Academy (co-beneficiary). Other stakeholders include the Ministry of Justice, Supreme Court, the Union of Turkish Bar Associations and NGOs. The purpose of the project has been to analyse the situation related to judicial ethics and prepare codes of judicial ethics; to raise Turkish judges and prosecutors' awareness of judicial ethics; to increase the capacity of the High Council of Judges and Prosecutors<sup>159</sup> to apply the codes of ethics; and to raise public awareness of judicial ethics and of the existence of the complaint mechanisms<sup>160</sup>.

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248. The CCJE member in respect of **Ukraine** states that, according to the current legislation, the grounds for bringing judges to disciplinary liability are in fact more pertinent for the tasks carried out by court staff, e.g. : judges' failure to provide copies of the court decision for its inclusion in the Unified State Register of judgments, failure to provide information or providing deliberately false information on the lawful requirements of the High Qualification Commission of Judges and/or the High Council of Justice.

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<sup>157</sup> Ibid., p. 25.

<sup>158</sup> Ibid., p. 26.

<sup>159</sup> Following the recently adopted, in 2017, constitutional amendments, this body is currently called Council of Judges and Prosecutors.

<sup>160</sup> EU/CoE Joint Programme entitled "Strengthening Judicial Ethics in Turkey", 19 December 2015 – 18 December 2017.

249. The question of the threshold for a finding of disciplinary liability on the part of judges, such as intent or negligence or serious negligence, remains uncertain.

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250. The CCJE member in respect of **the United Kingdom** states that the judiciary has published a guide to judicial conduct<sup>161</sup> based on the Bangalore Principles of Judicial Conduct, emphasising the importance of judicial impartiality. This means that a judge should, as far as reasonable, avoid extra-judicial activities that are likely to cause the judge to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

251. The guide to judicial conduct also deals with the maintaining of judicial integrity. Judges have to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. Judges should avoid situations which might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations which might expose them to charges of hypocrisy by reason of things done in their private life.

252. The Lord Chancellor and the Lord Chief Justice are jointly responsible for judicial discipline. If any judge is to be removed from office, both the Lord Chancellor and the Lord Chief Justice must agree. They are supported by the Judicial Conduct Investigations Office (JCIO). If the judge is a member of the High Court or above, both the Lord Chancellor and the Lord Chief Justice must agree to refer the matter to both Houses of Parliament.

#### **D. The economic basis for the smooth functioning of the judicial system**

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253. The CCJE member in respect of **Andorra** states that there is a double budget system. The budget which integrates all aspects under the direct responsibility of the High Council of Justice – training, appointment etc. - is proposed and implemented by that Council. On the other hand, there is a second budget, which falls under the Ministry of Justice and which includes the salaries and other costs.

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254. The AEAJ reports that in **Austria**, in the case of the majority of first instance administrative courts, presidents do not have power to budget or to allocate budgetary means. In these cases, court budgets lie in the competence of the administrations in the provinces (Länder). The AEAJ mentions that this is not in line with European

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<sup>161</sup> It can be consulted on-line at

[https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial\\_conduct\\_2013.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf)

standards because the role of the court presidents is not significant in the allocation of budgetary means<sup>162</sup>.

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255. The MEDEL reports that in **Belgium**, austerity measures and policies continue to affect all Belgian public services, including justice. A "budgetary extension" was granted to the justice sector after the terrorist attacks of 22 March 2016 and new persons were hired. However, the number of staff defined by law is still not respected by the government, which refuses to open all vacancies left vacant by departures, both at the level of judges, as well as of clerks and employees. They are below the 90% promised by the government in 2014. Some jurisdictions have an actual staffing rate of 80% compared to quotas imposed by law<sup>163</sup>.

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256. The CCJE member in respect of **Bulgaria** states that the judiciary has an independent budget. The draft is adopted by the Supreme Judicial Council (SJC). However, the budget of the judiciary is adopted by parliament. Although the SJC has always proposed the draft budget, parliament usually adopts the Ministry of Finance's draft budget which provides less funding and leads to insufficient financial security of courts. The lack of sufficient resources also prevents the increases due in judges' remunerations (for several years). There is a clear mechanism prescribed by law how judges' salaries shall be determined (on the basis of average salary of budget area servants). In fact, the SJC's decisions for periodic increases could not be enforced in due time because of lack of sufficient resources allocated from the state budget (unlike in other budget areas). The problem was brought to the attention of the CCJE by the SJC in 2016.

257. The Bulgarian Judges Association reported to the CCJE that five members of the Bulgarian Parliament introduced, at the beginning of July 2017, a Bill amending the Bulgarian Judicial System Act. According to the Bill, it would be illegal for professional organisations of judges and prosecutors to fund their activities in ways other than by membership fees and membership donations. It would also be illegal for professional organisations of judges and prosecutors to receive funding from foreign states or foreign persons for research and teaching activities. These proposed provisions were withdrawn due to protests from Bulgarian and international organisations.

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258. The CCJE member in respect of **Croatia** states that the continuous economic crisis puts courts in a constant lack of resources. The salaries of judges have not increased for several years, even though the cost of life has increased significantly during the same period. These circumstances severely affect judges of first instance courts of general jurisdiction who have the lowest salaries among judges in the country (around 1150 Euros per month).

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<sup>162</sup> See CCJE Opinion No. 19 (2016), part V, para 6.

<sup>163</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 6.

259. The CCJE member in respect of **Cyprus** states that the courts are still dependent on the relevant provisions in the budget for their smooth administration. The Supreme Court states its financial needs for itself and all lower courts, and the budget is approved by the House of Representatives. There is a call nowadays for autonomy of the judicial budget, and the matter is currently under discussion.
260. The MEDEL reports that, after the bail in Cyprus banks in May 2013, and the economic crisis that followed, today Cyprus economy managed to achieve growth, and successfully came out of the supporting program of the EU and the International Monetary Fund (IMF). Therefore, the Judges Association of Cyprus, in cooperation with the Supreme Court of Cyprus, decided to stop the voluntary offer of the 20% of the judges' salaries for supporting the economy. Also, the government decided in 2015 to cancel the suspension of the state funding to the Judges Association of Cyprus, and therefore, it is able to participate once again in international judges associations including MEDEL<sup>164</sup>.
261. The MEDEL also reports that, despite the strengthening of the economy, the problems remain. The courts are flooded with cases regarding bankrupt companies and bank clients concerning their decreasing bank deposits. The Supreme Court of Cyprus, in cooperation with the Judges Association, demanded from the government a significant increase in the number of the appointed judges in order for the judiciary to be able to handle the increased number of cases<sup>165</sup>.
262. The measures taken by the government affected also the pension of judges who are going to retire in the near future. The retirement pension was decreased by the government up to 40%. In addition, judges appointed after 2013 are not covered with pension plan or provident fund because this was cancelled for all public servants. These facts created serious problems to the judiciary. Appointment as a judge is no longer attractive for good legal professionals who choose to work as advocates, a profession with much more income and a good pension plan. Economic crisis did not affect only the salaries and pensions of judges. It also affected the whole society<sup>166</sup>.

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263. The CCJE member in respect of the **Czech Republic** states that the salaries of judges are not a problem. However, the salaries of the court staff are low compared to the average. The pensions of the judges are extremely low: about 15% of the salaries. As a consequence, a great number of older judges are still in office.

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264. The CCJE member in respect of **Georgia** states that one of the key challenges within the judiciary is the insufficient number of judges. In general, the European average is 20 judges per 100 000 inhabitants, while in Georgia, there are only 5 judges per 100 000 inhabitants. In 2015, the overall number of judges was 230, in 2016, this number increased to 267 and in 2017, to 339. However, many judicial positions remain vacant.

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<sup>164</sup> Ibid., p. 10.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid., p. 10.



265. The court system finds it necessary to have a right to directly present its budget to parliament for consideration and approval. The High Council of Justice takes the position that the court system shall enjoy this right when the government refuses to approve a requested increase in budget.

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266. The MEDEL reports that in recent years, due to the economic crisis, **Greece** was compelled to take certain immediate measures, including in the area of justice. These measures did not allow for a significant improvement in the functioning of justice. In addition, household debts throughout the country created new disputes, leading to an overload - not anticipated - of courts that were struggling to cope with these new challenges. The justice budget remains largely inadequate. In particular, there is lack of secretarial staff, technical equipment, maintenance of courtrooms and monitoring facilities<sup>167</sup>.

267. The EAJ states that the lack of resources for the proper functioning of the judiciary with a large impact on the continuing deterioration of the remuneration of judges to unacceptable levels was reported by the judicial association of Greece.

268. The AEAJ reports that the budget of 2015 for the judiciary was budgeted with 561 million euros, which corresponded to 0.36% of the overall state budget. Similarly, also the last years' (2016) restrictions in the budget resulted in insufficient resources to fulfil the duties and important role in ensuring the protection of human rights and fundamental freedoms. An efficient operation of the national judicial system was not possible. A reduction of remuneration of retired judges had been declared to be unconstitutional by different courts, including the Greek Council of State. The legislator did not respect the decisions, but issued new laws, which foresee a reduction of pensions of judges of up to 60%.

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269. The CCJE member in respect of **Hungary** states that the resources allocated in the state budget for the court operations have increased significantly in recent years, but these additional resources are mainly spent on the development of the infrastructure, e.g. renovation of court buildings, while the salary of judges has not increased at the same rate as the salary of other state employees such as civil servants. However, there are small improvements: the basic salary of judges was increased by 5% in 2016, and by a further 5,25% in January 2017. The salary of judges in Hungary at the beginning of their career is still the lowest within the European Union.

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270. The CCJE member in respect of **Lithuania** states that the financing of judicial activities is not consistent enough or based on clearly estimated criteria. The amount of courts funding is determined by the government essentially at its discretion and only partially taking into account the real needs of Lithuanian courts. There is no specific national strategy on this issue. This situation leads to a continuous shortage of resources for the

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<sup>167</sup> Ibid., pp. 15-16.

financing of judicial activities. Because of this problem, the proper and efficient functioning of judicial system is constantly facing financial challenges (for example, it is difficult to ensure the maintenance of buildings or to carry out repairs).

271. The AEAJ reports that Lithuania was forced to reduce remunerations of civil servants, including judges, due to the economic crises (in 2009). However, so far the remuneration of judges has still not re-gained the full amount of that remuneration, which they had received before 2009. It must be noted that the general price level has increased. The level of remuneration of judges ranks on the one but last position (followed by Bulgaria) in the EU member States.

272. The AEAJ mentions that, in addition, in practice, other civil servants, who had also been affected by the cuts, can receive additional remuneration (up to 50%) in case of good performance. This is not applicable for judges. Thus for the time being, judges suffer more from the cuts of remuneration than other civil servants. The remuneration of judges is not commensurate with their profession and responsibilities, nor it implies sufficient shields for their independence.

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273. The CCJE member in respect of **Luxembourg** states that the justice budget depends, and will continue to depend, on the Ministry of Justice.

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274. The CCJE member in respect of **Malta** states that the courts' finances are completely in the hands of the government. The courts have no independent source of income, but depend on the budget allocated to them by the government. The salaries of members of the judiciary are also paid by the government, although the yearly amount cannot be reduced unless there is agreement by two-thirds of the members of Parliament. Any increase in the salary is subject to an agreement between the Association of the Judiciary and the government. There have been discussions going on for quite some time on this subject, and although last year the government verbally promised to grant an increase, this has not yet been forthcoming. The staff, as noted, are provided and paid by the government, and any increases in the number of staff also depend on an agreement with the government and recruitment policy within the civil service.

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275. The CCJE member in respect of the **Republic of Moldova** states that the financial resources necessary for the well-functioning of courts are approved by the parliament on the proposal of the Superior Council of Magistracy and are included in the state budget. These funds cannot be reduced without the consent of the Superior Council of Magistracy and they are distributed on a regular basis. The costs are regulated by law and are included as expenses in the budget of each court.

276. The MEDEL reports that "although positive dynamics were previously recorded in the Republic of Moldova in providing an adequate salary for judges, auxiliary staff, at present, the salary of court auxiliary staff in the courts is insufficient, especially in terms of high workload which greatly condenses personnel fluctuation, dismissal of skilled,

experienced staff, and insufficient staffing courts. Another sensitive moment is related to the legislative changes that make it possible to review the salaries of judges and prosecutors on a yearly basis, reducing judges' pensions. Last year judges filed many requests for dismissal. At the same time, we note the difficulties caused by the implementation of the Judicial Map. In particular, the situation when both judges and courts' staff have to move to new offices, which involves spending extra time on their way to work (time that could be used to carry out job duties), additional costs for them, proportionate allocation of staff, etc."<sup>168</sup>

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277. The CCJE member in respect of **Montenegro** states that the budgetary funds allocated are always lower than requested and are not enough for the current needs of the Judicial Council and of the courts. The economic independence of judges, the improvement of the material situation of the court administration, and providing adequate budgetary funds for improving the infrastructure of court buildings, are some of the pre-conditions for the independence of the courts, their work and their complete commitment, as well as being as fundamental aspects for the strengthening of public trust in the work of the courts.

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278. The CCJE member in respect of **the Netherlands** states that there are a number of issues under debate with regard to the judiciary and the justice system. The following topics can be mentioned:

279. Access to justice issues include higher court fees, restrictions on legal aid, reducing the "judicial domain" by transfer of powers to the public prosecution, and important budget cuts for the public prosecution.

280. The Council for the Judiciary is of the opinion that the system for financing of the judiciary should be strengthened and should be less dependent on the policy of the government.

281. Judges in the Netherlands are concerned about the workload and its negative impact on the quality of their work, as is reflected in a Manifesto that approximately 700 judges signed, in a recent report of an audit commission that visited all the courts of the country and in a follow-up to the Manifesto by a group of judges called "Backlight". The Council for the Judiciary shares these concerns and promotes the development of "professional standards" to safeguard the quality of the work of the judges.

282. The government planned to abolish the Administrative High Court for Trade and Industry and transfer its jurisdiction to the Judicial Branch of the Council of State, as well as to abolish the Central Appeals Court and transfer its jurisdiction to the Courts of Appeal. This draft law has been withdrawn in November 2016.

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<sup>168</sup> Ibid., pp. 19-20.

283. The CCJE member in respect of **Norway** states that the funding of the judiciary in Norway has been slightly reduced in recent years due to the government's new policy of de-bureaucratisation of public authorities. Norwegian courts have, however, no large administration or court staff, so the reduction of funds directly reduces the judiciary's case management capacity, thus leading to increased lengths of judicial proceedings.

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284. The MEDEL reports that in **Portugal**, there are many issues crucial to judges, such as the absolute degradation of the career of judges, who not only have seen their salaries cut since 2010, but also have absolutely no progression in the career, there being almost no difference between the highest placed judge in first instance and the ones in the Supreme Court<sup>169</sup>.

285. There is a great lack of human and material resources in the courts throughout the country, mainly of prosecutors and court clerks. During the austerity period imposed by the IMF, the EU and the European Central Bank, magistrates training courses in the Magistrates School were not open and thus the number of magistrates (which was already insufficient for the needs of the country) became dramatically unsuitable, not even covering the number of those going into pension. As for court clerks, the number of them was always inferior to the actual needs of the system and that problem has only become worse<sup>170</sup>.

286. The EAJ states that the lack of resources for the proper functioning of the judiciary with a large impact on the continuing deterioration of the remuneration of judges to unacceptable levels was reported by the judicial association of Portugal.

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287. The CCJE member in respect of **Romania** states that, as far as the economic basis for the proper functioning of the judicial system in Romania is concerned, there are initiatives from other state authorities, but mostly from the executive authority to ensure proper funds from the budget, as much as the economic situation of the country allows. Financing programmes by the World Bank and the European Union have contributed significantly to the national financial resources in order to develop the facilities, by building new courthouses or restoring existing ones. Of course, there is a permanent need for financial resources for modernising the judicial system, the dialogue between the authorities being essential in obtaining those.

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288. The MEDEL reports that in **Serbia**, the judiciary is functioning with less judges and court staff than needed. A great deal of judges' trainees and even judges' assistants are working as volunteers, without salary. The reduction of salaries is being applied for a third consecutive year: 25% reduction for the period from 1 January 2014 to 31 October 2014, and 10% from 1 November 2014 until now. Given the devaluation of the

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<sup>169</sup> Ibid., p. 22.

<sup>170</sup> Ibid., p. 21.

Serbian currency, the reduction is in fact even higher – before the reduction, the salary of a judge of a basic court or deputy public prosecutor of first instance rank (which make up almost 70% of all judges and public prosecutors) was approximately 1,000 Euro, while today it is around 740 Euro (the average salary is about 400 Euro). The judicial assistants are working on a voluntary basis and are not paid for their work<sup>171</sup>.

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289. The MEDEL reports that Spain carries on with the economic policy of austerity, budgetary restrictions and cuttings on public sector. Spain is also the second EU country where inequality has been growing on. Furthermore, the country has been living in a period of politic instability for so long: two general elections have been carried out in order to try to form a government. Finally, the parliamentary minority new government has been shaped recently which will not be able to develop the legal reforms needed and demanded by the public opinion. The government has not even presented the 2017 State General Budget to the parliament<sup>172</sup>.

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290. The CCJE member in respect of **Switzerland** states that professional judges are in general well enough paid that corruption does not occur. Cantonal Parliaments have up to now been prepared to provide for the necessary means for judges to cope with their workload.

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291. The CCJE member in respect of **Ukraine** states that in general, the level of response to the needs of the institutions of the judicial system has significantly increased compared to previous years, but the volume of financial resources of the judiciary still does not cover 100% of what is needed.

292. In the process of the preparation of the draft Law “On the State Budget of Ukraine for 2017”, reasonable amounts of financial resources of the judiciary which would allow the measures necessary for the implementation of the judicial reform and improvements in the court proceedings, were considered for the first time by the Ministry of Finance.

293. However, without the participation of the judiciary, the Cabinet of Ministers of Ukraine approved and submitted to parliament another version of this draft Law. The amount of budgetary resources needed (10 957.6 million UAH), approved by the Ministry of Finance, was reduced to 2 630.5 million UAH, a reduction of 24%.

294. The issue of salaries of court staff is governed by the general provisions for all civil servants of the country, namely by the Law "On Civil Service" and by the order of the Cabinet of Ministers of Ukraine. However, taking into account the specific work of the employees of the judiciary and their role in ensuring an effective justice system, it is crucial to maintain the legislative guarantees for the proper remuneration of court staff.

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<sup>171</sup> Ibid., p. 25.

<sup>172</sup> Ibid., p. 12.

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295. The CCJE member in respect of **the United Kingdom** states that the provision of funds for the administration of justice is the responsibility of the Lord Chancellor who heads the Ministry of Justice. Although the judges are involved in budgeting, ultimate control rests with the Ministry.
296. Judges are paid out of central funds. There is a statutory prohibition on decreasing judges' pay, but nevertheless judges' pay has not kept pace with inflation and the gap between judges' pay and the earnings of practicing lawyers has widened over recent years. This is not seen to have a discouraging effect on the recruitment and retention of judges.

### **E. Judges and media: public discussion and criticism of judges**

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297. The CCJE member in respect of **Andorra** states that, even though media coverage of court proceedings is very common, the justice system does not have a press office or other mechanisms for direct contacts with the media. Judges are under an obligation not to comment on the proceedings in which they participate, and it is the High Council of Justice which is the body competent to participate in the public debate. However, in practice, there is no judicial involvement in the public discussion or response to criticism of judges in the media.

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298. The AEAJ reports that in **Austria**, since 2016, a certain Austrian daily newspaper showed unsubstantiated criticism without any reason in a general manner on qualifications and selection proceedings of new judges of the Federal Administrative Court at a personal level. This increased up to public personal verbal attacks and imputation of their position on three individual judges of this court in a certain court case, which was decided by them (concerning application for permission of a third runway in the Vienna Airport, which was denied by these judges)<sup>173</sup>.
299. The AEAJ alleges that the constantly rising verbal attacks following the negative decision of the Federal Administrative Court, culminated in a demand, publicly issued by the Conference of the Provincial Governors. As a directly mentioned consequence of this decision of the Federal Administrative Court, they demanded to abolish certain procedural rights/duties of judges (namely to decide on the merits of the case). The 9

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<sup>173</sup> See <https://kurier.at/wirtschaft/das-bundesversorgungsgericht/226.082.359>, <https://kurier.at/politik/inland/neue-verwaltungsrichter-karenzierung-gleich-zum-dienstantritt/226.282.304>, <https://kurier.at/wirtschaft/posten-besetzungen-juristen-werfen-spoee-und-oevp-einflussnahme-vor/236.346.312>, <https://kurier.at/wirtschaft/richterliche-befangenheit/246.764.083>, <https://kurier.at/wirtschaft/das-schmalspur-gericht/247.256.901>, <https://kurier.at/meinung/kommentare/innenpolitik/richter-als-umwelt-moralisten/246.396.808>, <https://kurier.at/wirtschaft/zwei-umwelt-hardliner-und-ein-agrar-lobbyist/246.397.578>, <https://kurier.at/wirtschaft/verwaltungsrichter-staatsanwaltschaft-prueft-straftanzeige/249.697.568>, <https://kurier.at/politik/inland/wahl/plan-k/buerokratie-blockiert-milliarden-investitionen/281.137.214>

Provincial Governors of the “Länder” (Austrian Federal Provinces) are not only heads of those administrations, legally controlled by the administrative judges, but at the same time are also heads of the respective authority, selecting judges and budgeting for their respective administrative court.

300. The AEAJ states that it is a violation of the Rec(2010)12 (points 13 and 18), because not only some parts of the Austrian media, but also members of the Austrian executive power showed public criticism of the judiciary in that way, which undermined public confidence, and have publicly acted which may call into question their willingness to abide by judges’ decisions, other than stating their intention to appeal. The AEAJ continues that the demand of the Conference of the Provincial Governors also violates European standards to avoid unbalanced critical commentaries according to the CCJE Opinion No. 18(2015) (part VIII, paras 18 and 19).

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301. The CCJE member in respect of **Bulgaria** states that each court has an official (press attaché or a press office) who communicates with the media and periodically issues press releases containing information about court cases of media interest. Judges avoid commenting on pending cases.

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302. The CCJE member in respect of **Croatia** states that unjustified criticism aimed at the judiciary in the great majority of the media has unfortunately become a normal state of affairs. There is a lack of willingness on the part of the media to understand and explain to the public the essence of court proceedings or the reasons for judicial decisions and this affects court activities and the ability of judges to perform their duties. In such circumstances, spokespersons of courts and presidents of courts are not responding in an adequate manner to this challenge.

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303. The CCJE member in respect of **Cyprus** states that there is a free public criticism of judicial decisions and judges but not at a personal level. Judges traditionally do not respond to, or enter into public discussions, to support or explain their decisions. The Supreme Court occasionally, if the need arises, may issue a brief statement on the matter, usually reminding all of the independence of the judiciary and of the fact that, while freedom of expression is widely recognised, courts are expected to base their decisions not on public feelings, but on well recognised legal principles.

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304. The CCJE member in respect of **Georgia** states that the public discussion of court decisions and criticism of judges is currently a very problematic issue. The High Council of Justice is of the opinion that the limits of admissible criticism towards judges are frequently overstepped by different actors. Individual judges are frequently under personal attack and there is no clear mechanism for their protection.

305. The internal and external communication standards need to be further developed and the institute of “speaker judges” requires further improvement. It is important to raise

the awareness of politicians, journalists and lawyers about standards of admissible criticism.

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306. The CCJE member in respect of **Hungary** states that the main problem in this respect is that politicians frequently express their opinions on individual court cases in public, including cases in which a final judgment has not yet been rendered. Politicians expressing their disagreement or disappointment with a particular first or second instance court judgment create an impression that politicians expect the appeal court to rule in a particular way.
307. Most recently, some politicians strongly criticised certain judgments of the ECtHR, accused NGOs providing legal representation for applicants of deriving financial benefit from such decisions, and have even suggested that Hungary should withdraw from the ECHR.
308. The lack of sufficient knowledge of journalists is a further problem. Inaccurate reports in the press are difficult to have corrected as judges are prohibited by statute from commenting on their judgments (including final judgments) in public. Instead of judges, it is typically the press officers of courts (sometimes judicial office-holders, such as heads of divisions) who give statements in public and reply to information requests by journalists. On the one hand, this prohibition protects judges from exposure to the mass media, on the other hand, it results in a lack of balance in the public debate as only counsels (legal representatives of the litigating parties) have an opportunity to express their views.
309. Another recently debated issue is the permissibility of demonstrations and protests in the proximity of court buildings and in the court buildings themselves. The Administrative Division of the Curia (the Supreme Court of Hungary) has recently issued a non-binding opinion according to which court buildings are not public areas, therefore demonstrations and protests cannot be held inside the buildings, and even demonstrations or protests outside in the vicinity of court buildings may be forbidden.

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310. The CCJE member in respect of **Iceland** states that the main criticism of judges is due to too lenient custodial sentences for sexual offences although custodial sentences in this field have become more severe in recent years. Judges have also been subjected to criticism for lack of fair treatment of persons who worked within banks in Iceland and have been sentenced to prison for major violations in connection with the activities of banks in the financial collapse of 2008.

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311. The CCJE member in respect of **Lithuania** states that in the public discourse in the media, a negative image of judges and therefore of the judicial system as a whole essentially prevails. In the press, criticism of judges, especially of their decisions, is usually based not on rational arguments or analysis, but on emotions beyond the standards of objectivity and discretion.

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312. The CCJE member in respect of **Luxembourg** states that a very popular television programme, broadcast over three last decades, has aimed at addressing the legal problems of members of the public, including those related to justice. Broadcasting was recently suspended following an accusation of manipulation of an interview, which led to the resignation of the director.

313. Otherwise the public debate on the work of the judiciary was generally calm. However, this changed recently, when the international press strongly attacked Luxembourg's courts in the so-called "Luxleaks" case. In another case, a member of the government twice expressed disapproval of a court decision against two professors concerning facts relating to their function. In another case, a lawyer publicly questioned the impartiality of the judges in assessing the facts before them. These two incidents resulted in press releases from the judges' union and letters of protest from the President of the Superior Court of Justice and the Prosecutor General. They resulted in apologies from the authors of these interventions.

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314. The CCJE member in respect of **Malta** states that the judiciary is often the subject of media scrutiny, sometimes positive, however, also in a negative sense. It is local policy that the judiciary does not comment to the media and so comments of the media against the judiciary, even if unfair or based on half-truths, very often go unchecked. It is the government who is supposed to "defend" the judiciary against unfair criticism, but in most cases it does not comment. Public discussion about the functioning of the judiciary is common, but, in general, there is no intervention by the judiciary in such discussions.

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315. The CCJE member in respect of the **Republic of Moldova** states that a judge has no right to share information with journalists about pending court cases. Only a delegated staff member, responsible for mass media relations has this right. The president of the court represents the court both vis-à-vis public authorities and the mass media.

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316. The CCJE member in respect of **Montenegro** refers to the right to have and express, without disturbance, opinions about the work of courts, but with the obligation to respect the values, rights and freedoms of others, as proclaimed in Article 10 of the ECHR. However, criticising the work of a court or of a judge often exceeds these limits, and it amounts to pressure on, or even threats against, judges because of dissatisfaction with court proceedings. Endangering the safety, reputation and authority of judges is unacceptable, and it is necessary that this kind of situation be sanctioned in an appropriate manner, with zero tolerance.

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317. The CCJE member in respect of **the Netherlands** states that public trust in the judiciary is relatively high and so is the rate of the perceived independence of the judiciary. This is also reflected in the 2017 European Union Justice Scoreboard.

318. In general, the debate on issues with regard to the rule of law, the balance of powers and the position of the judiciary has become more lively over the last few years, also in view of problematic developments in other European countries. In its 2016 Annual Report, the Council of State calls for a reinforcement of the awareness of and respect for the rule of law.

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319. The AEAJ reports that in **Poland**, not only the media, but also members of the executive power show public criticism of judiciary in a way, which undermines the independence and public confidence in the judiciary.

320. For example, the AEAJ refers to the Polish Prime Minister using stigmatising slogans in public speeches, like “judicial guild“ or saying “everyone knows someone who was hurt by the judiciary system”<sup>174</sup>. Equally, she is cited in the media to have stressed that majority of judges are corrupt and are not subordinated to democratic control<sup>175</sup>. By this, the impression is made that judges act unrightfully and are unjust towards the society in the ongoing debate on judicial reforms.

321. The AEAJ further points out to the case of judge Justyna Koska-Janusz<sup>176</sup>: in an official communique posted on the Justice Ministry’s website in October 2016, the judge was declared to be incapable of conducting a very simple, though much publicised, case, for the reasons of which the Minister of Justice ceased her external assignment of the higher instance court because of incompetence. However, it is noteworthy that the referred case concerned a criminal case where the indictment has been issued by prosecutor on 17 December 2013. Judge Justyna Koska-Janusz "received" that case on 18 December 2013 and, on the same day, returned the case to the prosecutor to prepare psychiatrist opinion. Therefore, it means that the case was finished after one day. Psychiatrist expert detected mental incompetence and case was finally finished by another judge<sup>177</sup>.

322. The AEAJ also mentions that in an interview given by the Minister of Justice on 9 August 2017<sup>178</sup>, he stressed that the jurisprudence of the Polish Supreme Court was directly linked to the communist times. There were no possibilities to punish communist criminals. They (the Ministry of Justice) could not accept moral bad behaviour or even pathologic behaviour. When the journalists indicated that only one judge in the Polish Supreme Court in 2017 has already been judge in communist times, the Minister denied so. He mentioned that in Poland, a pathological situation would exist, where judges would be out of any control, and there were low ethical standards. On the official website of the Ministry of Justice, a brochure concerning the new judicial reform

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<sup>174</sup> See <https://www.youtube.com/watch?v=njzV1xa-zno>

<sup>175</sup> See <http://www.mdr.de/nachrichten/politik/ausland/polen-justizreform-passiert-senat-100.html>

<sup>176</sup> See <http://www.hfhr.pl/en/what-are-limits-of-justice-ministers-freedom-to-express-his-opinions-on-judges/>

<sup>177</sup> As the AEAJ reports, mass media supposed that it was "revenge" for punishing by fine 2 000 Polish zloty of the Minister of Justice by Judge Justyna Koska-Janusz during the process in 2012. The Minister of Justice had been plaintiff and finally lost this case. In 2017, Judge Justyna Koska-Janusz has filed a lawsuit against the Minister of Justice for defamation - case IC 1115/16, see <http://bip.warszawa.so.gov.pl/artukul/453/2943/komunikat-w-sprawie-i-c-1115-16>

<sup>178</sup> See <https://www.zdf.de/nachrichten/heute-journal/wir-wollen-beidseitigen-respekt-100.html>

and the positive impacts in the tabloid style with the information partially concerning only allegations, but not finished by condemnation, is published<sup>179</sup>.

323. The AEAJ continues that in the media, information is repeated which gives an impression that family law judges take children away from their parents because of poverty. However, the Ombudsman for Children has stated, on a basis of review of cases in 2015, that there was no such situation<sup>180</sup>. Also in the media, information is repeated regarding excessively lengthy proceedings. These reports ignore statistical data according to which average lengths of the proceedings in civil and commercial law cases are below EU average<sup>181</sup>.
324. The AEAJ points out that recently, a Polish journalist also stressed the following: there was no control of judiciary at all in Poland; no reform of judiciary had been made after the change of system in 1989; there were sufficient proofs that the judges did not fulfil their duties in a good way, because cases of corruption existed; all would assume that judges were corrupt; judges were not being considered well in Polish society; judges would deny to be controlled; a guild of judges had emerged in the last 26 years. She (the journalist) cited anonymously judges, who allegedly said that they were an extraordinary guild; no one would be allowed to give orders to them<sup>182</sup>. Therefore, the reform would be necessary.
325. The AEAJ notes that apart from the responsibility of the media and standards of qualitative journalism to be demanded, neither the Minister of Justice nor other representatives of the executive power took measures, within the framework of their duties/competences, to protect judiciary from such unsubstantiated criticism<sup>183</sup>.
326. The AEAJ mentions that, equally, the Polish Prime Minister and the Minister of Justice did not observe the European standards that criticism should be undertaken in a climate of mutual respect. These unbalanced critical commentaries amount to an attack on the constitutional balance of a democratic state. Furthermore, no adequate protection against intimidation directed at members of the judiciary is granted<sup>184</sup>.

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327. The MEDEL reports that the overall situation of justice in **Portugal** is still linked to the media impact cases, mainly those linked to corruption and traffic of influence. A minister of the former government has been formally accused of unlawful participation in a scheme linked to the granting of visas to foreigners who make big investments in Portugal (the trial is currently going on), and there is an investigation going on against a

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<sup>179</sup> See <https://www.ms.gov.pl/pl/informacje/news,9422,sprawne-i-sprawiedliwe-sady--dobra-zmiana-w.html#prettyPhoto>

<sup>180</sup> See <https://brpd.gov.pl/aktualnosci-wystapienia-generalne/rpd-nie-potwierdzil-odbierania-dzieci-z-biedy>

<sup>181</sup> Based on the data of 2014, see

[https://www.iws.org.pl/pliki/files/IWS\\_S%C4%85downictwo.%20Polska%20na%20tle%20pozosta%C5%82ych%20kraj%C3%B3w%20Unii%20Europejskiej.pdf](https://www.iws.org.pl/pliki/files/IWS_S%C4%85downictwo.%20Polska%20na%20tle%20pozosta%C5%82ych%20kraj%C3%B3w%20Unii%20Europejskiej.pdf)

<sup>182</sup> See 18 [http://www.deutschlandfunk.de/polen-die-justizreform-ist-notwendig.694.de.html?dram:article\\_id=391533](http://www.deutschlandfunk.de/polen-die-justizreform-ist-notwendig.694.de.html?dram:article_id=391533)

<sup>183</sup> This constitutes a violation of Rec(2010)12, para 13.

<sup>184</sup> This constitutes a violation of European standards, contained in CCJE Opinion No. 18(2015), part VIII, paras 18-19.

former socialist Prime Minister for corruption and tax fraud, which inclusively led to his preventive arrest. Although the public perception of independence of the judicial system is positively affected by these investigations, the overall image of the system will depend much on the final results of them<sup>185</sup>.

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328. The CCJE member in respect of **Romania** states that all types of media communications show a keen interest in the work in the justice field, mostly by organising debates and press conferences and issuing press releases, all either organised by the Superior Council of Magistracy or by courts, on general issues and on targeted aspects of justice, mostly as regards fighting corruption.

329. Critical issues regarding judges come under the scope of the work of the Superior Council of Magistracy which provides responses to requests for protecting the independence of the judicial system and protecting judges when they are attacked either through press releases or in TV debates.

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330. The MEDEL reports that in **Serbia**, the pressures on judiciary, in addition to the public statements/accusations of the state and political authorities and media, sometimes come from judicial authorities as well (in which case it is just a transferred political pressure)<sup>186</sup>.

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331. The President of the **Slovenian** Association of Judges states that over the last three years, the judiciary was repeatedly attacked by political parties and the media. In particular, the largest opposition party made every effort using the media under its influence to undermine the constitutional role of the judiciary and the credibility of individual judges. As a result, judges were prevented from being promoted to a higher judicial post or from being appointed to an international court. Political parties used different means in order to discredit personally judges and/or their relatives. Just to mention one example, a film concerning the alleged violation of human rights by a Supreme Court judge in a corruption criminal case against the former Prime Minister was recorded and disseminated to the members of the PACE. Due to such unfounded allegations and discrediting, the Supreme Court judge *de facto* had no possibility to be appointed to the ECtHR.

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332. The CCJE member in respect of **Switzerland** states that, traditionally, the press reports on judicial decisions that refer to a court or the panel of a court, so that even when there is criticism of the decision, it is focused on the problems posed. Recently, certain media have started to name and attack judges personally which is clearly perceived as a danger to judicial independence.

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<sup>185</sup> See the MEDEL Report of 2017 on Justice in Europe, p. 22.

<sup>186</sup> *Ibid.*, p. 26.

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333. The CCJE member in respect of **Ukraine** states that there is still no balance between freedom of expression and respect for the judiciary in Ukraine. Criticism of courts in general and of judges in particular exceeds all limits, and freedom of expression is exercised in such a way as to place constant public pressure on the judiciary and its members.
334. Cases of unjustified and unfounded criticism by the media, officials, activists of various public organisations that propose to dismiss some judges or heads of the judiciary, citing their lack of professionalism and tainted reputation, continue to occur. The mistrust of the society caused by public statements through the media affects the work of judges and affects negatively the esteem in which their profession is held.
335. Psychological influence and pressure are exerted on judges through publishing of biased materials in the media. In this context, particular concern is caused by specific publications that indicate a deliberate discrediting of courts. Very frequent arbitrary interpretations of the facts of cases are usually based on one version of events and on the information provided by one of the parties to the process. There are instances where the authors draw conclusions about the results of the case before a decision has been issued.
336. Today, the impact of the media on courts and on individual judges has become critical, as the efforts to minimise it and to put into effect lawful channels are not supported by adequate reactions from the government, particularly from the law enforcement agencies.

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337. The CCJE member in respect of the **United Kingdom** states that the media often reports on the progress and outcome of court cases, as well as upon their views on a judge's performance in particular cases or in general. This form of accountability allows scrutiny through the media of individual judges. There can be no objection to criticism in the media of the merits of decisions made by judges. What judges decide and how they decide are matters of legitimate public interest. Many decisions made by judges are matters of controversy which are the subject of legitimate debate. The dividing line comes between criticism of judgments and personal criticism of judges.
338. The starkest example of this in recent times followed the decision in the Brexit case in which a national newspaper branded the judges who decided the case as "Enemies of the People". As mentioned, the Lord Chancellor has a statutory duty to uphold the independence of the judiciary, and many judges thought that she had failed to comply with that duty in responding to that headline. This contrasts with some other cases in the past where the Lord Chancellor publicly defended the sentencing judge.
339. Nevertheless, a judge deciding controversial cases can expect to be the subject of discussion (sometimes unfair discussion); and all judges need to develop a thick skin. For the last ten years or so, the Lord Chief Justice has also held an annual press conference at which he answers general questions from the media. Judges also try to educate the public about the workings of the justice system in order to prevent misunderstandings. This is done through school visits, lectures, and filming of proceedings in the Supreme Court, as well as the annual press conference. The

Judicial Press Office supports individual judges in relations with the media, and in particular deals with cases in which a judge has been misrepresented.

340. Individual judges may also be invited to give evidence to Parliamentary Committees. In modern times, judges who have been asked to attend have done so voluntarily, subject to the well-established and long-standing rules and conventions that prevent judges from commenting on certain matters. Parliamentary Committees respect these rules and conventions.

## V. Conclusions

- It is clear from the reports and requests that have been received by the CCJE during the reporting period that there have been continuing concerns about the proper implementation of relevant standards of the Council of Europe in a number of member States. In some cases and in some countries, these concerns are very serious indeed and the developments observed pose a threat to the very foundation of the rule of law. The CCJE is dismayed by these developments and deeply concerned for the individual judges affected by steps taken by the executive or legislative authorities. The CCJE therefore vows to continue to follow and examine closely the situation of judges and judiciaries in the Council of Europe member States and to make available its advice and expertise where it is considered useful. In accordance with its mandate, the CCJE will continue to examine alleged infringements concerning the independence and impartiality of judges. It encourages the competent authorities of the member States to comply fully with the relevant standards of the Council of Europe and to take note of this report in that connection.
- The CCJE Bureau can only reiterate the statement made in its Opinion 1(2001), para 6 that “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”.
- The CCJE Bureau expresses concern that there appear to have been trends which have the potential to jeopardise both the independence and also the appearance of independence of the judiciary, with the consequence that the trust that society must have in the judiciary is at risk of being undermined.
- The CCJE Bureau draws the attention of the Committee of Ministers to these issues, as well as to the information provided by the CCJE members and other parties concerned. It also draws attention to the comments of the CCJE Bureau made in the context of its Opinions and other relevant standards. These issues, and the comments on them which the CCJE Bureau feels obliged to make in relation to concrete situations affecting member State judiciaries, only serve to emphasise once again the importance of the Council of Europe’s work to improve adherence to the rule of law throughout Europe.
- The CCJE Bureau invites its members, observers, relevant national authorities, judicial bodies and associations of judges to submit further information and comments on the issues described in this report, with a view to preparing the next edition of the report for 2018.

## **Appendix:**

### **Comments from member States**

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#### **Austria**

### **Comments of the Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice regarding para 55 (page 11) of the report on judicial independence and impartiality in the Council of Europe member States in 2017**

Paragraph 55 of this report states that court presidents are generally not selected and appointed on the basis of nomination proposals. As this does not reflect the current legal situation in Austria, the following clarifications should be added to this document:

Article 86 of the Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz – B-VG) and Article 32 of the Federal Judges and Public Prosecutors Service Act (Richter- und Staatsanwaltschaftsdienstgesetz – RStDG) both state that senates consisting of judges are responsible to cast nomination proposals in the appointment procedures for presidents of regional courts and higher regional courts.

An exception from the requirement of such nomination proposals is stated within Article 134 B-VG for the presidents of administrative courts. Regardless of that exception within constitutional law, Article 2, para 3 of the Federal Act on the Administration of the Federal Administrative Court (Bundesverwaltungsgerichtsgesetz – BVwGG) states that candidates for the position of president of the Federal Administrative Court – that lies within the scope of responsibility of the Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice - have to undergo a hearing in front of a commission, consisting of a representative of the federal chancellor, a representative of another federal minister, two professors teaching law at a university and the presidents of the supreme court, the supreme administrative court and the constitutional court. Following this hearing, the commission recommends at least three candidates for appointment.



## **Czech Republic**

### **Comments of the Ministry of Justice of the Czech Republic regarding para 60, 61, 62 and 123 of the report on judicial independence and impartiality in the Council of Europe member States in 2017**

With regards to para 60: The report states that the traditional model of the selection of judges has been losing its appeal since the official age to become a judge was raised to 30. The Ministry of Justice however points out that there is no evidence that the loss has been caused by this fact.

With regards to para 61: The Ministry of Justice proves the findings stated in para 61 as incorrect, because the process of selection of judicial officers is governed by the Act No. 6/2002 Coll., on the Courts, Judges and Lay Judges (the Judiciary Act) as of 30 November 2001, as amended. According to this Act, judicial assistants are appointed by the President of the respective court upon a proposal of a judge whose assistant is to be selected. Similarly, the President of each court is responsible for a proper staffing of the court with judicial officers, court secretaries, judicial executors and other employees. In all cases, the selection procedure is undertaken pursuant to the Labour Code.

Therefore the selection procedure of the courts' staff is fully within the scope of responsibility of the courts. The only way the Ministry of Justice may, in accordance with the Judiciary Act, into some extent influence this issue is by setting the fix numbers of judges, assistants, judicial officers, court secretaries, executors and other employees active at each court with regard to the quantity of matters heard. No instructions or other secondary legislation stipulate this area.

With regards to para 62: The Ministry of Justice states that the fact that the law neither provides for an official selection procedure itself, nor it authorises any entity to undertake the procedure, has formed the grounds for the Ministry to draft and issue the instruction. The Union of Judges itself previously expressed an opinion that the form of an instruction would be adequate and it provided the Ministry with a background for and cooperation on the preparation of the instruction.

With regards to para 123: The Ministry of Justice would like to stress the findings of the "Data ENCJ Survey on the Independence of Judges 2016-2017" regarding perception of judges of their independence: In almost all relevant aspects the Czech Republic demonstrated average or aboveaverage (positive) results. At the same time, the number of responses from the Czech Republic makes the results adequately representative. Therefore, there is actually no indication of "increasing pressure of executive power".

## Poland

### **Commentary on sections 78-81**

It is advisable to refer to one of the judgements of an administrative court in proceedings following a complaint lodged by the Commissioner for Human Rights and the Helsinki Foundation for Human Rights against the Decision by the Polish President to refuse to appoint judges. The Provincial Administrative Court in Warsaw heard the case registered as file no. IISa/Wa 1675/16 and dismissed the complaint arguing that the President's decision is not subject to the cognition of an administrative court. The court justified its judgement by arguing that the National Council of the Judiciary and the Polish President exercised different powers of the two organs by issuing, respectively, the decisions regarding motions to appoint judges and the decisions to appoint judges. The same justification was given by the Supreme Administrative Court in its judgement which dismissed the cassation of 7 December 2017. The Court concluded that the Polish President is not bound by a motion of the National Council of the Judiciary. To the extent that he acts as the head of the Polish State, symbolizing the majesty of the State and its sovereignty, the President goes beyond the sphere of administrative activities. The President's powers as laid out in Art. 179 of the Polish Constitution are treated as a personal power (prerogative) of the President, and at the same time as a sphere of his own, exclusive competence and responsibility (see: Constitutional Tribunal decision of 23 June 2008, file no. Kpt 1/08, OTK-A 2008/5/97, legal justification, Par. 3, Constitutional Tribunal judgement of 5 June 2012, file no. K 18/092).

The Supreme Administrative Court also found that it falls within the powers of the President under Art. 179 of the Polish Constitution to refuse to take into account a motion of the National Council of the Judiciary. The Supreme Administrative Court noted that it is undisputed that the right to refuse to appoint a judge should follow from executing the President's tasks as stipulated by the Constitution, which is to ensure observance of the Constitution, to safeguard the state's sovereignty and inviolability, and to safeguard the integrity of its territory. Consequently, the Supreme Administrative Court found that the President has the right to refuse to take into account motions of the National Council of the Judiciary if they run counter to the principles that he safeguards as mandated by the Constitution.

### **Commentary on sections 134 and ff.**

In the Act on the National Council of the Judiciary, adopted on 8 December 2017, the Polish side implemented the ODHIR's recommendations as set out in its Opinion of May 2017 by:

- deciding not to create two assemblies in the structure of the National Council of the Judiciary;
- granting the possibility to submit candidates for members of the National Council of the Judiciary to a group of at least 2,000 Polish citizens or to a group of twenty-five judges. Consequently, the Council is going to be composed of 25 members (15 judges, 4 deputies - elected by the SEJM, 2 senators - elected by the Senate, 1 representative of the President and ex officio - the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice;"

- introducing a restriction whereby deputies' clubs may designate not more than nine candidates for members of the Council from among the judges whose candidacies have been submitted;
- introducing the principle of electing members of the Council by a 3/5 majority in the presence of at least half of the statutory number of deputies.

It needs to be noted, moreover, that according to the Venice Commission, an independent judicial council does not imply judicial self-governance, and court administration does not necessarily have to be entirely in the hands of judges. The Venice Commission recommended that judicial councils include more members who are not judges to avoid the risk of corporatism and to create the element of external and more neutral oversight.

A similar view was expressed by the Organisation for Security and Co-operation in Europe, according to which judicial councils should not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and allegations of corporatism. This was the intention of the authors of the bill.

It is worth noting that the model of electing members of the National Council of the Judiciary adopted in the Act of 8 December 2017 on the National Council of the Judiciary is similar to the Spanish system.

When addressing the allegation of prematurely terminating the term of office of the current judge-members of the National Council of the Judiciary, it needs to be noted that this step is related to the thorough and comprehensive reform of this institution. It is necessary to ensure the Council's correct functioning in the new shape. It needs to be emphasized that the new Polish regulations as regards terminating the term of office correspond with the regulations adopted in Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms when the European Court of Human Rights was established to replace the European Commission and Court of Human Rights in 1998. The Convention's Section II was modified by Art. 1 of Protocol 11, and Art. 23 was added to set out the rule that the terms of office of judges expire when they reach the age of 70. Prior to that, the maximum age was not defined and judges held office until the term for which they were elected expired. It is also important that according to the Protocol, the terms of office of all judges were terminated on 1 November 1998 and the states were given a possibility to present new candidates, irrespective of whether the candidates who had been presented before reached the retirement age.

When it comes to the retirement age of judges, Article 37 (1) of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2 January 2018) stipulates that a Supreme Court justice retires upon reaching the age of 65, unless, not later than 6 months and not earlier than 12 months before reaching this age, the judge declares their will to continue in this position, and submits a health certificate confirming their fitness to discharge judicial responsibilities as required of a candidate for judge, and the Polish President consents to their continuing in the position of Supreme Court justice.

On the other hand, under Article 69 (1) of the Act of 27 July 2001 on the Common Courts Organisation (consolidated text), a judge (of a common court) retires upon reaching the age of 60 (in the case of a woman) or upon reaching the age of 65 (in the case of a man), unless, not later than six months and not earlier than twelve months before reaching this age, the judge declares to the Minister of Justice the will to continue in this position and submits a

health certificate confirming their fitness to discharge judicial responsibilities as required of a candidate for judge.

One should emphasize that in the light of the European Court of Human Rights jurisprudence, states, as a rule, are free to regulate matters related to setting the retirement age for judges if in doing so, their real aim is not to infringe on the rights guaranteed under the Convention. Therefore, if an important public interest justifies the need to readjust the age limit for exercising judicial office pursuant to objective criteria, this can surely represent no violation of the Convention.

As of today, competitions for judicial positions can be announced in the following scope: courts of appeal – 67, regional courts – 290, district courts – 63. This amounts to a total of 420 judicial vacancies.

It should be clarified that the actual number of such positions is higher. That is because once a position is vacated (after a judge has retired or been promoted), the Ministry of Justice analyses whether such position should remain in the court where it became vacant. A number of such analyses are now under way. In any case, the number of vacancies does not exceed 500. Vacancy notices are published by the Minister of Justice on a regular basis.

The highest number of judicial vacancies, i.e. 697, was reported on 30 June 2017. Ever since the current procedure of filling judicial positions entered into force in 2008, the average number of vacancies has been approx. 400. This results from the lengthy procedure that begins when a position becomes vacant and ends when it is filled. Before a vacancy can be filled, another position is vacated. This explains the number of approx. 400 vacancies.

After some positions were taken by assistant judges following 30 June 2017, the number of vacancies dropped from 697 to 420 today. The figure of around 400 vacancies can be considered as normal.

### **Commentary on sections 319 and ff.**

Statements by Madam Prime Minister and the Minister of Justice are within the limits of freedom of expression, as guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They reflect an ongoing long-time public debate about the need to reform the Polish system of justice. Contributions to the debate are also being made by current members of the National Council of the Judiciary, who have been widely articulating their views on the introduced reforms, sparing the government no criticism. Their criticisms are accepted out of respect for the same freedom of expression.

## Turkey

### Comments of the Council of Judges and Prosecutors (CJP) of Turkey to the related parts of the Report of the Bureau of the CCJE

#### 1. Regarding paragraph 88 of the CCJE Bureau Report

First and foremost, it should be noted that independent courts are authorized and mandated to reach a conclusion in the trial process for these judges and prosecutors charged with membership in a terrorist organization. This letter aims at presenting information on the proceedings undertaken within the framework of disciplinary law.

The Council of Judges and Prosecutors of Turkey (*referred hereinafter as CJP*), which took office after the elections in 2014, carefully handled the disciplinary investigations initiated based on the claims that some members of the judiciary responsible for some investigation and prosecution files such as 17-25 December, Selam-Tevhid, irregular wiretapping, Ergenekon, the Sledgehammer, Fenerbahçe matchfixing and ODA TV, which were and had previously been in the public eye, had conducted some irregular and unlawful judicial proceedings acting in line with Fethullah Terrorist Organization/Parallel State Structure (*referred hereinafter as FETÖ/PDY*) instructions. Consequently, the CJP took decisions for inquiry and investigation of the related judges and public prosecutors.

In this respect, inquiries carried out by CJP Inspection Board revealed that some members of the judiciary had acted in the benefit of the FETÖ and executed the instructions of Fethullah Gülen, the leader of this organization, in the course of trials during the abovementioned sensational cases and had established judgements which constituted an offense; thus, relying on the letters dated 24.03.2015 and 07.04.2015 and the appended document prepared by the Bureau for Investigating Crimes against the Constitutional Order under Ankara Chief Public Prosecutor's Office; based on the report against some judges and public prosecutors, which claimed that they set up a parallel judicial power as links of the structure called the Parallel State Structure Terrorist Organization inside the judiciary, which had its organization and hierarchical structure within the judicial power of the Republic of Turkey; acted as an organized structure alternative to the judiciary of the State; targeted at individuals who were not its members or it could not use or who had different opinions making them the focus of operations through judgements; executed the decisions taken by high-ranking administrators of the organization based on the intelligence collected on the police and judiciary; victimized many people through the use of judiciary by not judging whether they were perpetrators or innocent people; prosecuting people relying on exaggerated, excessively detailed data aimed at disguising the facts in intentional, biased and ill-founded case files; and manipulated public perception, the Third Chamber of CJP opened its file number 2015/3488 and decided on 14.04.2015 that this claim and various issues that might arise during the inquiry shall be taken up by an inspector of the Council.

The inquiry carried out by the CJP Inspection Board on the related file led to many judges and public prosecutors, who were affiliated with and connected to the FETÖ/PDY. Taking into consideration the gravity of the situation, the CJP decided to extend the scope of action for identifying more members of the judiciary, who were affiliated with and connected

to the abovementioned terrorist organization and as a result, names of many other members of the judiciary were discovered.

As indicated by Mr. Mehmet Yılmaz, the Acting President of the CJP, in a newspaper interview, in his words as *“Before the coup attempt, we had already had the files about the members of this organization. Even if we hadn’t had the coup attempt, we would take necessary action about the related judges and prosecutors by the end of 2016. Back then, there were still discussions about whether Fethullah Gülen gang was an armed terrorist organization, despite the decisions of National Security Council and decisions of the Council of Ministers. On the very date of July 15 this organization went out on the streets with the weapons. It was clear and obvious that it was an armed terrorist organization.”*, based on the investigations filed after the coup attempt by Ankara Chief Public Prosecutor’s Office against 2745 judges and public prosecutors on being affiliated with and connected to this terrorist organization, the CJP decided for suspension of these judges and prosecutors.

Due to reports, complaints or facts established concerning allegations of membership in this organization, 1479 complaint files had been opened before the coup attempt on July 15, and these files concerned 2146 judges and prosecutors. Furthermore, before July 15, permission had been granted to conduct inquiries and investigations in 342 files concerning 989 judges and prosecutors. Therefore, claims asserting that disciplinary sanctions were imposed on many judges and prosecutors in an overnight without implementing the complaints and disciplinary investigations procedure do not reflect the truth.

Before July 15, Erzurum Assize Court had already listed this organization as a criminal organization. After this organization had attempted an armed coup on the night of July 15, Ankara Chief Public Prosecutor’s Office initiated many investigations referring to this organization as an armed terrorist organization, and during the trial process after the admission of these indictments, many judges and prosecutors, about whom charges were pressed for membership in the organization, resorted to effective remorse and made confessions.

Based on confessions that surfaced during criminal proceedings and solid facts such as using the Bylock software, and evidence obtained during disciplinary investigations before July 15, it was indisputable that the judges and prosecutors were affiliated with and connected to FETÖ/PDY terrorist organization which committed crimes within a strict hierarchy. Those judges and prosecutors were initially suspended and then dismissed considering that they violated principles of independence and impartiality, which are indispensable principles of the profession.

As a matter of fact, immediately after the coup attempt, taking into consideration the investigation initiated ex-officio by Ankara Chief Public Prosecutor’s Office relying on article 161/6 of the Code of Criminal Procedure and custodial orders taken against the judges and prosecutors, who were found to be members to FETÖ based on administrative and criminal investigations conducted since 2014, the Third Chamber of CJP, pursuant to its decision dated 16/07/2016, granted permission for investigation to be carried out by an Inspector of the CJP, and making an assessment of the preliminary report prepared by the Inspector. Then, the Second Chamber of CJP decided for suspension of the related judges and prosecutors as per article 77 of the Law no 2802 so as to prevent any damage to ascendancy and honour of the judicial power. After Statutory Decree no 667 entered into force, CJP Plenary unanimously decided for dismissals of the judges and prosecutors, whose membership in, belonging and connection to and affiliation with the organization was established.

Suspension by its nature is a measure that must be imposed urgently. This measure was urgently imposed on judges and prosecutors against whom there was strong suspicion and the aforementioned evidence suggesting their membership to FETÖ terrorist organization, to prevent them from jeopardising the constitutional order. European Court of Human Rights's (*referred hereinafter as ECtHR*) judgement in Micallef vs. Malta emphasizes that failure to implement all safeguards provided in article 6 of the European Convention on Human Rights (*referred hereinafter as ECHR*) under extraordinary circumstances requiring urgent action does not constitute a violation.

Regarding this extraordinary process, considering both suspensions and dismissals from the perspective of safeguards provided by article 6 of the ECHR, it should be especially underlined that these decisions were taken by the CJP as an independent and impartial body, and in their applications for reexamination against the decision taken applicants were given the opportunity to present their defense in writing, committees were established within the CJP to handle several motions submitted by judges and prosecutors in this process, these committees examined all claims and presented them to the Plenary of CJP, separate disciplinary files were prepared for every judge and prosecutor dismissed (These files included information on the process of their admission into profession, powers they unlawfully exercised in courts or administrative offices, complaints, reports, inquiry and investigation files about them and related decisions taken, research conducted in the field, decisions taken by judges and prosecutors incumbent on FETÖ related files in these files, records of encrypted communication software used by members of this organization, information and documents provided by Ankara Chief Public Prosecutor's Office, their statements and confessors' statements. Statements of the related individuals were not taken by police officers, but by the prosecutor and statements were communicated to the CJP immediately.) and the disciplinary procedure was implemented, the disciplinary procedure had been initiated before Statutory Decree no 667 was promulgated, and after this Statutory Decree entered into force keeping these judges and prosecutors in office was not deemed appropriate as per the Statutory Decree; however, the disciplinary process is ongoing; and furthermore, as per the domestic legislation it is predictable that a person who does not comply with the principles of independence and impartiality shall not exercise duties as a judge or prosecutor; therefore proceedings undertaken does not fall short in respect of the principle of legal certainty.

Applications to the ECtHR for interim measures against suspensions were found inadmissible and rejected.

It must be highlighted that judges and prosecutors were not dismissed by means of name lists appended to Statutory Decrees. The dismissals were decided by the Plenary of the CJP. The purpose was to avoid acts of legislative and executive organs over the members of the judiciary and allow for domestic remedies to be applicable. Moreover, dismissed judges and prosecutors were thereby given the opportunity to apply for re-examination against decisions of the Plenary and exercise their right of defense in relation to claims against them submitting several motions and evidence. To this end, committees were set up within the CJP, which diligently examined claims presented by the related individuals in their motions. (Those whose re-examination applications were accepted are returned to their previous office or other offices.)

During suspension/dismissal procedures the principle of individuality of the crime was respected. In this framework, independent decisions were taken for judge-prosecutor spouses. There are 7 couples in which one of the spouses remained in office while the other was dismissed.

## **2. Regarding paragraphs 89 and 90 of the CCJE Bureau Report**

After the failed coup attempt by the FETÖ on July 15th, 2016; some international organizations formally asked for information regarding recent developments in Turkey whereas others hastily expressed biased opinions without any evidence or legal ground. It is very disappointing that these biased and ill-informed remarks were made under the disguise of international principles of law. We would have expected that international organizations whose members are mostly judges and prosecutors based their decisions and opinions on the values of impartiality and objectivity.

We have repeatedly informed the general public and international organizations that for the last two years the Ankara Chief Public Prosecutor's Office and the CJP have been investigating FETÖ's attempts to infiltrate the Turkish judicial system. Moreover, the bloody coup attempt on July 15th, 2016 has unequivocally revealed that the FETÖ is an armed terrorist organization.

Most of the dismissed judges and prosecutors have already admitted that they were members of the FETÖ, that they took part in the organization's attempts in infiltrating in the judicial system, and that they exercised their judicial authority in accordance with the will and orders of the FETÖ. Despite all this evidence, some international organizations claimed that these people were innocent and were the victims of a purge. Such biased and ungrounded conclusions make us question how impartial these organizations are.

The ongoing investigations are solely aimed at identifying members of FETÖ who infiltrated in the judicial system. As the investigations continue, severity of the situation becomes increasingly apparent. We learn day by day how so many citizens were victimized by false and made-up evidence by the judges and prosecutors who submitted themselves to the FETÖ. The damage that the FETÖ has caused in the Turkish judicial system has been repeatedly expressed to all international organizations. The failed coup attempt on July 15th, 2016 clearly and unquestionably revealed that the serious threat posed by this terrorist organization was not limited to the Turkish judicial system but targeted the entire Republic of Turkey. Given the dismissed judges and prosecutors have already confessed that their judicial decisions did not reflect their own independent judgment but rather orders by their superiors in the FETÖ, there is no international ground justifying that these judges and prosecutors remain in office.

We were disappointed and baffled to see international organizations of law making remarks supporting a terrorist organization that attempted a coup to destroy democracy and that brutally murdered anyone who stood in their way-including innocent civilians. Such remarks naturally make one wonder about the underlying intentions of these organizations. If the coup attempt was successful, would these organizations still raise concerns about democratic principles and human rights as they are doing now or would they have remained silent? If a similar violent coup attempt took place in their own country, wouldn't they fight the terrorists as Turkish institutions are doing right now? The answer is surely yes. But then, why do these organizations demonstrate such a hypocritical stance that seem to be borderline supportive of the coup attempt?

Judges and prosecutors who were members of the FETÖ submitted to the will of a terrorist organization rather than exercising their own free will and abiding by the Constitution and the law. Needless to say, such acts would destroy judicial independence and impartiality, as a result the rule of law. Criticizing the CJP for their rulings against members of the FETÖ contradicts international principles of law and the very values that European Union claims to



stand for. No democratic country would allow persons who are under hierarchy of such an organization to continue working as judges or prosecutors.

### **3. Regarding paragraphs 91 and 92 of the CCJE Bureau Report**

EAJ's claim that the judges and prosecutors under arrest are deprived of the rights guaranteed under articles 5 and 6 of the ECHR is completely ungrounded. Similarly, the AEAJ's claims about the dismissals lack any factual basis. The CJP have declared to the international community time and again that the CJP is open to sharing all information regarding its processes and decisions. Unfortunately, neither the EAJ nor the AEAJ have ever been interested in obtaining information from us through formal communications.

Efficient and serious evidences have been obtained by public prosecutors related to the coherence and connection of almost all the judges and prosecutors who were dismissed from their profession. The use of the software called ByLock, statements given by the confessors, monetary aid given by these people to the terrorist organisation to support it, the use of their judicial authority in favor of the organisation, and the actions they took with the instructions received from the organisation are among such evidences. Public prosecutions have been initiated against them upon the collection of the aforementioned evidences, and trials have begun in various courts. Most of the suspects have been heard in courts, some of them being convicted for being the members of a terrorist organisation. The trial process is still pending, and everyone is expected to be respectful since the process has not yet been completed. Contrary to the misinformation regarding the circumstances of the arrested judges and prosecutors, they are not being kept in isolation in prisons. The prisons in Turkey, which are open to the observation and supervision of both national and international bodies, are in better conditions than the prisons in most other countries. Those arrested or convicted for FETÖ membership are not subject to a different regime of imprisonment compared to the rest of the arrested and convicted.

### **4. Regarding paragraphs 93 and 94 of the CCJE Bureau Report**

We are deeply concerned that neither AEAJ nor EAJ are willing to base their assessments on objective information that are available to them from our official authorities. They instead choose to make their assessments based on the information they receive from unknown and unreliable sources.

Within the boundaries of the state emergency conditions and the application of the Statutory Decree no 667, information and documents indicating that each of the concerned individuals is affiliated with or connected to the FETÖ/PDY terrorist organization have been compiled in an individual file-similar to files created for disciplinary offences. These individual files enabled the proceedings to be carried out in an individualized manner based on concrete evidence.

Although the dismissal decision has been justified in a verdict that involves all the files, circumstances of each dismissed judge or prosecutor have been individually assessed during the examination and determination process. Information and documents pertaining to each of the concerned individuals, their concrete relations with the FETÖ/PDY terrorist organization, and their actions have been individually elaborated. That is, each and every dismissal decision was subjected to an individualized evaluation process.

Considering the very requirements of the judicial profession, any judge's or prosecutor's affiliation or connection with the FETÖ/PDY, a terrorist organization operating under a strict hierarchy, would be a sufficient violation in and of itself that would result in dismissal from duty. Nevertheless, the investigations did not just stop with proving these

individuals' connections or affiliations with the FETÖ/PDY but also identified, documented, carefully considered, and evaluated each individual's actions separately. Again, that the overall verdict did not include each individual's concrete actions and the relations with the FETÖ/PDY did not mean that these were not taken into account. Finally, please note that this extremely careful investigation process did not contradict with either the ECtHR caselaw or the national administrative law in any way.

#### **5. Regarding paragraph 95 of the CCJE Bureau Report**

AEAJ ignores that judges and prosecutors in Turkey are subject to rotation and they do not have geographic guarantee in accordance with the legislations in Turkey, and declares the rotation of judges and prosecutors as an arbitrary application. In his professional life of 29 years, Mustafa Karadağ worked in the Ankara province for about seventeen years. He worked in the eastern region of Turkey only for two years, where he was rotated to due to the principle of equality.

#### **6. Regarding paragraph 96 of the CCJE Bureau Report**

The judges and prosecutors in Turkey consider that the dismissals of their colleagues who are affiliated with and connected to the FETÖ/PDY is a crucial step towards an independent and impartial judiciary. They are well aware that they will always enjoy constitutional guarantees provided that they fulfill their professional duties with utmost adherence to the rule of law and in accordance with their personal convictions.

That the AEAJ ignores this fact is yet another example clearly showing that they do not base their conclusions on objective information.

#### **7. Regarding paragraph 97 of the CCJE Bureau Report**

Clearly, there are judicial remedies for dismissal decisions, and all public officials including judges and prosecutors can file cases before independent courts, submit their allegations, and have their arguments heard in trials. The ECtHR, for instance, has so far found around 25.000 applications inadmissible since the domestic remedies have not been exhausted. The proceedings are still pending.

#### **8. Regarding paragraphs 192 and 193 of the CCJE Bureau Report**

We consider that the attitude of the ENCJ, which ignored our explanations based on the information and the documents at our disposal, and arrived at a conclusion with a decision which lacked any justification, is not only unlawful, but also political.

On the other hand, we completely disagree with the CCJE's claim that the membership of the CJP and the procedure for election of its members are contrary to the CCJE standards. The change in the judiciary system is the result of a constitutional amendment. These amendments were implemented following an entirely democratic process: The citizens of Turkey exercised their free will in a constitutional referendum on April 16, 2017. Please note that the regulations underlying formation of judiciary institutions across Europe are not uniform and do vary from country to country based on their circumstances. We also would like to emphasize that the new CJP includes 9 (out of 13 total members) judges and prosecutors. The percentage of judges and prosecutors in the current council is greater than that of many European countries. The concerns raised about the independence and impartiality of the CJP are the product of biased judgements.

#### **9. Regarding paragraph 247 of the CCJE Bureau Report**

The code of ethics were prepared, finalized, and discussed in the Plenary of the CJP.

The code of ethics for the judiciary in Turkey will be a reference document first and foremost for the judges and prosecutors in Turkey. The codes prepared thanks to the invaluable efforts of all parties, but especially our judges, prosecutors, and inspectors, will soon become an integral part of our legislation. This will be followed by the preparation of booklets explaining and exemplifying the situations covered by the codes. Taken together, these documents will be a major guide of ethical and professional conduct for judges and prosecutors.

There is absolutely no reason for the European Union, which keeps making unjustified and ungrounded arguments about an independent and impartial judiciary in Turkey, to ignore the aforementioned efforts, and to discontinue supporting the Project on Strengthening Judicial Ethics in Turkey.

## Ukraine

### Amendments to the Report on judicial independence and impartiality in the Council of Europe member States in 2017

Ukraine would like to make the following amendments to the Report on judicial independence and impartiality in the Council of Europe member States in 2017.

Paragraph 99 should be read as follows:

99. The CCJE member in respect of **Ukraine** states that the judicial reform, which significantly changed the structure of the judicial system in Ukraine and the procedures regulating appointment, dismissal and accountability of judges, has resulted in a wave of retirements of judges of first instance and appeal courts. This transitional period of the reforms has resulted in a number of challenges as regards capacity. The general lack of judges in the courts affected is at almost **25%** and this has negatively affected the whole judicial system because the caseload of serving judges has become so heavy that it does not allow treating duly all cases. This leads to unreasonable lengths of proceedings within the courts.

Paragraph 100 should be read as follows:

100. Today the process of solving the long-standing problem of appointment for an indefinite period of judges whose five-year term of office has expired, remains unreasonably slow. In this regard the long-term procedure of initial appointment of judges is another problem of the judiciary organization, since the current rules for appointment of judges require at least one year training period of a new judge.