

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 29 April 2021

CDCJ-BU(2021)9

**BUREAU OF THE
EUROPEAN COMMITTEE ON LEGAL CO-OPERATION
(CDCJ-BU)**

110th meeting
20-21 April 2021
(by videoconference)

**Implementation of the Sofia Action Plan
CDCJ written contribution to Secretary General's report
Draft detailed outline
(Item 4 of the draft agenda)**

Document prepared by the Secretariat
Directorate General Human Rights and Rule of Law – DG

Draft detailed outline of the report

Table of contents	
1. Background	2
2. Council of Europe’s action: delivering the Sofia Action Plan (2016-2021)	2
3. An agenda for national action: gaps, opportunities and actions to strengthen judicial independence and impartiality	3
4. Judicial independence and impartiality in COVID-19 times	6
5. Concluding remarks	6

Executive summary (1 page)

1. Background

(1/2 page introduction)

Introduction on the Sofia Action Plan and related decisions by the Committee of Ministers

The 2nd report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe (2015) identified the lack of judicial independence in many countries of Europe as one of the biggest challenges to democratic society today. Standards of impartiality and independence were found not to be sufficiently guaranteed. Therefore, the Council of Europe developed a Plan of Action on “Strengthening judicial independence and impartiality” to support member States in implementing such measures. The Plan of Action was adopted by the Committee of Ministers on 13 April 2016. This final report takes stock of progress in implementing the Action Plan by member States and the Council of Europe and specific challenges and measures identified and implemented to address them.

2. Council of Europe’s action: delivering the Sofia Action Plan (2016-2021)

(3-5 pages)

This section will provide an overview of Council of Europe’s agenda for supporting measures and results achieved to implement the different aspects of the Action Plan during these five years (i.e. Venice Commission, the guidance of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), the monitoring done by GRECO within the framework of its 4th evaluation round with regard to prevention of corruption in respect of members of parliament, judges and prosecutors, European Commission for the Efficiency of Justice (CEPEJ), European Committee on Legal Co-operation (CDCJ), European Committee on Crime Problems (CDPC), Steering Committee for Human Rights (CDDH), as well as bilateral assistance provided through the numerous co-operation projects with wider justice reform aims, including HELP, ECtHR relevant case law would also be reflected upon as well as examples of general measures following

judgments of ECtHR. This section would also cross-refer to the work of the various bodies on this aspect as a contribution to the 2030 Agenda and UNSDGs. Where and if appropriate, some of the relevant standards/reports/case law/tools could be referred to in separate annexes to the report to enable this section to be as concise as possible.

3. An agenda for national action: gaps, opportunities and actions to strengthen judicial independence and impartiality

(up to 10-15 pages)

This section will provide an overview stemming from responses provided by responding member states and other responding stakeholders, focusing on specific lines of action and themes and actions which reflect progress achieved through reforms reported, or specific challenges identified. When recent trends have been identified and reported by relevant CoE bodies, those could also be reflected to the extent that they would not overlap with information reflected in the above-mentioned section.

3.1 JUDGES

Measures against external pressure on the judiciary (Action 1.1)

- Independence from the executive and legislative
- Securing the independent and effective functioning of judicial councils (action 1.1)
- Independence from other private actors; public criticism and inappropriate use of media (action 1.4)

Topics addressed under this chapter could include the following: adoption of justice reform strategies and measures aimed at reducing the influence of legislative and executive on the judiciary.

GRECO evaluation reports show that the number of countries where the executive or legislative branches are actively or decisively involved in the appointment of judges is limited while governing judicial councils play a pivotal role. At the same time, it is important to secure a balance between guarding against undue external influence and a system where the preponderance of judges gives rise to concern about self-protection and cronyism within the judiciary. A number of countries have also recently introduced or reformed judicial councils for this purpose.

As political attacks and media campaigns against judges and prosecutors are frequently reported in a number of member States, this chapter will also focus on mechanisms to react to such statements and other attempts to exert undue influence on judges by the executive, legislative and private actors, including codes of conduct within the executive, parliament and the press. This section could also cover the issue of the regulation of freedom of expression of judges, in particular when they discuss reforms concerning the operation of the judiciary but also when they report misconduct, undue influence and interference in their work (*Baka v Hungary*).

Internal independence

- Securing the effective administration of courts; allocation of cases (Action 1.5 and Action 2.1)
- Selection, appointment and dismissal (including action 1.2 and reference to integrity checks – part of action 2.3 and 3.3)
- Disciplinary proceedings (including action 1.3 and 2.2)

- Inspections (action 1.5)

Systems of random case allocation protects judges from arbitrary case assignments decisions that can serve to reward or punish them. The random allocation of cases also helps ensure fair and equitable workloads and reassure the public that cases are heard by an impartial judge. GRECO has addressed recommendation to secure the random allocation of cases to a significant number of state members thus we can expect a number of reforms in this respect that could be mentioned under this paragraph.

As mentioned in GRECO reports, the majority of state members received recommendations in respect of judicial independence and several countries were required to improve specific practices, primarily to do with judicial appointments and conditions of service including measures to strengthen the transparency of the selection and appointment of judges in order to secure that judicial positions are awarded on the basis of merit; This section could also address the increasing use of mechanisms to verify the integrity of candidates to judicial office and the need to balance screening mechanisms with the respect for judges' independence and private life (for example Ukraine and Armenia have recently introduced or amended integrity checks, while the Republic of Moldova is in the process of reviewing integrity checks on judges following a critical opinion of the Venice Commission on a draft law.

The evaluation of reforms of disciplinary proceedings should assess, among the others, whether infringements are clearly defined, sanctions are proportional, whether the systems of dismissal and discipline are impartial, objective and transparent; whether disciplinary regimes provide guarantees of fairness and effectiveness and sanctions are subject to independent and impartial review.

In light of the importance of judicial inspections, which on occasion, have been used as a tool in order to gain access to and review the independent decision making of judges, the report could also review measures aimed at securing impartiality and independence of judicial inspections (for example, recent reforms in Bulgaria).

3.2. PROSECUTORS

External and internal independence (Action 3.1 and 3.2)

- Relationship with the executive
- Appointment of prosecutor generals
- Regulations of instruction, orders and directives
- Abuse of prosecutorial discretion and selective, politically motivated prosecutions.

This section could be introduced by a reference to CoE standards including ECtHR judgments (*Kovesi v Romania*, *Kolevi v Bugaria* and *Guja v Moldova*) as well as the CCPE opinions underlying that the independence of the prosecution service is an important element of judicial independence, and an increasing trend towards acknowledging that prosecutors should enjoy the same status as judges.

An additional consideration is that in a number of countries existing legal provisions allowing the executive to issue instructions in individual cases to prosecutors have de facto never (or almost never) been used (the Netherlands) and debates are ongoing on procedural mechanisms to avoid that if used, such mechanisms undermine the independence and impartiality of prosecutors (Austria). So, while it may be difficult to identify a common European standard prohibiting the executive from issuing instructions, de facto countries characterised by prosecutorial independence and integrity do not use

available mechanisms regulated by law. The review should cover the number of countries that have abolished such powers for the executive to issue instructions.

This chapter could also include measures adopted in a number of countries to separate the prosecution service from the executive (Malta, Cyprus) and also measures aimed at reducing influence of the executive on the appointment of the Prosecutor General. A number of countries have recently adopted reforms concerning the appointment, powers and dismissal of the prosecutor general (for example Bulgaria and Spain). Given the hierarchical structure of prosecution systems and the impact that the prosecutor general can have on the functioning of the system, reforms introducing strong safeguards against due pressure are important.

More problematic is the impact of regulations concerning internal instructions as while most countries have introduced the right for prosecutors to ask that instructions are put into writing, it appears that such provisions are not used in practice and do not represent a sufficient guarantee against undue interference in the prosecution of crimes.

3.3. CROSS CUTTING ISSUES/TRANSVERSAL ACTIONS

3.3.1. Promoting integrity within the judiciary (Action 2.3 and Action 3.3)

Effective anti-corruption frameworks, transparency and integrity in the exercise of state power can strengthen the judiciary, public trust and secure its independence. At the same time measures adopted should be commensurate to the risks and incidence of corruption within national judiciaries. Thus, the need and opportunity of adopting prevention corruption measures will depend on the degree of integrity within the judiciary or some of its branches. A number of countries have put in place general anti-corruption strategies as well as specific measures targeting corruption prevention within the judiciary. These reforms have been adopted in connection with GRECO evaluation and recommendations and have covered asset declarations, rules on conflicts of interests and third party contacts, codes of conducts, creation and functioning of ethics commissions, issuing of ethics guidelines; reporting integrity issues within the judiciary and whistleblower protection. This chapter could draw on the findings of the compliance reports of GRECO IV evaluation round (notably, also the EU rule of law report heavily relies on GRECO's findings). Among the countries that have taken or are planning corruption prevention measures are Armenia, Czech Republic, Greece, Ireland, Malta, Portugal, Republic of Moldova, Ukraine.

3.3.2. Securing transparency and openness in the workings of the judiciary

While most countries respect an open court system, the principle of open justice is broader and includes public access to courts and legal decisions and increasingly more information about the judicial function. This section will review measures adopted to make court judgments fully accessible to the public and easily searchable. This paragraph could also address reforms introduced to increase trust and transparency of the judiciary such as communication strategies and publication of decisions in disciplinary and ethics matters.

3.3.3. Measures to strengthen training in effective competence and ethics (Action 2.5)

A large number of state members are in the process of adopting or reforming their codes of conduct, introducing guidelines to the codes, creating ethics commissions, confidential counselling systems

and reforming their training modules based on GRECO recommendations. This section could rely to a great extent on GRECO compliance reports and CoE technical assistance projects.

3.3.4. Guaranteeing a role for professional associations

This section should draw on the findings/national replies to the questionnaire of the CCJE for the drafting of Opinion No 23 on the role of association of judges in supporting judicial independence and on the Opinion itself as the main standards against which to measure progress. There are also other reports concerning the selective prosecution and harassment against judges/prosecutors for membership in professional associations and recent reforms to prevent further abuses (see for example the Bulgaria EU CVM reports or the 2016 regulations on declarations of interests in France expressly excluding judges from declaring membership in professional associations, or conversely the Italian reforms introducing a number of provisions in magistrates' code of conduct to prevent trading in influence through chairmanship in professional associations)

3.3.5. De jure and de facto independence

This chapter could briefly mention existing research on the relationship between de jure and de facto independence (showing that, for example, there is limited correlation between legal provisions and effective independence in the judiciary while stronger correlations exist with freedom of the press or victims' rights in the framework of criminal proceedings) as well as some findings from CoE reports. This section could look into statistics and other data, for example looking at whether new laws or mechanisms introduced are effectively used (such as whether ethics or disciplinary commissions are issuing decisions or opinions). Another possible example of the tension between de jure and de facto independence, as mentioned above, is the rule concerning the right of prosecutors to ask that instructions are put into writing.

4. **Judicial independence and impartiality in COVID-19 times**

(2-3 pages – could be a separate section, or otherwise included in the transversal aspects subsection)

The COVID 19 pandemic has created considerable challenges for the rule of law in a number of member States, including for the functioning of courts during states of emergency, curfews and lockdowns. This part will focus on the impact of the pandemic on the judiciary in view of the new challenges that emerged such as such as to access to courts, acceleration the digital transition, management and functioning of courts and judicial systems in order to ensure judicial independence. It should also reflect the actions and statements of relevant CoE bodies on this matter in relation to ensuring judicial independence and impartiality and of other institutional sources, including highlighting positive practices implemented to prevent or minimize such impact.

5. **Concluding remarks**

(2-3 pages)