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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

HUNGARY'S COMMENTS ON

THE DRAFT OPINION OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) ON THE CARDINAL ACTS ON THE JUDICIARY THAT WERE AMENDED FOLLOWING THE ADOPTION OF THE OPINION CDL-AD(2012)001

On 20 September 2012 rapporteurs of the Venice Commission visited Hungary where they met the President of the Curia and the President of the National Judicial Office (hereinafter "NJO"), members of the Constitutional, Judicial and Standing Orders Committee of the Hungarian Parliament, State Secretary of the Ministry of Public Administration of Justice and representatives of NGOs. The aim of the visit was to assess the progress made since the last visit of the Venice Commission with regard to the amendment of cardinal Acts regulating the organization and administration of courts and the legal status and remuneration of judges. On 26 September 2012 the Venice Commission delivered its draft opinion 683/2012 on the cardinal Acts amended after the adoption of the opinion CDL-AD(2012)001 on Hungarian courts.

Following the earlier visit of the Venice Commission the Parliament amended the above mentioned Acts several times. On the basis of the detailed remarks of the Venice Commission on regulation on courts and judges and the exchange of informal letters with Mr Thorbjørn Jagland, General Secretary of the Council of Europe, the Government drafted the legislative proposal that the Parliament adopted on 2 July 2012. Act CXI of 2012 entered into force on 17 July 2012. The Venice Commission found that the amendments to the Act on the organization and administration of courts and to the Act on the legal status and remuneration of judges addressed most of its comments made in its opinion CDL-AD(2012)001 of 16-17 March 2012. The Venice Commission welcomed the legislative steps made and recommended further legislative amendments. The summary of the position of the Government concerning the remaining suggestions of the Venice Commission is as follows.

I. Appointment of the proceeding court, the "transfer of cases"

The amendments introduced by the Act CXI. Of 2012

According to the amendment adopted in Act CXI of 2012, the National Judicial Council (hereinafter "NJC") shall determine the principles to be applied when appointing a proceeding court. In addition, the Act provides for legal remedy for the parties with regard to the appointment of the proceeding court. The court initiating the appointment of a different court to proceed shall inform the parties involved in the proceeding of the initiation. The President of the NJO shall publish the decision on the appointment of the proceeding court on the official website of the courts. Parties affected by the appointment of a proceeding court may lodge an appeal against the decision on the appointment of the proceeding court within 8 days of its publication on the official website of the courts. Such appeals shall be adjudicated by the Curia within 8 working days in non-litigious proceeding. The Curia examines whether the President of the NJO has breached the legal provisions applicable to the making of the decision. If the Curia determines during the review that the decision of the President of the NJO on the appointment of the proceeding court is in conformity with the rules, the Curia shall uphold the decision, otherwise the Curia shall repeal it. The Curia may not modify the decision. In order to raise transparency with regard to the practice of the Curia and of the President of the NJO concerning the appointment of the proceeding court, the new Act ensures that beside the decision on the appointment of the proceeding court, also the decision adjudicating the appeal against that decision is published on the internet.

Remarks concerning the proposals of the Venice Commission

1. The NJC did not obtain the legal mandate to elaborate, in addition to the principles for the appointment of the proceeding court, the principles governing the selection of cases "to be transferred", because it is only the president of the court initiating the appointment who can judge whether it should be initiated for a case to be "transferred", taking into account the specific features of the case, as well as the workload and the personnel

capacities of the given court. By means of example, the long-lasting absence of a judge hearing cases concerning legal relationships arising from securities, which require special expertise, can make it necessary at some courts to initiate for such cases to be “transferred”, while such a problem would not arise at other courts. For eventualities of this nature, it is not possible but also not necessary to elaborate principles.

2. The starting point for the time limit to appeal is not the notification to the parties but the publication on the website of the courts, because proceedings have in many cases several parties, the delivery to whom involves uncertainties which would impede the beginning of the trial, thus harming the interests of all parties. Publication on the website results in a communication at the same time for everyone. Following preliminary postal notification, taking into account the development of technology, it can reasonably be assumed that parties or their legal representatives obtain information of the President of the NJO’s decision via the official website of the courts.

3. If a decision of the Curia upholds the appeal, the case will not necessarily be heard by the court initiating for the case to be “transferred”, meaning that another appointment is possible, because it does not follow from the first appointment of the proceeding court being not in compliance with the rules that such an appointment would be unnecessary. Therefore, it is appropriate to ensure the possibility for an overloaded court to re-initiate appointment of the proceeding court, since the decision of the Curia provides only for *restitutio in integrum*, but does not remedy the problem of being overburdened which risks adjudication of cases within a reasonable period of time.

4. The principles for the appointment of the proceeding are obligatory, since the relevant provisions of the Act clearly oblige the President of the NJO to take the principles of the NJC into account. In addition, in the reasoning of his/her decision, the President of the NJO has to present the application of those principles. The Government is of the opinion that this regulation is sufficient to ensure that the principles are enforced.

It is true that the Curia can only revise the discretionary decision of the President of the NJO to the extent that the President of the NJO has breached the legal provisions applicable to the making of the decision. However, this limitation concerns the discretionary powers, and does not affect the examination of the compliance with the principles. The Curia does not have any data concerning the management of cases, furthermore, in line with its role as professional leader, it does not have any databases similar to the ones of the central administration, therefore, the Curia is not required to overrule the decisions of the President of the NJO in the course of adjudicating appeals, since officially the Curia has no information of to what extent the different courts of the country are overburdened. On the other hand, it is possible for the Curia and at the same time it is its obligation to examine the compliance with the legal provisions governing the appointment of the proceeding court, including the enforcement of the principles determined by the NJC, since these principles are based on legislation and the President of the NJO is clearly obliged by law to apply them. If the President of the NJO would depart from the principles, he/she would violate the law, which would make the Curia take a decision annulling the appointment.

5. The Prosecutor General has no power to “transfer” cases. He can initiate the appointment of the proceeding court, however, he may not exercise the President of the NJO’s power, consequently, the Prosecutor General has no competence that could be removed, as recommended by the Venice Commission.

The Transitional Provisions of the Fundamental Law of Hungary make it possible that in the interest of the enforcement of the fundamental right to a court decision within a reasonable period of time, and until a balanced distribution of caseload between the courts has been

realised, the Prosecutor General may instruct that charges be brought before a court other than the court of general competence but with the same jurisdiction. However, this competence differs from the power of the President of the NJO to appoint the proceeding court, examined by the Venice Commission. This power of the Prosecutor General does not affect the independence of the judiciary either. The right of the parties for a fair trial will not be violated, because the case will also in such a case be heard by a same level court having same jurisdiction and same independence. Furthermore, the right of the parties for a lawful judge will not be violated either, because this right of the parties is not bound to a given judge or chamber of judges, but to a judge or a chamber of judges determined by the case distribution schedule of the court proceeding in accordance with the law.

The appointment and the instruction of the Prosecutor General determine only the court, the judge actually acting in the case can only be determined by the case distribution schedule.

For appointed courts procedural rules and guarantees (such as the principles according to which judges are in their person independent and may not be instructed in Hungary) apply in the same way, the cases concerned by the appointment are in no way subject to separate procedural rules.

The European Court of Human Rights convicted Hungary several times because the requirement for adjudicating cases within a reasonable period of time was not met. The rules concerned are exactly intended to promote compliance with these international standards. The Government is of the opinion that the right for a fair trial includes the requirement for adjudicating cases within a reasonable period of time, for the meeting of which the legal institution above seems to be necessary.

II. Remarks on earlier recommendations of the Venice Commission

1. It is a traditional solution in Hungarian public law that in case a position is vacant, it is the deputy official who – temporarily – exercises the functions that go with the position. Accordingly the President of the NJO is, in case of impediment and also if the position is vacant, substituted by the general Vice President of the NJO. The general Vice President of the NJO, in case of impediment, shall be substituted by other deputies of the President of the NJO. In the absence of a person authorized for the substitution, the duties of the President of the NJO shall be performed by the President of the NJC.

According to the proposition of the Venice Commission, in case the position is vacant, it should not be the Vice President of the NJO who has the powers of the President but the President of the NJC. The Government did not consider applying substitution by the President of the NJC suitable for a wider range of cases, since the NJC is a body with no permanent staff, meeting only periodically. More importantly, members of the NJC (so naturally also its president in power) exercise their tasks following from their membership in the NJC in addition to their ordinary judicial obligations, that is, beside their adjudicating or court leading activities. It would not have been practical to jeopardize these tasks (and of course those to be performed by the President of the NJC in this capacity) by the wide powers of the President of the NJO, and to burden one person with the job of three, when this person may not even have administrative leadership experience, while the President of the NJO has a deputy who is able to perform the tasks, participates permanently in the work of the NJO, and has a direct overlook on it. It also has to be noted that the President of the NJC changes in every six months, which would not be suitable with regard to the performance of the tasks of the President of the NJO by way of substitution.

In the framework of their self-administration judges elect the members of the NJC from among themselves. The President of the NJC is selected on a rotational basis defined by the

Act. The general and other Vice Presidents of the NJO shall, in the framework of an application procedure be appointed by the President of the Republic for an indefinite term, which means that they have high-level public law legitimacy that makes interim performance of the duties possible.

2. The President of the NJO shall state the reasons of his/her decisions "to the extent necessary". As the President of the NJO informed the Venice Commission, the President of the NJO states the reason of all his/her decisions. The term "to the extent necessary" does not refer to the eventuality of the obligation for reasoning but to its extent. To determine for example the annual amount of the cafeteria allowance, to order a statistical research, to grant long-term external service at the request of the judge obviously requires reasoning of a completely different extent and depth than the reasoning of deviation from the ranking of applications for judicial posts.

3. The NJC shall determine the principles of deviation from the raking of applicants with regard to applications for judicial positions and also exercise the right of consent in cases where the President of the NJO (or the President of the Curia) decides to deviate from the ranking as well as exercise the right of consent with regard to the appointment of court leaders when applicants fail to receive the support of the majority of the judicial reviewing board.

In the case of applications for judicial positions, the President of the NJO (or in the case of applications for positions at the Curia, the President of the Curia) may, based on the principles determined by the NJC, deviate in favour of the applicant placed 2nd or 3rd from the ranking established by the panel of judges, however the NJC shall have the right to veto. As a result, the President of the NJO may either decide not to deviate from the ranking and transfer or forward for appointment the candidate ranked 1st or make a new proposal to the NJC or declare the application procedure to be unsuccessful. In the case of applications for leadership positions at courts, the President of the NJC (or the President of the Curia), if wishing to appoint a candidate who has not obtained the support of the majority of the reviewing board, shall prior to the candidate's appointment obtain from the NJC a preliminary opinion on the applicant. The applicant may only be appointed if the NJC has given its consent.

The act provides for legal remedy against the results of application procedures for judicial positions. An applicant participating in the application procedure may submit an objection if the successful applicant does not meet the requirements for becoming a judge laid down in law, or if the successful applicant does not meet the conditions listed in the call for applications. If the court establishes that the person winning the application does not meet the requirements for becoming a judge laid down in law, or that the person winning the application does not meet the conditions listed in the call for applications, it shall communicate its decision in this respect to the applicant submitting the objection, and – in order for them to take the necessary measures – to the assessor and the President of the Republic.

a) The Venice Commission suggested that as part of the judicial review of the results of the application procedure the court should, apart from the fulfilment of the legal requirements for becoming a judge and the conditions listed in the call for applications, also examine the enforcement of the principles determined by the NJC with respect to deviation from the ranking of applicants.

In the view of the Government, further amendments in this direction are unnecessary, as any deviation from the ranking is bound to the consent of the NJC anyway. The NJC not only has the opportunity to, but is also obliged to refuse to give its consent should the principles of

deviation from the ranking be breached. Furthermore, it should also be noted, that in such a case, an appeal for the judicial review of the deviation from the ranking would not only be directed against the decision by the President of the NJO but at the same time also against the decision by the NJC, which does not seem to be in accordance with the suggestions made by the Venice Commission this far to broaden the NJC's competence.

b) Furthermore, the Venice Commission has also suggested that the President of the NJO's right to veto also be abolished and that the President of the NJO be obliged to propose for appointment the person ranked 1st if the NJC does not agree with the decision of the President of the NJO.

It is important to make clear that the NJC does not participate in the application procedure as a reviewing and proposal making body and is not the assessor of applications either. Consequently, it is difficult to interpret the remark by the Venice Commission that "the President of the NJO can veto a candidate, even if he or she has been ranked first by the reviewing board and if the NJC agrees with his or her nomination". The procedure is not conducted like this. The NJC does not receive the ranking of candidates for preliminary review or to exercise the right to preliminary consent and does not even make any decision on the application with regard to which the President of the NJO "could raise a veto".

It appears that the opinion of the Venice Commission is rooted in the Venice Commission's interpretation of the President of the NJO's possibility to declare an application procedure unsuccessful as a veto. This however, is impossible, as decision makers cannot possibly raise a veto in their own decision making procedures, as a veto, by definition, is directed at preventing a decision made by somebody else, in the application procedure however, it is the President of the NJO who makes the decision. It is with regard to this that the NJC has the right to veto.

The possibility of the President of the NJO (an the President of the Curia) to declare application procedures unsuccessful had to be maintained for the simple reason that irrespective of the ranking established by the panel of judges, it may happen that the applicant receiving the highest score may not be able to fulfil the conditions for application. It may easily happen for instance, that irrespective of their scores, none of the applicants for a leadership position have any leadership experience, in which case it would be reasonable to declare the application procedure unsuccessful.

c) Based on a further suggestion by the Venice Commission is should also be possible for unsuccessful applicants to contest the ranking on the grounds that the application "has not been evaluated based on objective criteria based on merit".

The substantial amendments introduced by Parliament in the fall of 2010 were in stark contrast with the earlier regulation, where the appointment system of judges had not been transparent due to the lack of detailed legal norms. The act introduced a transparent and consistent system with regard to the evaluation of judicial applications where applicants were given scores and ranked by the panel of judges and the chair of the court would make his nomination based on this ranking. Thus the amendments had explicitly been undertaken in order to make the application procedure objective.

It should be noted that it had already been possible based on the 2010 rules for the presidents of courts to deviate from the ranking if they wished, in such cases they had to specify their reasons in writing and it was the then administrative body, the National Council of Justice that would decide on the evaluation of applications. So the legal institution of deviation itself is not new either.

The judiciary acts that entered into force on 1 January 2012 did not fundamentally change the process of becoming a judge. The detailed criteria for establishing the ranking are contained in Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Decree 7/2011. (III. 4.) KIM of the Minister of Public Administration and Justice on the Detailed Rules for the Evaluation of Judicial Applications and Scores Assignable in the Ranking Process. When assigning the scores only the results of the professional evaluation of the term of experience or term of service, the term of practical experience or term of service, the results of the professional aptitude test, the results of the bar examination, academic degrees, specialization or any other post-graduate degrees, studies abroad, language skills, publications in the field of law, results achieved in training courses, results of the hearing before the panel of judges, opinion of the college, opinion of the chair of the court shall be taken into account. The decree defines on an item by item basis the scores that can be given to an applicant based on the individual criteria.

In the light of the above, should someone's application still "not be evaluated based on objective criteria based on merit" it would have to be suspected that there had been an abuse, the examination and judgment of which shall not be undertaken as part of the appeal against the results of the application.

d) To sum up: While it is the current application procedure that is criticized for abuse and the lack of transparency in decision making, this actually characterized the period between 1997 and 2010. The system of judicial applications introduced in 2010 and slightly modified in 2012 can be regarded as a clearly positive achievement from a professional point of view. The system had clearly become fully objective though slightly rigid at the same time. This is why it had been necessary already from the outset to provide for the possibility of deviation, as the applicant with the highest score may not always have the special skills that the persons ranked 2nd or 3rd are in possession of, and are of advantage when having to fill a judicial position specializing in patent issues for instance.

In addition to the above, it is necessary to state that the suggestions made so far by the Venice Commission regarding applications for judicial positions have exclusively been formulated with respect to the President of the NJO while the President of the Curia has completely identical competences with regard to applications for positions at the Curia including deviation from the ranking.

4. The Hungarian judicial Acts do not know the concept of term of probation. Term of probation is a period of a couple of months during which either of the parties can terminate the employment relationship with an immediate effect without any further legal consequence. Appointment of judges for a fixed period cannot in any aspect be compared to the above, because it means an appointment for three years and with full responsibilities. The termination of such an appointment by the employer is not permitted under any circumstances (regardless whether with or without legal consequences), in accordance with the principle of judicial immovability. It is a fact that if at the end of the three years, as a result of the obligatory professional evaluation (against which legal remedy is ensured) the judge is declared unsuitable, no new appointment for an indefinite term is possible, since one obviously cannot act as a judge when qualified unsuitable.

The Venice Commission suggested that the probationary period of court secretaries should be counted as a part of the judicial appointment for a fixed period, since court secretaries also exercise judicial functions. This suggestion cannot be adhered to, because although court secretaries perform some judicial tasks, they do not perform the most important function that is the most characteristic feature of the judicial profession: they do not adopt judgments; they have decision-making power only in non-litigious proceedings (where no judgment is adopted, since judgments are the result of litigious proceedings).

5. In Hungary, the Curia ensures the uniform application of law by the courts and takes law standardization decisions, which are binding on courts. This legal institution was established in 1881 in Hungary and its key function is that the highest level of judicial forum serves also as the guardian of law standardization. In this case the decision is not made in a given case, but in the abstract interpretation of a debated legal issue, which shall however not affect the independence of the proceeding judge. The legislative policy reason for the existence of the uniformity is the principle of legal certainty and equality before the law, since the aim is to have a possibly identical judgment regardless which court in which region of the country proceeds.

The Curia is the guardian of the uniform application of law, however, it does not perform this task alone, lower courts also take part in it. Accordingly, if the chamber or single judge of a regional court of appeal, court of appeal, labour court or local court passed a ruling on an authoritative issue such ruling of authoritative significance shall be presented to the president of the court. The presidents and division heads of courts shall continuously monitor the administration of justice by the court(s) under their supervision. If it comes to the attention of the president of a court or the division head of a court that a decision of authoritative significance was adopted, a contrary practice evolved with respect to a theoretical issue of authoritative significance or final and absolute rulings were passed on contrary theoretical grounds at the court under his management or supervision, he shall inform the president of the higher court thereof. In the interest of maintaining standard practices in the administration of justice, divisions shall monitor the practices of courts, shall express their opinions on law application issues in dispute and shall, at the request of the head of the jurisprudence analysis task force of the Curia, participate in the analysis of jurisprudence. If necessary in the interest of standard law application, the leader empowered to do so shall propose a motion aimed at a law standardization procedure or the publication of an authoritative court decision.

As it is reflected in the above, in the interest of ensuring standard law application, courts operate coordinated, having regard to each others' activities, and where applicable, in accordance with the judicial hierarchy, they propose the application of the lawful instruments intended to ensure standard law application or they use those instruments. However, this can by no means be considered a measure violating judicial independence, because judges must, in the course of their adjudicating activities, be independent of both external and in-court influence. Therefore, judges may not be instructed, not even in terms of the standard law application, they are subordinated only to the law and take their decisions in accordance with their convictions. This may not however lead to the judge regularly opposing the jurisprudence of higher level courts, since legal remedies proceedings thus growing in number slow down justice, decrease the efficiency of the judicial system that contradicts both public interest and interests of the parties. Therefore operation of mechanisms ensuring the uniform application of law is necessary.

6. Further proposal in the opinion of the Venice Commission is that the possibility of secondment of judges should be reduced substantially.

The secondment of a judge means that the judge adjudicates cases received by a court other than his/her post on a temporary basis, without a change to the judge's post. Secondment does not even automatically involve a change in the judge's place of work as secondment may also be implemented in such a way that the relevant documents are transported to the seconded judge. On the basis of the former Act on the legal status and remuneration of judges this same rule has been applied for more than ten years, which means that it was included already in the former Act. Moreover the former legislation did not lay down additional guarantee rules that are established in the new Act. Such a guarantee

rule is the statement of the reasons for which secondment may be ordered and statement of the (e.g. family) circumstances that preclude the possibility of secondment.

The Act does allow the presidents of courts to decide on the temporary secondment of judges to ensure an even distribution of caseload between courts or for the promotion of the judge's professional development, without their consent, once every three years and for a maximum of one year. This however does not mean that the moving of the judge in the geographical sense is a generally accepted practice, especially as the judge should be reimbursed for his/her costs that would result in unaffordable extra costs in the economic and financial management of courts. In practice typically the aim of secondment is that judges of local courts are seconded – in their own interest, to ensure their professional career – to courts of appeal in order to get adjudicating experience at second instance.

According to the Government secondment does not affect the independence of the judge, because it does not change the post or remuneration of the judge, who hears cases that fall within the same legal area. Secondment does not mean heavier workload (only with the judge's consent), because according to the Act a judge can only be seconded to another service post while maintaining his/her adjudicating activity arising from his/her position with his/her consent.

The Venice Commission proposed the introduction of the "Sprengelrichter", a system known in Austrian law, for consideration. "Sprengelrichter" is a type of judge who is appointed for secondment from the beginning. In connection with this the Government notes that Section 33 of Act on the Legal Status and Remuneration of Judges introduces the institution of the so-called "moving judges" as of 1 January 2012.

7. The Government does not consider the revision of the judicial Acts to be necessary from the aspect of cardinality. Both Acts contain a cardinality clause that handles the issue sufficiently. According to the Fundamental Law rules on the organization and administration of courts and on the legal status and remuneration of judges shall be included in cardinal acts. The parts of the Acts that contain the guarantees are cardinal. Since the Government of Hungary and the Parliament are committed to the guarantees of the rule of law, further loosening of the regulation, or regulation – even partially – at a lower level is not possible. Nor is it necessary to regulate certain parts in a source of law at a higher level, since in fields such as the administration of courts the Fundamental Law does not need to contain particular legal provisions apart from the fundamental provisions.

8. On the basis of the former opinion of the Venice Commission the Parliament has increased social participation in the NJC and broadened the circle of those who can participate at the meetings of the NJC with consultative rights. In its present opinion the Venice Commission suggests to include non-judges in the NJC as members instead of inviting them with consultative rights.

The Government is of the opinion that within the framework of the present administrative structure this is not possible. One achievement of the new system is exactly the clear judicial self-government, while in the former National Council of Justice also non-judges were full members. Those present with consultative rights represent institutional interests, values and opinions of other legal professions, thus they contribute to the functioning of the NJC however, granting them full membership is incompatible with the idea of judicial self-government. It is hardly justifiable for the Prosecutor General or the President of the Hungarian Bar Association for instance to obtain a right to vote on the report concerning the implementation of the budget of courts, to control the economic and financial management of courts, to have the right of consent to the appointment of court leaders, to appoint members of the service court or to award prizes to judges. The participation of the President of the

NJO has to stay by all means at the level of consultative rights; it would be unacceptable if the President of the NJO had the right to vote in a body that is supposed to control the President of the NJO, while granting the minister responsible for justice the right to vote would oppose the consistent separation of powers. The aim of the amendment stating that in case of a closed meeting participants with consultation rights may not participate, except if the NJC provides otherwise, was precisely to ensure complete independence.

9. The Venice Commission proposed to revise the rotation system of the presidency of the NJC and the membership in the NJC for only one term, because they weaken the NJC.

The Government is of the position that the experience obtained since the NJC was established in March 2012 provides no ground for such a conclusion. At present, there is nothing to suggest that the NJC would not exercise its powers effectively. It would clearly weaken the control powers, if structural changes in the NJC should be introduced already now.

The experience of the former National Council of Justice indicated clearly that it is not a good solution to associate the functioning as a board with a permanent one person leadership, because it leads to power monopoly, as well as to the leader being overburdened and to members being collectively unaccountable. The rotation system of the presidency prevents this by distributing duties and responsibility evenly.

There is no reason to ensure that the members of the NJC can be re-elected. It is specifically aimed by this regulation that as many judges as possible can participate in this board of judicial self-government in order to make them feel it their own organization. This solution raises interest in the activities of the NJC, thus promoting the control powers, as well as prevents alienation of judges from the organization. A more open membership encourages the emergence of new ideas and methods in the administration of courts, therefore its innovative potential is significant.

10. The Venice Commission suggested that stating the reasons for deviation from the ranking suggested by the President of the NJO should be an obligation of the President of the Republic.

It has to be made clear that the adjudicator of these applications is the President of the NJO or the President of the Curia. The President of the Republic receives no shortlist, therefore cannot deviate from its ranking. According to the Fundamental Law it is the President of the Republic who appoints professional judges, this is why the President of the NJO puts forward a proposal to President of the Republic concerning the appointment of the successful candidate. The Act does not explicitly state that the President of the Republic is obliged to appoint the judge according to the proposal, since traditions in this area made it unnecessary to regulate this issue. However, the President of the Republic has no competence to overrule the decision of the adjudicator of the application.

III. The upper age limit and retirement of judges

<u>The regulation after 1 January 2012</u>

The Fundamental Law establishes the upper age limit for judges differently than the regulation prior to 1 January 2012 (which had set the upper age limit at 70 years of age). Article 26 (2) declares that with the exception of the President of the Curia the service relationships of judges may exist till reaching the general retirement age. The Act on the Legal Status and Remuneration of Judges, with a view to the Fundamental Law, established

that the service relationships of judges shall be terminated upon reaching the applicable retirement age.

The action brought before the Court of Justice of the European Union by the European Commission with regard to the upper age limit of judges, prosecutors and notaries public

Because of the reduction of the upper age limit for judges, prosecutors and notaries public there is an infringement procedure initiated by the European Commission currently in progress against Hungary, in the course of which the European Commission has turned to the Court of Justice. In its action brought to the Court of Justice on 7 June 2012 the European Commission requested that the Court establish that Hungary by passing the regulation requiring the compulsory termination of the service relationships of judges prosecutors and notaries public at the age of 62 has failed to meet its obligations stemming from Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Decision of the Constitutional Court

The Constitutional Court produced its decision relating to the upper age limit for judges on 16 July 2012 in response to several constitutional complaints. The pertaining provisions of the Act on the Legal Status and Remuneration of Judges were found by the decision to be in conflict with the Fundamental Law and were thus annulled by the Constitutional Court with *"ex tunc"* effect. According to the Constitutional Court the upper age limit for judges should be objectively and uniformly defined in either the Fundamental Law or a cardinal act.

Regulations in the second amending proposal to the Fundamental Law of Hungary and the legislative proposal on the amending of acts related to the upper age limit applicable with regard to certain judicial legal relationships

During the visit of the Venice Commission on 20 September 2012 Hungary presented the regulations in the second amending proposal to the Fundamental Law of Hungary and the legislative proposal on the amending of acts related to the upper age limit applicable with regard to certain judicial legal relationships.

The former amends the transitional provisions of the Fundamental Law so as to make the completed 65th year the upper age limit for judges. The regulations regarding the upper age limit shall enter into force on 1 January 2013, however there are also provisions to give affected judges a further one year transitional period counting from the day of entry into force for preparation.

The amending proposal to the Fundamental Law declares that no persons receiving state pension in their own right shall fill judicial positions. Judges may ask for the suspension of the payment of their pensions, or, providing they fulfil the requirements for the establishment of judicial pension, they may – upon their own request – also be discharged.

Besides this, the amending proposal to the Fundamental Law also introduces a 62 year upper age limit with regard to persons in leadership positions – the President of the Curia and the NJO being exceptions – in order for court leaders to be able to stay for a period equivalent to at least half the fixed term assignment. The upper age limit for leadership positions does not affect the judicial service relationship, as judges whose leadership position is terminated upon reaching the upper age limit for leadership positions shall serve on for another 3 years as judges.

The Constitutional Court has declared that the future legal situation of those affected may be resolved either based on the rules of the Act on the Legal Status and Remuneration of Judges or by legislation. As a result, the second amending proposal to the Fundamental Law of Hungary and the legislative proposal on the amending of acts related to the upper age limit applicable with regard to certain judicial legal relationships have been submitted to Parliament. The legislative proposals do, in the view of the Government, extensively correspond to and respect the principle of judicial independence, a detailed evaluation of the provisions of the legislative proposals however, may only be undertaken in the light of the acts passed by Parliament. This is also underpinned by the fact that the procedure before the Court of Justice is still in progress.

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By Act CXI of 2012 the Government wished to refine the regulation in a manner that ensures beyond doubt the independence of the judiciary and prevents the emergence of the impression that the structure of the administration of the courts or its functioning may hamper the constitutional principle of judicial independence. The Government is of the opinion that the arguments presented above clearly express the dedication of the Hungarian Government and Parliament to the independence of courts while at the same time also clarifying the circle of aims that can realistically be achieved by legislation.

In the view of the Government, the regulation in force ensures the independence of the judiciary and its uninfluenced operation with regard to the application of both European Union and Hungarian legislation and fulfils the international obligations of Hungary to guarantee the operation of independent and impartial courts for the adjudication of legal disputes.