MEDEL | Greifswalder Str. 4 | Briefkasten 42 | 10405 Berlin | GERMANY

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MEDEL
Magistrats Européens pour la Démocratie et les Libertés
Greifswalder Strasse 4
(Briefkasten 42)
10405 Berlin
GERMANY

Martina Reeßing,
Head of the office

phone +49**3042022349**
fax +49**3042022349**

office@medelnet.eu
www.medelnet.eu

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Udruženje tužilaca Srbije

Yarsav

THE NEED FOR EU-WIDE MINIMUM STANDARDS FOR SAFEGUARDS FOR THE INDEPENDENCE OF THE JUDICIARY

(COMPOSITION OF HIGH JUDICIAL COUNCILS, SELF-GOVERNMENT OF THE JUDICIARY INCLUDING THE PUBLIC PROSECUTION, ACCESS TO JUSTICE FOR THE PEOPLE)

MEDEL'S CONTRIBUTION TO THE "ASSISES DE LA JUSTICE"

Since it was founded, MEDEL has battled for the effective implementation of the Rule of Law in European Countries, discussing and focusing on the key-role of an independent Judicial Power as an indispensable guarantee for the promotion of fundamental rights and basic freedoms of all citizens.

MEDEL welcomes the Commission's initiative of organizing the *Assises* and hopes to contribute to a thorough debate that we all hope will be a milestone in the building of the Common Area of

Justice – the transformation of EU from a free economic area into a true community of Law and respect for Fundamental Rights.

The need for positive "minimum standard" common rules on the organization of the judicial power in all EU Member States

As stated by MEDEL in the *Memorandum to the European Institutions*[1], the principle of mutual recognition, on which all judicial cooperation between Member States is founded, demands for the definition of clear minimum standard rules to ensure that any judicial decision issued by a national court is taken in total independence.

The Tampere European Council (15 and 16 October 1999) addressed the need for a common area of justice and freedom, clearly stating in its *Presidency Conclusions* that *"the enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own"*. In order to achieve this objective the European Council pointed the way to a *"genuine European area of justice"*, stressing that *"the principle of mutual recognition (…), in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union."*

The importance of mutual recognition was restated in the *Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens* (OJEU, C-115/01, 04/05/2010), emphasizing that *"Mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future"*. That same *Stockholm Programme* noted that it is essential to develop *"a core of common minimum rules"* – *"to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters, the Union may adopt common minimum rules. The European Council considers that a certain level of approximation of laws is necessary to foster a common understanding of issues among judges and prosecutors, and hence to enable the principle of mutual recognition to be applied properly, taking into account the differences between legal systems and legal traditions of Member States"*.

This question was also addressed in the working document *"on the situation of Fundamental Rights: standards and practices in Hungary"* presented in September 2012 to the *Committee on Civil Liberties, Justice and Home Affairs* of the European Parliament: *"any doubts in the independence and impartiality of judges based on systematical flaws in the Constitution and national laws could have a significant impact on the on-going cooperation in the common area on freedom, security and justice based on the principle of mutual recognition as enshrined in Articles 81 TFEU (civil matters) and 82 TFEU (criminal matters). (…) Therefore, any problems with the appearance of the independence and impartiality of judges would endanger the whole existing structure based on mutual trust. At the same time any cross-border*

[1] Published in 2013 in the book *« Justice : un pouvoir de la démocratie en Europe »*, available at http://www.medelnet.org/images/publikacija.pdf

issue when implementing EU law could trigger directly Article 47(2) of the Charter in connection with Article 52(3) of the Charter on the harmonious understanding of rights guaranteed also by the ECHR".

Furthermore, included in the Copenhagen Criteria (established in the EU Summit in Copenhagen, in June 1993), to be followed by all countries applying for membership of the EU, is the *"stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"*. Included in this criterion is the independence of the judiciary as a part of the effective implementation of the separation of powers. To guarantee that independence, the EU has demanded candidate countries to fulfil certain conditions, such as implementation of a high judicial council with competence for professional evaluation, transfer and disciplinary action. Even in some of those countries that have implemented such solutions – as Romania and Bulgaria – the EU kept them under monitoring, still after accession.

The agreement on the Copenhagen Criteria by Member States on the independence of the judicial power demonstrates clearly that minimum standards common to all EU Member States on the structure of the judicial power are already generally accepted. They are essential to guarantee its independence. Action to clearly define and implement such criteria is urgently needed.

All the conditions necessary to an action at EU level are met.

As for the principle of conferral, Article 3 par. 2 of the EU Treaty establishes that *"the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"*, thus transferring competence to the Union to act in that area.

In what concerns the principle of subsidiarity, the need to ensure the trust in which the mutual recognition of judicial decision is based upon, the establishing of criteria on the guarantee of the independence of the judiciary to be met by States wanting to join the EU, the need for clarification on what shall be considered a *court* or *tribunal* in EU Member States (either for the purposes of the ECJ case-law or for the fulfillment of the fundamental right stated in Article 47 of the Charter of Fundamental Rights of the European Union), clearly shows that individual Member State action is no longer enough and that a European definition of minimum standards is fundamental.

As for the principle of proportionality, the European action shall not prevent Member States to define the structure and internal organization of their own judicial systems – it would just define common minimum standards that all Member States must comply with.

Being aware of the urgent need of an European action, **MEDEL wishes to call for intervention in six different aspects**:

1. **The need for independent *High Judicial Councils* in Europe;**
2. **The Independence of the Judiciary and the statutes of Judges and Prosecutors;**
3. **The Public Prosecution autonomy;**
4. **The right of access of citizens and immigrants to the justice system;**
5. **The precise definition of the essential role of courts and the frontiers with the informal and non judicial dispute resolution instruments;**
6. **The freedom of judicial associations as an essential instrument to the democratization of Justice.**

1. The need for independent *High Judicial Councils* in Europe

All current international instruments underline the importance of *"independence of judges and of the judiciary"*. In some States (e.g. Austria, Czech Republic and Germany) there is only independence of judges, but no independence of the judiciary. Courts are subordinated to a ministry and thus are integrated into the hierarchical structures of the executive power. In Germany, for example, the presidents of Courts, when exercising this function, have the standing of civil servants and are subject to executive control or even orders. One of the effects of this is that careers of judges are steered from within the ministries (also other decisions are taken in the ministries like allocation and transferal of judges or grants for extraordinary leave), which opens an indirect, but considerable influence of the executive over the judiciary. Also all major decisions, like the design of the strongly upcoming electronic workflow for judges, are taken on a purely administrative basis, steered by the ministries, even though judges often do participate in teams that elaborate this (then again: not enjoying judicial independence in this function).

As a result, the highest judges (presidents) have the position of heading a subordinate body and there is no judge who is representing the judiciary and who could with an appropriate standing pronounce publicly on the needs of the judiciary.

As MEDEL has been claiming for many years[2], the existence of an independent body that ensures self-governance of the Judicial Power is a fundamental guarantee of the independence of the Judiciary.

The existence of an independent *High Judicial Council* is also seen by the EU institutions as essential to guarantee the independence of the Judiciary – it was one of the conditions to be fulfilled by

[2] See the Frankfurt-am-Main conference held in 7-8 November 2008, whose papers are partly available in http://www.medelnet.org/index.php?option=com_content&view=article&id=139:judicial-independance-in-europe&catid=45: an-independent-judiciary&Itemid=61&lang=fr and were published (http://www.gbv.de/dms/spk/sbb/toc/605666008.pdf).

candidate countries like Romania to join the EU. Paradoxically, founding States like Germany would not meet this criterion imposed to other countries.

But the mere existence of a High Judicial Council is not enough to ensure the independence of the Judicial Power.

It is also fundamental that its composition, while being a fundamental element of legitimacy of the Judicial Power, guarantees a true and effective self-governance, avoiding any interference of the other branches of Power. Also the composition of Judicial Councils must reflect pluralism within the Judiciary, with representatives from all levels and a democratic and proportional way of election.

This has been clearly stated by the Committee of Ministers of the Council of Europe in the Recommendation CM/Rec(2010)12 – *"not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary"*.It is an issue of serious concern that in the selection of the members of the Judicial Councils these criteria, although of basic democratic character, are not implemented in all Member States.

The competences of the High Judicial Council must be wide and clearly defined by law, and its working rules and procedures the most clear and transparent possible.

Defining boundaries to the interference of management decisions (allocation of cases, dependence from the hierarchy, disciplinary proceedings, concentration of great unchecked power in the hands of a few High Grade Judges) in the judicial activity is also fundamental, as well as the need to ensure that productivity goals set for judges do neither affect their independence nor the quality of their decisions.

There must also be a clear set of rules destined to ensure financial autonomy, thus granting the Judicial Power the means necessary to pursue its goals, and guaranteeing that the other powers of the State cannot indirectly interfere through discriminatory budget restrictions.

As analyzed by MEDEL in the case of Romania[3], the clear definition of the composition and working and transparency rules of the High Judicial Council is as important as the existence of the Council itself, when it comes to ensuring the Independence of the Judicial Power.

This matter of self-government of the judicial power is a cornerstone of the independence of the judiciary.

The absence of EU legislation in this area is even more difficult to understand if realized that the EU has already established strict rules of independence regarding Member States authorities other than courts.

[3] In the international conference held by MEDEL in Bucharest, 9-10 November 2012 – *The High Judicial Council – Best Practices and Lessons Learned* - http://www.medelnet.org/images/Bucarest%20FR.pdf .

Articles 35, nr. 4 of the *Electricity Directive* (Directive 2009/72/EC, concerning common rules for the internal market in electricity) and 39, nr. 4 of the *Gas Directive* (Directive 2009/73/EC, concerning common rules for the internal market in natural gas) stipulate that "*Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently*". Both Directives impose that *"in order to protect the independence of the regulatory authority, Member States shall in particular ensure that: (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once".*

Article 28, nr. 1 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) also establishes that Member States must create public authorities that ***"****shall act with complete independence in exercising the functions entrusted to them"*. The ECJ has already convicted Germany for not ensuring the independence of its national authority (decision of 09/03/2010 in case C-518/07), stating in the decision that *"the independence of the supervisory authorities, in so far as they must be free from any external influence liable to have an effect on their decisions, is an essential element in light of the objectives of Directive 95/46. That independence is necessary in all the Member States in order to create an equal level of protection of personal data and thereby to contribute to the free movement of data, which is necessary for the establishment and functioning of the internal market"* .

It is inconsistent that the EU is concerned about guaranteeing the independence of national regulators or other authorities but does not take action about defining minimum common rules to safeguard the separation of powers and the independence of the judiciary. The argument of the ECJ in the decision quoted above is completely applicable to the lack of those common rules: they are essential to create an equal level of protection of all European citizens in what regards the fundamental right of having access to an independent justice system.

2. The Independence of the Judiciary and the statute of Judges and Prosecutors

As stated in Chapter IV of the above quoted Recommendation CM/Rec(2010)12, the Status of Judges is an essential guarantee of the independence of the Judiciary. More than two centuries ago, United States' President Alexander Hamilton justified the need for a special statute of judges because the judicial branch of government was *"the weakest of the three, because it has no influence over either the sword or the purse".*

In the EU area, extremely different statutes of judges and prosecutors can be found, mainly as regards the possibility of direct interference of the executive and legislative powers in areas such as granted rights or remuneration.

The criteria for selection and career of Judges and Prosecutors should be clearly defined by law, and the irremovability of Judges and Prosecutors must be expressly stated in law.

Judges and Prosecutors have the right to get continuous training and whenever there is an evaluation or assessment of Judges or Prosecutors, it should be carried out only by the High Judicial Council and with pre-defined objective criteria established in law.

As for the remuneration of Judges, while in some Member States there is a clear rule of prohibition of the reduction of salaries of judges, in other Member States there are absolutely no laws on the subject. In the Constitution of the Republic of Poland, Article 180 states that *"1. Judges shall not be removable. (…) 5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration."*. In most Member States, however, there is no such guarantee of the independence of judges, though many countries throughout the world (e.g. Mexico, Argentina, Brazil, U.S.A., South Africa) have similar constitutional guarantees of non reduction of the salaries of judges, thus showing its importance for the safeguard of the independence of the judiciary.

Besides the question of the prohibition of reducing judges' salaries, there are also substantial differences in what concerns the actualization of those salaries. In some countries, like Italy and Poland, national laws implemented automatic actualization methods for the salaries of judges, being that in Poland it is clearly defined that in case the actualization method should lead to a decrease in the salary, the decrease is forbidden, and the salary would stay untouched. This is directed to assure that there can be no interference of the legislative or executive powers in that area. It is an important and essential mechanism for guaranteeing the separation of powers and the independence of the judicial power. The 8th of October 2012, the Italian Constitutional Court has analysed (judgment n. 223/2012) this mechanism and expressly stated that one of the dimensions of the principle of independence of the judiciary – as contained in the Constitution – is the guarantee of economic independence and stability of judges and prosecutors, that *"cannot be subjected to systematic and periodic negotiations and conflicts with the others powers of the State"*, a situation that would create the general idea of the legislative and executive powers' dominance over the judicial power. Although they have such an importance, these mechanisms are not established in all EU Member States. In Portugal, judges and prosecutors are subject to periodical negotiations with the executive and legislative powers in order to have an increase (or not to have a bigger decrease) in their income. This, as the Italian Constitutional Court pointed out, leads to a general perception of submission of the judicial power to the other powers of the State, diminishing the independence and authority of the judiciary.

Also in what regards the retirement pensions of judges and prosecutors, there are substantial differences between Member States. In Portugal, e.g., retired judges and prosecutors retain their full

remuneration, as a guarantee of their independence, while in other countries, like Czech Republic, retired judges suffer a big decrease in the remuneration.

The salary issue clearly shows that in the EU area there are very different levels of protection of the independence and of the status of the judicial power. It's an incomprehensible situation when we look at the growing integration that has been achieved in the area of justice in the last two decades.

3. The Public Prosecution autonomy

In some countries the public prosecution has no judicial independence whatsoever. Public prosecutors are subject to orders in a hierarchy that ultimately culminates at the respective minister. It is obvious that this is not in line with the international standard of the rule of law and some cases are well documented, where the work of the prosecution has been obstructed by frequent requests for reports from the minister. For instance, Germany has been called upon to end this general situation by the Parliamentary Assembly of the Council of Europe (resolution 1685 (2009)). Yet no project to amend the law accordingly has been initiated. In France the debate is open on the judicial status of the *Parquet* following the ECHR rulings on this matter. As public prosecutors are in charge of bringing criminal cases before Courts, where they do not act with full independence the entire functioning of the criminal system and ultimately equality of citizens and rule of law are at risk.

MEDEL has always struggled for the autonomy of prosecutors, stressing that it is fundamental for an independent Judicial Power[4] - there is no independence of the Judiciary without an autonomous body of prosecutors. That is why the establishment of the *European Public Prosecutor's Office* is an important step towards that independence of the Judicial Power.

However, it also shows that it is indispensable to ensure full independence and autonomy of Prosecutors at the national level – where Delegate Public Prosecutors will come from – and ensure the impartiality, objectivity and professionalism, which largely depend on the process of designation of their national members, as well as on their hierarchical structure and the system of institutional loyalties.

This also leads us to the matter of selection of Prosecutors, which should only be done by independent councils with no interference of the Executive Power. As in the case of Judges, Prosecutors must also have their irremovability expressly consecrated in law, thus avoiding the possibility of arbitrary removal of Prosecutors during an investigation.

[4] See all the documents in http://www.medelnet.org/images/stories/docs/livre%20vert%20parquet%20europeen_medel_fr.pdf and http://www.medelnet.org/index.php?option=com_content&view=category&layout=blog&id=61&Itemid=196&lang=fr .

4. The right of access of citizens and immigrants to the Justice system

The economic neoliberal crusade currently on its way has its effects on the Judiciary. There are increasing voices demanding the privatization of the administration of justice, arguing that this would add more effectiveness to the system. Hence the need to expressly state in EU Law that the public nature of the justice system is essential to ensure that all citizens have equal access to it, regardless of their origin or economic means.

Not only for citizens of the EU full access to the justice system must be guaranteed. As MEDEL has clearly denounced in October 2013[5], Europe is facing a tragedy at its doorstep. Each week, hundreds of desperate men and women try to reach European soil, only hoping to reach a decent condition of living, denied in their home countries. The ones who survive the inhuman crossing of the sea are held in camps, deprived of any rights or possibility to access justice.

In the preamble of the Charter of Fundamental Rights of the European Union, the European Nations have solemnly stated that *"the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity"* and that *"enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations"*. It is therefore a duty of the European Union to grant access to all individuals – citizens of a EU Member State or not – to the national justice systems of the EU Member States – that right must be clearly defined and stated in EU Law.

5. The correct definition of the essential role of courts and the frontiers with the informal and non judicial dispute resolution instruments

The lack of clear minimum standard rules on the organisation of the national judicial systems is also leading to uncertainty in the European Court of Justice decisions. Although the definition of *national court* or *tribunal* remains a Member States' competence, there is the need for clear criteria in order to consider a national organ as a *court* or *tribunal*. The ECJ has faced the problem in various moments, when dealing with the definition of *national court* for the purposes of Article 234 of the Treaty. The case- law has been lacking a clear definition that could be generally applied to all EU Member States.

The opinion of Advocate- General RUIZ-JARABO COLOMER on case C-17/00 (*De Coster*, restated in the opinion delivered on case C-393/06, *Ing. Aigner*) could not be any clearer: *"far from providing a reliable frame of reference, the case- law offers a confused and inconsistent panorama, which causes general uncertainty. The frequent disparity between the solutions suggested by the Advocates General and the pronouncements of the Court illustrate the legal uncertainty surrounding the concept of court or tribunal of a Member State"*, adding that *"if uncertainty in legal relations is disturbing, the sense of unease is all the greater when it concerns a notion which, like that in Article 234 EC, is a matter of public policy. (…) The ground rules must be clearly defined in a Community governed by the rule of law. The national courts*

[5] http://www.medelnet.org/index.php?option=com_content&view=article&id=210%3Amedel-calls-for-new-immigration-rules&catid=57%3Aeurope&Itemid=179&lang=fr .

and Community citizens are entitled to know, in advance, who may be deemed to be courts or tribunals for the purposes of Article 234 EC".

Article 47 of the Charter of Fundamental Rights of the European Union grants to all EU citizens the right to a fair hearing by an independent and impartial tribunal. However, there is no definition whatsoever of what can be considered in EU Law as a tribunal, and the minimum criteria that have to be met by a national organ to be considered "independent" and "impartial". Obviously the court system in the Member States is based on traditions and is deeply rooted in history. But the respect for tradition cannot be the only answer to the imminent need for development and reform in a Europe that has decided to build a common area of justice. Once again, the absence of minimum standard rules defining not only which authorities can be considered *courts* or *tribunals*, but also (and specially) the minimum procedural and impartiality guarantees that those authorities must comply with, brings uncertainty to the common area of justice, undermining the trust-based mutual recognition of decisions.

This question is of utmost importance, specially in times of economic crisis, when social fundamental rights of citizens are put at risk for the sake of economic interests, based on theories that disregard human dignity in areas like labour law[6]. The importance of the development of non-judicial methods of dispute resolution can never lead to solutions where citizens are denied the access to a judicial court to make hear their reasons, mainly when fundamental rights are at stake.

Any European citizen must always have the right to access a court - without any reserve or penalty – to defend fundamental rights.

6. The freedom of judicial associations as an essential instrument to the democratization of Justice

As previously said, the Judicial Power is the weakest of all three powers of the State, because it has a corrective and non creative competence. It is a diffuse power, spread by all judges and prosecutors that have strict conduct rules and a reserve duty inherent to their functions.

It this framework, judicial associations play a fundamental role in both ensuring the collective representation of magistrates before the State and contributing to the democratic participation of judges and prosecutors in the social and political life of each State. Let us not forget that magistrates are part of the State structure, and therefore need to be safeguarded from that same structure.

[6] As it was analyzed in the conference *"The Welfare State – at the mercy of the Financial Markets?"*, held by MEDEL in Berlin, June 21st 2013 - http://www.medelnet.org/index.php?option=com_content&view=article&id=204%3Athe-welfare-state-at-the-mercy-of-the-financial-markets&catid=48%3Ala-defense-des-droits-economiques-et-sociaux&Itemid=58&lang=fr .

MEDEL's intervention throughout time is a proof of the importance of the judicial associations in defending the independence of the Judiciary. We just look back to the recent case of Serbia and MEDEL's audit, that lead to a change of position of the government regarding the dismissal of Judges[7].

But judicial associations also play a significant role in the democratization of Justice. They promote the debate of different ideas and conceptions and guarantee the active participation of everyone in the democratic debate. While the tasks of judges and magistrates are inevitably political in the sense that they are important to shape the future of society, it is the independence of the associations from political parties that safeguards that the internal democratization of the judiciary is politically independent. And there is no other proper forum to discuss the important issue of ethics of judges, as this topic can by definition not be covered sufficiently by law and obviously cannot be determined by the executive, from which the judiciary needs to be independent.

For these compelling reasons judicial associativism in all EU Member States needs to be protected by EU Law as a fundamental tool for the democratization of justice and the independence of the Judiciary.

[7] http://www.medelnet.org/images/audit%20dernière%20version%20corrigé%20noire.pdf .