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Ladies and Gentlemen,

It is my great pleasure to participate today in this panel. I am very honoured, and I am very grateful to Paulo Pinto de Albuquerque and Filipe Marques for inviting me to take part in my capacity as President-elect for 2022 of the Consultative Council of European Judges (CCJE).

My statement will first describe the interpretation of Art. 6 ECHR. Subsequently, I will focus on the work of the CCJE and describe the influence of CCJE regarding the case-law of the European Court of Human Rights.

1. Europe as constituted by the membership in the Council of Europe consists of 47 member states. This Europe - larger than the EU - has a broader cultural, legal, geographical, and language dimension.

And what is important: The Council of Europe has several members in which the erosion of the rule of law and of judicial independence is at stake. However, based on the Convention the member states represent a legal community with more similarities than differences.

Art. 6 ECHR states that everyone has the right to an “independent and impartial tribunal established by law”. The member states of the Council of Europe have accepted the obligation to guarantee an independent and impartial judiciary by national law. This obligation is legally binding for each member state under international law. Today, it is very important to make this clear as some member states seem to deny this obligation.

The principles in Art. 6 ECHR are institutional guarantees on which democracy and the rule of law depend. A functioning independent judicial system is therefore vital to the strengthening of the rule of law. An efficient, impartial, and independent judiciary is the cornerstone of any functioning system of democratic checks and balances.

2. What does an “independent and impartial tribunal by law” mean according to Art. 6 ECHR? What are the criteria/standards of the Court’s case-law in more detail? How do national judges influence the creation of these standards on the level of the Court?

The Court has adopted a variety of important judgements related to the requirement of what a “tribunal” and an “independent and impartial judiciary in general” is under Art. 6 ECHR.

In this context, the Court applies the principle of autonomous interpretation. This means that some of the Convention's key terms are to be defined authoritatively by the Court and independently of how they may be understood by member states.

This interpretation relies on a systematic approach to the Convention on the Council of Europe, its goals, and the common or divergent application of principles in the legal systems of its member state.

Employing this value-oriented fact-finding approach, the Court often defines common denominators or common European legal standards which are then applied in the cases of the Court.

3. The Consultative Council of European Judges is an important source in the development of this European standard. Please allow me to present the CCJE and its work:

a) CCJE is an advisory body of the Council of Europe. Its work is defined in the context of the implementation of Art. 6 ECHR, in particular the right to an independent and impartial court.

It is the only body within an international organization to be composed exclusively of judges and in this respect, it is unique in Europe.

It was created 20 years ago. The CCJE gives advice to the Committee of Ministers on issues relating to the status of judges and the exercise of their duties.

All member states in the Council of Europe are represented in the CCJE. Every member state appoints a serving judge, with an in-depth knowledge of questions relating to the functioning of the judicial system combined with a high level of personal integrity. The members of the CCJE act in their personal capacity without any binding vote.

With its work, the CCJE specifies the requirements for judicial independence. It provides an institutional framework for determining judicial independence. In other words: the European judges themselves specify and thus defend the European rule of law.

The work of the CCJE is essentially characterized by two focal points, which may be described as "benchmarking" and "monitoring".

b) Every year, the plenary of the CCJE adopts Opinions. They define the premises for judicial independence and impartiality, thus establishing a European standard. In addition to the Magna Carta (MC) of 2010 - adopted on the occasion of the 10th anniversary of the CCJE - there are already 24 Opinions.

MC and Opinions are not legally binding. However, as they become part of the reasonings of the Court's case-law, they have to be considered as factual law.

The MC enumerates the guarantees of judicial independence referring to independence itself, the body in charge of guaranteeing independence, the access to justice and transparency, ethics, and responsibility. It also states that the principles shall apply *mutatis mutandis* to judges of all European and international courts.

The Opinions deal with different topics.

One focus is on the nature of the judicial decision-making process with regards to the framework conditions of judicial activity such as working conditions, tenure, training, performance evaluation, remuneration, education, judicial ethos, but also regarding the quality of judicial decisions themselves. Another focus is on the relationship to other state authorities or judicial bodies.

The representatives of the member states always endeavor to ensure that their point of views do not merely reflect a summary of their own legal cultures. When adopting the Opinions, the plenary rather strives to determine its own European standard. This does not necessarily reflect the legal reality of each individual member state.

In sometimes long and intensive discussions, the plenary attempts to find the best possible wording that meets this standard. It also considers the need to ensure coherence among the Opinions. This is achieved by coordinating the contents and by referring to earlier Opinions.

The plenary of the CCJE selects the respective topics of the Opinion in an autonomous manner. The members formulate the requirements for the content of judicial independence. Their adoption is preceded by empirical findings - supported by an expert - on the situation in the individual member states. An overview of the respective national legal and factual basis obtained within the framework of these findings enables a partly descriptive, partly program-like presentation of the topic. Thus, the Opinions are based on empirics and legal dogmatics. They conclude with a summary and recommendations that form a European overarching standard.

National legislators and administrations may orient themselves to this standard, but also the Court in its interpretation of the Convention uses the Opinions as a source of law. Given the independence and competence of the members of the CCJE, the Opinions have a high degree of legitimacy. This is how national judges influence the creation of these standards on the level of the Court.

There is no doubt that the dialogue between the member states, which takes place during the drafting of the Opinion, already promotes the European legal culture. Thus, this creates a possible basis for legal standardization. Experience reports and statements of the representatives of the member states create mutual understanding for processes under the rule of law and make clear the concrete personnel concerns of the judges, the requirements, and challenges of the judiciary under the specific political framework conditions.

c) In addition, the task of the CCJE is to provide targeted cooperation at the request of the CCJE members, judicial bodies, or relevant associations of judges, and to enable member states to comply with the standards of the Council of Europe.

Attacks on judicial independence can come from both the executive and the legislative branches. The CCJE deals with serious legislative infringements on the rule of law and comments on individual cases of violation of judicial independence. Overall, this activity may be described as "monitoring".

The reporting of violations to the CCJE reflects how fragile the rule-of-law systems are in some countries. I refer to the report of the CCJE-Bureau on the independence and impartiality in the Council of Europe member states, 2019, in which for example Poland, Hungary, Turkey, Romania, Serbia, Bulgaria, in particular, are mentioned.

Changes in the retirement age of judges, replacements, and dismissals of judges for so-called "incompetence", non-transparent appointment procedures, incomplete composition, or the creation of new courts are regularly reported violations of judicial independence. However, interventions in the economic basis or the organizational independence initially granted by judicial administrations should also be mentioned here. Other interventions are drafts on the methodology of ensuring the uniform application of laws by the Court.

Moreover, politicized media coverage, populism, and general political encroachment put judges under pressure and indirectly influence judicial decisions. The reports clearly show that by addressing the CCJE and by its monitoring opinion, certain timely publicity can be achieved. It thereby partly fends off the attacks on judicial independence or keeps them within limits.

The fact that - in general - the respective states take the reports seriously is shown by the fact that they, for their part, can comment and explain themselves, and sometimes do so very explicitly. In cases of systematic violations, the work of the CCJE is preparatory for all further reactions under European law and policy.

5. In the following, let me please describe the influence of CCJE on the case-law of the Court.

The Court regularly and increasingly refers to the statements, MC, and Opinions of the CCJE as sources of a European standard for the requirements of judicial independence and impartiality. It is recognized that the work of the CCJE builds the basis for the development of the relevant international standards for measuring the independence and impartiality of the judiciary under Art. 6 ECHR.

The Court refers to the opinions literally in the facts as "relevant domestic and international law or documents", "document of the council of Europe", "relevant international or European documents or text" or as "the court's assessment". Thereby the CCJE is integrated into the case-law as European standard as a source of soft-law.

I quote insofar the (concurring) Opinion of honorable former Judge at the ECHR Pinto de Albuquerque in *Baka v. Hungary* (20261/12, 2016).

“The court’s direct recourse to international-law standards on judicial independence, including soft-law sources, as a source of law in order to address the applicant’s situation is highly remarkable, and laudable.”

“The court invokes the soft law of the Council of Europe as a legal basis not only to sustain the principle of the independence of the judiciary in abstracto but also to assert in concreto the existence of the applicant’s individual civil right to irremovability and of access to a court to protect that right in the (Hungarian) legal framework.”

In the case *Baka v. Hungary*, the focus has been particularly on the issue of the tenure and removal of judges by the executive and legislative powers. Up to now, this has been one of the main reasons why the Court stated a violation of Art. 6 ECHR.

The court referred in its reasoning substantially to the Opinion of the CCJE as sources of soft law and remarks as follows:

“The court notes, in this regard, the emphasis that is placed on these qualities of technical competence and moral integrity of judges in various prominent international texts, as an aspect of the right to a fair trial before an independent and impartial “tribunal” established by law. It would refer in this connection to para 25 of Opinion 1 (2001) of the CCJE, which recommends that “the authorities responsible in member states for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency.”

Expressly, the Court argued:

“The CCJE considered in Opinion 1 (2001)

- that the irremovability of judges should be an express element of the independence enshrined at the highest internal level
- that the intervention of an independent authority, with procedures guaranteeing full rights of defense, is of particular importance in matters of discipline; and
- that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.”

The Court refers to quotes the Magna Carta of Judges (Fundamental Principles) 2010:

“Rule of law and justice

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair, and efficient manner.

Judicial independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional, and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

5. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).”

6. This brings us to the question which individual source of law carries the most significance in the Court’s judgements?

In particular, the Court refers to the MC as the fundamental principles in recent judgements. However, other opinions are also expressly referred to as a source of law. These include opinions concerning the qualification and evaluation of judges as there are:

Opinion 1/2001 on standards concerning the independence of the judiciary and the irremovability of judges,

Opinion 3/2002 on ethics and liability of judges,

Opinion 11/2008 on the quality of judicial decisions,

Opinion 17/2014 on the evaluation of judges work the quality of justice and respect for judicial independence.

Finally, those opinions, which concern the relationship of the judiciary within the society, are of particular importance.

Opinion 18 (2015) on the position of the judiciary and its relation with the other powers of the state in a modern democracy,

Opinion 21 (2018) on preventing corruption among judges.

In addition, in the context of recent decisions on the rule of law (mainly in the case-law regarding the situation in Poland), the Opinion 10/2007 on the council for the judiciary at the service of society has gained particular importance.

The Court refers in some cases (e.g. *Reczkowicz v. Poland*) not only to the Opinion 10/2007 but as well to the opinion of the CCJE-Bureau following the request of the Polish National Council of the Judiciary to provide an opinion with respect to the Draft Act of September 2017 on the Polish national council of the Judiciary. The Bureau is

competent to assess whether drafted regulations or their interpretation in member states are in compliance with the Council's standard concerning judges. In the case of Poland, there have been several Opinions of the Bureau stating that Drafts on the selection methods for judge members of the National Council, pre-term removal of judges, the structure of the National Council would infringe judicial independence insofar as the legislative and executive powers will have a decisive role in the procedure for appointing judges. Expressively, the Bureau assessed the adoption of these acts as a major setback for the rule of law and for judicial independence.

In reaction to the occurred situation in Poland and other member states during the last years, the CCJE had decided on the new subject of the Opinion for 2021. Referring to the Opinion 10/2007 on the Council for the Judiciary at the service of society, CCJE followed up on these general recommendations on the composition, functioning, and powers of the Council for the Judiciary and developed its standard in the Opinion 24/2021 on Evolution of the Councils for the Judiciary. It can be assumed that this opinion will also be considered in the case-law of the Court.

Here are the major conclusions and recommendations:

“The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary and avoids any perception of political influence, self-interest or cronyism.

The majority of members of the Council should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of gender and regions.

A selection of judge members by parliament or the executive must be avoided.

Members should be appointed for fixed time in office and must enjoy adequate protection for their impartiality and independence from internal and external pressure. A member's term should in principle only end upon the lawful election of a successor.

The CCJE wishes to reaffirm the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed.”

7. Let me please conclude my statement:

First, the case-law of the Court relies increasingly on the work of the CCJE as a relevant source of law in interpreting Art. 6 ECHR. Therefore, the case-law of the Court reinforces their factual lead to binding quality. Thus, I would like to encourage the Court to rely on the work of the CCJE in the future as well.

Second, although we observe severe critical situations for the rule of law in some member states in Europe, we have to take into account that within the Council of Europe all member states share a broad legal framework of common values. Let me emphasize that: We have more similarities than differences. This presents a basis for

further discussions and solutions for the benefit of the rule of law. We have to listen and communicate with each other.

It is crucial for the rule of law to strengthen the legitimacy of the European standard. Insofar CCJE plays an important role. The CCJE is a platform for all members to indicate infringements of the Convention. Further, it offers the possibility to those member states who are in the focus of this violation to explain their opinions and positions. Therefore, I would like to encourage all member states to participate actively in the CCJE's work and to communicate its work to their judiciary as well as to their legal and executive powers. We together create the European legal standard for the judiciary.