Justice:
un pouvoir
de la démocratie
en Europe
Justice: un pouvoir de la démocratie en Europe

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FOR A DEMOCRATIC EUROPE,
TOWARDS JUSTICE AND SOLIDARITY GOVERNED
BY THE RULE OF LAW AND PROTECTIVE OF CITIZENS’ RIGHTS

1. This booklet seeks to summarize and to document the work and reflexions developed over the past two years by MEDEL and its comprising associations.

In general, this reflexion has been guided by the need to assert at European level and departing from the shared cultural background that built the national and European legal institutions, principles that everyone understands as being essential for the cooperation that we want increasingly developed and improved.

However, such cooperation can only deepen if the common principles that generally rule and guide the judiciary power and judicial authorities of different European countries can materialize into independent institutions and bodies that are able to express as well as to take on the responsibility for themselves.

Towards this, all the European judicial authorities and their magistrates need to be able to be governed by chartered statutes that guarantee the same level of independence and autonomy from other institutional powers – be they Community or national ones - or even before any factual powers that may be developing and acting within the various societies and under the context of our globalized world.

The principle of mutual trust, which enables further deepening cooperation between magistrates and judicial systems of different European countries, therefore requires accepting and institutionalizing those principles that will both integrate their statutes and guide the composition of the governing bodies for judges and public prosecutors and thus ensuring their independence and democratic accountability.

This is only possible if we make way towards the definition, at European level, of minimum guarantees regarding chartered statutes of autonomy and independence for judges and prosecutors, while these guarantees can only be enshrined into base models of self-government bodies.

Many of these essential minimum guarantees are already outlined in numerous resolutions and legal opinion by the Council of Europe and its various bodies.

However, it is of importance now to give them a constitutive and binding capability.

2. The crisis that we are experiencing in the world and in Europe, a crisis differently affecting many of its countries, cannot be overcome without increased regulation of the wild powers that have caused it; that is, without strengthening laws and the rule of law.
Only by strengthening democratic political control and judicial control over the interests and factual powers that have created illegitimate imbalances in the path towards integration and solidarity between European peoples and nations, can the illegitimate preponderance of those non-institutional powers be prevented.

Only in that way, then, can it be possible to put the brakes on the aggravation of unjust inequality of rights for the citizens of Europe, either internally within each country, or at the level of the different countries that make it up.

In those documents and testimonies that we leave shown here, MEDEL has sought therefore to reflect, from a common culture and principles, the plurality of civic and professional opinions and experiences by magistrates from the different national associations belonging to it.

Here are then expressed the concerns, aspirations and the shared sense of the reforms that all MEDEL associations deem as being needed to strengthen the rule of law within Europe and, not least, the right of its citizens to have equal and ensured rights.

Democracy in Europe can only be asserted if democratic laws are respected, and this is possible only if the judicial powers of Europe and its magistrates abide by principles, statutes and independent bodies, that through similar composition, same autonomy standards and democratic accountability, can enforce them and make them to be respected.

Peace in Europe and in the world relies upon the realization of justice and this materialization stems, by and large, from the respect that everybody may attach to democratic laws, the Rule of Law and to citizenship rights.

Antonio Cluny
President of MEDEL - Magistrats Européens pour la Democratie et les Libertés
Challenges of the Judiciaries in European Countries
– Reports of the Member Associations
A BRIEF GLANCE AT THE JUDICIARY IN GERMANY
WITH A FOCUS ON THREATS TO JUDICIAL INDEPENDENCE

1. In Germany there is only independence of judges, but no independence of the judiciary. High judicial councils to govern the judiciary do not exist. All courts – with the only exception of the federal constitutional court – are subordinated to a ministry and thus are integrated into the hierarchical structures of the executive power. 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, which opens an indirect, but considerable influence of the executive over the judiciary. The highest judges (presidents) of each of the five branches of the judiciary have the position of heading a subordinate body. There is no judge who is representing the entire judiciary and who could with an appropriate standing pronounce publicly on the needs of the judiciary.

2. The public prosecution has no judicial independence whatsoever. Public prosecutors are civil servants and subject to orders in a hierarchy that ultimately culminates at the respective minister. Germany has been called upon to end this general situation by the Parliamentary Assembly of the Council of Europe (resolution 1685 (2009)). Rapporteur was an MP who shortly after that, already several years ago, has become the federal minister of justice. Yet no project to amend the law accordingly has been initiated.

3. The construction of the judiciary and of the public prosecution as “embedded” in the executive is not explicitly defined in the constitution, but is shielded by jurisprudence of the federal constitutional court. As a consequence, to change it, an amendment of the constitution would be necessary. All major judges’ organizations have adopted positions calling for a reform. Neue Richtervereinigung has been calling for that for a long time and published in 2011 a comprehensive proposal for an amendment of the law to provide the judiciary with full independence. This has been introduced to federal parliament in 2013 by the opposition (left party) and the legal committee of parliament has held a public hearing of experts on 22nd of april 2013. Politics is slowly becoming aware of the issue.
4. In an effort to respond to jurisprudence of the ECHR and to reduce undue length of some procedures, a system of financial compensation for the parties of a case has been enacted in 2011. In the meantime, the first compensations have been granted. What is troubling is that this gave rise to the question of recourse against judges. We see the independence of the judges in danger, as this builds up financial pressure on the individual judge to demonstrate and maybe even prove retrospectively that she or he was overloaded with work. It will come down to find out what the reasons were and who was responsible: understaffing of courts or laziness of judges. There is one case pending, that might have a direct link to that: a president of a court (acting in his administrative capacity, which means this act could be internally reviewed or controlled by the ministry) has taken a disciplinary action against a judge for “insufficient numbers of files closed”, as he statistically fell back to roundabout two thirds of the average number of his fellow judges. At the same time the president acknowledged that the respective judge worked sufficient hours and produced adequate quality decisions. This kind of disciplinary action, focusing only on the overall quantity of output, thus directly aiming at how a judge handles his cases - and in our opinion interfering with judicial independence -, is unprecedented and might be a new means of the administration to prepare recourse-cases against judges for compensation in lengthy procedures.

5. To set the payment for judges is – like for civil servants – up to parliament. Generally speaking, with regional differences, over the last decade the payment was not adjusted to the development of the prices and of wages. This has led to the payment of judges falling back substantially in relation to wages. As a result, in the comparative study of the European Commission on the efficiency of justice (CEPEJ) „European judicial systems – Edition 2012 (data 2010) – Efficiency and quality of justice“, when looking at the level of payment for judges in relation to the average wages, German judges are ranking on the last place (both: beginners and judges at the end of their career). There is a case pending about the remuneration of judges at the federal constitutional court, but chances are slim that it will find the salary unconstitutional.

6. The state’s response to the financial and banking crisis affects the role of the courts, namely labour and social courts. Law reforms in these fields are no more intended to improve the conditions of life for the citizens but to the contrary “reform” nowadays consists of cutting social rights in what is deemed to be an attempt to secure structures that in reality most likely cannot be saved. Judges are expected to accept the economic constraints flowing from the financial system in crisis. This shift leaves labour judges without a remedy against new forms of industrial relations, social judges unable to stop the increase of poverty. Civil judges inevitably contribute to the systematic scheme, that in essence only consumers belonging to the middle and the lower tiers of society bear the burden of public debts. Judicial power lacks proper instruments to respond in an equitable and just manner to these challenges that are the result of “modernizing” law and justice.

Neue Richtervereinigung (NRV)

Bundesfachausschuss Richter und Staatsanwälte in Vereinigten Dienstleistungsgewerkschaft (VER.DI)
L’indépendance des juges et du ministère public est garantie par la Constitution et par les textes internationaux. Elle subit pourtant de sérieuses menaces. La justice est ultradépendante des centres de décisions qui lui sont extérieurs, attachés principalement au pouvoir exécutif. Si ceux-ci n’agissent pas sans faille dans l’intérêt du fonctionnement et de la continuité des services judiciaires, c’est leur indépendance qui est en cause. Sous le prétexte d’une meilleure gestion des moyens dont dispose la justice, des projets de loi actuellement à l’examen visent à renforcer la mobilité des magistrats, sans considération pour le principe d’indépendance.

LA MOBILITE DES MAGISTRATS: UN TERRAIN MINE

1. La ministre de la justice a présenté en mars dernier un projet de loi permettant de déplacer „dans l’intérêt du service“ les magistrats en dehors de la juridiction ou du parquet dans lequel ils ont été nommés pour combler le manque d’effectifs d’autres juridictions ou parquets. Ce projet s’inscrit dans un programme plus vaste de modernisation de la justice prévoyant également l’autonomie de gestion des structures judiciaires et la définition d’arrondissements élargis.

Attachons-nous aux atteintes portées aux garanties constitutionnelles et posons d’emblée que dans les faits, ce projet n’est pas de nature à rendre la justice plus efficace. Souffrant en majorité d’un manque criant d’effectifs du fait des lenteurs qui caractérisent les procédures de nomination et de remplacement des magistrats, rares sont les juridictions et parquets qui pourront sans compromettre davantage leur fonctionnement, pallier par le transfert de leurs membres le déficit d’autres corps ; certaines juridictions ont des délais de fixation, au civil, qui dépassent deux ans. L’intention manifeste du politique est d’imposer au pouvoir judiciaire la gestion de sa pénurie en personnel.

2. Ce projet heurte de plein fouet les principes d’indépendance et d’impartialité des tribunaux que la règle constitutionnelle de l’inamovibilité garantit sans concession.
La Constitution belge dispose en effet en son article 13: „Nul ne peut être distrait, contre son gré, du juge que la loi lui assigne“ tandis que selon l’article 152, alinéa3, „le déplacement d’un juge ne peut avoir lieu que par une nomination nouvelle et de son consentement“.


Il est acquis que cette règle essentielle ne peut être aménagée que de manière exceptionnelle et moyennant des garanties qui excluent qu’elle soit vidée de son contenu et de sa portée.

Il s’agit à la fois d’empêcher que des pressions puissent être exercées sur des magistrats dans le traitement des affaires qui leur sont soumises et de garantir que le justiciable comparelaise devant le juge que des règles objectives et préétablies lui assignent.

Le déplacement des magistrats ne peut ainsi être laissé ni à la discrétion de l’exécutif, ni à celle des seuls chefs de corps (arrêt CEDH, Pandjikidzé c.Géorgie, 27 octobre 2009).

3. Le projet de loi ne rencontre en rien ces exigences nationales et internationales:
- la décision de déplacer un magistrat est prise par un ou deux chefs de corps selon les cas;
- dans de nombreuses hypothèses, le consentement de l’intéressé n’est pas requis;
- aucun recours n’est aménagé;
- aucune concertation effective n’est prévue avec les membres de la juridiction concernée par le transfert d’un de ses membres;
- une motivation liée aux seules „nécessités du service“ est imposée, ce qui équivaut à une absence de motivation réelle.

Ceci menace les garanties que le justiciable, confronté à un adversaire puissant politiquement ou économiquement, est en droit de revendiquer. C’est particulièrement interpellant dans la période de crise que nous traversons. Il sera désormais possible d’exercer des pressions sur certains magistrats réputés „difficiles“, mais aussi d’empêcher que des juges considérés comme trop indépendants siègent dans des affaires délicates ou politiques; il sera possible en somme de choisir son juge.

Une magistrature docile et craintive se profile ainsi à l’examen du projet, empêchée objectivement de jouer se reine ment et avec force le rôle de contre-pouvoir que la démocratie lui assigne.

ULTRADEPENDANCE DE LA JUSTICE

En 2012, l’ASM et de nombreux partenaires de la justice ont lancé un appel commun : rien ne va plus. A force de prétendues politiques de gestion de crise qui n’ont même plus l’ambition d’apporter des solutions aux véritables
problèmes de fond, les responsables dégradent notre justice qui est pourtant déjà loin de mériter la cote AAA et mettent en danger l’indépendance de la justice et la situation des justiciables.

Si le troisième pouvoir que représente la justice est indépendant, l’organisation de la justice, son financement, la responsabilité des prisons et tant d’autres décisions dont dépend la justice relèvent presque entièrement des pouvoirs politiques: le législateur et le gouvernement.

L’appel commun, qui conserve toute son actualité, dénonçait les décisions et l’absence de vision politique ayant pour effet de déshumaniser la justice et de lui faire perdre son sens:

- La surpopulation pénitentiaire a atteint un niveau record depuis le printemps 2012. L’absence de politique pénitentiaire est criante. On désespère d’attendre autre chose que le mystérieux masterplan qui prévoit d’empiler des cellules de prison sans réflexion criminologique. Attend-on des magistrats qu’ils distribuent des mandats d’arrêt et des peines d’emprisonnement sans se préoccuper des conséquences effectives de leurs décisions?

- Une loi de 2011 a mis en œuvre le droit à l’assistance d’un avocat conformément à l’arrêt Salduz. Cette loi prévoit des permanences organisées par les barreaux. L’absence de financement suffisant de ce service a dès l’origine conduit à une impasse qui se prolonge aujourd’hui et met en cause l’effectivité de cette garantie fondamentale touchant au fonctionnement judiciaire. Est en outre arrivé en 2013 un projet gouvernemental visant à réduire encore les budgets consacrés à l’aide juridique et à faire payer les restrictions par les bénéficiaires, c’est-à-dire les justiciables les plus démunis.


Les exemples pourraient être multipliés : les tribunaux prononcent des peines de travail qui perdent leur sens en raison du retard de leur exécution, ils décrètent l’internement en régime psychiatrique d’auteurs d’infractions jugés incapable du contrôle de leurs actes et, faute d’investissement suffisant dans les institutions adaptées pour les recevoir, ces personnes sont parquées durant des années dans des annexes de prison où le personnel spécialisé manque cruellement, etc.

Qu’est-ce qu’une justice indépendante sans l’effectivité des droits?

l’Association Syndicale des Magistrats (ASM)
THE JUDICIAL SITUATION IN SPAIN

The recently reform of Judiciary Act 1/1985, significantly worsens judge’s status as reduce the days off, increases considerably the workload in a general context of overload, and allow trainees from the Judiciary School to perform real judicial functions at Courts.

In a context of not increasing wages for years, with loss of purchasing power, judges, public prosecutors, court clerks and civil servants who compose the Courts staff, have suffered the cut of salaries twice. The first time, in June 2010, with an approximate reduction of a 10 %. The second time in 2012, with the loss of the 1/14 part of the salary already reduced.

There is a reform of Judiciary Act 1/1985 in process, affects central aspects of judicial independence, such as the appointment, organization, functioning and powers of the General Council of the Judiciary. It seems that the purpose of this reform is to transfer to the Ministry of Justice the maximum of powers on judges, in detriment of the Council.

The Spanish judicial organization responds to a 19th century design. It is essential and urgent its reform to adequate the old structures to the requirements of 21st century. Moreover, the Spanish Judges ratio, with near 5,000 judges and a population of more than 47,000,000 inhabitants, is very low. Most of the Courts are overburdened, so the public service provided presents unavoidable delays. Despite this fact, investment has drastically fallen, real plans to modernize the organization have been laid aside, and there will be no more new judges in the next years. It is evident that the Judiciary cannot perform effectively its task of enforcing and guaranteeing the rights and freedoms of citizens without means.

In Spain, the overall budget of justice in 2013 represents less than 1 % of the GDP. And in relation to 2012 this budget has decrease due to the financial and economic crisis. Budget cuts directly affect the effectiveness of citizens’ rights.
A few months ago, an act passed by the Parliament that introduces universal fees to litigate in civil, administrative and social jurisdictions (let us say in constitutional terms: introduces fees to enjoy the right of access to the courts). Its aim is to produce a deterrent effect in order to reduce the amount of cases that reach the courts, which is contradictory to the section 24 of the Spanish Constitution: Right to action in court (“All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense”).

According to the neoliberal agenda, the Penal Code is used to solve social problems. Proliferation of strikes, street demonstrations and social movements who refuse the new model are considered a public order problem, so the political solution is to criminalize conducts with, properly, are mere acts of exercise of fundamental rights (the right to freely express and spread thoughts, the right to peaceful unarmed assembly and the right of association), in order to discourage that exercise. At the same time, penalties increases for certain crimes, especially those referred to property offences. Paradoxically, meanwhile it has been approved a general amnesty for tax evaders. If the draft reform of the Penal Code (July 2012), is finally approved, it would become the 28th reform of this Act in seventeen years. It is surprising that, in this context, the prison population rate in Spain per 100,000 inhabitants (161), is far superior to the rates in near countries (Germany, 89.3, France, 103.1, Portugal, 104.4 or Italy, 106.6), even when Spain has lower crimes rates.

Despite millionaire public financial aid for Spanish banks, no action has been adopted to help mortgagers, even when they are good faith debtors who lost their jobs because of the crisis and have no means to give the money back to the Banks-creditors. According to the Spanish Law, mortgager cannot extinguish the debt just through the conveyance of the property, as he has to give back the same amount of money received plus the interests. Due to the crisis, real state decreased its value, so the property (generally, the debtor and his family home), is not enough to cancel the credit. This means that thousands of families have lost their homes, and are still debtors of the Banks, in a somewhat status of servitude at risk of social exclusion. Though the dramatic situation, the Parliament has not intention to change the essential aspects of this Act.

For those reasons, Jueces para la Democracia (Jpd) and Unión Progresista de Fiscales (Upf), the two Spanish associations members of MEDEL, with other associations of judges and prosecutors had called for demonstrations to protest the weakening of the spanish judicial system.
FRANCE

La nouvelle majorité politique élue en mai et juin 2012 a trouvé une justice abîmée, sinistrée et caporalisée. Au regard de cette situation, les réformes envisagées sont insuffisantes, et ne remettent pas en cause une logique gestionnaire, qui met le service public de la justice en danger.

DES RÉFORMES INSUFFISANTES

* Le Conseil supérieur de la magistrature
Le CSM actuel ne dispose pas des moyens nécessaires pour remplir son rôle de garant de l’indépendance de la justice. Il est privé de toute capacité d’expression autonome sur les questions liées à l’indépendance, il ne dispose pas de l’initiative des nominations (sauf pour quelques rares postes hiérarchiques au siège). Les membres extérieurs sont nommés par les autorités politiques selon un système qui peut entretenir le soupçon d’allégeance politique. Le système électoral pour les membres magistrats favorise une surreprésentation de la haute hiérarchie judiciaire.

La réforme envisagée par le gouvernement se contente de prévoir que le CSM sera doté du pouvoir d’avis conforme sur les nominations des magistrats du parquet, à l’instar de ce qui existe pour les magistrats du siège.

* Le parquet
En matière de nomination, il est prévu un avis conforme et non plus un avis simple du CSM sur les propositions de la Chancellerie. L’interdiction pour le ministre de la justice de donner des instructions individuelles aux magistrats du parquet dans les dossiers devrait également être inscrite dans la loi. Néanmoins, la réforme n’aborde nullement la question du statut du magistrat au sein du parquet, lequel ne dispose aujourd’hui d’aucune garantie par rapport à sa hiérarchie qui peut le dessaisir d’un dossier à tout moment. Pire, le principe hiérarchique sortira renforcé de cette réforme puisque d’une part, le parquet général se voit confier un contrôle de l’action publique menée
par les parquets de première instance et que d’autre part, l’obligation d’information à l’égard du ministère de la justice est réaffirmée, laissant craindre une politique du “rapport permanent”.

* L’absence d’une grande réforme statutaire

Seule une réforme en profondeur du statut des magistrats (nominations, carrière, discipline) et du fonctionnement des juridictions serait à même de garantir une indépendance effective et une démocratisation de notre institution. Tel est le sens des réformes revendiquées par le Syndicat de la magistrature qui déplore que la gauche au pouvoir refuse d’ouvrir ce chantier.

CRISE ET LOGIQUE GESTIONNAIRE:
LE SERVICE PUBLIC DE LA JUSTICE EN DANGER

L’augmentation minime du budget pour 2013 de 4,3 % ne saurait faire oublier la misère dans laquelle se trouvent les services judiciaires : effectifs insuffisants particulièrement dans les greffes, juridictions en état de cessation des paiements, dotation destinée à la couverture des frais de justice sous-évaluée et par conséquent fournisseurs et experts qui ne sont pas payés, augmentation des stocks de dossiers et allongement des délais de jugement des affaires, en particulier en matière civile et sociale, délabrement des bâtiments dont l’entretien courant n’est même plus assuré.

Les réflexions lancées par la ministre de la justice au sein de groupes de travail concernant l’office du juge et la création de tribunaux de première instance laissent pour l’instant perplexe sur les véritables objectifs. Sous couvert d’une “rationalisation” de l’organisation judiciaire, il pourrait s’agir d’une occasion pour supprimer les juridictions d’instance qui sont pourtant de véritables juridictions de proximité et d’accroître encore les pouvoirs de gestion des chefs de juridictions.

CORRUPTION: DES ANNONCES POUR APAISER LE SCANDALE.

La détention en Suisse et à Singapour de comptes par le ministre en charge du budget de la lutte contre la fraude fiscale a causé un grand scandale. Le gouvernement a depuis annoncé diverses mesures pour renforcer la lutte contre la fraude et la corruption, notamment la création d’un parquet financier national.

Syndicat de la Magistrature (SM)
SHORT REPORT ABOUT THE SCJ
AND JUDICIAL INDEPENDENCE IN GREECE

Supreme Council of the Judiciary

In Greece, the Supreme Council of the Judiciary is consisted in by judges of the High Courts. Its role is restricted to the assignment, promotion, transfer of judges and their leaves. There is no question for it to take initiatives when the judicial independence is in danger. Anyway, it could be said that the judicial independence is protected by its above acts, in the measure that it is an absolutely judicial organ (in other words, when it is for the assignment, promotion etc. of a judge, only judges decide about it). Problems could be detected in its function, by a lack of transparence of its decisions.

Judicial independence

1. Presidents and Vice – Presidents of the High Courts are assigned by the Government (art. 90 of the Constitution). This fact, combined with the nomination of the supervisor of the disciplinary inspection of judges, between the Vice – Presidents of the High – Courts, creates an immediate link of dependence by the Executive. This way judges can be pressured not only to work hardly, but also to specific directions.

2. Recently there were legislated disciplinary sanctions which infringe the international standards, thus: cut of leaves and wages in case of delay in the publication of the decision (Code of the Judiciary, Law no 1756/1988 as it is amended).

In addition, transfers of Judges are not depended on their request alone, but can be decided by the Superior Council of the Judiciary, under the vague reasoning of functional necessities. From the other hand, detachments of judges for six months or a whole year, to serve in courts even hundreds of kilometers away from their home, are not scarce at all.

3. Regulations of courts (Code of the Judiciary, Law no 1756/1988 as it is amended), which determine, between others, the burden of labor of each judge, were up to now voted by the Plenary Assembly of each court. By a new
stipulation, they are accredited by the High Courts, with consequence the loss of the functional independence of each court, the increase of the judges’ charge and the degradation of their performance.

4. By their nomination judges forfeit any training, even when the object of their vocation changes. Thus, they encounter great difficulties in order to carry out their duties.

5. Judges bear often the insulting and nasty behavior of litigants and lawyers, while there are no strong institutions to protect them. Moreover, recently, especially well known attorneys, are making a practice (especially when the case is important) to sue judges, form actions against them and report them before the disciplinary organs, in order to discourage and disable them. This pressure, combined with the fact of the plethora of disciplinary proceedings (especially upon delays in publishing decisions, which not very scarcely lead to the dismissal of the judge) do not leave judges enough space in order to take their decisions in peace and with impartiality.

6. We have unfailing information, that in this very moment, a new code of the judiciary is prepared, which will overturn the sensitive balance of the above situation, by restraining much more the judicial independence. Unfortunately, we still have no access to this draft of law. Moreover, an amendment of the constitution is prepared to the same direction. Especially in order to abolish the diffusive constitutional control of laws (which is the right of every judge, to let any law inapplicable, if judged unconstitutional). That is why in Greece there is not up to now constitutional court. All this is taking place during a very important moment, when heavy loads are imposed to the back of every citizen, by the memorandums of frugality. It is important to say that the High Courts found the first memorandum consistent to the constitution (many new recourses are pendent). Reversely, there are sufficient judgments of first instance courts that deemed it as unconstitutional.

7. The last three years, consecutive cuts of wages, reach the 50% for ordinary judges and the 60% for superior judges. This abrupt deduction, combined with the anxiety for new reductions, creates a field of instability, which jeopardizes the judicial calm, absolutely necessary for its independence.

Eteria Elinon Dikastikon Litourgon Gia ti Demokratia ke tis Elefteries
SITUATION OF THE JUDICIARY IN ITALY

The Italian judiciary is dealing with a serious crisis of rights, caused by recession and exacerbated by strong financial measures and reforms giving mainly attention to reduce debt. The judiciary finds itself in the middle of complex situations, and serious social tension. For instance, the Ilva case has become extremely serious: criminal investigations on serious environmental and health damages caused by the steelworks in the city of Taranto highlighted a lack of preventive intervention. After a judicial seizure of a portion of the steelworks and products, the company started procedures to lay-off 6500 workers; judges and prosecutors have been criticized in the press and by the press; public statements by institutions representatives have censured the “abuse” of judicial initiatives and its “non-institutional“ purposes.

The Court of Accounts has estimated at 60 billions per year the amount of stolen State assets by corruption. The most shocking investigations have led to strong reactions against the judiciary by political and institutional representatives.

The new law on corruption approved last November 6th besides the positive aspects, such as the provision of new criminal offences, doesn’t provide for legislative measures to change the statute of limitations, and for effective, proportionate and dissuasive sanctions and penalties, also with regard to other offences, usually connected to corruption (as economic and fiscal offences).

Participation in political elections of judges and prosecutors revives the discussion within the judiciary about the risks to compromise the perception of magistrates’ impartiality, and leads to the consideration of stricter ethical rules in this area.

The serious crisis of efficiency of the judiciary, demonstrated by the length of trials, and by increasing workloads, requires a long-term program, which identifies priorities and a reasonable use of resources. The political elections’
results describe a very complex framework, with a long period of political instability. The current situation of uncertainty raises the risk of not being able to implement a justice policy based on an overall design and on clear priorities.

The European Court of Human Rights’ decision on January 2013 sentenced Italian Government and ordered to solve the structural problem of overcrowding of prisons, by putting in place, within one year, an effective domestic remedy, with adequate and sufficient redress in cases of overcrowding in prison.

Magistratura democratica (Md)
SITUATION OF JUDICIARY IN POLAND

1. General remarks
   The position of judiciary in relation to the Minister of Justice has become weaker as his influence is still increasing. It mainly results from the amended Law on Courts which has granted the MoJ wide authorisation to effect on judicial administration, particularly visible through new institution of court managers directly subordinated to the MoJ, not to presidents of courts where they work. The Law provides also new measures of control, f.e. assessment of judges, which criteria has been specified only by the regulation of MoJ, not by the law.

2. Liquidation of courts
   In 2012 the MoJ, despite of strong opposition of judges, the National Council of Judiciary, advocates, local societies and politicians of all parties except of the governing one, decided to liquidate 79 of 300 district courts in Poland justifying it was necessary to increase their effectiveness, also by bigger flexibility of judges. This decision was challenged by the National Council of Judiciary before the Constitutional Court as the competence of the MoJ to found and liquidate courts by his regulations was questioned. The Constitutional Court confirmed the right of the Minister to decide about a map of courts. In the opinion of many constitutionalists this decision may endanger the division and balance of power as it strengthen position of the MoJ in reference to the judiciary.

3. Remuneration
   The Polish Constitution stipulates that judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.
   In 2009 after widespread protests of judges and prosecutors, supported by international organizations, the new system of remuneration was introduced. Since then the remuneration of judges and prosecutors stopped to be dependent on the arbitrary decision of the executive and has been connected with the average salary in the national economy. The law provides indexes to be applied to establish salaries of judges appointed to courts of proper instances, taking into account period of service. Thanks to this solution salaries have significantly increased in 2009 and there was visible progress also in 2010 and 2011.
In 2011 the Parliament adopted the law that “freezed” for the year 2012 the principle that remuneration of judges is based on the average salary in the national economy what was justified with the global crisis. It resulted in calculating the remuneration on the level of 2011.

The amended law was challenged by the First President of the Supreme Court before the Constitutional Court but the least declared in December 2012 that the “freezing” of the remuneration mechanism was justified because of difficult financial situation of the state. The Constitutional Court also stated that the very short vacatio legis (just two days) provided for this amendment did not breach the Constitution because judges could have learnt much earlier from media that such freezing mechanism would be introduced.

4. Training

The law provides almost sole competences for the MoJ in reference to the National School of Judiciary and Public Prosecutors, responsible for initial and permanent training. The School is supervised by him with regards to compliance of its operations with legal regulations and the statute. The MoJ has right to appoint and recall the Director of the School and members of the Board. Acting by way of ordinance, the MoJ grants the School its statute, which also states the manner and mode of training activities. Combination of all these competences makes the School and training of judges and prosecutors fully dependent on the MoJ.

5. Promotion

Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. They should be founded on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law.

The Law on Courts does not stipulate precise criteria that should be used during the process of assessing candidates for vacancies in higher courts. Promotion of judges is often based on unclear criteria and “popularity” of a candidate.

6. Lengthiness of proceedings

The important problem affecting Polish justice system is the time taken to process cases, in all fields of law, and difficulty enforcing courts’ decisions.

The main factors that have negative influence on the effectiveness of courts and lengthiness of trials are:
- very formalistic procedure, esp. in criminal cases,
- very wide jurisdiction,
- lack of appropriately qualified support staff, such as secretaries, assistants,
- too many non – judicial tasks assigned to judges.
REPORT ON THE SOCIAL AND JUDICIAL SITUATION IN PORTUGAL

Portugal is under international financial assistance from the European Commission, the European Central Bank and the International Monetary Fund (the so-called troika) since May 2011, initially predicted to last until September 2013, but now extended to 2014.

According to that plan, many cuts in public expenditure have been implemented (some of them were already in place before May 2011), mainly in public servants wages, unemployment subsidies and retirement pensions, and essential public services, like health and education. The government has been criticized for not being able to implement cuts in expenditure other than in wages and public services – mainly in ruinous contracts made with major private companies and taxing financial transactions. The effects on the economy have been devastating – recession has increased and unemployment rate is at the highest point for the last 40 years.

The government is now talking about a “refoundation” of the welfare state, and announced that since the beginning of October 2012, experts from the IMF are in Portugal “helping” the government to restructure the public expenditure in order to reduce it in 4 thousand million Euros. The main opposition party was not previously contacted and says that what he government is trying to do is breaking up the social contract laid down in the 1976 Constitution.

The concrete measures were in stand by, as the government was waiting for a decision of the Constitutional Court on the 2013 budget, that was pronounced only on April 5th, stating some of the measures put into place this year are unconstitutional. After that decision, the Government announced more cuts in public expenditure, to cover the measures declared unconstitutional, and announced that until the end of May is expected to present to the troika the permanent cuts to be put in place.

In the particular case of judges and prosecutors, the salary cuts reached this year a total of nearly 40%, when compared to net wages in 2010. The cuts have been higher than other public servants – a supplement received by
magistrates had a 20% cut in 2011, while for other public servants the cut was only 10%, without any explanation from the political power. All these cuts have had a significant and obvious impact in the motivation of judges and prosecutors.

In the reforms under way in the justice area, the intention is to face structural problems with many years and actual questions related with the economic crisis, mainly the great increase of cases in the commercial (bankruptcy of companies and individuals), labour, civil, administrative and fiscal areas.

Two of the compromises of the Portuguese government with the troika in the area of justice were the change in the civil procedure code and the reorganisation of the judiciary division of the territory, both of them currently under way. One of the objectives of the latter is introduction of flexible methods of management that can improve efficiency, but some sectors of the government are pushing to introduce also mechanisms to control the “productivity” of judges, with a direct link to the salary.

In 2012 new courts were created, specialized in economic areas – mainly two new courts on Regulation, Competition and Supervision and on Intellectual Property. Also special teams of judges were put in place to solve the problem of extraordinarily big accumulation of files in the fiscal jurisdiction and a new process of revitalization of companies in bad financial situation was created. Recently, a revision of the Criminal and Criminal Procedure codes was implemented in order to accelerate the cases and prevent improper use of the procedural mechanisms to delay the decisions.

Although the results of these reforms are still to be evaluated, there is an enormous lack of means necessary to implement them – the number of court clerks is highly insufficient, the IT system is fragile and there is a notorious underfunding of the justice system.

Associação Sindical dos Juízes Portugueses (ASJP)
Sindicato dos Magistrados do Ministério Público (SMMP)
INFRINGEMENTS OF THE STANDARDS GOVERNING THE STATUS OF JUDGES IDENTIFIED IN THE CZECH REPUBLIC

1. Infringements of the standards concerning the composition and functioning of Councils for the Judiciary:
   Czech Republic is in strong conflict with the principles put forward in Opinion No. 10, the Magna Charta of Judges and Recommendation (2010)12, because we do not have such self-governing body as Council for Judiciary. Minister of Justice (the executive power) has the majority of competences for the appointment of judges and for the management of the courts.

2. Cuts in remuneration of judges and budgetary cuts:
   Czech Republic facing economic crises as many other countries has opted for a cut in the salaries of public officers, including judges. However the attempts to cut the judges’ salaries were declared to be unconstitutional by the Constitutional Court and the Acts of Parliament were cancelled.
   The payment of a retirement pension is absolutely not in a reasonable relationship to judges’ remuneration when working. The retirement pension reaches only 15–20 % of the judges’ last salaries.

3. Deficiencies in the organisation of judicial training:
   In Czech Republic there is still absence of objective criteria for training and appointment of judges resulting from changes of applicable rules by the executive power.

Soudcovska Ceske Republiky
BRIEFING ON THE JUDICIARY IN ROMANIA

1. The human resource:
   The ever growing number of cases has been a constant problem of the system for years, and there is still no coherent strategy to overcome it. In 2012, there have been 3.3 million cases in the Romanian courts (for 20 million inhabitants, 4000 judges approx.) The Legislative, the Ministry of Justice and the Superior Council of Magistracy (S.C.M.) have done very little over the years to address this issue, and the measures taken were never based on a long-term strategy.

   The problem became more visible with the entering into force of the new Civil Procedure Code, for which no adequate measures were taken in advance, apart for some minor adjustments with regard to the number of judges in some courts, without much being done to address the more important issue of the court staff. The measures taken with regard to the Cassation Court are only going to increase the workload of inferior courts. Although an impact study was commissioned by the former Minister of Justice in 2011, we cannot be sure that the adjustments were made based on this study. An initiative to close some small courts and redistribute the personnel in 2011 has also been blocked for purely political reasons.

   The law regarding mediation has also been amended in an attempt to reduce the workload of courts, but since the procedure itself has not become mandatory (there is only an obligation for the parties to take part in an “information meeting”) and the court fees are still very low for most claims, there is little hope that this measure will have a significant effect on the number of cases.

   The system is still underfinanced (with austerity measures regarding the number of non-judges employees still in place) and there is no political will for the court fees to be used for the judiciary.

   Nothing has been done to improve the procedure for evaluating the professional performance of judges and prosecutors, after the current one has proven formal and ineffective.
2. The amendment of the Constitution:

The procedure, which should be concluded by the end of 2013, comes in a very delicate time for the judicial system, with regard to its public image, and there is fear that this will be used by politicians to undermine the independence of the system, especially with regard to the status of prosecutors.

The S.C.M. failed to fulfil its most important role (namely, safeguarding the independence of the judicial system) during the electoral campaign in 2012. Deep disagreements between members of the Council and public positions that were obviously politically motivated, were very visible both for the general public and for the judges and prosecutors in the system. With this in the background, the election of a prosecutor as a president of the council in January sparked a vivid debate inside the system with regard to the status of the prosecutors and the ability of a mixed Council to safeguard the independence of the judiciary, leading to some courts initiating the procedure for the dismissal of their representatives. These proceedings were largely debated in the media and were given a political connotation, with the substantial aid from the judges- members of the Council- involved in the proceedings. Finally, the outcome of what was supposed to be an internal procedure of the judiciary has been overturned by the Constitutional Court (which is an entirely political authority), creating tremendous dissatisfaction among judges.

The disputed appointment of the general prosecutors of Romania and the chief prosecutors of the National Anticorruption Directorate, since the head prosecutors are proposed directly by the Minister of Justice, has also contributed to the debate regarding the interference of politics with the justice system. After almost a year since the term of office of former chief prosecutors expired, with pressure from European authorities, a transparent (though not provided by the law) selection procedure has been agreed by the Minister and the Council, only for it to be abandoned later on, in favour of what has been largely perceived as a pure political bargain.

In view of all these events, the proposed amendments of the constitution, though stated to be in favour of the independence of the justice system, are very likely to affect in a negative way the status of prosecutors. A different Superior Council (or no council at all) for prosecutors has been proposed, as well as the prosecutor not being a “magistrate” anymore, which implies less guarantees of independence. There is obviously no political will towards transferring the appointments of the chief prosecutors from the Ministry of Justice to the Superior Council.

Not only is the independence of prosecutors is now at stake. The failure of the S.C.M. to perform its crucial role of safeguarding the independence of the justice system has weakened the position of the entire judiciary and has given the politicians a chance to introduce to the public agenda, in relation with the constitutional debate, critical issues like the “material liability” of judges (which could prove a huge pressure instrument, in connection with the workload, the difficulties in assimilating the new legislation and the already in force laws regarding disciplinary proceedings that give powers to the Minister of justice and allow the revision of the judicial decisions) and even amendments to the dismissal procedure of the judges elected as members of the Superior Council (in order to increase their “independence” from the very system that has appointed them, which for the first time has proved to be an effective remedy for the side-slips of elected members).

Uniunea Națională a Judecătorilor din România
A BRIEF GLANCE AT THE JUDICIARY IN SERBIA
WITH A FOCUS ON THREATS TO JUDICIAL INDEPENDENCE

1. Without “red light” of EU, the reappointment of all magistrates which violated their permanent (till the retirement) tenure had been conducted in December 2009, as a beginning of reform of the judicial system. More than 1/3 (more than 830 judges and 220 prosecutors) had been dismissed without transparent and contradictory procedure and without any reason. The newly established court network reduced the number of Basic courts from 138 to 34, and tremendously increased the expenses for the judiciary (because of the travels of the magistrates, court stuff, parties and their legal representatives, witnesses, court experts, etc). The serious violations of the rule of law have been overcome by reinstating of 500 judges and more than 100 prosecutors at the end of 2012 and the overcoming of the reform failures (the “reform of the reform”) has been preparing since September 2012.

2. Unfortunately, the same magistrates – members of the judicial councils (similar, but separate for the judges and prosecutors) who violated the rule of the law while mal performing the reappointments and its review and poorly organizing the judicial system are still in place as members of judicial councils. Though they lost legitimacy and credibility of their peers, and failed to perform their legal obligations, yet it will be up to them to decide on the strategic judicial issues (drafting the National Judicial Reform Strategy, establishing the criteria for the needed number of magistrates, the criteria and the procedure for the evaluation of judge performances, appointment of court presidents, transfer of magistrates, etc). Being obedient to the previous Minister of Justice, who is ex officio member of the councils, worried for their future carriers, they are even more obedient to the current one. Executives are in a “perfect” situation to impose their impact on the judiciary by using as cover councils who, officially, are taking the important judicial decisions. That spreads dangerous message to the magistrates: “Integrity is risky, obedience pays off”.

3. As a consequence even deeper and widely spread intimidation of magistrates governs Serbian judiciary. Judicial system is functioning in manner that magistrates are solving the cases not the real problems, and are
concentrating only on “cases” without any openness to reflection about the society and the social problems which surrounds them.

4. Serbia is facing the process of amendments of judicial laws which proposal are raising the concerns that soon the new violations of the rule of law (Constitution of Serbia as well as of acquis) will occur. The proposed solutions that are raising the concerns are:

- The deletion of the provision under which a judge of an abolished court shall continue exercising his judicial office in the court that assumes the jurisdiction of the abolished court or in a court of the same type and same instance or approximately the same instance
- Serbian judiciary is facing with certainty of the transfers of judges (permanent appointment to other courts) without their consent and in the absence of predefined standards and criteria, to a court of any type or instance, in the view of the impending changes in the jurisdictions and in the catchments areas of the Courts and increasing of the current number (34) for another 33 Basic Courts, in conjunction with the provisions under which the appointment of acting court presidents and transfers of judges will be completed by 1 July 2013,
- Indented assessment of judges based on the “cult of statistics”, quantity and rapidity, regardless the efficiency as defined by Art.31 of the Recommendation CM/Rec(2010)12 - the delivery of quality decisions within a reasonable time following fair consideration of the issues
- The absence of a provision specifying that the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation
- The provision for the party to seek the legal protection from the court of higher instance claiming violations of the right to a trial within a reasonable time and pecuniary compensation, which could lead to the blaming of judges (even if it is systemic deficiency), appraising poorly of their work, and at the end to their dismissal
- Authorization of the Court presidents (who are elected by the Parliament) to initiate the procedure of the dismissal of judges although, given the grounds set out for dismissal (final conviction of the judge in accordance with the law, incompetence or a serious disciplinary offence), it is clear that such a procedure may be launched only by the Council ex officio (in the event the judge at issue was finally convicted), the authority charged with appraising judicial work or the disciplinary authority.

Judges’ Association of Serbia (JAS)
Prosecutors Association of Serbia (PAS)
Incumbent party (AKP) holds the majority of the Parliament and the Prime Minister's authority over executive and legislative is absolute. Political elites lack of a tradition of mutual respect, restraint, co-operation and democratic culture. Checks and balances that restrict executive power do not work in practice.

The principle of “Separation of powers” has lost its meaning. Executive dominates the Parliament. If PM wills any kind of text can easily become law, the legal supremacy of the legislature has been used against independence of judiciary. Thus parliamentary guarantee against arbitrary interference of executive, in reality, does not exist.

Democratic instutions has lost their meaning with PM's attitude and mentality since posts in these institutions have been filled according to PM's preferences.

Prime Minister has considerable informal influence over judicial council (HCJP). Majority of the members belong to same world view (conservative) and act accordingly as a block. Basic principles on this subject which are indicated by international text such as, “pluralistic composition” and “widest representation in judicial council” have not been realised. In the process of selection HCJP members (10 of them out of 22 is selected by judges and prosecutors through voting) the list which was belonged to Justice Ministry was imposed on judges and prosecutors and the names in the list, as a block, has been selected as council members. When the nature of other 11 is taken into consideration (ex-officio members Minister of Justice, Undersecretary of Justice Ministry, 4 people appointed by President of the Republic, who is an ex-member of incumbent party and very close friend of PM, 3 members from Supreme Court, 2 members from Council of State which are newly rearranged by HCJP, one can say executive has overwhelming influence of HCJP and can motivate any desired result.
In high profile cases, after judges and prosecutors having been replaced, process is stalled and judicial process bears no fruit. Public are under the impression that against PM’s will no one can be brought to justice. Executive (Prime Minister) has been using any means necessary (enacting or ammending laws, or exerting pressure over judicial council, intimidating judges and prosecutors via comments which are published by newspapers etc.) to avoid any negative outcome of the relevant judicial process.

New proposal for new constitution: Presidency System: In the process of drafting new constitution, AKP proposes to switch from parliamentary system to presidency system in which the president will be the owner of the absolute power. There will not be a system of checks and balances as in the US presidency system but the president will have nearly absolute power. One of the proposals is that of the Supreme Board of Judges and Prosecutors that was altered just two years ago. If accepted, the AKP (incumbent party) proposes that the president should have the authority to appoint 7 members of the HCJP, 8 members of the Constitutional Court, ¼ of members of the to-be-established Court of Cassation (According to government proposal Council of State and Court of Appeals will be merged into one institution).

Yargıçlar ve Savcılar Birliği (Yarsav)
Documents of MEDEL
– Responses to the Crisis
1. L’ambition de Medel s’inscrit dans un modèle de société civile : l’association se donne notamment pour buts la défense l’indépendance du pouvoir judiciaire tant à l’égard de tout autre pouvoir que des intérêts particuliers, le respect en toutes circonstances des valeurs juridiques propres à l’Etat de droit démocratique, la défense des droits des minorités et des différences dans une perspective d’émancipation sociale des plus faibles.

Défendre l’indépendance de la justice pour l’égalité des citoyens devant la loi.

2. L’effectivité des droits dépend des hommes et des institutions en charge de leur application. C’est au pouvoir judiciaire qu’il revient notamment d’assurer la garantie des droits fondamentaux et de poursuivre les activités criminelles. En situation de crise, l’action des juridictions administratives et financières est essentielle pour garantir la légalité et la régularité de l’affectation des ressources publiques.

3 mars 2012
MANIFESTE DE VILAMOURA

3rd March 2012
VILAMOURA MANIFESTO

1. Medel’s ambition is inspired by a civil society model: the principle goals of this association are to defend the independence of the judiciary power both with respect to any other power and to any particular interest, to ensure in all circumstances the respect for the values of democracy and the Rule of Law, to defend the rights of minorities and of differences, and in particular the rights of the most deprived, in perspective of social emancipation of the weakest.

Defend the independence of justice for the equality of citizens before the law

2. The effectiveness of these rights depends on the people and institutions responsible for their application. It is the role of the judiciary in particular to ensure fundamental rights and to prosecute criminal activity. In a crisis, the action of the administrative and financial courts is essential to ensure the legality and regularity of public resources’ allocation.
3. Quand elle devient l’instrument d’autres pouvoirs - politiques, économiques, médiatiques - la justice se dégrade. Son indépendance est la condition de l’égalité des citoyens devant la loi.

4. La recommandation du Comité des ministres du Conseil de l’Europe sur l’indépendance, l’efficacité et les responsabilités des juges et celle sur le rôle du ministère public dans le système de justice pénale constituent un socle minimal de principes, condition d’une confiance mutuelle entre les magistrats des États membres.

5. Ce socle est utilement complété par les avis des Conseils consultatifs des juges et des procureurs européens, notamment la Déclaration de Bordeaux de 2009, („Juges et procureurs dans une société démocratique“) et la Magna Carta des juges, adoptée en 2010.

6. Pour lutter contre le crime et assurer le respect de l’égalité de tous devant la loi, le parquet doit disposer, dans tous les États européens, d’un statut d’autorité judiciaire, au sens de la jurisprudence de la Cour européenne des droits de l’homme.

7. Pour assurer leurs missions, les États doivent donner aux juridictions des ressources appropriées. La rémunération des magistrats doit être de niveau suffisant pour les mettre à l’abri de toute pression. À cet égard, les travaux de la CEPEJ mettent en évidence la disparité préoccupante des moyens entre les systèmes judiciaires des États européens.

8. Enfin, l’efficacité de la justice ne peut résulter de son assujettissement au modèle de marché. La généralisation des outils gestionnaires axés sur la performance, la productivité et le rendement ne doivent pas neutraliser les principes qui fondent le procès équitable. Les ressources économiques ne doivent pas déterminer le re-

3. When justice is being misused by other powers – either political, economic or media – it deteriorates. Its independence is essential for equality of citizens before the law.

4. The Recommendation of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges as well as the one on the role of public prosecution in the criminal justice system represent a set of minimum of standards, which is vital for mutual trust between Member States magistrates.

5. This minimum is usefully supplemented by the opinions of the Advisory Councils of European judges and prosecutors, particularly by the Bordeaux Declaration of 2009 („Judges and prosecutors in a democratic society“) and the Magna Carta of Judges, adopted in 2010.

6. To fight against crime and ensure the equality of all before the law, the prosecution must have, in all European states, the status of a judicial authority, as defined in the jurisprudence of the European Court of Human Rights.

7. To carry out their missions, the magistrates must have appropriate resources and conditions provided for by the state. The remuneration of magistrates must be of sufficient level to make them free from pressure. In this regard, the CEPEJ highlights the worrying disparity in resources available to the judicial systems of European states.

8. Finally, the efficiency of justice could not be linked to the widespread market model. The generally accepted managerial tools focused on performance, productivity and efficiency requirements should not
cours à des acteurs non judiciaires pour la résolution des litiges.

**Défendre des droits sociaux**

9. Medel considère comme particulièrement important le rôle du juge en matière sociale pour la défense des plus démunis, car „Entre le riche et le pauvre, entre le fort et le faible, c’est la liberté qui opprime, et la loi qui affranchi”¹).

10. La Déclaration de Philadelphie, définissant les buts et les objectifs de l'organisation internationale du travail, énonçait notamment les principes suivants: le travail n'est pas une marchandise, la liberté d'expression et d'association est une condition indispensable d'un progrès continu, la pauvreté constitue un danger pour la prospérité de tous. Enfin, tous les êtres humains, quels que soient leur race, leur croyance ou leur sexe, ont le droit de poursuivre leur progrès matériel et leur développement spirituel dans la liberté et la dignité, dans la sécurité économique et avec des chances égales.

11. La Charte sociale européenne, dont le Conseil de l'Europe a célébré le 50ème anniversaire en 2011, garantit logement, santé, éducation, emploi, protection juridique et sociale, libre circulation et non-discrimination.

12. La Charte des droits fondamentaux de l'Union européenne reconnaît un ensemble de droits personnels, civils, politiques, économiques et sociaux aux citoyens de l'Union.

13. Les problèmes actuels de l'Europe ne résultent pas de la mise en œuvre de ces droits. Mais ils coïn-

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¹) Henri Lacordaire
cident avec l’insuffisance du contrôle des Etats sur la sphère financière et le détournement criminel de certaines ressources. C’est pourquoi la crise économique actuelle ne peut justifier une remise en cause des acquis sociaux.


**Lutter contre la corruption.**

15. La prédation des ressources publiques justifie l’intensification de la lutte contre la corruption. Il est essentiel, notamment, de donner leur pleine effectivité à la Convention des Nations-Unies contre la corruption (Convention de Mérida), aux Conventions du Conseil de l’Europe contre la corruption en matière pénale et civile et à la Convention de Bruxelles relative à la lutte contre la corruption impliquant des fonctionnaires de l’Union européenne ou des Etats membres.

16. La lutte contre la corruption et la fraude doit aussi être renforcée par une politique de lutte contre les paradis fiscaux et judiciaires et contre l’opacité financière, notamment par la neutralisation des sociétés écrans.

17. Un parquet européen, proposé dès 1997 et dont la possibilité est inscrite dans le Traité de Lisbonne (art.69E), doit enfin être créé. La présidence espagnole a proposé en 2010 de créer un parquet européen chargé, dans un premier temps, d’enquêter sur les fraudes et les spéculations contre l’euro, puis, dans un second temps, d’enquêter et d’intenter des procédures pénales dans le

they coincide with the lack of state control over the financial sphere and criminal diversion of some resources. That is why the current economic crisis can not justify a reconsideration of social acquis.

14. No economic freedom or competition rule should take priority over fundamental social rights. In case of dispute, the fundamental social rights should prevail. Transnational companies should be submitted to the rule of law.

**Fight against corruption.**

15. Plundering of the public resources justifies the intensification of the fight against corruption. It is essential, in particular, to give full effect to the UN Convention against Corruption (Mérida Convention), Conventions of the Council of Europe against corruption in criminal and civil matters and the Brussels Convention regarding the fight against corruption involving officials of the European Union or Member States.

16. The fight against corruption and fraud should also be reinforced by implementing a policy against the tax havens and against financial opacity, especially by counteracting shell companies.

17. The creation of the European Public Prosecutor’s Office, proposed in 1997 and set out in the Treaty of Lisbon, must finally happen. The Spanish Presidency has proposed in 2010 to create a European Public Prosecutor’s Office which would initially be responsible for investigating fraud and speculation against the euro, then, in a second step, for investigating and initiating criminal proceedings against cross-border crimes such as human trafficking, drug trafficking or terrorism. This
cadre de délits transfrontaliers, tels que la traite des personnes, le trafic de stupéfiants ou le terrorisme. Cette proposition doit être mise en œuvre dans le cadre d’une coopération renforcée.

18. Enfin, les règles essentielles en matière de droit et de procédure pénale doivent être unifiées et les moyens de saisir les avoirs criminels et de les restituer à la société civile doivent être développés. Les dettes illégitimes doivent être dénoncées.

Conclusion.

19. Face à la crise, plus que jamais, la justice doit être en mesure d’être la gardienne des promesses inscrites au cœur des lois et conventions de sauvegarde des droits fondamentaux.

20. La solution n’est pas dans l’abandon des droits, mais dans la mobilisation pour leur défense. Il appartient à tous les magistrats européens de mobiliser les forces imaginantes du droit pour garantir et développer, à l’échelle de l’Europe, une communauté de valeurs fondée la liberté et l’égale dignité de tous en dignité et en droits.

propose should be implemented within the framework of enhanced cooperation.

18. Finally, the basic rules on the legal and criminal procedure must be unified and the mechanisms of criminal assets forfeiture and their restitution to civil society must be developed. Illegitimate debt shall be challenged.

Conclusion

19. Faced with a crisis, more than ever, justice must be able to safeguard promises given in the laws and conventions protecting fundamental rights.

20. The solution is not in the abandonment of rights, but in the mobilization for their defence. All European magistrates should mobilize the imaginative forces of law to emerge across Europe in order to create and safeguard the community of values based on freedom and equality of all in dignity and rights.
La resolution de Bucharest

LES MESURES APPLIQUEES PAR LES ETATS EUROPEENS QUI ONT DRASTIQUEMENT REDUIT LE BUDGET DU SERVICE PUBLIC DE LA JUSTICE, Y COMPRIS LES SALAIRES DES JUGES ET PROCUREURS, SONT CONTRAIRES A LA LEGISLATION DE L’UNION EUROPEENNE

Bucharest, le 10 novembre 2012

1. La crise financière et économique qui affecte l’Europe depuis 2008 a contraint plusieurs Etats européens à recourir à l’assistance financière d’organisations internationales comme la Commission européenne, la Banque centrale européenne et le Fonds monétaire international. Ces institutions ont imposé une série de mesures d’austérité que les Etats doivent appliquer, la plupart d’entre elles visant à la réduction de la dépense publique.

Conformément à ces exigences, plusieurs Etats comme la Grèce, le Portugal et l’Espagne ont réalisé

Bucharest Resolution

MEASURES IMPLEMENTED BY EUROPEAN STATES THAT HAVE SEVERELY REDUCED THE BUDGET OF THE JUSTICE PUBLIC SERVICE, INCLUDING THE REMUNERATIONS OF JUDGES AND PROSECUTORS, ARE CONTRARY TO EU LAW

Bucharest, 10/11/2012

1. The financial and economic crisis that since 2008 has been affecting Europe, has forced many European countries to seek financial assistance from international institutions such as the European Commission, the European Central Bank or the International Monetary Fund. These institutions have imposed a series of austerity measures that the countries assisted must implement, many of which are directed to the reduction of public expenditure. In accordance to those demands, many States like Greece, Portugal and Spain have implemented severe reductions in the budget of public ser-
d’importantes réductions dans les budgets des services publics. Cependant, ces États n’ont pas pris en considération la situation spécifique du service public de la justice et celle des juges et procureurs, ni le fait que les fonctions exercées par ceux-ci sont essentielles pour garantir les droits et libertés des citoyens, en particulier à un moment où les droits les plus fondamentaux sont remis en cause. Au même moment, ces gouvernements qui refusent de reconnaître la spécificité des fonctions des juges et procureurs, ont accordé de nombreuses exceptions en faveur des hauts fonctionnaires des banques centrales et des “régulateurs”, en expliquant qu’ils ne pouvaient pas être concernés par les mêmes coupes budgétaires en raison de leur indépendance.

C’est dans les moments de crise que les citoyens ont le plus besoin d’un pouvoir judiciaire indépendant et renforcé auquel ils puissent faire appel pour discuter et défendre leurs droits.

En conséquence, les associations de magistrats ont le devoir de défendre non seulement l’indépendance mais aussi l’image de cette indépendance du pouvoir judiciaire, ainsi que de faire respecter les lois existantes qui le protègent.

2. Cette question a déjà été analysée par le Parlement européen dans le document de travail “sur la situation des droit fondamentaux: normes et pratiques en Hongrie”, présenté en septembre 2012 à la Commission des libertés civiles, de la justice et des affaires intérieures. Dans ce rapport, il est clairement dit “que le moindre doute concernant l’indépendance et l’impartialité des juges est notamment en raison des insuffisances systématiques relevées dans la Constitution et dans les lois nationales pourrait avoir des effets considérables sur la coopération en cours dans le

However, those States did not properly consider the specific situation of the public service of justice and of judges and prosecutors, and the fact that the functions of the latter are essential to the guarantee of the rights and liberties of citizens specially in this situation in which the most essential rights are being put in risk. At the same time, those governments that refuse to accept the specific functions of judges and prosecutors, granted numerous exceptions to high public servants of central banks and regulators, arguing that due to their independence, they could not be affected by the same cuts.

It is in moments of crisis that citizens need the most an independent and reinforced power, to which they can appeal to discuss and defend all their rights.

Therefore, the magistrates associations have the duty to defend not only the independence but also the image of the independence of the judicial power, as well as to ensure the respect for the existing laws that protect it.

2. This question has already been analysed by the European Parliament, 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. It is clearly said in that report: “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 appear-
domaine de l'espace commun de liberté, de sécurité et de justice, fondée sur le principe de reconnaissance mutuelle, tel que consacré à l'article 81 du traité FUE (en matière civile) et à l'article 82 du traité FUE (en matière pénale). (...) En conséquence, tout problème concernant l'apparence d'indépendance et d'impartialité des juges compromettrait l'ensemble de la structure existante, fondée sur la confiance mutuelle. Par ailleurs, tout problème transfrontalier rencontré lors de la mise en œuvre du droit de l'Union pourrait conduire à un recours immédiat à l'article 47, paragraphe 2 de la Charte ainsi qu'à son article 52, paragraphe 3 pour une interprétation harmonisée de droits garantis également par la CEDH”.

3. Le 8 octobre, la Cour constitutionnelle italienne a décidé (dans l'arrêt n° 223/2012) que les réductions des salaires des juges et procureurs étaient inconstitutionnelles, soulignant dans sa décision la nette différence entre eux et les autres fonctionnaires de l'État.

La Cour a dit, inter alia, que “la relation entre l'État et la magistrature, comme corps autonome au sein de l'État, ne peut pas se réduire à une relation de travail, dans laquelle l'employeur / bénéficiaire du travail est en même temps le "régulateur" de cette relation” et que l'une des dimensions du principe d'indépendance de la justice – consacrée par la Constitution – est la garantie de l'indépendance économique et de la stabilité des juges et des procureurs, qui “ne peuvent être soumis à des négociations et conflits systématiques et périodiques avec les autres pouvoirs de l'État”, situation qui engendrerait l'idée générale de domination des pouvoirs exécutif et législatif sur le pouvoir judiciaire.

La décision de la Cour constitutionnelle italienne fait porter le débat sur la question centrale – les relations of the independence and impartiality of judges would endanger the whole existing structure based on mutual trust. At the same time any cross-border 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”.

3. The 8th of October, the Italian Constitutional Court has decided (in case 223/2012) that the cuts of salaries of judges and prosecutors are unconstitutional, stressing in its decision the clear difference between them and any other public servants.

The Court said, inter alia, that the “relationship between the State and the magistrates, as a separate body within the State, cannot be reduced to a mere labour relation, where the contractor / beneficiary of the work force is at the same time regulator of that relation” and that one of the dimensions of the principle of independence of the judiciary – as stated 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”, situation that would create the general idea of the legislative and executive power’s dominance over the judicial power.

The decision of the Italian Constitutional Court brings the discussion to its core aspect – the relations between the different powers of the State and the independence of the judiciary. And by doing so, it points to the fact that the States that have already cut the salaries of judges and prosecutors are acting against EU Law.

4. Article 47 of the Charter of Fundamental Rights of the European Union grants to all EU citizens the
tions entre les différents pouvoirs de l’État et l’indépendance de la justice. Ce faisant, elle pointe le fait que les États qui ont déjà réduit les salaires des juges et procureurs ont violé la législation de l’Union européenne.

4. L’article 47 de la Charte des droits fondamentaux de l’Union européenne garantit à tous les citoyens le droit à ce que sa cause soit entendue par un tribunal impartial et indépendant. Comme l’a indiqué la Cour constitutionnelle italienne, les coupes budgétaires effectuées par certains États (et que d’autres s’apprêtent probablement à appliquer) constituent une interférence illégitime dans le pouvoir judiciaire des pouvoirs législatif et exécutif, minimisant le rôle des juges et procureurs et déniant le rôle spécifique qu’ils jouent dans la société et les structures de l’État.

5. L’article 53 de la Charte des droits fondamentaux de l’Union européenne établit un “standard maximum” - si l’un des États membres garantit à ses citoyens un droit fondamental, tous les autres citoyens européens peuvent prétendre à ce que ce droit leur soit également garanti. En conséquence, la décision de la Cour constitutionnelle italienne garantit à tous les citoyens européens le droit d’avoir un pouvoir judiciaire qui ne soit pas soumis, sur la question économique de l’indépendance des juges et procureurs, à des immixtions des autres pouvoirs étatiques.

6. En conclusion, les mesures appliquées par les États européens qui ont drastiquement réduit le budget du service public de la justice, y compris les salaires des juges et procureurs, affectent directement le principe d’indépendance de la justice et sont par conséquent contraires à la législation de l’Union européenne.

right to a fair hearing by an independent and impartial tribunal. As the Italian Constitutional Court stressed, the cuts carried out by some States (and that other States presumably also prepare to enforce) are an illegitimate interference in the judicial power by the legislative and executive powers, minimizing the role of judges and prosecutors, not considering the special role they play in society and in the structure of the State.

6. In conclusion, the measures implemented by European States that have severely reduced the budget of the public service of justice, including the salaries of judges and prosecutors directly affect the principle of independence the judiciary and are therefore contrary to EU Law.

According to the EU Treaty, it is the role of the European Commission to protect and defend EU Law and prevent Member States of breaking it. The European Parliament, on the other hand, must control the activity of the Commission.

Based on the above mentioned, the CA of MEDEL, in this situation of crisis in which the fundamental rights are put in question by the destruction of public services:
Selon le Traité de l’Union européenne, la Commission européenne est chargée de protéger et défendre la législation européenne et d’éviter que les États membres ne la viole. Par ailleurs, le Parlement européen exerce un contrôle sur l’activité de la Commission.

Pour ces motifs, dans cette situation de crise dans laquelle les droits fondamentaux sont remis en cause par la destruction des services publics, le Conseil d’administration de MEDEL

- réaffirme le rôle spécifique des droits fondamentaux dans la construction de l’Union européenne et la mission particulière du pouvoir judiciaire dans la protection de ces droits;
- rappelle que l’indépendance de la justice est un principe essentiel de l’État de droit et protège directement les droits fondamentaux des citoyens;
- décide de mandater le bureau:
  * pour présenter une plainte officielle devant la Commission européenne, fondée sur la violation de la législation européenne, contre les États membres qui ont adopté des mesures de réductions drastiques du budget du service public de la justice dans une proportion telle qu’elle menace le fonctionnement propre du système judiciaire, y compris le statut économique des juges et procureurs, et ce, sans tenir compte d’un standard minimum de rémunération;
  * pour présenter un rapport au Parlement européen dénonçant la violation de la législation européenne par ces mêmes États.

- restates the special role of fundamental rights in the construction of European Union and the specific mission of the judicial power in protecting those rights;
- recalls that the independence of the judicial power as essential principle of the Rule of Law and also directly protects the fundamental rights of the citizens;
- decides to mandate the Bureau:
  * i. to present a formal complaint in the European Commission, based on the breach of EU Law, against the Member States that have adopted measures severely reducing the budget of the public service of justice to an extent that the proper functioning of the judicial system is endangered, including the economic statute of judges and prosecutors, disregarding the minimum standard of their remuneration;
  * present a report to the European Parliament, denouncing the breach of EU Law by those same States.
Le Traité de Lisbonne établit un espace de justice, liberté et sécurité entre les pays de l’Union européenne, qui doivent respecter la Charte des droits fondamentaux.

En publiant en 2009 le programme de Stockholm pour un espace de liberté, de sécurité et de justice au service des citoyens, l’Union européenne s’assignait un devoir d’ambition.

La justice doit être une force pour la démocratie, effective tant pour la promotion des droits des citoyens que pour la lutte contre la criminalité et la corruption.

The Lisbon Treaty has established a zone of justice, freedom and security between the European Union country members, which are required to honour the Charter of Fundamental Rights.

By publishing the Stockholm Programme for an area of freedom, security and justice at the service of its citizens in 2009, The European Union set before itself an ambitious task.

Justice has to be a force for democracy, effective both for the promotion of citizens’ rights and for the prevention of crime and corruption.
In Favour of a Europe of Justice

The Stockholm Programme provides mechanisms for facilitating people’s access to justice and asserting their rights throughout the EU.

However, the rights of all citizens to effective recourse cannot prosper amidst reduction of resources intended for justice. The CEPEJ report from 2012 thus points out that the budgets for justice in several EU member countries have been slashed (among others, in Bulgaria, Finland, the Netherlands, Latvia and Lithuania), whereas in Greece, the adopted budgets have not been implemented.

On top of the reduction of funding came the crisis, which prompted a rise in litigation cases stemming from overindebtedness, redundancies and bankruptcies.

Judicial systems must be more efficient in order to be able to respond in due time to the demands of parties involved in court procedures. Efficiency, however, does not imply subjecting the judiciary to a market model that relies only on the production of rulings and a culture centered on statistical results.

The recommendation of the Council of Europe relative to judges reads, inter alia, that: “Each country should allocate adequate resources, equipment and facilities in order to allow tribunals to operate in observance of requirements set forth in Article 6 of the Convention on the Defense of Human Rights and Fundamental Freedoms and to enable the effective work of judges.

Judges should be able to procure the information that they require for competent procedural decisions, whenever such decisions may affect expenses. The power of a
Justice: un pouvoir de la démocratie en Europe

The respect of judicial independence and its efficiency are prerequisites for mutual recognition of judicial decisions, which cannot be rendered effective without ensuring mutual trust in judicial authorities among EU member states.

In Favour of a Europe that protects

An internal security strategy has to be developed in order to further improve security within the EU. But while corruption is gaining momentum, courts are often impeded in dealing with sensitive cases; to the detriment of the principle of equality of all in front of the law. While the European territory is becoming a unified economic space, judicial cooperation is all too often inefficient in economic and financial matters.

In order to improve efficiency, the status of prosecutors, like that of the judges, must be guaranteed by law at the highest level. Prosecutors must remain independent and autonomous in making decisions in order to exercise their authority in a just, objective and impartial way.
Setting up a European Prosecution Office might be necessary for a more efficient prevention of damage to EU’s financial interests and of cross-border criminality. Envisaged by the Lisbon Treaty, this prosecution office could be set up as part of enhanced cooperation procedures.

This European Prosecution Office would boost fraud prevention efficiency and be vested with the authority to conduct investigations throughout European territory, under the same terms. This could also strengthen the legitimacy of fraud prevention; with this Office operating as an unbiased, independent and responsible institution guaranteeing the observance of fundamental rights, under jurisdictional control.

The EU and member states must also fight tax and judicial havens, among other things, by maintaining automatic data exchange systems between countries, by ensuring a European coordination for the prevention of fraud and illicit capital flight and by neutralizing ‘shell’ companies. Member states should also put an end to harmful fiscal competition.

In MEDEL’s view, at times when austerity has been imposed on so many of its members, Europe and member states should do everything in their power to prevent the embezzlement of wealth.
Justice: un pouvoir de la démocratie en Europe

Charter of Fundamental Rights, these rights should not remain just a statement of principles.

In this sense, MEDEL advocates the development of a European social contract. The EU must be a region of solidarity, not an arena of struggle among employees of member states, further aggravated by the introduction of social rights competitiveness, social dumping, opacity of subcontracting chains, and even illegal employment.

In the Vilamour Manifest adopted in 2012, MEDEL emphasises that, in response to the crisis, the judiciary must, more than ever, act as the guardian of promises inscribed in the spirit of the laws and conventions related to the protection of fundamental rights. The solution is not to abandon rights but to engage in their defense.

MEDEL recalls the EU obligation to observe and promote fundamental social rights guaranteed by the Charter of Fundamental Rights of the European Union, in particular the right to work, to freely exercise selected professions and to protection against unjustified redundancy. The right to negotiation and collective action must be interpreted in accordance with related ILO conventions, ratified by all EU members.

Efficient implementation of these fundamental social rights is a prerequisite to economic and social development and to the progress of the European Union and its member states. Ensuring high standards in social matters and labour rights is necessary for the recovery of economies, for supporting revenue and as an incentive for investment.
For these reasons, today we should pursue an objective of impartial evaluation of the implementation of EU policies in the areas of freedom, security and justice by member states, in line with Article 70 of the Treaty on the Functioning of the European Union.

Today, as we commemorate the anniversary of the assassination of judge Falcone, which also marked the starting point of civil societies’ raising of awareness, MEDEL appeals to engage all means envisaged by the Treaty in order to allow the development of a European justice system that effectively protects the fundamental rights of citizens.
L’intégration de plus en plus forte des pays européens a conduit à l’adoption croissante d’instruments visant à renforcer la coopération judiciaire entre les juridictions nationales des États membres. Toutefois, ces instruments n’ont pas été accompagnés par la définition de règles communes relative à l’indépendance du pouvoir judiciaire. Cela peut provoquer le dysfonctionnement de l’espace commun de justice vers lequel les traités tendent. Ce risque est d’autant plus fort dans un moment où l’UE est confrontée avec des questions relatives à la violation de l’indépendance du pouvoir judiciaire dans certains États membres.

The increasing integration of European countries has led to the growing adoption of instruments designed to boost judicial cooperation between the Member States’ national jurisdictions. However, those instruments have not been accompanied by the definition of common rules about the independence of the judiciary. This may lead to the malfunctioning of the common space of justice towards which the Treaties point the way, especially in moments where EU is faced with questions regarding the breach of independence of the judiciary in some Member States.
The EU law has led to a European jurisdiction, that national judges have to apply. That European jurisdiction demands a common statute of judges and the judiciary, that guarantees an effective independence of the judicial power.

This memorandum is aimed to point out the problems posed by that lack of common rules and standards and the urgent need for a European level intervention.

MEDEL calls for action at EU level in the area of evaluation of the justice system(s) and elaboration of common rules and standards, and for involvement of judges’ and prosecutors’ associations in such process.

I. The diverse defects of protection of the independence of the judiciary in Member States

a) The governance of the judicial power

Usually all current international instruments underline the importance of “independence of judges and of the judiciary”. In some States (e.g. Austria, Czech Republic, 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. 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 ex-
traordinary 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.

This matter of self-government of the judicial power is a cornerstone of the independence of the judiciary, and the EU cannot demand candidate countries to meet strict criteria in this area and not act when the current Member States do not meet those same criteria.

b) The role and autonomy of Prosecutors

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
A project to amend the law accordingly has been initiated. In France the debate is open on the judicial status of the Parquet following the ECtHR rulings on this matter. As public prosecutors are in charge of bringing criminal cases before Courts, where they don't act with full independence the entire functioning of the criminal system and ultimately equality of citizens and rule of law are at risk.

c) 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.
En outre, existent également des différences importantes en ce qui concerne l’actualisation du niveau de rémunération.

Dans certains pays, comme l’Italie et la Pologne, des législations nationales ont mis au point des méthodes de révision automatique des traitements des juges ; en Pologne dans le cas où la méthode d’actualisation conduirait à une diminution du traitement, la réduction est interdite et le salaire reste intact.

Cette disposition est destinée à prévenir toute interférence des pouvoirs législatif ou exécutif en ce domaine. C’est un mécanisme important et essentiel pour garantir l’effectivité de la séparation de pouvoirs et de l’indépendance du pouvoir judiciaire.

Le 08 Octobre 2012, la Cour constitutionnelle Italienne a été conduite à analyser (dans l’arrêt n.º 223/2012) ce mécanisme et a clairement indiqué qu’une des composantes du principe de l’indépendance du pouvoir judiciaire – prévue par la Constitution – est la garantie de l’indépendance économique et d’une situation stable des juges et procureurs. Ils „ne peuvent être soumis à des négociations systématiques et périodiques ainsi qu’à des conflits avec les autres pouvoirs de l’État“, car cela induirait un système de domination des pouvoirs législatif et exécutif sur le pouvoir judiciaire.

Malgré leur importance, les mécanismes de garantie ne sont pas prévus dans tous les États membres. Au Portugal, juges et procureurs sont soumis à des négociations périodiques avec les pouvoirs exécutif et législatif afin de bénéficier d’une augmentation (ou de ne pas subir une plus grande diminution) de leurs revenus. Cela, comme l’a souligné la Cour Constitutionnelle Italienne, conduit à une démarche générale de soumission

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’s 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 clearly stated that one of the dimensions of the principle of independence of the judiciary – as stated 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”, situation that would create the general idea of the legislative and executive power’s 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
conclusion, leads to a general idea of submission of the judicial power to the other powers of the State, diminishing the independence and authority of the judiciary.

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, an incomprehensible situation when we look at the growing integration that has been achieved in the area of justice in the last two decades.

II. The need for positive “minimum standard” common rules on the organization of the judicial power in all EU Member States

a) The principle of mutual recognition of judicial decisions

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 Euro-
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qu’il le ferait dans son propre pays”. Pour atteindre cet objectif, le Conseil européen a ouvert la voie à un „véritable espace européen de justice“, soulignant que „le principe de reconnaissance mutuelle(...)“, selon lui, devrait devenir la pierre angulaire de la coopération judiciaire en matière tant civile que pénale au sein de l’Union. Le principe devrait s’appliquer tant aux jugements qu’aux autres décisions émanant des autorités judiciaires”. L’élaboration de ces principes généraux a été prévue dans le programme de mesures pour appliquer le principe de reconnaissance mutuelle des décisions pénales (JOUE, C 012, 15/01/2001).

L’importance de la reconnaissance mutuelle a été réaffirmée dans le programme de Stockholm : une Europe ouverte et sûre qui sert et protège les citoyens (JOUE, C 115/01, 05/04/2010). Il y est clairement précisé que „la confiance mutuelle entre autorités et services des différents États membres ainsi qu’entre décideurs est le fondement d’une coopération efficace dans ce domaine. L’un des principaux défis à relever à l’avenir consistera donc à instaurer cette confiance et à trouver de nouveaux moyens de faire en sorte que les États membres s’appuient davantage sur les systèmes juridiques de leurs homologues et améliorent leur compréhension mutuelle à cet égard“. Assurément, la reconnaissance mutuelle des décisions judiciaires ne peut devenir effective que si règnent des normes communes minimales dans tous les États membres. La reconnaissance mutuelle est fondée sur la confiance : chaque État membre doit être sûr que les principes fondamentaux, inhérents à tout système judiciaire démocratique, sont respectés dans tous les autres pean 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 principle should apply both to judgements and to other decisions of judicial authorities”. The development of such general principles was laid down in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJEU, C-012, 15/01/2001).

The importance of the mutual recognition was restated in the Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens (OJEU, C-115/01, 04/05/2010), where it is clearly stated 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”.

It is clear that the mutual recognition of judicial decisions can only become effective if there are minimum common standards in all Member States. The mutual recognition is based upon trust – each Member State must be sure that the basic principles of a democratic judicial system are followed in all other States, in order to give full effectiveness to the judicial decisions from those States without any other formality.
We must notice that the Tampere Council itself also stressed the need for basic common principles in order to create the common area of justice: the European Council invited the Council to set common minimum standards:

- “ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims”;

- “for multilingual forms or documents to be used in cross-border court cases throughout the Union”;

- “on the protection of the victims of crime, in particular on crime victims’ access to justice and on their rights to compensation for damages, including legal costs”.

Those were the common principles that the Tampere Council felt as the minimum starting point for the common area of justice, but as that area grew and became stronger and deeper, there is now the urgent need of more intense and broad common rules to ensure an effective common area of justice.

As it was stated in 2010 in the Stockholm Programme, 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 be-
que la coopération policière et judiciaire en matière pénale, l'Union peut adopter des règles minimales communes. Le Conseil européen considère qu'un certain degré de rapprochement des dispositions législatives est nécessaire pour favoriser l'émergence, chez les juges et les procureurs, d'une communauté de vues sur ces questions, et permettre ainsi la bonne application du principe de reconnaissance mutuelle, dans le respect des différents systèmes et traditions juridiques des États membres”.

Cette question a été également abordée dans le document de travail „Situation en matière des droits fondamentaux: normes et pratiques en Hongrie”, présenté en septembre 2012 à la commission des libertés civiles, justice et affaires intérieures du Parlement européen : „Le moindre doute concernant l’indépendance et l’impartialité des juges en raison des insuffisances systématiques relevées dans la Constitution et dans les lois nationales pourrait avoir des effets considérables sur la coopération en cours dans le domaine de l’espace commun de liberté, de sécurité et de justice, fondée sur le principe de reconnaissance mutuelle tel que consacré à l’article 81 du traité FUE (en matière civile) et à l’article 82 du traité FUE (en matière pénale). (...) En conséquence, tout problème concernant l’apparence d’indépendance et d’impartialité des juges compromettrait l’ensemble de la structure existante, fondée sur la confiance mutuelle. Par ailleurs, tout problème transfrontalier rencontré lors de la mise en œuvre du droit de l’Union pourrait conduire à un recours immédiat à l’article 47, paragraphe 2, de la Charte ainsi qu’à son article 52, paragraphe 3, pour une interprétation harmonisée de droits garantis également par la CEDH”.

Comme évoqué dans la partie I du présent mémoire (et comme il sera démontré dans la partie III),

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 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”.

As seen in Part I of this memorandum (and as it will be shown in Part III), there are enormous differences in
existen de substantielles différences dans l’étendue et le degré de la protection de l’indépendance du pouvoir judiciaire dans les États membres. Ces différences peuvent engendrer la méfiance à l’égard de l’effectivité de l’indépendance des pouvoirs judiciaires nationaux, préjudicier ainsi à la reconnaissance mutuelle des décisions judiciaires qui, soulignons-le à nouveau, selon les termes des conclusions du Conseil de Tampere – est „la pierre angulaire de la coopération judiciaire en matière tant civile que pénale au sein de l’Union “.

Il est donc essentiel que la Commission européenne et le Parlement européen définissent des normes minimales communes et claires sur l’organisation et l’indépendance des systèmes judiciaires des États membres.

b) la nécessité d’une définition claire de la notion de „juridiction d’un des États membres,“

L’absence de règles minimales claires sur l’organisation des systèmes judiciaires nationaux entraîne également l’incertitude sur la jurisprudence de la Cour de Justice de l’Union Européenne (CJUE). Bien que la définition de la juridiction nationale ressortisse à la compétence d’un État membre, il est nécessaire d’élaborer des critères précis pour considérer qu’un organe national doit être qualifié d’ „organe juridictionnel“. La CJUE a rencontré cette question à divers moments, lorsqu’elle a traité de la définition d’une juridiction d’un des États membres, dans le cadre de l’application de l’article 234 du Traité (spécialement en ce qui concerne la question préjudicielle). La jurisprudence ne permet pas de dégager une définition claire susceptible de s’appliquer généralement à tous les États membres.

the extent and degree of the protection of the independence of the judiciary in the Member States, which can trigger mistrust about the effective independence of the national judicial powers, undermining the mutual recognition of judicial decisions that – again in the words of the Tampere Council conclusions – is “the cornerstone of judicial co-operation in both civil and criminal matters within the Union”.

It is therefore essential that the European Commission and the European Parliament define clear common minimum standards on the organisation and independence of the judicial systems of Member States.

b) The need for a clear definition of “national court or tribunal”

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 the definition of 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 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”.

Therefore we face here a matter of public policy. It affects not only national citizenship, but it also has implications at European level, as pointed out by the case-law of the ECJ.

c) Article 47 of the Charter of Fundamental Rights of the European Union

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.

As seen in the previous point, 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”. 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.

d) The minimum criteria imposed to States applying to become a Member States

The need for the clear definition of minimum standards is recognised by the EU institutions when they impose to Member State candidates some criteria to be met in the area of independence of the judiciary.

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, are:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Included in the first of the above-mentioned criteria is the independence of the judiciary, within the ef-
Le respect du premier critère suppose l’indépendance du pouvoir judiciaire, en vue de l’application effective du principe de séparation des pouvoirs. Afin de garantir cette indépendance, l’UE a imposé aux pays candidats le respect de certaines conditions, telles que la mise en place d’un Conseil supérieur chargé, entre autres, de la sélection, la carrière, l’évaluation professionnelle et la discipline des juges. Dans les pays qui ont mis en place de tels dispositifs – comme la Roumanie et la Bulgarie – l’UE les a gardés sous surveillance, même après l’adhésion.

L’accord des États membres sur les critères de Copenhague relatif à l’indépendance du pouvoir judiciaire révèle un accord général sur des normes minimales en ce domaine. Une actualisation s’impose afin de définir clairement ces critères et les mettre en œuvre.

e) l’incongruité entre la protection des autorités de régulation nationales et l’absence de règles protégeant les systèmes judiciaires

L’absence de législation communautaire dans ce domaine est encore plus difficile à comprendre quand on réalise que l’UE a déjà ressenti la nécessité d’imposer des règles strictes aux États membres sur l’indépendance d’autorités autres que les organes judiciaires.

Les articles 35, n°4 de la directive sur l’électricité (directive 2009/72/CE, concernant des règles communes pour le marché intérieur de l’électricité) et 39, n°4 de la directive (directive 2009/73/CE, concernant des règles communes pour le marché intérieur du gaz naturel) déclarent que „les États membres garantissent l’indépendance de l’autorité de régulation et veillent à ce qu’elle exerce ses compétences de manière impartiale et effective implementation of the separation of powers. As a guarantee of that independence, the EU has imposed on candidate countries the establishment of certain conditions, such as the implementation of a High 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 shows 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.

e) The case of National Regulatory Authorities

The absence of EU legislation in this area is even more difficult to understand when we realize that the EU has already felt the need to impose to Member States strict rules of independence regarding authorities other than courts.

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) state 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”.

transparente“. Les deux directives imposent que „afin de protéger l’indépendance de l’autorité de régulation, les États membres veillent notamment à ce que: (a) l’autorité de régulation puisse prendre des décisions de manière autonome, indépendamment de tout organe politique, bénéficie de crédits budgétaires annuels séparés et d’une autonomie dans l’exécution du budget alloué, et dispose de ressources humaines et financières suffisantes pour s’acquitter de ses obligations; et (b) les membres du conseil de l’autorité de régulation ou, en l’absence d’un conseil, les cadres supérieurs de l’autorité de régulation soient nommés pour une période déterminée comprise entre cinq et sept ans maximum, renouvelable une fois”.

L’article 28, n° 1 de la directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995 (relative à la protection des personnes physiques à l’égard du traitement des données à caractère personnel et à la libre circulation de ces données) dispose également que les États membres doivent créer des autorités publiques qui „exercent en toute indépendance les missions dont elles sont investies“. La Cour de justice a déjà condamné l’Allemagne pour ne pas avoir assuré l’indépendance de son autorité nationale (décision du 03/09/2010 dans l’affaire C-518/07). Sa décision précise que „l’indépendance des autorités de contrôle, en ce qu’elles doivent être soustraites à toute influence extérieure susceptible d’orienter leurs décisions, est un élément essentiel au regard des objectifs de la directive 95/46. Elle est nécessaire pour créer, dans tous les États membres, un niveau également élevé de protection des personnes physiques à l’égard du traitement des données à caractère personnel et contribue de cette façon à la libre circulation des données, qui est nécessaire à l’établissement et au fonctionnement du marché intérieur“.
It's inconsistent that the EU is concerned in guaranteeing the independence of national regulators or other authorities and 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 just quoted 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.

f) The respect for the principles of conferral, subsidiarity and proportionality

The principle of subsidiarity, as established in Article 5 of the Treaty on European Union, is directly connected with two other principles: the principles of conferral and of proportionality.

The Protocol (No 2), On The Application Of The Principles Of Subsidiarity And Proportionality (OJEU, C-83/206, 30/03/2010) has defined mechanisms to put the principle into practice.

According to the principle, intervention at European level must meet three criteria:
- the subject must have transnational aspects that cannot be resolved by Member States;
- national action or an absence of action should be contrary to the requirements of the Treaty;
- action at European level must have clear advantages.

The coordination of the three principles above mentioned implies that the European Union can only act if:
- the competences in that area is conferred upon the EU by the Treaties (principle of conferral);
- this action is within the competences shared with Member States, the European level is most relevant in order to meet the objectives set by the Treaties (principle of subsidiarity);
- the content and form of the action does not exceed what is necessary to achieve the objectives set by the Treaties (principle of proportionality).

Because of the above mentioned, all the conditions necessary to an EU level action 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 conferring competence to the Union to act in that area.

In what concerns the principle of subsidiarity, all that has been said above – 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
l’Union Européenne). Il est ainsi démontré clairement que l’action au niveau des États membres n’est plus suffisante et qu’est fondamentale une définition européenne des normes minimales.

Quant au principe de proportionnalité, l’action européenne n’empêche pas les États membres de définir la structure et l’organisation internes de leurs propres systèmes judiciaires ; cette action définirait simplement des normes minimales communes que tous les États membres doivent respecter en conservant, cependant, toute liberté pour concevoir la structure interne de leur système judiciaire.

Tous les éléments mentionnées ci-dessus vont dans la direction indiquée par madame Viviane Reding, vice-présidente de la Commission européenne, dans le discours prononcé lors d’un débat en session plénière du Parlement européen, le 12 septembre 2012 :

„En ce qui concerne l’État de droit en général et l’indépendance du pouvoir judiciaire, je suis d’accord avec ceux qui ont posé les questions. Oui, la Commission doit jouer son rôle de gardienne des traités, et doit agir contre les violations du droit communautaire en recourant aux procédures d’infraction. C’est un principe général : si les petites infractions comptent, qu’en est-il des grandes violations? (…) Les exemples très concrets vécus cette année démontrent qu’il manque à l’Union européenne des mécanismes efficaces pour faire respecter, plus largement et plus systématiquement, l’État de droit. Aujourd’hui, tout le monde évoque la situation de la Hongrie et de la Roumanie. Sommes-nous sûrs que, dans quelques semaines, nous ne verrons pas une telle situation, dans un autre pays de l’UE? Maintenant, soyons honnêtes – et certains des parlementaires l’ont dit très clairement - nous sommes confrontés au dilemme de Copenhague. Au cours du pro-

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, granting them, however, full freedom to design the internal structure of their judicial systems.

All the above-mentioned goes in the direction pointed by Ms. Viviane Reding, Vice-President of the European Commission, in the speech given during a debate in a Plenary session of the European Parliament on 12th September 2012 :

“What about the rule of law in general and what about the independence of the judiciary? I agree with those who asked these questions. Yes, the Commission has to play its role as guardian of the Treaties and it has to go after breaches in EU law by means of infringement proceedings. It is a general principle, and small violations count too. What about the big violations? (…) we can see very well by these very concrete examples that we have experienced this year that we lack effective mechanisms in the EU to enforce respect for the rule of law more generally and more systematically. Today everybody mentions the situation in Hungary and Romania. Are we sure that we will not see such a situation again in a couple of weeks in another EU country? Now let us be honest – and some of the parliamentarians have said it very clearly – we face a Copenhagen dilemma. We are very strict on the Copenhagen criteria, notably on the rule of law in the accession
cessus d’adhésion d’un nouvel État membre, nous sommes très stricts sur les critères de Copenhague, notamment quant au respect de l’État de droit ; cependant, une fois que cet État membre a adhéré à l’Union Européenne, il semble que nous n’ayons aucun instrument pour vérifier si l’État de droit et l’indépendance du pouvoir judiciaire sont toujours respectés. L’Union Européenne, doit rester ferme sur nos valeurs et sur l’État de Droit, et c’est pourquoi je pense que nous devons mettre en place un mécanisme objectif pour évaluer les systèmes judiciaires dans l’ensemble de nos 27 États membres, parce que nos procédures d’infraction sont trop techniques et trop lentes à réagir face à des situations à haut risque concernant l’État de droit et parce que la procédure de l’article 7 est une option qui doit seulement être utilisée par la Commission, le Parlement et le Conseil lorsqu’il n’y a vraiment pas d’autre solution”.

MEDEL soutient fortement une action dans ce domaine au niveau européen et appelle à l’implication des associations des juges et des procureurs dans ce processus.

III. Conclusion

a) la violation actuelle du droit communautaire par les États membres

Au-delà de la nécessité urgente –déjà mentionnée– d’une action de l’UE relative à la définition de règles minimales, le cadre juridique actuel conduit, dores et process of a new Member State but, once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect. We as a European Union need to stand firm on our values and on the rule of law, and that is why I think that we need to put in place an objective mechanism to assess the judicial systems in all of our 27 Member States, because our infringement procedures are too technical and too slow to react to high-risk situations concerning the rule of law, and because the Article 7 procedure is a nuclear option that should only be used by the Commission, Parliament and the Council when there is really no other solution”.

MEDEL strongly supports action in this field at EU level and calls for involvement of judges’ and prosecutors’ associations in such process.

Also there is a joint initiative of several Member States, addressed to the Commission in the beginning of March 2013, with the intention to place greater emphasis on the rule of law in Member States in times of debt crisis and not forget that the rule of law has a significance which goes far beyond economic benefits.

III. Conclusion

a) The actual breach of EU Law by Member States

Beyond the just mentioned urgent need for EU action on defining minimum standard rules, the existing legal framework already leads to the conclusion that some Member States are currently in breach of EU Law in what regards the independence of the judiciary.
Article 53 of the Charter of Fundamental Rights of the European Union establishes a “maximum standard" clause – if one of the Member States grants to its citizens a determined fundamental right, all the other European citizens must expect that right to be also granted to them. It is a “race to the top" levelling clause (as underlined by scholars), destined to ensure equal treatment of all EU citizens, regardless of their national origin, in what concerns fundamental rights.

The Italian Constitutional Court in the decision n. 223/2012 stated, inter alia, that the “relationship between the State and the magistrates, as a separate body within the State, cannot be reduced to a mere labour relation, where the contractor / beneficiary of the work force is at the same time regulator of that relation”.

The decision of the Italian Constitutional Court brings the discussion to its core aspect – the relations between the different powers of the State and the independence of the judiciary.

The right granted to all European citizens by Article 47 of the Charter of Fundamental Rights of the European Union to a fair hearing by an independent and impartial tribunal is put at risk by those Member States that have not clearly established in their national laws the mechanisms and guarantees essential to ensure the independence of the judiciary. Those countries are, therefore, in breach of the EU Law and the disparity of levels of protection leads to the conclusion that all EU citizens can appeal to the provision of Article 53 of the Charter in order to see granted to themselves the same
En guise de conclusion, nous déclarons fermement que les pays:
- où le pouvoir judiciaire n’est pas gouverné par un Conseil supérieur indépendant et autonome;
- où les salaires des juges et des procureurs ont été diminués par une décision unilatérale des pouvoirs législatif et exécutif;
- et où il n’y a aucun mécanisme permettant l’actualisation automatique de leur rémunération sans dépendre de négociations entre les pouvoirs judiciaire, législatif et exécutif;
- ou où ces mécanismes ne peuvent être remis en cause par le pouvoir exécutif;
- où l’autonomie du ministère public n’est pas garantie;

ne respecte pas le droit communautaire.
Les institutions européennes doivent, par conséquent, agir immédiatement.

b) la nécessité de nouvelles mesures dans ce sens
Dans la mesure où elle veut représenter et constituer un “espace de liberté, de sécurité et de justice dans le respect des droits fondamentaux et des différents systèmes et traditions juridiques des États membres”, ce qui comprend l’accès à la justice, l’Union – a travers la procédure prévue à l’article 70 du TFUE et avec l’implication, au sein des compétences respectives, de la Commission, du Parlement européen et du Conseil – peut mettre au point les mécanismes nécessaires à l’évaluation objective et impartiale de la mise en œuvre des politiques de l’Union visées au présent titre (sur l’espace de liberté, de sécurité et de justice) par les autorités des États membres, en particulier afin de faciliter la pleine application du principe de reconnaissance mutuelle.

level of protection granted to citizens of other Member States.

As a conclusion we strongly state that countries:
- where the judiciary is not ruled by an independent and autonomous High Council;
- where salaries of judges and prosecutors have been decreased by unilateral decision of the legislative and executive powers, and where there are no mechanisms establishing an automatic actualization of remuneration, not dependent of negotiations between the judicial, legislative and executive powers;
- where the autonomy of prosecutors is not guaranteed;

are currently in breach of EU Law.
The European Institutions should therefore act immediately.

IV. The need for further steps in this direction
While envisaging and constituting an “area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”, which includes access to justice, the Union – through the procedure laid down in Article 70 of TFEU and the involvement within their respective competences of the Commission, the European Parliament, and the Council – may adopt measures laying down the arrangements to conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title (on the area of Freedom, Security and Justice) by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition.
Mutual trust and mutual recognition require full knowledge of the respective systems and common standards. Independence, efficiency and accountability of the judiciary are a core area to test and assess the level of integration. The Council of Europe has developed highly esteemed and detailed standards in this area (see CM Rec. (2010) 12 on judges: independence, efficiency and responsibilities and CEPEJ reports on Evaluation of European Judicial Systems).

MEDEL calls the Union to address through existing mechanisms the democratic development of its judicial systems, not only with the view to enhancing the common market, but with the view to fully protecting the fundamental rights of European citizens as enshrined in the Charter.

1) Members of MEDEL: Association Syndicale des Magistrats (ASM) (Belgium); Magistratur & Maatschappij (Belgium); Association des juges chypriotes (Cyprus); Soudcovská unie České republiky (CUJ) (Czech Republic); Unie statnich zastupcu České republiky (Czech Republic); Syndicat de la Magistrature (SM) (France); Neue Richtervereinigung (NRV) (Germany); Bundesfachausschuss; Richter und Staatsanwälte in Vereinigten Dienstleistungsgewerkschaft (VER.DI) (Germany); Eteria Ellinon Dikastikon Litourgon gia ti Demokratia ke tis Eleftheries (Greece); Magistratura democratica (MD) (Italy); Movimento per la Giustizia (Italy); Union progresista de Fiscales (UpF) (Spain); Y argıçlar ve Savcılar Birliği (Yarsav) (Turkey)