

Zagreb, 9 November 2018

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

### **CCJE Opinion No. 21 (2018)**

#### **PREVENTING CORRUPTION AMONG JUDGES**

#### **I. Introduction**

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the following Opinion on preventing corruption among judges.
2. Corruption among judges is one of the main threats to society and to the functioning of a democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe. Judicial integrity is the foremost pre-condition for effective, efficient and impartial national justice systems. It is closely interlinked with the concept of judicial independence: the latter enables integrity, and integrity reinforces independence. Judicial integrity has become all the more important nowadays in the context of numerous attacks on the judiciary.
3. Unfortunately, corruption remains too often a reality in several member States, which hampers public trust in their judicial system, and therefore in its overall political system<sup>1</sup>. Judges share responsibility for identifying and responding to corruption and for oversight of judicial conduct. The CCJE wishes to focus on the position of judges themselves, within their judicial capacity, regarding ways of both ensuring judicial integrity vis-à-vis the attempts at corrupting the judiciary and the role of judges in the fight against corruption.

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<sup>1</sup> See the Council of Europe Secretary General's annual reports on "The state of democracy, human rights and the rule of law in Europe".

4. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities (hereafter CM/Rec(2010)12), the Criminal Law Convention on Corruption (1999)<sup>2</sup>, the Additional Protocol (2003) to this Convention<sup>3</sup>, and the Civil Law Convention on Corruption (1999)<sup>4</sup>. The United Nations Convention against Corruption (2003) has also been taken into account.
5. The Opinion is based, in particular, on the findings and recommendations of the Council of Europe's Group of States against Corruption (GRECO), including notably its report on "Corruption Prevention. Members of Parliament, Judges and Prosecutors. Conclusions and Trends" (GRECO's Fourth Evaluation Round). The Opinion further takes into account the Resolution (97)24 on the twenty guiding principles for the fight against corruption and Recommendation Rec(2000)10 on codes of conduct for public officials, as well as the Parliamentary Assembly's Resolution 2098(2016), Resolution 1703(2010), Recommendation 2019(2013) and Recommendation 1896(2010) on judicial corruption. The conclusions of the European Conference of Judges on "Judicial Integrity and Corruption" organised by the CCJE on 7<sup>th</sup> November 2017 in Strasbourg have also been considered and drawn on.
6. The Opinion also takes account of the replies of the CCJE members to the questionnaire on judicial integrity and fighting/preventing corruption in the judicial system, and of the synthesis of these replies and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Dr Rainer HORNUNG<sup>5</sup>.
7. The replies to the questionnaire have illustrated that the situation of actual and/or perceived corruption differs widely among the member States – from countries where corruption has not been an issue, to countries with occasional reported cases of judicial corruption, and to countries where actual and/or perceived corruption in the judiciary is a matter of major concern among the public. Accordingly, one of the tasks of this Opinion is to find common ground and to bridge the existing gaps. This also means that there are often no uniform solutions, and that some of the recommendations issued will be less relevant for certain member States than for others.

## II. Judicial corruption – what is it?

### A. Definition of judicial corruption

8. All Council of Europe member States have adopted criminal legislation – and sometimes accompanying regulatory instruments – on general corruption, especially as far as public officials are concerned. For example, a public official's acceptance of a bribe is punished severely by all member States. However, the definition of corruption differs. There is, in the legislation of the member States, no common

<sup>2</sup> ETS 173. The Convention sets out common standards for corruption offences – among others, the establishment of criminal offences for active and passive bribery (as well as aiding and abetting in such offences) of public officials, including judges and officials of international courts.

<sup>3</sup> ETS 191. The Protocol requires the establishment of criminal offences for active and passive bribery of domestic and foreign arbitrators and jurors.

<sup>4</sup> ETS 174. The Convention deals with compensation for damage, liability and other civil law matters in relation to corruption.

<sup>5</sup> Dr HORNUNG is presently Deputy Chief Prosecutor (and anti-corruption contact point) at the Lörrach Prosecution Office in Germany. He was Director of the German Judicial Academy in 2011-2015. Dr Hornung was one of Germany's experts during GRECO's 4<sup>th</sup> Evaluation Round.

understanding beyond the fact that giving and accepting a bribe is specific phenomena of corruptive behaviour and is criminally punishable. As concerns more specifically the corruption of judges, a minority of Council of Europe member States have formally adopted particular criminal statutes which provide for more severe penalties for judges accepting bribes than for other public officials. In the vast majority of member States, judicial corruption falls under the same definitions of criminal offences as corruption by other public officials.

9. However, the CCJE takes the view that within the scope and for the purpose of this Opinion, corruption of judges must be understood in a broader sense. The reason for this is the very important role a judge plays as an independent and objective arbitrator in the cases brought to his/her court. For the purpose of this Opinion, judicial corruption comprises dishonest, fraudulent or unethical conduct by a judge in order to acquire personal benefit or benefit for third parties.
10. As can be seen in the responses to the questionnaire<sup>6</sup>, the perception of corruption in the judiciary in certain member States, for various reasons, may not be an accurate reflection of the reality. Perception can be as detrimental to the functioning of a democratic state as actual corruption. Accordingly, an extra chapter of this Opinion (see below Chapter IV) is devoted to describing and tackling this specific problem.

## **B. Factors leading possibly to corruption among judges**

11. Reasons for actual corruption inside the judiciary are manifold. They range from undue influence from outside the judicial branch to factors within the court system, and can be grouped into several categories: structural, economic, social and personal. However, all of the factors outlined below that contribute to the corruptibility of a judge share a common characteristic that they constitute a threat to judicial independence and to judicial integrity. Often, two or more factors are closely connected. This list of factors is not intended to be exhaustive. It is just meant to illustrate the main dangers of corruption a judicial system might encounter.
12. It is vital for the good functioning of the system in any democratic state that the judiciary is truly independent. Whenever there is a lasting structural imbalance/impairment between the three branches of state and where checks and balances are weak or ignored, there is a serious threat to the independence, impartiality and integrity of the judicial system.
13. A lack of transparency caused by preventing access to information relating to the judicial system facilitates corrupt behaviour, and is therefore often an important trigger for corruption. There is clear evidence that a judicial system with a (traditionally) high degree of transparency and integrity presents the best safeguard against corruption.
14. Poor working conditions, which include insufficient salaries and social benefits, poor infrastructure and equipment, along with a heavily understaffed judiciary and the like, can motivate a judge to accept an improperly offered favour more easily.
15. The CCJE draws attention to the interaction between judicial corruption and the acceptance and tolerance of corruption within society in general. A poor climate within the judiciary itself can be equally damaging. A lack of regulations concerning a judge's ethical conduct, a lack of general awareness of the dangers of corruption, and

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<sup>6</sup> See paragraphs 6-7 of the present Opinion.

a lack of guidance from court management can lead to judges becoming indifferent to the requirements of objective and impartial justice.

16. A judge might be the victim of undue pressure, be it by peers or by influential groups within the court system. It seems to be a rather widespread perception that judges cannot sufficiently defend themselves against these kinds of pressure due to the very specific nature of the role and position they hold.
17. Another series of factors which can potentially lead to a judge's corrupt behaviour are more intrinsic in nature. Subjective considerations linked to one's personal advancement and promotion can make a judge indifferent as to the risk of bias in a given case. Furthermore, the image of a judge, and as a consequence also the image of the judiciary as such, is seriously tainted whenever a judge decides a case in which he/she holds direct or indirect personal or financial interests capable of being affected by the outcome.

### **III. Preventing corruption among judges**

#### **A. General safeguards against corruption**

18. It is not exaggerated to state that effective prevention of corruption in the judicial system depends to an important extent on the political will in the respective country to truly and sincerely provide the institutional, infrastructural and other organisational safeguards for an independent, transparent, and impartial judiciary. Each member State should implement the necessary legislative and regulatory framework to prevent corruption within the justice system. They should also take all necessary steps to guarantee and foster a culture of judicial integrity, a culture of zero tolerance towards corruption concerning all levels of the court system, court staff included, and at the same time a culture of respect for the specific role of the judiciary. However, combating corruption should not be used to impair the independence of the judiciary.
19. Good political will is first and foremost required when proper staffing, infrastructure, and equipment of the judiciary are at stake. Proper working conditions (such as functional court buildings and equipment, as well as sufficient court staff) compatible with the dignity of the judicial mission can serve as strong deterrents from any corruptive behaviour. Accordingly, the CCJE wishes to stress that it is every country's responsibility to provide sufficient budgetary means for a reasonably well-equipped judiciary which can render justice through well-reasoned and timely decisions. It also calls upon the competent authorities to always provide the judicial branch with adequate salaries, retirement pensions and other social benefits. It is also worth noting in this context that a court system is only as strong and robust as its pillars. Therefore, adequate salaries, social benefits and equipment for non-judge court staff are as vital for a corruption-free judiciary as proper working conditions for the judges themselves.
20. Rules on a judge's proper conduct can serve as an effective safeguard to prevent corruption. In many member States, the Constitution and/or the statute on the functioning of the judiciary fix rules as to a judge's required behaviour inside and outside the courts. The most widespread examples of such rules are the obligation of discretion and the obligation of reserve. Often, these rather generic rules – both on the conduct in court and outside the court – are accompanied by, and specified in, regulations and/or guidelines.
21. The CCJE wishes to stress, however, that there is a clear link between the degree of transparency of a judicial system, on the one hand, and the role which the judges

assume in society, on the other. It is undisputed that due to his/her particular role in the interplay between the balance of powers, a judge should always show the discretion and reserve necessary for the proper exercise of his/her duty. But this does not mean that a judge must be a societal outsider. It seems, in fact, to be easier for someone positioned in the midst of society and in touch with its realities to render – and where necessary to explain – a judgment which the general public can understand and accept. However, a judge should refrain from any political activity liable to compromise his/her independence or jeopardise the appearance of impartiality. The CCJE maintains in this respect what has been already stated in its Opinion N° 3 (2002) on the ethics and liability of judges<sup>7</sup>.

## **B. Strengthening the integrity of judges**

22. The most important safeguard to prevent corruption among judges seems to be the development and fostering of a true culture of judicial integrity. There does not seem to be a uniform definition of this term, but there is nevertheless a broadly shared understanding of what are the constitutive elements of judicial integrity.

### **a. Regulatory institutional and organisational framework**

23. One important pillar of judicial integrity is the already mentioned formal – legislative or otherwise regulatory – framework concerning the position of the judiciary as such and of the individual judge in a given system. In Council of Europe member States, as a general rule, a combination of each individual member's Constitution (where there is a written one) and the central statute(s) on the functioning of the judiciary (including any by-laws, directives, circulars, etc.) fix rules, both on the organisation the judicial system (including rules on institutional independence) and on an individual judge's expected conduct inside and outside the courts.

24. The overarching core principles are regularly fleshed out in specific rules on a judge's career development - selection, appointment, promotion and advancement, training, performance appraisal and the disciplinary responsibility of judges. Here again, the CCJE wishes to note that it fully respects the very different judicial cultures and traditions among the member States. However, it is possible, based on a comparative analysis and professional experience, to detect and describe objective criteria for proper and transparent career development within the judiciary. Respect for these criteria has a positive impact on the fostering of a climate of judicial integrity in each system, and this is true regardless of the country's specific setting. On an institutional level, the CCJE considers that the judiciary itself should, in essence, be responsible for the career development of its judges, including training through autonomous judicial training institutions.

25. The majority of member States have entrusted high judicial councils or other self-governing bodies composed at least of a majority of judicial practitioners with the most relevant decisions as to selection, appointment, promotion and advancement along with performance appraisal and disciplinary proceedings. Another suitable way is to involve the relevant Supreme Court in these decisions. As to the selection, appointment and promotion of judges, the CCJE deems it very important that the process is based on objective findings as regards the legal and extra-legal skills of the candidates. The decisions should be merit-based<sup>8</sup> and taken by essentially non-political bodies<sup>9</sup> with at least a majority of persons drawn from the judiciary. Regardless of the method adopted by the member State, unsuccessful candidates

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<sup>7</sup> See especially paragraphs 27 et seq. of Opinion N° 3 (2002).

<sup>8</sup> See CM/Rec(2010)12, paragraph 44.

<sup>9</sup> See CM/Rec(2010)12, paragraph 46.

should have the right to challenge the decision or at least the procedure under which the decision was made so as to ensure objectivity and transparency in the process<sup>10</sup>. The general public should have a general insight into the selection and appointment procedure<sup>11</sup>.

26. The CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation. Nevertheless, some countries carry out very thorough background integrity checks which include the personal, family and social background of the candidate. These checks are usually carried out by the security services. In countries where such checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A candidate who is rejected on the basis of such a control must have the right to appeal to an independent body and, to this end, have access to the results of such control.
27. A distinction should be made between candidate judges entering the judiciary and serving judges. In no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption of judges is an offence and should therefore be tackled within the framework of established legislation.
28. Additionally, the CCJE wishes to draw attention to the negative effects of lustration as a means to combat corruption. The process where all judges are screened for corruption, and those who do not pass the review are dismissed and possibly prosecuted, can be instrumentalised and thus misused to eliminate politically "undesirable" judges. The mere fact of being a judge in a member State where the judiciary is compromised at a systemic level is, by democratic standards, not sufficient to establish responsibility on the part of individual judges. Another issue that arises concerns guarantees that the process will be conducted by competent, independent, and impartial bodies.
29. Properly done, a system of evaluation is a very effective means to make promotion and advancement decisions more objective and reliable. This also contributes to the transparency of the judicial system as a whole. In this context, the CCJE would recall the principles enunciated in its Opinion No. 17(2014) on the evaluation of judges' work. A good system of performance appraisal also takes into account the judicial integrity of the evaluated judge. This is different from scrutinising individual decisions rendered by the judge, as this would constitute an evident infringement of judicial independence.
30. Lastly, disciplinary proceedings are another important regulatory mechanism to fight corruption. In the CCJE's view, disciplinary proceedings should always be carried out essentially by judicial bodies (such as a disciplinary commission or court, or a branch of the high judicial council). This not only gives the judiciary a good self-regulatory instrument, but it also guarantees that persons with the requisite professional background assess whether the behaviour in question should entail disciplinary liability, and if so what sanction would be adequate and proportionate<sup>12</sup>. Further, judges should always be entitled to appeal disciplinary sanctions rendered against them to a judicial body<sup>13</sup>.

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<sup>10</sup> See CM/Rec(2010)12, paragraph 48.

<sup>11</sup> See Opinion No.10(2007) of the CCJE, paragraphs 42, 50.

<sup>12</sup> As to disciplinary sanctions, see in-depth *infra* sub C.

<sup>13</sup> The European Court of Human Rights (hereafter the ECtHR) has found violations when this was not the case: see *Baka v. Hungary*, 23 June 2016; see also *Paluda v. Slovakia*, 23 May 2017.

## **b. Guidelines on ethical conduct, ethical counselling, and training on ethics**

31. In virtually all member States, the aforementioned regulatory framework is accompanied by a set of written principles of / guidelines for ethical conduct. These principles have as a general rule been elaborated either by a body or several bodies of judicial self-governance, or the respective country's (main) judges' association.
32. As important as the development and adoption of these rules is, clearly they will only be internalised by the judges if they are understood and applied in practice. In order to attain this goal, it is the competent authorities' task to give their judges proper guidance on how to behave when faced with specific ethical dilemmas. This guidance should be offered from within the judiciary itself. One possibility is making available to the judges electronic or paper materials explaining how best to behave in given concrete scenarios. On the basis of such materials, discussions could be held at regular intervals between members of each court and/or members of different courts. Additionally, the CCJE considers that a vital aspect of implementing a true culture of integrity in the judiciary is to provide proper training on ethical conduct. It should be each judge's duty, regardless of age and seniority, to regularly undergo such training. This training could also be carried out in less formal in-house formats in peer groups. Guided collegial exchanges and discussions seem to be a good means to foster awareness of the dangers of corruption.
33. However, the CCJE wishes to underline that these training offers should be complemented by offers of individual ethical counselling, which would once again be preferably conducted by peers. A good solution can be to appoint an ethics officer or an ethics commission in each court of a certain size<sup>14</sup>. It is the court presidents' responsibility to take the initiative in this regard. They play a vital role in the implementation of a sound concept of ethical guidance in their respective courts, and thus in the promotion of a true culture of judicial integrity. This understanding of a court president's role as to ethical guidance is in line with CCJE Opinion N° 19 (2016) on the role of court presidents<sup>15</sup>. Additionally, the central judicial authorities should offer confidential ethical counselling on request.

## **c. Avoiding conflicts of interests**

34. The CCJE considers that systemic safeguards should exist to avoid situations where a judge decides a case in which he/she holds direct or indirect personal or financial interests capable of being affected by the outcome.
35. Any acceptance of a gift by a judge in relation to the performance of his/her judicial duties is likely to give rise to a perception of undue influence. This is why most member States have rules, for example, on the acceptance of gifts and other benefits by judges (and other public officials) within the exercise of their profession. Low (objective) value thresholds, on the one hand, and the definition of what is acceptable hospitality, on the other, can give the judges clear and understandable guidance, especially when combined with recommendations on how to proceed when an improper gift has been given. The CCJE welcomes GRECO's recommendations to a number of member States as regards the implementation and/or fine-tuning of rules for the acceptance of gifts and other benefits by judges, adopted in its Fourth Evaluation Round entitled "The prevention of corruption in respect of members of Parliament, judges and prosecutors"<sup>16</sup>.

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<sup>14</sup> See paragraph 49 iv) of CCJE's Opinion N° 3 (2002) on ethics and liability of judges.

<sup>15</sup> Cf. especially paragraphs 18 and 19 of this Opinion.

<sup>16</sup> See <https://www.coe.int/en/web/greco/evaluations/round-4> .

36. Another often regulated aspect of a judge's conduct is his/her activities outside of court and the way he/she conducts his/her private life. These rules diverge considerably among member States. In some countries, it is not unusual to find quite strict regulations forbidding, for example, retired judges or those that have otherwise left office from becoming members of a political party, any external professional activity, or even the establishment of a social media account. Other countries, where corruption has not been an issue, have quite loose and liberal rules, such as simply asking the judges to divulge (teaching or scientific) activities outside the court. The CCJE welcomes the disclosure of activities outside court to internal structures in the court system, as far as conflict of interest might occur, and preferably, if applicable, to the general public.
37. GRECO has issued, in its aforementioned Fourth Evaluation Round, recommendations to a number of countries as to the implementation or improvement of a system of asset declaration to comprehensively record in a regular – often annual – rhythm the judges' revenues and other assets. GRECO also recommends having a specific body inside or outside the judiciary charged with the scrutiny of the timeliness and accuracy of such declarations. Non-compliance with these rules may constitute, in certain countries, administrative misdemeanours or disciplinary offences<sup>17</sup>. Some countries have extended the asset declaration obligation to spouses and other close relatives of the judges. Sometimes, the declarations of all or certain categories of judges are made publicly accessible.
38. The CCJE considers that a robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby lead towards more transparency inside the judiciary, and contribute to the fostering of a climate of judicial integrity.
39. However, in view of a judge's right to privacy and the right to privacy of his/her family members, the implementation of such a system should always be strictly in line with the principle of proportionality. The first element of the latter is the question of necessity. In the many member States where corruption has not been an issue, or at the least very little in the way of actual corruption, it does not seem necessary to implement a general system of asset declarations. In such countries, it might even be detrimental to the quality of the judiciary to introduce an obligation of systematic asset declaration. Other suitable candidates for a judge's post might refrain from applying because they see such a far-reaching obligation as an unjustified intrusion into their private lives.
40. In addition, the CCJE is of the view that even in countries where a system of asset declaration exists, due attention should always be given to the proportionality of the details of the respective regulation. Disclosure to stakeholders outside the judiciary should only be done on demand, and only if a legitimate interest is credibly shown<sup>18</sup>. Confidential information should never be divulged and the privacy of third parties such as family member should be protected even more strongly than that of the judges.
41. Another effective safeguard against potentially corrupt judges deciding a case is the principle of the natural judge. Case allocation can be done either electronically or based on an annual case allocation scheme elaborated within the court system. Objective criteria for the case allocation can be a rotation in cycles, a party's last

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<sup>17</sup> Cf. in-depth infra sub C.

<sup>18</sup> For example, member States report of incidents leading to the destruction of property and even lives of judges and members of their families provoked by such disclosure.



names, local court districts, specialisations, etc. It is important for the transparency of the process, and thus the reputation of a judiciary, that this system cannot be manipulated<sup>19</sup>.

42. In some Council of Europe member States where corruption has not been an issue, especially from the common law system and from Scandinavia, court presidents have quite broad discretion in allocating the incoming cases to judges<sup>20</sup>. They will strive as a general rule to guarantee a fair allocation of the workload, all by taking into account the factors for case allocation as mentioned in the foregoing paragraph. This “softer” approach to case allocation is perfectly legitimate as long as the chosen system ensures in practice the fair and time-efficient administration of justice, and thus enhances public confidence in the integrity of the judiciary<sup>21</sup>.
43. In any event, potential conflicts of interests of judges are not automatically eliminated by a system of random case allocation. In fact, the random allocation can result in the attribution of a case to a judge who is a close relative of one of the parties. This is why it is important for each judiciary to have robust rules in place on recusal and self-recusal of judges in the event of an apparent or even only potential bias in a given case. All member States have rules of this kind (either legislative or case law-based). The definitions of potential bias adopted by member States are also very similar in this regard.
44. However, the truly vital point for the degree of a given country’s judicial integrity is the actual implementation and application of the rules on recusal and self-recusal. The CCJE considers that any member State encountering the phenomenon of judges’ reluctance to self-recuse (seeing it, for example, as a dishonourable step), should take the necessary measures to implement a culture of self-recusal, i.e. an environment where it is a matter of course for any judge to divulge a potential bias in a given case. This can be done by regular reminders, individual or peer group counselling on ethical conduct and/or formal in-service training. It is important to remember, however, that these concerns must be balanced against considerations of judicial efficiency and discouraging judge-shopping (forum-shopping) by litigants<sup>22</sup>.

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<sup>19</sup> IT must not prevent judges from applying the law in an independent manner and with impartiality, see CCJE Opinion No. 14(2011), paragraph 8. IT governance should be within the competence of the Council for the judiciary or other equivalent independent body. Regardless of which body is in charge of IT governance, there is the need to ensure that judges are actively involved in decision-making on IT in a broad sense, see CCJE Opinion No. 14(2011), paragraph 36.

<sup>20</sup> The CCJE confirms its previous position that, where the court presidents have a role in the allocation of cases among the members of the court, this should be done in accordance with objective pre-established criteria following a transparent procedure, see CCJE Opinion No. 19(2016), paragraph 21.

<sup>21</sup> GRECO dealt with this issue in its already mentioned 4<sup>th</sup> Evaluation Round. As concerns the United Kingdom, it found that “case management appears to be adequate; external interference in the adjudication of particular cases is not perceived as a source of concern in the United Kingdom” (paragraph 119). As concerns Norway, GRECO had the “impression that case allocation policies in courts were not formalised and lacked transparency and clarity to some degree /.../ and better information and foreseeability concerning case allocation or case re-allocation to a given judge could benefit the public” (paragraph 111).

See also the European Network of Councils for the Judiciary (ENCJ)’s 2013-14 Report on “Minimum Judicial Standards IV: Allocation of Cases”. This very thorough 138-page Report is based on a vast research project involving 17 different EU member countries with very different judicial cultures and traditions.

<sup>22</sup> Judge-shopping (forum-shopping) is a practice of trying to replace the judge assigned to the case by another judge. An unjustified self-recusal of the natural judge in such case could be a symptom of corruptive action.

**d. The responsibility of each judge to act against corruption within the judiciary**

45. As important as a comprehensive framework and ethical guidelines are, their effectiveness depends on the willingness of each judge to apply them in their everyday work. Each judge carries a personal responsibility, not only for his/her own conduct but also for that of the judiciary as a whole.
46. Judges, as holders of public office, have an obligation to report to the competent judicial authorities offences they discover in the performance of their duties, in particular, acts of corruption committed by colleagues.
47. The CCJE wishes to emphasise that judges, having assumed responsibility for the integrity of the judiciary, should not be questioned as to their loyalty in their future career, regardless of whether their concerns in the final analysis were proven to be well-founded or not. At the same time, the authorities, to whose attention such cases are brought, should always be careful when investigating such allegations.

**C. The preventive effect of properly investigating and penalising corruption among judges**

48. Evidently, adequate criminal, administrative or disciplinary penalties for a judge's corrupt behaviour, and severe actual sanctions pronounced against corrupt judges, can serve as a strong deterrent and thus have a preventive effect. The CCJE reiterates what has already been said in a more general context in its Opinion N° 3 (2002) on the ethics and liability of judges as regards the criminal and disciplinary liability of judges<sup>23</sup>.
49. Corruption committed by a judge must be addressed in accordance with the principle of proportionality and taking into account its seriousness. It may be sanctioned by a measure removing the judge from office or by another appropriate disciplinary measure following disciplinary proceedings. Criminal acts must be punished by the penalties provided for by criminal law, up to a term of imprisonment. The seriousness of criminal acts can be assessed in particular by their impact on the general public's confidence in the judicial system.
50. In a non-negligible number of member States, the problem in fighting and preventing corruption among judges is not so much the definition of criminal, administrative or disciplinary corruption offences and the penalties, but rather the investigation, indicting and judging of corrupt high-level officials, judges included. It is in the CCJE's view of utmost importance to avoid the deeply damaging impression that the higher-ranking, the cleverer and the better defended an allegedly corrupt public official is, the more he/she benefits from a de facto immunity. Depending on a given country's history, traditions and administrative structure, as well as the actual extent of corruption inside the system, it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges. As to specialised courts, the CCJE confirms its position set out in its Opinion No. 15(2012) on the specialisation of judges. It should be possible to introduce specialised courts only under exceptional circumstances, when necessary because of the complexity of the problem and thus for the proper administration of justice.
51. However, the CCJE, inspired by GRECO's findings, calls on member States to consider introducing, independent of the existence of decentralised authorities and

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<sup>23</sup> See especially paragraphs 51 to 77 of this Opinion.

bodies, a central anti-corruption authority at the national level. This authority does not necessarily have to have investigative and/or prosecutorial competencies, but it should serve as a competent and impartial interlocutor and networker, when cases of high-gearred corruption are at stake.

#### **D. International instruments, mechanisms and cooperation for preventing corruption among judges**

52. Finally, the CCJE wishes to stress that the proper use of mechanisms and instruments of international cooperation in the field of prevention of corruption among judges can also be a strong preventive factor. The judiciary may benefit from the guidance they get by evaluation reports with specific recommendations from world-wide or regional institutions such as the Council of Europe's Venice Commission and GRECO, as well as UNCAC, OSCE, OECD, the UN global judicial integrity network and similar. As a rule, these reports are based on well-reflected and reciprocity-based monitoring mechanisms involving field visits and highly qualified experts, both from the monitoring institution and the monitored country.
53. It should be underlined that countries where the judiciary is more or less corruption-free also benefit from such evaluation reports. The recommendations allow them to fine-tune their institutional, organisational and other safeguards against corruption, including those within the judiciary.

#### **IV. Perceived corruption**

54. A non-negligible number of member States have reported in their replies to the questionnaire preparing this Opinion the phenomenon – at first sight quite odd – that the public perception of corruption inside the judiciary is considerably higher than the actual amount of cases against corrupt judges would suggest. Even though only a very small percentage of interviewees could report on personal negative experiences with corrupt judges, a very significant share of the same polled group was of the view that the judiciary was among the most corrupt institutions in the country.
55. The CCJE considers that reasons for the existence or non-existence of a significant discrepancy between actual and perceived judicial corruption in a given country lies principally in the (non-)transparency, i.e. (non-)openness or taciturnity of the judicial system. It has already been highlighted that the judiciary as the third power of state is to a certain extent hampered in its information policy by specific obligations which make it difficult to respond effectively to criticism from the outside. These are namely: the obligation of discretion, including the right to a fair trial and respect for the presumption of innocence, as well as the obligation of reserve.
56. Outside the judiciary, the misbehaviour of other professional groups plays an important role among factors leading to the perception of corruption among judges. For example, in pending cases it is not uncommon for prosecutors and lawyers to use tactics, such as litigation through the media, to influence public opinion.
57. In principle, the judiciary must accept that criticism is part of the dialogue between the three powers of state and with society as a whole, where free and diverse media plays an indispensable role. However, there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other<sup>24</sup>. Politicians, others in public positions and

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<sup>24</sup> See paragraph 52 of CCJE Opinion N° 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy.

the media, particularly in pending cases and during political campaigns, might use simplistic, populist, or demagogic arguments and deliberately misinform the public to make irresponsible criticisms of the judiciary and do not respect the presumption of innocence. Consequently, this may also create an atmosphere of public mistrust in the judiciary and can in some cases infringe the principle of a fair trial as set out in Article 6 of the European Convention on Human Rights (hereafter the ECHR)<sup>25</sup>.

58. Several mechanisms exist to enhance the prerequisite legitimacy<sup>26</sup> and transparency of the judiciary, and thereby public confidence and trust in the judiciary. They all can be summarised by the necessity of a proactive information policy, such as providing general information about the functioning of the judicial system and informing the public in sensitive cases where there is a “whiff” of corruptibility.
59. The CCJE confirms in this context the views set out in its Opinion No. 7 (2005) on justice and society, concerning the necessary dialogue with all stakeholders in the justice system. In order to promote transparency and public confidence, as stated in Opinion No. 7(2005), it is judges’ responsibility to use accessible, simple and clear language in the proceedings and in their judgments.
60. Court presidents play a vital role in the enhancement of transparency in their courts. The CCJE reiterates the aforementioned Opinion N° 19 (2016) and holds that the interests of society require that court presidents inform the public through the media about the functioning of the justice system<sup>27</sup>. This includes pending cases. Sometimes, quick and regular information (which can be given without breach of confidentiality) is of the essence even before an actual verdict is rendered. This can take the form of a press release or an interview.
61. The CCJE considers in this context that court presidents and/or press spokespersons (media relation officers) from within the judiciary should benefit from hands-on media training.
62. However, transparency and public trust in the judiciary is not fostered only by a proactive approach to the media and the general public, but to a significant extent by the way the participants in court proceedings are treated<sup>28</sup>. A judge who explains his/her decisions – and in given cases the pathway to find the solution – in an understandable way will as a rule generate a feeling of fair treatment even on the part of the party which ultimately loses the case<sup>29</sup>.
63. Also, the CCJE considers it vitally important for the perception of a transparent, fair and impartial judiciary that judges and private lawyers, and also public prosecutors, maintain an on-going dialogue, all by respecting their different professional positions and roles, and more specifically the principle of judicial independence. The CCJE reiterates in this connection the views expressed in its Opinion N° 16 (2013) on the relations between judges and lawyers<sup>30</sup>.

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<sup>25</sup> See ECtHR judgment *Pesa v. Croatia*, No. 40523/08, 8 April 2010.

<sup>26</sup> CCJE Opinion N° 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy contains ample considerations as to ways of guaranteeing and enhancing the legitimacy of the judiciary and at the same time its accountability.

<sup>27</sup> See paragraph 12 of CCJE Opinion No. 19 (2016); see also paragraph 32 of the aforementioned Opinion N° 18 (2015).

<sup>28</sup> This has already been highlighted in CCJE Opinion N° 7 (2005) on justice and society, especially in paragraphs 24 to 32. It is also in accordance with the Plan of Action of the Council of Europe on strengthening judicial independence and impartiality, CM(2016)36 final.

<sup>29</sup> See CCJE Opinion N° 11(2008) on the quality of judicial decisions.

<sup>30</sup> Cf. especially paragraphs 10 to 25.

64. The trend that can be observed in some member States of attempts to undermine justice systems is a real threat to the principle of the rule of law and the proper functioning of democratic society. Notwithstanding any intention to restrict the justified comments by the public about the work of courts, the role of protecting the constitutional position of the judiciary lies not only with judges but also with representatives of the executive and legislative powers, representatives of civil society, the media and so on. Public criticism of the judiciary should always comply with the requirements set out by Article 10(2) of the ECHR and paragraph 18 of CM/Rec(2010)12.
65. Consequently, the CCJE wishes to stress that it is every country's responsibility to provide sufficient budgetary means for a well-equipped judiciary which can render justice through well-reasoned and timely decisions<sup>31</sup>.

## **V. Conclusions and recommendations**

- a. Corruption among judges is one of the main threats to society and to the functioning of the democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe. It becomes all the more important nowadays in the context of numerous attacks on the judiciary. Judicial corruption severely affects public trust in the administration of justice.
- b. Corruption of judges must be understood, for the purposes of this Opinion, in a broader sense so that it comprises dishonest, fraudulent or unethical conduct by a judge in order to acquire personal benefit or benefit for third parties.
- c. Reasons for actual corruption inside the judiciary range from undue influence from outside the judicial branch to factors within the court system, and can be grouped into several categories: structural, economic, social and personal.
- d. Effective prevention of corruption within the judicial system depends to an important extent on the political will in the respective country to provide the institutional, infrastructural and other organisational safeguards. The most important safeguard to prevent corruption among judges seems to be the development and fostering of a true culture of judicial integrity.
- e. The legislative or otherwise regulatory framework is an important safeguard against corruption. It should provide for independence at all stages of a judge's career: selection, appointment, relocation, promotion and advancement, training, performance appraisal and disciplinary responsibility of judges. Respect for objective criteria for career development within the judiciary has a positive impact on fostering of a climate of judicial integrity.
- f. The CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation. In countries where such checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A distinction should be made between candidate judges entering the judiciary and serving judges.
- g. The competent authorities should always provide the judicial branch with adequate funds for the dignified and proper accomplishment of its mission. Adequate salaries,

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<sup>31</sup> See CM/Rec(2010)12, paragraphs 32-33; see also CCJE Opinion N° 2(2001), paragraphs 2-5.

retirement pensions and other social benefits, a manageable workload, a proper working infrastructure and job security for both judges and court staff are vital for the legitimacy and good reputation of a judicial system. These are also important safeguards against corruption in the judiciary.

- h. In all member States, judges should be provided with a set of rules / principles / guidelines on ethical conduct. These should be illustrated by practical examples, and accompanied by formal ethics training, as well as individual or peer group confidential ethical counselling. The judiciary should provide counselling in the courts and at central level in this respect.
- i. A robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby lead towards more transparency inside the judiciary, and contribute to the fostering of a climate of judicial integrity.
- j. Potential conflicts of interests of judges are not automatically eliminated by a system of random case allocation. This is why it is important for each judiciary to have robust rules in place on recusal and self-recusal of judges in the event of an apparent or even only potential bias in a given case.
- k. The effectiveness of ethical guidelines depends on the willingness of each judge to apply them in their every-day work. Each judge carries a personal responsibility, not only for his/her own conduct but also for that of the judiciary as a whole.
- l. Adequate criminal, administrative or disciplinary penalties for a judge's corrupt behaviour can serve as a strong deterrent and thus have a preventive effect. Cases of judicial corruption should always be addressed with a sense of proportion.
- m. The proper use of mechanisms and instruments of international cooperation in the field of prevention of corruption among judges can be a strong preventive factor, including the Council of Europe's institutions such as GRECO and the Venice Commission, as well as other organisations such as the UN Global Judicial Integrity Network, UNCAC, OSCE, OECD and others.
- n. The phenomenon of perceived corruption, where the public distrust in the impartiality of the judiciary is much higher than the actual number of corruption cases, is usually the result of systemic deficiencies at national level concerning the transparency and openness of the judicial system.
- o. Several mechanisms exist to enhance transparency and thereby the public trust in the judiciary. These mechanisms can all be summarised by the necessity of a proactive information policy, such as providing general information about the functioning of the judicial system and informing the public in sensitive cases, keeping, however, in mind the obligation of discretion and reserve, including the right to a fair trial and respect for the presumption of innocence.