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(VENICE COMMISSION)

OPINION

**ON THE CARDINAL ACTS ON THE JUDICIARY
THAT WERE AMENDED FOLLOWING THE ADOPTION
OF OPINION CDL-AD(2012)001**

ON HUNGARY

**Adopted by the Venice Commission
at its 92nd Plenary Session
(Venice, 12-13 October 2012)**

on the basis of comments by

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I. Introduction

1. By letter of 6 July 2012, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Mr Herkel, asked the Venice Commission to provide an opinion on the amendments to the Cardinal acts on the judiciary that were adopted by the Hungarian Parliament following the adoption of opinion CDL-AD(2012)001 by the Venice Commission. The Monitoring Committee asked, in particular, whether these amendments have addressed all of the substantial concerns of the Venice Commission regarding the cardinal acts on the judiciary as voiced in opinion CDL-AD(2012)001.
2. The Commission invited Mr Grabenwarter, Mr Hoffmann-Riem, Ms Suchocka, Mr Tuori and Mr Velaers, who were rapporteurs for the previous opinion, to work also on this opinion.
3. On 20 September 2012, a delegation of the Commission, composed of Ms Suchocka, Mr Tuori and Mr Velaers, accompanied by Mr Dürr from the Secretariat, visited Budapest and had meetings with (in chronological order) Ms Handó, President of the National Judicial Office, Mr Rétvári, State Secretary, Ministry of Public Administration and Justice, Ambassador József, Head of Section, Ministry of Foreign Affairs, Mr Darák, President of the *Curia* and with the Constitutional, Judicial and Standing Orders Committee of the Hungarian Parliament, as well as with NGOs. The results of this visit are reflected in this opinion. The Venice Commission is grateful to the Hungarian authorities for the excellent co-operation in the organisation of this visit and for the explanations provided by the authorities and the NGOs.
4. This opinion was adopted by the Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), following discussions with the Hungarian Minister of State for Justice, Mr Répassy.

II. Preliminary remarks

5. At the request of Mr Martonyi, the Minister for Foreign Affairs of Hungary, the Venice Commission prepared an Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges (CDL-REF(2012)006, hereinafter “ALSRJ”) and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary (CDL-REF(2012)007, hereinafter “AOAC”).
6. At the 90th plenary session of the Venice Commission (Venice, 16-17 March 2012), Mr Répassy, Minister of State for Justice of Hungary, announced that his Government had introduced in Parliament draft amendments to these texts (CDL(2012)034), as a response to criticism, which had been expressed in the draft opinion.
7. The Opinion thus concludes that the “Venice Commission was informed that - as a reaction to the draft Opinion – the Government intends to introduce amendments to the judiciary acts in Parliament, which is to be welcomed” and offered its services to examine these proposals.
8. Following the adoption of Opinion CDL-AD(2012)001 (hereinafter, the “previous Opinion”) at the 90th plenary session, Mr Jagland, the Secretary General of the Council of Europe, visited Budapest on 21 March 2012 and held talks with Prime Minister Orbán on the implementation of the Opinion. During these discussions, Prime Minister Orbán expressed the readiness of his Government to go further in certain respects than the legislative proposals, which had been introduced in Parliament before the Commission adopted its opinion.

9. In order to come to a quick settlement of the most urgent issues, the Secretary General suggested, in a letter of 24 April 2012 addressed to the Hungarian Deputy Prime Minister Navracsics, to focus on three priority areas in the implementation of the Venice Commission's opinion:

1. the introduction of a provision that the wide discretionary powers of the President of the National Judicial Office (NJO) are subject to judicial review;
2. a revision of the procedure for the election of a new President of the NJO in order to prevent that a blocking minority of 1/3 of members of Parliament can indefinitely extend the mandate of the President of the NJO;
3. structural measures to strengthen the courts in Budapest in order to end the procedure of transfer of cases, which includes no criteria for the selection of cases to be transferred and for the selection of the court to receive the cases.

10. It was clear that a focus on these three priority areas would not mean that other recommendations of the Venice Commission should not be implemented, but the three priority areas should be addressed as a matter of urgency.

11. Following a further exchange of letters with the Secretary General, the Hungarian Government submitted the legislative proposal T/6393 on the amendment of the two Acts, the ALSRJ and the AOAC. The Hungarian Parliament adopted the proposal at its session on 2 July 2012 (CDL-REF(2012)034, hereinafter "the amendments").

12. This opinion examines for the main issues addressed in the previous Opinion, to which extent the Hungarian legislator implemented the recommendations made and to which extent further amendments are required. This opinion should also be read in context with Opinion CDL-AD(2011)016 on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

III. The president of the National Judicial Office

A. Appointment and removal

13. The amendments do not change the rules on the election and on the removal of the President of the NJO. According to Section 66 AOAC, the President of the NJO shall be elected by Parliament with a two-thirds majority from among the judges with an experience of at least 5 years of judicial service. In its previous opinion, the Venice Commission regretted that the Act did "not require any specific administrative or management qualities or any special experience in this field as one would expect" (paragraph 29).

14. **The Commission welcomes that the amendments attribute the National Judicial Council (NJC) the power to "express a preliminary opinion on persons nominated as President of the NJO and President of the *Curia* on the basis of a personal interview"** (Section 103.3.a AOAC).

15. **The Commission also welcomes that the President of the NJO cannot be re-elected.** Upon expiry of his or her mandate, **the post-holder is no longer automatically extended in office until the election of a successor by a two-thirds majority.** Now, the Vice-President of the NJO steps in as the interim President. According to Section 76.2.c AOAC, the Vice President is still chosen by the President alone. The President of the NJO can thus choose his or her own interim successor who can be kept in office by a blocking minority of 1/3 of members of Parliament. While the new regulation is certainly an improvement, **it would be preferable to avoid such a situation, e.g. by giving the NJC the power to appoint an interim President of the NJO.**

B. Powers of the President of the National Judicial Office

16. The most important criticism expressed in the previous Opinion related to the very wide powers of the President of the National Judicial Office. The Venice Commission was of the opinion that the President of the NJO became the “the crucial decision-maker of practically every aspect of the organisation of the judicial system” (paragraph 118). The Venice Commission found in particular:

- that very large and comprehensive powers were concentrated in the hands of this one person;
- that many of these powers were discretionary powers, as they were described in rather broad terms without clear criteria governing their application;
- that the powers had been invested in one person who lacks sufficient legitimacy and democratic accountability.

17. The amendments respond to a large extent to this criticism, though not fully.

a. Staff management powers

18. The amendments transfer important aspects of the staff management competences from the President of the NJO to the National Judicial Council (NJC). On the basis of the amendments, while the President of the NJO retains the power to deviate from the shortlist and propose the second or third candidate on the list for appointment as a judge, this power is however curtailed as the **NJC will determine in general the applicable principles**, which the President of the NJO will have to apply (Section 103.3.b AOAC) and he or she will **in each individual case also have to seek the consent of the NJC to a changing of the ranking** (Section 103.3.c AOAC).

19. As a result of these amendments, some of the most important powers of the President of the NJO will no longer be discretionary. The NJC will have the power to determine the principles (the criteria) to be applied by the President of the NJO when he or she wishes to deviate from the ranking of the applicants for appointment as a judge.

20. These **principles and criteria** are of the utmost importance for the **rule of law**¹ and for the independence of the judiciary. Therefore, the Commission suggested in its previous Opinion that these criteria be “legally established” (paragraph 43). While this may be the general understanding, **the Act should explicitly state that the principles are the applicable standard in review proceedings. Furthermore, the legislature should give guidelines to the NJC on the type and content of the criteria to be established by the NJC.**

b. Appointment of court leaders

21. The President of the NJO still has the power to **appoint the chairs and vice-chairs of courts** of appeal and tribunals, the division heads of courts of appeal and tribunals and the heads and deputy heads of the regional administrative and labour divisions. But **when the candidate has not obtained the approval of the reviewing board, the NJC will have to give its consent** (Section 103.3.c AOAC).

c. Initiation of legislation

22. The Venice Commission welcomes that Section 76.1.d AOAC has been reformulated in a more precise manner, making it clear that **the President of the NJO cannot initiate**

¹ See the Report on the Rule of Law (CDL-AD(2011)003rev), adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011),

legislation him or herself, but can only suggest to the President of the Republic, the Government, any Parliamentary Committee or any Member of Parliament, to initiate legislation.

C. Accountability of the President of the National Judicial Office

23. In its previous Opinion, the Commission insisted that the decisions of the President of the NJO should be reasoned explicitly. The amended Acts indeed increase the accountability of President of the NJO. According to the amended Section 5.1 AOAC, **“the President of the NJO shall – where applicable – state the reasons of his or her decisions”**. The President of the NJO informed the Commission’s delegation that in practice all her decisions are reasoned and that no exception is required. **If the clause “where applicable” could be interpreted as implying that the President of the NJO has discretion to state the reasons of his or her decisions, it should be removed and the reasoning of the decisions of the President of the NJO should be made the general rule.**

24. The transparency of the decisions of the President of the NJO is enhanced as he or she **will have to publish a report** with “the minutes of the interviews of applicants for a leading position that falls under the appointment authority of the President of the NJO” and a detailed report “with special regard to the criteria and circumstances of the exercise of his or her competences under Section 76.4.b and Section 76.5.b, h and m” (Section 77.7 AOAC).

25. The parliamentary control of the President of the NJO is strengthened as **members of Parliament will be able to ask for information from the President** about every single issue that concerns his or her duties, and as the President will have to report between the annual reports to the Parliamentary Committee on the Judiciary (Section 76.8.c AOAC).

26. In its previous Opinion, the Venice Commission also emphasised the importance of the decisions of the President of the NJO being subject to judicial review. It therefore **welcomes the possibility for judges to turn to the administrative and labour court or to the service court**, with regard to the staff management decisions of the President of the NJO.

27. Finally, **judges can submit a constitutional complaint to the Constitutional Court** against the rules adopted by the President of the NJO “if the conditions set out for constitutional complaints in the Act on the Constitutional Court are met” (Section 77/A.1 AOAC).

28. The control of the President of the NJO by the NJC can, to some extent, be deemed to be strengthened by the involvement of persons who are not judges with consultative rights in the meetings of the NJC.

29. **The accountability of the President of the NJO is strengthened** by the obligation to state reasons, additional reporting obligations, the possibility for members of Parliament to question the President on his or her activities, the possibility for judges to appeal to court both against the decisions and rules of the President of the NJO and the possibility for the NJC to invite non-judges to its sessions.

IV. The National Judicial Council

A. Powers

30. By increasing the powers of the National Judicial Council, the Hungarian legislator addressed one of the important criticisms of the Venice Commission in its previous Opinion. The Venice Commission regretted that the NJC – the body composed of judges - had scarcely any significant powers and played only a negligible role in the administration of the Judiciary (paragraph 50). The Commission even found that the system was not in compliance with Article

25.5 of the Fundamental Law, which states that “the organs of judicial self-government shall participate in the administration of the Courts.”

31. The amended Section 103 AOAC **transfers important powers to the NJC**. Without aiming to be exhaustive, these powers are notably:

1. to propose to the President of the NJO to exercise the power to make proposals for legislation concerning courts;
2. to approve the rules of procedure of the service court and publish it on the central website;
3. to order, as a matter of urgency, the adjudication of cases concerning a broad spectrum of society or cases of outstanding importance with a view to public interest;
4. to determine the principles to be applied by the President of the NJO when appointing a proceeding court in the interest of adjudicating cases within a reasonable period of time;
5. to express a preliminary opinion on persons nominated as President of the NJO and as President of the *Curia* on the basis of a personal interview;
6. to determine the principles to be applied by the President of the NJO and the President of the *Curia* when awarding a position to the applicant in the second or third position in the ranking;
7. to exercise the right of consent when the President of the NJO or the President of the *Curia* wishes to award a position to the applicant in the second or third position in the ranking;
8. to exercise the right of consent regarding the appointment of court leaders who did not receive the approval of the reviewing board;
9. to decide on the approval to the renewal of the appointments of Presidents and Vice-Presidents of the regional courts of appeal, tribunals, administrative and labour courts and district courts if the President or the Vice President has already served two terms of office in the same position;
10. to publish an opinion annually on the practice of the President of the NJO and the President of the *Curia* with respect to evaluating the applications of judges and court leaders;
11. to appoint the President and members of the Service Court;
12. to approve, in the case of resignation of a judge, a notice period shorter than 3 months, and to relieve the judge from his/her work related duties for the notice period in full or in part; and
13. in the case of a judge retiring or reaching the upper-age limit, to make a decision concerning the relief of the judge of his/her duties during the notice period in line with the Act on the Legal Status and Remuneration of Judges.

32. As the powers, which the NJC will have to exercise, relate to very important issues pertaining the general administration the distribution of cases, the measurement of the workload, and – last but not least - human resources (appointment, evaluation, retirement), the assessment expressed in Section 88.1 AOAC that the NJC can be considered as a “supervisory body of the central administration of Courts” can to a certain extent be justified. However, the powers of the President of the NJO still clearly prevail over those of the NJC, also because the current Council, composed exclusively of judges, cannot enjoy a true autonomy and independence from the NJO.

B. Composition

33. In its previous Opinion, the Venice Commission emphasised the importance of ensuring that not only judges, but also the “users of the judicial system” such as advocates, representatives of the civil society and academia, have a seat in the NJC, as uniformity “can easily lead to mere introspection and a lack of both public accountability and understanding of external needs and demands” (paragraph 45).

34. The Hungarian legislator addressed this criticism in Section 106 AOAC. Although the NJC is composed solely by judges, the external perspective is now introduced, as **other persons than judges persons will be able to attend the meeting of the NJC with consultative vote**. In addition to the President of the NJO, the Minister for Justice and the Prosecutor General, Section 106 AOAC refers to the President of the Hungarian Bar Association, the President of the Hungarian Chamber of Notaries Public as well as experts and representatives of any civil society and other interest groups, which can be invited by the President of the NJC, but who are not members of the NJC. Although the Venice Commission acknowledges that States – if they are to establish a judicial council – have a large margin of appreciation in regulating the composition of judicial councils, the Commission is still of the opinion that the composition of the Council should be “pluralistic”² and the Council should not be composed of judges only. **It is important that such a pluralistic composition is achieved not only by inviting non-judges as guests, but also by including them as full members with voting rights.**

35. The Hungarian legislator maintained the **system of continuing rotation of the presidency every six months** (Section 89.2 AOAC) and **the membership in the NJC for only one term**. During discussions on whether the NJC could play a role in exercising the interim presidency of the NJO, the Commission’s delegation was told that the presidents of the NJC exercise this function in addition to their ordinary judicial tasks and that at a given moment a first instance judge from the countryside could be the President of the NJC who could not effectively exercise any nationwide executive functions. Under such circumstances, it is difficult to see how the NJC could effectively control the President of the NJO. The Venice Commission **remains critical of this system, which weakens the NJC and, as a consequence, its capacity to control the activities of the President of the NJO.**

C. Functioning of the National Judicial Council

36. The Venice Commission welcomes the fact that the Hungarian legislator decided to **reform the rules on the functioning of the NJC** in order to increase its efficiency. Henceforth, the meeting of the NJC shall be convened and the proposed items shall be put on the agenda if proposed by at least one-third of the members of the NJC (Section 105.2 AOAC). There are now clear rules on the replacement of members who are unable to attend a meeting (Section 106.2 AOAC). Moreover, the meeting shall be open to judges, except when the NJC orders a closed meeting to be held. The NJC may order a closed meeting, “especially if this is indispensable for the purpose of protecting classified information, business secrets or any other secret defined in a specific legal act, furthermore if that is justified for the purpose of protecting the personal rights of the persons heard at the meeting” (Section 106.3 AOAC).

37. It is not clear whether the NJC can only order a closed meeting in the circumstances explicitly mentioned in this provision. The provision may not go far enough depending on how the term “especially” is interpreted. In its previous Opinion, the Venice Commission underlined that it could be negative for the independence of the NJC that the President of the NJO will be able to attend even the *in camera* meetings of the NJC, as the mere presence of the President of the NJO in every meeting may prevent critical thoughts from being expressed (paragraph 40). Therefore, it should at least be possible for the NJC to order a closed meeting whenever it thinks it necessary to discuss the functioning of the NJO and its Presidency.

² CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

V. Appointments of Judges

38. In its previous Opinion, the Venice Commission pointed out that the substantive and procedural rules on the appointments of judges did “not contain sufficient safeguards in order to exclude that improper considerations play a role” (paragraph 36). More specifically, the Commission emphasised:

1. that it would no longer be a collective organ, but a single person, the President of the NJO, who will propose the applicants for nomination, without being bound by the ranking drawn up on the basis of objective criteria by the “panel of judges” (paragraph 60);
2. that the President exercises an almost full discretionary power, as he or she can deviate from the shortlist and propose the second or third candidate on the list, without being bound by objective criteria established by law (paragraph 58);
3. that there is no judicial review of the use of this discretionary power by the President of the NJO, as the decision cannot be appealed to a court (paragraph 58).

39. To a large extent, this criticism seems to have been answered in the amendments. The power of the President will no longer be discretionary. He or she will still be able to deviate from the ranking, but on two conditions. The **President of the NJO can only change the ranking if he or she applies the general principles established by the NJC** (Sections 103.3.b; 132.4-6 AOAC and Section 15.2 ALSRJ) **and if, in the specific case, the NJC consents to this change** (Section 103.3.c AOAC). “The candidate may only be appointed if the NJC has agreed to his/her appointment” (Section 132.6 AOAC). The system described in the amended Act implies that the President of the NJO cannot propose an applicant for nomination without either the consent of the reviewing board (the panel of judges) or the NJC.

40. The amendments **significantly improve the transparency of the use of the appointing powers by the President of the NJO**. He or she will have to state the detailed reasons in writing of any decision departing from the recommendation of the reviewing board (Section 132.4 AOAC) and he or she will also have to inform the NJC of the reasons for the deviation and shall expose the reasons at the next meeting of the NJC (Section 132.5 AOAC).

41. Finally, the amendments provide for a possibility for judicial review of the decision on the appointment of a judge. The unsuccessful applicants can submit an objection against the appointment of the successful candidate, “if the successful candidate does not meet the requirements for becoming a judge laid down in law, or if the successful candidate does not meet the conditions listed in the call for applications” (Section 21 ALSRJ).

42. Some aspects of the new regulation however are still prone to criticism. The **principles to be applied by the President of the NJO when deviating from the shortlist** will be determined by the NJC. In its previous Opinion, the Venice Commission took the stance that “in order to enable the courts to review these decisions, the law would have to indicate the criteria to be used by the President of the NJO” (paragraph 58). It seems that the system set up by the amendments remains within the margin of appreciation of the national legislator, on condition that these principles established by the NJC will be objective, sufficiently precise, transparent, binding for the President of the NJO and that they will be enforceable in a court of law. The principles are only adopted as a decision of the NJC. The Commission recommends to **state explicitly in the Act that the principles are the applicable standard in review proceedings**.

43. The system established by the amendments implies that the President of the NJO can propose an applicant for nomination only if either he or she has been ranked first by the reviewing board or, when he or she has been ranked second or third by the reviewing board, if the NJC agrees to a change in ranking.

44. The system however also implies that **the President of the NJO can declare unsuccessful an application procedure when he or she changed the ranking but this change is not approved by the NJC. This means that the President can block the career of a candidate, even if he or she has been ranked first by the reviewing board and if the NJC disagrees with the change in ranking.** Arguments put forward by the Government for this regulation are that either the first ranked candidate or even all three candidates might not fulfil the criteria for appointment. However, if none of the candidates fulfil the conditions of the application, this can in any case not be solved by a change in ranking. If there are only doubts regarding to whether the candidate ranked first fulfils these conditions, the judgment of the NJC as a collective organ should prevail over that of the President of the NJO. It is therefore difficult to justify why a candidate who was considered to be the best by the reviewing board and whose first rank was confirmed by the NJC, should not be appointed. The President of the NJO informed the Commission's delegation that in practice there would be no need for the possibility to declare the procedure unsuccessful because the NJC would accept a change in the ranking proposed by her if it was duly justified. The Venice Commission therefore **recommends that the possibility of declaring the appointment procedure "unsuccessful" in this case be removed and that the President of the NJO be obliged to make a proposal for appointment of the candidate ranked first when the NJC disagrees with the change in the ranking.**

45. **The judicial review of the decisions on the appointments of judges seems to be rather limited, as it only pertains to the compliance of the successful candidate with "the requirements for becoming a judge laid down in law" or "with the conditions listed in the call for applications"** (Section 21.4 ALSRJ). This means that when the successful candidate meets these requirements and conditions, no judicial review will be possible, even if this candidate was appointed following a deviation from the ranking, without applying the general principles established by the NJC and/or without the consent of the NJC with this deviation. This also seems to imply that **an unsuccessful candidate cannot contest the ranking on the ground that it was not based on objective criteria based on merit**, but on erroneous personal data or on data which cannot be deemed to be relevant. In order to avoid arbitrary decisions, it is important that judicial review also relate to these objections.

VI. Appointments of court leaders

46. In its previous Opinion, the Venice Commission found that the AOAC gave the President of the NJO "excessive weight in the appointment of court presidents", as he or she "can go ahead with such appointments, even if the NJC disagrees" (paragraph 63). The Commission recommended that the AOAC "should be amended to provide for better checks of the power of the President of the NJO" (paragraph 65).

47. The amendments adequately meet this criticism, as henceforth **the appointment of the candidate who did not receive the approval of the reviewing board, may only take place if the NJC gives its consent** (Section 103.3.d AOAC). Moreover, **the NJC shall decide on the approval of the renewal of the appointments of court leaders** (Section 103.3.e AOAC). Finally, **the NJC appoints the President and members of the Service Court.**

VII. Initial appointments of judges for a fixed term - probationary periods

48. The Venice Commission has been critical of the (renewable) probationary periods³ of three years, foreseen in Sections 3.4 and 23.1 ALSRJ (paragraph 66). It recommended that "the Law should provide *expressis verbis* for a maximum limit of cumulative probationary periods with the

³ On the issue of probationary periods see also Section II.4 of the Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004, adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010).

aim of balancing the need for judicial independence on the one hand with the interest of the state on the other.” (paragraph 67)

49. The amendments seem to meet this criticism in Section 25.2 ALSRJ. **The probationary period is limited to a maximum period of three years.** A renewed appointment for a fixed term is only possible when the judge has been prevented from performing actual judicial work during 18 months in his or her first probationary period; in this case the amendments provide for an automatic appointment for another fixed term until the judge has completed the period of actual judicial work necessary. The amended Act eliminates the qualification “apt, further examination necessary”, which entailed a further appointment for a fixed period. Henceforth, after the first period the qualification can only be “apt” or “unfit”. No further appointment for a fixed period may occur.

VIII. Internal independence – uniformity / standardisation procedure

50. In the previous Opinion, the Venice Commission pointed out different ways in which the *Curia* and the court leaders can interfere in the administration of justice of the lower courts. The *Curia* ensures the uniformity of the application of the law by adopting “an obligatory decision applicable for courts” (Section 24.1.c AOAC), by “publishing court rulings and decisions or authoritative rulings” (Sections 24.1.d and 31 AOAC), by making a “legal standardisation decision” (Sections 32 to 44 AOAC) and by conducting an analysis of the jurisprudence.

51. Crucially, chairs and division heads of courts and tribunals continuously monitor the administration of justice by the courts under their supervision and have to inform the higher levels of judgments handed down contrary to ‘theoretical issues’ and ‘theoretical grounds’ (Section 26.2 and 26.4 AOAC). Non-compliance with the rulings of the higher courts could have a negative influence on the evaluation of the judges and thus on their career.

52. The Venice Commission assessed that the uniformity procedure and its system of supervision by the court presidents might have a chilling effect on the independence of the individual judge (paragraph 73) and that a uniformity procedure may only be acceptable if it does not have a negative influence on the career of the judges (paragraph 74).

53. The Hungarian legislator has not answered this criticism. The delegation of the Venice Commission learned, however, that in practice, the information about issues to be subject of the uniformity procedure most often reaches the *Curia* through other channels than through the supervision by chairs and division heads of courts and tribunals, which does not seem to be required in practice. **The supervision of judges by chairs and division heads of courts and tribunals should be abolished.**

IX. Irremovability of judges (temporary and permanent transfers of judges)

54. The Venice Commission has criticised the possibilities to transfer judges. As concerns temporary transfers, it found that the possibility for the chair of the tribunal to “reassign judges without their consent to a judicial position at another service post on a temporary basis out of service interests every three years for a maximum of one year” (Section 31 ALSRJ) was “too generally phrased and excessively large” (paragraph 78). This criticism has not been answered sufficiently by the Hungarian Legislator. The new criterion - “to ensure an even distribution of caseload between courts” - is somewhat more precise, but still too broad. **The possibility to transfer a judge for “one year every three years” has been maintained despite the criticism of the Venice Commission (paragraph 78). It should not be possible to transfer a judge so often.**⁴

⁴ The Austrian system of the “*Sprengelrichter*” might serve for inspiration. According to Article 88a of the Austrian Federal Constitution, *Sprengelrichter* are (usually younger) judges who are designated in advance for being

55. The Venice Commission also criticised the harsh consequences of a refusal to accept a permanent transfer proposed by the President of the NJO, in case his or her court ceases to operate or when its competences or territorial jurisdiction is reduced to such an extent that it no longer permits the employment of the judge (Section 34 ALSRJ). If the judge did not agree with the transfer, he or she was automatically “exempted from office” for six months and his or her service relationship was terminated. The Venice Commission assessed that this was an “overly harsh automatic sanction” and asked for “clear and proportional rules for such actions as well as a right of appeal” (paragraph 79).

56. This criticism has been addressed. Henceforth, the **judge will have the opportunity to choose between the available judicial posts at courts at the same level, which are offered to him or her**. If there are no available posts or if the judge does not accept any of the posts “the President of the NJO shall transfer the judge, with a consideration of the fair interests of the judge, to a court on the same level of the judiciary or on the next inferior level” (Section 34.2 ALSRJ). **The Commission welcomes the fact that the amendments provide for judicial review by the administrative and labour court in the event of a transfer. However, this should be a full review on procedure and substance of the decision** (Section 34.4 ALSRJ).

X. Evaluation and disciplinary procedures

57. As was recommended by the Venice Commission (paragraphs 80 and 84) the evaluation and disciplinary procedures have been amended in order to provide sufficient fair trial guarantees.

58. Henceforth **the president of the court shall provide the judge subject to an evaluation, an opportunity to present his or her position regarding the assessment in the form of a personal hearing** (Section 81.1 ALSRJ), **the investigating commissioner shall hear the judge subject to disciplinary proceedings** (Section 84.2 ALSRJ) and rules on the composition of the disciplinary chambers and on the distribution of the cases will be introduced in the rules of procedure of the service court (Section 104/A ALSRJ).

59. It has to be deplored, however, that **the recommendation to introduce criteria for the application of disciplinary sanctions** (paragraph 84) **has not been followed**.

XI. The transfer of cases

60. The Venice Commission strongly criticised the sweeping powers of the President of the NJO to transfer cases to another court on the basis of the vague criterion of “adjudicating cases within a reasonable period of time”. It insisted on the importance of the “right to a lawful judge” and emphasised that the problems caused by the extraordinary and disproportionate workload of some courts should be solved by less intrusive means, in particular by providing for a sufficient number of judges and court staff (paragraph 90), by redesigning the court districts or by voluntary transfer of judges (paragraph 94). The Commission pointed out that “in general, a system of transferring cases should be avoided altogether, even if it is completely objective.” It also has to be recalled that the Hungarian Constitutional Court already had assessed the system of transfer of cases and the previous act was found not in compliance with the Constitution then in force but was then reintroduced as part of the Transitory Provisions to the Fundamental Law.⁵ If a transfer of cases were however exceptionally maintained as a

transferred in case of need elsewhere. This avoids *ad hoc* transfers. In addition, no more than 3 per cent of the judges of a court can be *Sprengelrichter* and they can be assigned to another court within the same court district only under strict criteria.

⁵ Judgment no. 166/2011 of 20 December 2011.

transitional solution, it should be based on objective criteria, both for the selection of these cases and the designation of the receiving court.

A. Transitional character of the system

61. This criticism has to some extent been answered by the Hungarian legislator. The amended Section 62.1 AOAC provides that **the transfer of cases will be “an exception”. However, it provides no time-limit when the transferring of cases should finally end.**

62. In their dialogue with the Secretary General of the Council of Europe, the Hungarian authorities promised to solve the problem by other, structural means, i.e. by strengthening the courts in Budapest, as suggested by the Venice Commission. The Commission's delegation was informed that one of the problems was the availability of court rooms. Additional space had been rented and would be available soon. These new court rooms could be used in criminal cases, where the procedural code did not require a trial at the seat of the court.

63. As concerns personnel resources, the Commission would suggest that the courts in the capital be strengthened through additional staff, which, following the Constitutional Court judgment no. 33/2012 (VII. 17) AB határozat of 16 July 2012, should be available thanks to the reintegration of judges who had left the judiciary because of early retirement. The new judges who were appointed as a replacement could be integrated in Budapest.

B. Objective criteria for the designation of the receiving court

64. The Hungarian legislator took up the suggestion of the Venice Commission that objective criteria for such case assignments are indispensable and that the NJC should have a decisive role to play in the establishment of such criteria. The amended Section 103.2a.b AOAC provides that **the NJC “shall determine the principles to be applied by the President of the NJO when appointing a proceeding court** in the context of the use of the power to appoint a different proceeding court in the interest of adjudicating cases within a reasonable period of time.” Moreover, Section 62.1 AOAC provides that the President of the NJO can, as an exception, appoint a court “taking into account the principles laid down by the NJC” “if the case or a specific group of cases received by the court during a given period cannot otherwise be assessed within a reasonable time due to the extraordinary and disproportionate workload of the court and if the appointment does not result in a disproportionate burden for the appointed court.” (Section 62.1 AOAC).

65. While it has to be welcomed that the NJC shall have a say in the transfer of cases and shall establish abstract and general criteria, which aim at narrowing the discretion of the President of the NJO, the binding force of the NJC's principles remains doubtful. First, the term “principle” refers to rather general and not very detailed rules, which allow for quite some discretion in their application. Secondly, **the President is not bound by the principles, but shall only “take them into account”** and “present their application” (i.e. report on their application). Thirdly, the newly introduced **judicial review**, which had been suggested by the Venice Commission (CDL-AD(2012)001, paragraph 91) **is restricted to compliance with “legal provisions”, which would not include the principles of the NJC.**

66. At its visit in Budapest, the delegation of the Commission was informed that the principles are considered to be binding upon the President of the NJO and that the *Curia* had already applied them as a standard in two review cases. While this is to be welcomed, the Commission recommends to **state also explicitly in the Act that the principles are the applicable binding standard in review proceedings.**

67. Furthermore, the organisation of the judicial review is not satisfactory. The **time limit to appeal against the decision of the President of the NJO** in Section 63.3 AOAC is **eight**

days from the publication of the decision on the website. Taking into account that extensions are explicitly excluded, the **notification to the parties should be the starting point for the deadline.**

68. In addition, the benefits of the judicial review are jeopardised by the amendment to Section 62 AOAC, which allows **the President of the NJO to assign a case to another court, even in a situation when the Curia has annulled a previous appointment decision in the same case.** If an appeal against the decision was successful, the originally competent court (typically in Budapest) should hear the case.

C. Objective criteria for the selection of cases

69. Finally, it has to be made clear that **the criteria to be established by the NJC do not only pertain to the appointment of the court, but also to the selection of the cases,** and that they should be sufficiently precise in order to exclude any suspicion of a lack of objectivity. **Even for a transitional period, the system of transfer of cases is acceptable only if the NJC obtained the legal mandate and were able to elaborate objective principles for the selection of cases (e.g. by open random selection), which would bind both the President of the transferring court and the President of the NJO. The right to appeal against a transfer should also cover the decision to select a case for transfer to another court.**

70. The delegation of the Commission was informed that 33 cases had been transferred, out of which 25 were economic cases and 5 penal cases. This distribution of cases seems to be somewhat imbalanced because it depends only on the initiative of the respective court president whether cases are proposed for transfer. The Acts do not give the NJC the mandate to adopt objective principles on the selection of cases. Without such a legal mandate, the NJC cannot adopt binding principles.

71. The President of the NJO also informed the delegation that she intended to have all 'key' cases transferred. It seems that such cases are defined in civil procedure as those involving a claim for more than 400 million forint and in the criminal procedure law, they are serious cases such as homicide or organised crime. The problem with such a selection of cases, which might be objective if it were applied without exception to all such key cases, is that they can be considered to be the least fit for transfer. They require specific expertise which the small, "under-burdened" courts often lack. In addition, because of their general social or political significance, exactly in these cases - in, for instance, high-publicity corruption cases - the right to a lawful judge is especially important.

72. The Venice Commission was informed by the Hungarian authorities that, in their opinion, it is impossible to elaborate objective criteria for the selection of cases and that only the President of the 'sending court' can judge whether a case should be transferred, taking into account the specific features of the case as well as the workload and the staff capacities of that court.

D. Assessment

74. As the transitional character of the system is not guaranteed by providing a precise time-limit when the transferring of cases will finally end and as it seems impossible to elaborate objective criteria for the selection of cases, **the Venice Commission strongly disagrees with the system of transferring cases because it is not in compliance with the principle of the lawful judge, which is an essential component of the rule of law.**

E. Prosecutor General

73. A closely related issue is the possibility for the Prosecutor General to give instructions that charges be brought before a court other than the court of general competence but with the same jurisdiction (Article 11.4 of the Transitional Provisions to the Fundamental Law). The Venice Commission recalls that **this competence of the Prosecutor General needs to be removed** (CDL-AD(2012)008, paragraph 84).

XII. Transitional issues - Retirement of judges and President of the Curia

74. The amendments to the ALSRJ did not pertain to the criticisms expressed in the Opinion of the Venice Commission on the provisions on the retirement age. All those judges who would have reached the age limit by 31 December 2012 at the latest were released by presidential order of 7 July 2012.

75. The Venice Commission acknowledges the judgment no. 33/2012 (VII. 17) AB határozat of 16 July 2012 of the Hungarian Constitutional Court, which declared the sudden reduction of the upper-age limit for judges unconstitutional. It trusts that the Hungarian authorities will respect this judgment and ensure its implementation, i. e. re-instate the former judges to their previous positions. It seems that the labour courts have started to reinstate the retired judges. The Venice Commission's delegation has however learned that the implementation of this judgment has resulted in considerable legal uncertainty. While the legal basis of early retirement was annulled with *ex tunc* effect, the individual resolutions of the President of Hungary, which dismissed some ten per cent of the Hungarian judges, are considered to remain in force, even if their legal basis had ceased to exist. The President of Hungary did not repeal them. The Legislator should adopt provisions re-instating the dismissed judges in their previous position without requiring them to go through a re-appointment procedure.

76. The President of the NJO invited the judges concerned to appeal to the labour courts in order to have their dismissal reversed. Several judges already won their cases before the labour courts, but these judgments were appealed against by the President of the NJO because she disagreed with their reasoning. Most importantly, even final judgments of the labour courts would not result in a reinstatement of the judges concerned in their previous position, but they will go through a new appointment process and could be assigned to other courts than those, which they belonged to before their dismissal.

77. In September 2012, the Hungarian Government introduced the legislative proposal T/8289, which would amend the Transitory Provisions⁶ of the Fundamental Law, introducing a new retirement age of 65 years for judges and prosecutors. Judges who are older than 65 would (after their re-appointment) be able to continue in office for one year before they would have to retire. The legislative proposal remains however silent on how the dismissed judges should be reinstated, leaving open only the way through the labour courts.

78. The Commission's delegation was told that automatic reinstatement would be impossible because new judges had been appointed in the meantime and not all judges wished to be reinstated. The Commission is of the opinion that it should be possible to find a legislative solution that takes into account the various cases.

79. Furthermore, the legislative proposal provides that judges who are over the age of 62 cannot have leading positions in the courts. This concerns reinstated judges but in the future also all other judges who turn 63. They would lose their leading position and would have to terminate their career as an ordinary judge. Apart from the fact that these judges are the most

⁶ It seems odd that the proposal intends to amend the Transitory Provisions in order to introduce an obviously permanent provision on the retirement age.

experienced to lead the courts, such a limitation constitutes evident age discrimination. The delegation was told that these experienced judges should train younger judges rather than hold leading positions in courts. This argument is hard to follow because younger judges learn from older ones precisely when they see how they act in leading positions.

80. The situation of the dismissed judges is very unsatisfactory. **The Legislator should adopt provisions re-instating dismissed judges who so wish in their previous position without requiring them to go through a re-appointment procedure.**

81. The Hungarian Legislator did not address the remarks on the eligibility to become President of the *Curia*, which should be revised.

XIII. Level of regulation

82. As to the level of regulation the Venice Commission found the constitutional guarantees, principles and structures regarding the judiciary underdeveloped. The major part of regulations should have been left to ordinary legislation instead of cardinal laws, while some provisions should not have been subject to a law at all (CDL-AD(2012)001, paragraphs 16 *et seq*). The Hungarian authorities have not taken up these suggestions at all. **The Legislator should revise the judiciary acts in order to re-attribute cardinal or ordinary law status to each section as required by the contents of the provision.**

XIV. Conclusion

83. The amendments of 2 July 2012 address most remarks made in the Opinion CDL-AD(2012)001 of the Venice Commission of 16-17 March 2012 on the Act CLXI of 2011 on the organisation and administration of courts and on the Act CLXII of 2011 on the legal status and remuneration of judges of Hungary.

84. In its Opinion, the Venice Commission had fully acknowledged the need to reform the judicial system in Hungary in order to establish an efficient and operational administration of justice. However, the Commission concluded that the reform undertaken introduced a unique system of judicial administration, which existed in no other European country and which threatened the independence of the judiciary.

85. The amendments constitute a commendable step in the right direction. Focussing on the issues raised by the Secretary General of the Council of Europe, they take into account many of the major criticisms that were expressed in the previous Opinion.

86. While the President of the National Judicial Office (NJO) remains the pivotal element of the Hungarian judicial system, a number of his or her competences have been transferred to the National Judicial Council. The Commission welcomes in particular that:

1. the amendments attribute the power to the National Judicial Council (NJC) to express a preliminary opinion on persons nominated as President of the NJO and as President of the *Curia* on the basis of a personal interview;
2. the President of the NJO cannot be re-elected;
3. the mandate of the President of the NJO is no longer automatically extended until the election of a successor by a two-thirds majority in Parliament;
4. the NJC will determine the applicable principles, which the President of the NJO will have to apply when deviating from the ranking in the appointment of judges;
5. the President of the NJO will have to seek the consent of the NJC to a change in the ranking in the appointment of judges;
6. the President of the NJO has to obtain the approval of the NJC to appoint the chairs and vice-chairs of courts when the candidate has not obtained the approval of the reviewing board;

7. the amendments clarify that the President of the NJO cannot initiate legislation him- or herself but can only suggest to the competent authorities to do so;
8. the reporting obligations of the President of the NJO have been enhanced and the members of Parliament can put specific questions to the President of the NJO;
9. the rules of the President of the NJO can be submitted to the Constitutional Court if the conditions for a constitutional complaint are met;
10. judges can turn to the administrative and labour court or to the service court against the President of the NJO's decision not to appoint them;
11. the competences of the NJC have been widened substantially;
12. out-of-court persons will be able to attend the meetings of the NJC;
13. the rules on the functioning of the NJC have been improved;
14. the President of the NJO can only change the ranking of candidate judges if he or she applies the general principles established by the NJC and the NJC has to approve such a deviation in each individual case;
15. the transparency of the use of appointing powers by the President of the NJO has been improved;
16. unsuccessful applicants can submit an objection against the appointment of the successful candidate;
17. court leaders who did not receive the approval of the reviewing board can only be appointed with the consent of the NJC;
18. the NJC decides on the approval of the renewal of the appointments of court leaders;
19. the NJC appoints the president and the members of the Service Court;
20. probationary periods are limited to a maximum period of three years;
21. judges will have an opportunity to choose between the available judicial posts at courts at the same level if they are transferred;
22. administrative and labour courts can review the transfer of a judge (this review is restricted to the procedure followed in the decision, however);
23. the president of a court shall provide the judge being evaluated an opportunity to present his or her position regarding the assessment during a personal hearing;
24. the investigating commissioner shall be obliged to hear the judge subject to disciplinary proceedings;
25. the transfer of cases should be "an exception" (even though no time-limit for the possibility of transferring cases has been established);
26. the NJC will determine the principles to be applied by the President of the NJO when appointing a proceeding (receiving) court;
27. the (limited) judicial control of the transfer of cases.

87. The Venice Commission welcomes these amendments, which result in an improved accountability of the President of the NJO. The judicial review of the decisions of the President of the NJO, the reduction of his or her powers and the transfer of some of these powers to the NJC will reduce the overwhelming role of the President of the NJO and the NJC can now, to some extent, be considered to be an organ of judicial self-control. The principles and criteria, which the NJC will have to establish, will constitute an objective basis for the reasoning of the decisions of the President.

88. Nonetheless, the powers of the President of the NJO remain very extensive to be wielded by a single person and their effective supervision remains difficult. These amendments do not fully dispel the Venice Commission's concerns. From the points which should be addressed, two elements are of a pressing nature.

89. The first issue is the implementation of the Constitutional Court judgment no. 33/2012 (VII. 17) AB határozat of 16 July 2012, annulling the early retirement of all judges over 62 years. The Legislator should adopt provisions re-instating the dismissed judges in their previous position without requiring them to go through a re-appointment procedure. Any additional age

discrimination removing judges who are older than 62 years from leading positions should be avoided.

90. The second urgent topic is the procedure of the transfer of cases. While the NJC adopted criteria on the selection of the court, which is to receive the case, the most critical decision is the selection of individual cases by the president of the overburdened court. The amendments do not provide for the establishment of criteria for this selection. The NJC should be mandated to establish such criteria, which would have to be objective (e.g. a transparent random selection). The conformity of the selection of a case with such criteria should be the standard for the judicial review of the transfer.

91. In addition, further issues are linked to the transfer of cases:

1. the date of notification of the transfer to the parties should be the starting point for the 8 days deadline for appeals against transfers, not the date of their publication on the web-site;
2. in case of annulment by the *Curia* of the assignment of a case to another court, the case should be dealt with by the original court and the President of the NJO should not be able to assign a case to another court instead;
3. even if the *Curia* uses the NJC's principles on the transfer of cases, the President of the NJO should be explicitly bound by them (and not only "take them into account") and the judicial review of the transfer of cases should not be restricted to compliance with "legal provisions" but should explicitly include the principles established by the NJC;
4. as a contradiction of the principle of equality of arms, the competence of the Prosecutor General to give instructions that charges be brought before a court other than the court of general competence should be removed.

92. A solution to the problem of the transfer of cases is urgent not only because it relates to structural issues but, in addition, it directly affects the right to a fair trial. For this reason, this topic was a particular focus of the dialogue between the Secretary General of the Council of Europe and the Hungarian authorities. The progress in this issue is commendable, but insufficient. The system of the transferring of cases is not in compliance with the principle of the lawful judge, which is essential to the rule of law; it should be revised. Pending a solution of this problem, no further transfers should be made.

93. Further points which need to be addressed are:

5. the Vice-President of the NJO, who is selected by the President of the NJO, should not become the interim President of the NJO;
6. the obligation of the President of the NJO to state the reasons of his or her decisions should be made a general rule; the limitation by the clause "where applicable" should be removed if it could be interpreted as giving discretion to the President of the NJO whether or not to state reasons for his or her decisions;
7. the NJC's principles to be applied by the President of the NJO when deviating from the shortlist of candidate judges should explicitly be made opposable to the President of the NJO in judicial proceedings;
8. the possibility for the President of the NJO to declare the appointment procedure unsuccessful should be removed; the President of the NJO should be obliged to make a proposal for appointment of the candidate ranked first when the NJC disagrees with the change of the ranking;
9. an unsuccessful candidate should be able to contest the ranking of candidate judges on the ground that it was not based on objective criteria based on merit and not only on procedural grounds;
10. the supervision of judges by chairs and division heads of courts and tribunals in the uniformisation procedure should be removed;
11. the maximum frequency of transfers of judges ("one year every three years") should be reduced substantially; it should not be possible to transfer a judge so often;

12. the Legislator should revise the judiciary acts in order to re-attribute cardinal or ordinary law level status to each section as required by the contents of the provision;
 13. the NJC should not be composed exclusively of judges; the 'users of the judicial system' such as advocates, representatives of civil society and the academia should be included as full members (not upon *ad hoc* invitation and with consultative status only)⁷;
 14. the system of continuing rotation of the presidency and the membership in the NJC for only one term, which weakens the NJC, should be reconsidered.
94. The Commission recommends including these points in the current reform process in Parliament.
95. The Venice Commission remains at the disposal of the Hungarian authorities for assistance in the implementation of these recommendations.

⁷ On the importance of a pluralistic composition of judicial councils, see the Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004, adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010).