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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

HUNGARY

OPINION

**ON THE LAW
ON ADMINISTRATIVE COURTS**

AND

**ON THE LAW
ON THE ENTRY INTO FORCE
OF THE LAW ON ADMINISTRATIVE COURTS
AND CERTAIN TRANSITIONAL RULES**

**Adopted by the Venice Commission
at its 118th Plenary Session
(Venice, 15-16 March 2019)**

on the basis of comments by

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I. Introduction

1. In a letter dated 9 November 2018, the Minister of Justice of Hungary, Mr Laszlo Trocsanyi, requested the opinion of the Venice Commission on the provisions of the Law on administrative courts (hereinafter "the Law") and the Law on the entry into force of the Law on administrative courts and certain transitional rules (hereinafter "the Transitional Rules").
2. Mr Grabenwarter (Member, Austria), Ms Monika Hermanns (Substitute member, Germany), Mr Bertrand Mathieu (Member, Monaco) and Ms Katerina Šimáčková (Substitute member, Czech Republic) were asked to be rapporteurs for the present opinion. Mr Mário Aroso de Almeida (Portugal), DGI expert, was invited to join the rapporteur group tasked with this opinion.
3. A Venice Commission delegation, accompanied by Mr Thomas Markert, Director, Secretary of the Venice Commission, and Ms Artemiza Chisca, Head of the Division of Democratic Institutions and Fundamental Rights, travelled to Budapest on 4 and 5 February 2019, where the delegation held talks with the Minister of Justice, the National Office for the Judiciary, the National Judicial Council, the Constitutional Court, relevant parliamentary committees, professional associations of judges, the Hungarian Bar Association and also civil society representatives. The Venice Commission thanks the Hungarian authorities for the excellent organisation of the visit.
4. The present opinion was drawn up on the basis of the comments of the rapporteurs and the findings of the visit to Budapest.
5. On 13 March 2019, the Minister of Justice transmitted to the Venice Commission comments from his Ministry (hereinafter the "Comments"). At the same time, he forwarded amendments prepared in the light of the Commission's draft opinion, which have been submitted to Parliament on 12 March 2019.
6. This opinion was examined by the Sub-Commission on the Judiciary on 14 March 2019. Following an exchange of views with the Minister of Justice, it was adopted by the Venice Commission at its 118th plenary session (Venice, 15-16 March 2019).

II. Background

7. On 12 December 2018, the Hungarian Parliament passed two laws establishing a separate system of administrative courts, with its own high court (the future Supreme Administrative Court, hereinafter the SAC) and its own judicial council (the future National Administrative Judicial Council, hereinafter the NAJC). The draft laws had been submitted by the Government to Parliament on 6 November 2018. The first text relates to administrative courts. It is a substantive law, comprising 87 articles and instituting these courts, organising them and determining their competence. The second law sets the date of entry into force of these new provisions and determines the transitional provisions. The new administrative courts, which will be entirely separate from the ordinary courts, should begin to operate on 1 January 2020.
8. Hungary already has a system of judicial review of administrative decisions within the framework of the court system operating in the country. The various reports drawn up at European level in recent years would suggest that Hungarian administrative justice is not facing any particular problems. Furthermore, there have been two reforms in the area of administrative justice in the last six years. In January 2013, administrative courts and labour tribunals were set up at local court level. These courts are responsible for the judicial supervision of administrative decisions and rule on cases concerning labour relations or relations that may be assimilated to labour relations (as well as other cases assigned to them by law). Up to 31 December 2012, these cases were judged at first instance by local courts and labour tribunals. As of 1

January 2013 it is the regional courts which now examine appeals lodged against judgments handed down by administrative courts and labour tribunals. Within the regional courts, there are chambers, sections and divisions devoted to administrative and labour cases. A new Code of administrative procedure entered into force on 1 January 2018.

9. Already back in 2016, the Government had announced its intention to set up a separate judicial system for handling administrative cases together with a high administrative court. However, in January 2017, the Constitutional Court decided that such a change would require an amendment of the Constitution (see 1/2017, Decision I. 17 AB).¹

10. On 29 June 2018, the Hungarian Parliament passed the seventh amendment to the Constitution, which replaced Article 25 paragraphs 1 to 3, of the Fundamental Law with a new provision establishing a distinction (and a separation) between ordinary law courts and administrative courts. The amendment states that *"administrative courts shall rule on administrative disputes and other matters specified in a law. The supreme judicial organ of the administrative courts shall be the Supreme Administrative Court, which shall ensure uniformity of the application of the law by the administrative courts and shall take decisions on uniformity which shall be binding on the administrative courts"*. The amendment specifies that the new court instance will not only deal with administrative cases but will also have a status similar to that of the Curia (Supreme Court of Hungary). This includes the power to take "decisions on uniformity", which are binding on lower courts and are intended to guarantee uniform judicial practice. The amendment also provides, in Article 26 of the Fundamental Law, that, like the President of the Curia, the President of the Supreme Administrative Court (SAC) is to be elected from among judges at the proposal of the President of the Republic for a nine-year term of office by the National Assembly by a majority of two-thirds of its members.² At the same time, at constitutional law level an interpretative rule was incorporated into Article 28 of the Fundamental Law, which stipulates that the courts shall interpret laws in accordance with their purposes and with the Fundamental Law and that, when interpreting the Fundamental Law and other laws, it shall be presumed that these serve moral and economic purposes conforming to common sense and the public good.

11. On the basis of the constitutional provisions, the Law of 12 December 2018 establishes two levels of courts: a Supreme Administrative Court and administrative courts. While not specifying the institutional hierarchy, the text states that the presidents of administrative courts shall cooperate with the President of the SAC.

12. The text of the law is fairly general as regards the competence of the future administrative courts. According to the information obtained by the Venice Commission, the scope of the new courts' jurisdiction will cover cases of public interest, including elections, asylum, administrative decisions taken by the police and also peaceful assembly, economic matters, disputes in the area of taxation, the issuing of building permits and planning permission, the media and market competition.

13. The Minister of Justice will have the power to appoint judges to the new administrative courts (placed at regional level) and the Supreme Administrative Court (hereinafter the SAC), and in the case of candidates who are not judges, the Minister is to forward his or her proposal to the President of Hungary. The Minister also has the power to control the operating budget of those courts.

14. Over the last several years, certain legislative measures taken by the Hungarian authorities, particularly certain reforms aimed at Hungary's judicial system, have prompted criticism from the viewpoint of the principles of the rule of law and the independence of justice. On 12 September 2018, the European Parliament passed a resolution aimed at triggering a

¹ Constitutional Court Decision 1/2017 (I. 17)

² Fundamental Law of Hungary, in force from 29 June 2018, following its 7th Amendment, Article 26 para. 3

procedure against the Hungarian Government for a breach of the rule of law. The concerns stated by the European Parliament in support of its resolution included "the independence of the judiciary and of other institutions and the rights of judges". To back up the European Parliament's concerns in this area, reference was made *inter alia* to the work of the Venice Commission regarding the changes made to Hungary's judicial system in recent years.

15. The Venice Commission has issued several opinions since 2011 on the constitutional and legislative measures adopted by Hungary in the area of justice, drawing attention to the risks and dangers posed by them in terms of the independence of the judiciary, judicial institutions and individual judges. In the framework of dialogue initiated with the Hungarian authorities, while there are still major causes for concern, a number of improvements adopted following an initial set of recommendations, relevant to the present analysis, have been welcomed (see below).

III. Standards

16. This opinion assesses the laws submitted for examination by the Venice Commission from the viewpoint of their compatibility with democratic principles, in particular the separation of powers and the balance of powers, notably the independence of the judiciary, which are defining features of the rule of law.

17. The opinion should be seen in the context of previous work by the Venice Commission on recent reforms of the judicial system in Hungary and the recommendations set out in it:

- Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 14-15 June 2013
- Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of opinion CDL-AD(2012)001 on Hungary, CDL-AD(2012)020, 12-13 October 2012
- Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CDL-AD(2012)001, 16-17 March 2012
- Opinion on the New Constitution of Hungary, CDL-AD(2011)016, 17-18 June 2011)

18. In its opinions adopted in March and October 2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts of Hungary, the Commission focused *inter alia* on the powers and responsibilities of the President of the National Judicial Office (and the role of the National Judicial Council, hereinafter the NJC) particularly with regard to the appointment of judges and heads of court, probationary periods, the irremovability of judges, their appraisal, disciplinary proceedings and the transfer of cases.

19. There was a special focus on whether the powers vested in just one person, the President of the National Judicial Office (NJO), were too extensive and whether the National Judicial Council has sufficient means of supervision. According to the Commission's findings, the President of the NJO, elected without the members of the judicial system being consulted and not accountable in a meaningful way to anyone, was the crucial decision-maker for practically every aspect of the organisation of the judicial system and had wide discretionary powers that are mostly not subject to judicial control.

20. In a second opinion (CDL-AD(2012)020), the Venice Commission took a positive view of the amendments adopted by Hungary following the initial criticism and recommendations in opinion CDL-AD(2012)001, seeing them as a step in the right direction. While the president of the NJO remained, and remains today, the pivotal element of the Hungarian judicial system and his or her powers were still extensive and concentrated in the hands of just one person, a number of them had been transferred to the National Judicial Council. Furthermore, the amendments resulted in the improved accountability of the President of the NJO.

21. Accordingly, the Hungarian legislation provides: that the NJC shall determine the principles to be applied by the President of the NJO when appointing judges if deviating from the ranking; that the President will have to seek the consent of the NJC to a change in the ranking in the appointment of judges; that the President must obtain the approval of the NJC to appoint the presidents and vice-presidents of courts when the candidate has not obtained the approval of the reviewing board; that judges may appeal against a decision of the NJO not to appoint them before the administrative court and the labour tribunal or the disciplinary tribunal; that the powers of the NJC have been considerably broadened; that unsuccessful candidates can submit an objection against the appointment of the successful candidate; and that heads of court who did not receive the approval of the reviewing board can only be appointed with the consent of the NJC.

22. In the present analysis, the Venice Commission has also taken account of the essential safeguards and requirements deriving from Article 6 of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights, as well as the principles, requirements and standards for the independence of the judiciary and the organisation of administrative courts set out in various documents, including:

- Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd plenary session (CDL-AD(2010)004, Venice, 12-13 March 2010);
- Report on the rule of law adopted by the Venice Commission at its 86th plenary session (CDL-AD(2011)003rev, Venice, 25-26 March 2011) which mentions access to justice before independent and impartial courts, carrying out *inter alia* judicial review of administrative acts, as one of the fundamental principles of the rule of law;
- Rule of Law Checklist, adopted by the Venice Commission at its 106th plenary session (CDL-AD(2016)007, Venice, 11-12 March 2016), notably in the section on Access to justice, sub-sections Independence of the judiciary and Impartiality of the judiciary;
- Recommendation CM/Rec(2004)20 on judicial review of administrative acts;
- Recommendation CM/Rec(2003)16 on execution of administrative and judicial decisions in the field of administrative law;
- Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities;
- Opinion no. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges;
- as concerns EU law: Court of Justice of the European Union, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, case C-64/16, ECLI:EU:C:2018:117

23. Given the legal context of the Law on administrative courts and the Law on the entry into force of the Law on administrative courts and certain transitional rules, the opinion analyses the provisions of these laws individually and in the light of the above principles, but also in terms of the combined effect these provisions (taken together and combined with earlier amendments of the laws on the judiciary in Hungary) are likely to have.

24. Although the laws provide for a long period of implementation, it is regrettable that, after the Minister of Justice had requested the opinion of the Venice Commission at the beginning of November 2018, Parliament actually passed the laws in December 2018 without waiting for that opinion. In this context, the Venice Commission welcomes the statement made by the Minister of Justice when meeting the rapporteurs in Budapest, indicating that the Government would take account of the Venice Commission's criticism and suggestions and would be prepared to make changes to the Law on administrative courts that had already been adopted and published, before the legislation entered into force on 1 January 2020. The fact that the Ministry supports draft amendments in the light of the Commission's draft opinion seems to confirm the willingness to take into account the criticisms and suggestions of the Commission.

IV. General comments

1. Introduction of a separate system of administrative justice

25. According to the official explanation, the adoption of the two laws in December 2018 was a measure intended to restore a traditional model of administrative justice in Hungary, under which a Supreme Administrative Court had operated up to 1949, and also to bring the Hungarian system into line with European practice. The Hungarian authorities explained that, for the model chosen, they had drawn on the systems established in Austria and Bavaria.³ On a more technical level, the measure was intended to give effect to the aforementioned Constitutional Court judgment and apply the seventh amendment of the Fundamental Law.

26. A document supplied to the Venice Commission's rapporteurs during their visit to Hungary⁴ points out that, from the legal viewpoint, a system of administrative justice that is separate in organisational terms is justified by the balance required "between private interests and public interests", as a means of ensuring "consistency between the fundamental rights of individuals and the legal protection of the public interest". The same document indicates that a working group of the Curia having examined judicial practice in the administrative field had recommended in 2014 the setting up of administrative courts of first instance with jurisdiction over several counties as well as creating a high administrative court as an appeal instance. The document further emphasises that settling disputes of an administrative nature requires specific knowledge on the one hand and a particular approach on the part judges on the other hand. Hence the importance attached, in the planned system for recruiting new administrative judges, to the experience that certain candidates outside the system might have in the administrative sphere, beyond judicial experience.

27. As such, the principle of creating a new legal order cannot *a priori* be called into question, but it must be assessed objectively, in the light of the relevant legislative provisions and the context into which that new legal order is to fit.

28. Both models (creating special administrative courts or keeping administrative cases within the remit of ordinary courts) are legitimate, and each has its pros and cons, with their evaluation depending largely on the context of the national court system. In any case, "it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts".⁵

29. Accordingly, the Venice Commission sees no reason to oppose the sovereign decision of the Hungarian legislature to create a distinct administrative court system, which is perfectly compatible with European standards. What it is looking at in its opinion is whether the modalities for implementing that decision include sufficient safeguards for the independence of the newly created courts.

2. Legislative process

30. According to the information provided to the Venice Commission, the legislative process resulting in the passing of the two laws was not backed up by an impact study, as required under Hungarian law.⁶ The consultations held by the Hungarian authorities and in particular the period of time allowed for the debate of the draft legislation - amounting to a few days - were rather

³ Examples of national practices referred to in this respect include those of: Austria, Bulgaria, Finland, Germany, Greece, Lithuania, Luxembourg, Poland, Portugal and Sweden, as well as France, Belgium, Italy or the Czech Republic, illustrating a specific organisation of administrative justice at the level of the highest court.

⁴ See Ministry of Justice of Hungary, "Legislation on administrative courts in Hungary", document supplied to the Venice Commission's rapporteurs during their visit to Hungary.

⁵ See CDL-AD (2017)019, Opinion on the draft judicial code of Armenia, § 44; CDL-AD (2002) 026, Opinion on the draft law on judicial power and corresponding constitutional amendments of Latvia, paras. 6 and 7.

⁶ Law CXXXI of 2010 on public participation in the legislative process, Article 8 para. 3.

short. In this context, the comparison with Austria's new system of administrative courts (mentioned by the Hungarian authorities as one of the models for the introduction of the new system of administrative courts in Hungary) points to intense discussion taking place in Austria over several years and a lapse of time between the passing of the constitutional legislation and its entry into force of nearly 2 years. While such a long period of time is not absolutely necessary, the time devoted to the preparatory work in Hungary was particularly short.

31. It is regrettable that the Hungarian legislature did not make more provision to ensure that legislation entailing such a major, and politically sensitive, reform of Hungary's judicial system was passed in the right conditions. The fact that the Ministry of Justice has presented the cornerstones of the reform at public scientific conferences and established an expert committee composed of judges and law professors is positive, but may be insufficient. The conditions for the introduction and functioning of a court system responsible for "guaranteeing that the authorities' actions are guided by the rule of law", as the Hungarian authorities put it, and, in concrete terms, settling disputes between the state administration and citizens should be the result of ample and effective consultations with all the interested parties. An inclusive, transparent and constructive legislative process can only be of benefit to the legal framework adopted, by making it understood and acceptable within society.⁷

V. Detailed analysis

32. It is important to emphasise from the outset that, as the Transitional Rules provide, it is guaranteed – which is a positive for such a major overhaul within the Hungarian judicial system – that all administrative judges in post will be able to continue in office in the new system of administrative courts by sending a declaration to the President of the NJO, by 30 April 2019, stating their wish to be incorporated in it (Article 2 of the Transitional Rules). A judge making such a declaration will serve as an administrative judge as of 1 January 2020. The term of office of court leaders (including court presidents) is to expire when the new system enters into force, on the day before the law's entry into force, scheduled for 1 January 2020 (Article 5 § 1 and Article 25 of the Transitional Rules).

33. The provisions of the Transitional Rules on the recruitment of new judges within the future administrative courts will be commented separately (see below).

34. It is also important to acknowledge that having administrative judges from more diverse professional backgrounds is a positive point. In particular, the possibility of appointing people having worked in the administrative authorities or at the bar as an administrative court judge is a guarantee of effectiveness. In France, administrative judges and in particular the members of the *Conseil d'Etat* are encouraged to work in the administrative authorities on secondment, and lateral recruitment channels enable senior officials, law professors or lawyers to serve as members of the *Conseil d'Etat*, providing a wealth of expertise and making it possible to hand down decisions enlightened by a broad spectrum of experience, in complete independence. In both Germany and Austria there is a long tradition of administrative courts dating from the second half of the 19th century. Since then, specific rules and a code of procedure have been developed. In addition, there is considerable specialisation at the level of judges. In Austria, only a minority of the administrative court judges have previously worked in civil or criminal law courts, and even the vocational training for administrative judges is completely different from that of ordinary court judges. In most cases, judges have worked in the public administration at the level of the Federation, the *Länder* or municipalities.

⁷ CDL-AD(2016)007, Rule of Law Checklist, II.A.5.

1. Independence vis-à-vis external bodies

35. The Venice Commission has repeatedly been supportive of independent judicial councils with decisive influence over decisions on the appointment and career of judges, as a way to uphold the independence of judges and of the judicial system. That said, the Commission has not ruled out systems with a decision-making process within the sphere of a minister for justice accountable to Parliament, provided that effective guarantees are in place to avoid such systems negatively affecting judicial independence.⁸ The Commission has at the same time stressed the importance of effective checks and balances within such systems, including judicial councils with all the necessary powers and resources⁹ to ensure respect for judicial independence, at the level of both the institutions of justice and the individual judges.¹⁰ The Commission's position on this point is summed up in paragraphs 81 and 82 of its Rule of Law Checklist, as follows¹¹:

"81. It is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges." That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration. There may however be other acceptable ways to appoint an independent judiciary.

82. Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation. Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided. An appropriate balance should be found between judges and lay members. The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary."

36. According to the official explanation¹², the Hungarian Government chose the model of ministerial management of the new administrative justice system with a view to introducing a "balanced system, assigning appropriate powers to the different stakeholders in the administration of courts - the Minister, the judicial organs and court presidents - and based on cooperation between the players involved". In that process, existing practices in other European countries, notably Germany and Austria, have been studied and taken into account.¹³ According

⁸ CDL-AD(2012)001corr, para. 44 ; see Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para 32: "To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers". See also "Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society", para. 8.

⁹ The Commission has further emphasised in its work that, while acknowledging that States – if they are to establish a judicial council – have a broad margin of appreciation in regulating their composition, it is important to ensure that its composition is pluralistic, not only by inviting non-judges as guests, but also by including them as full members with voting rights. See CDL-AD(2012)020, para. 34; see also CDL-AD(2014)010, para. 188.

¹⁰ Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para. 8

¹¹ Venice Commission, Rule of Law Checklist, paras. 81 and 82

¹² Ministry of Justice document, page 9

¹³ In Germany, there is a longstanding tradition of special administrative courts that has given rise to a special administrative law and extensive case-law in this field. In Austria, there was a single (supreme) administrative court in operation up to 2014, when the new system of two-tier administrative courts entered into force. France has had

to the same document, "*the Minister of Justice will not wield any powers other than those exercised in the other member States where the administration of courts is entrusted to a minister*" (p. 21).

37. At the level of principles, the Law stipulates in Article 60 § 1 that, in the framework of his or her responsibility for the operation of administrative courts, the Minister shall perform the duties of general judicial administration, in cooperation with the judicial bodies, and in line with the principle of judicial independence enshrined in Article 26 paragraph 1 of the Fundamental Law. Under that provision, "*judges shall be independent and subordinate only to laws, and may not be instructed in relation to their judicial activities. Judges may be removed from office only for the reasons and in a procedure defined by a cardinal law. Judges shall not be affiliated to any political party or engage in any political activity*".

a. The powers of the Minister of Justice

38. Paragraph 3 of Article 60 stipulates that, in the framework of the new administrative courts system, unless provided otherwise, the functions and powers falling within the remit of the President of the National Judicial Office in Hungary's system of ordinary courts (powers set out in Law CLXI of 2011 on the organisation and administration of courts, hereinafter "the 2011 Law on courts") shall be performed or exercised by the Minister. However, as previously stated, the extensive powers assigned by Hungarian law to the President of the NJO have been strongly criticised by the Venice Commission in the past, in connection with the principles of independence of justice and separation of powers.¹⁴ In this connection, the Commission specifically "emphasised the need to enhance the role of the National Judicial Council as a control instance".¹⁵

39. *A priori*, the law makes a positive change since, unlike the President of the NJO, the Minister is accountable to Parliament. Nonetheless, it does stand out that the powers of the Minister of Justice are extensive when compared to a number of other systems in Europe. Under the Law, the Minister of Justice will have substantial prerogatives as regards:

- determining the number of judges and judicial positions to be filled at each level of the new system and within each court;
- taking decisions on the recruitment and appointment of the new administrative court judges;
- promoting individual judges and appointing judges as court presidents or to positions of responsibility; initiating disciplinary proceedings;
- taking decisions, in coordination with the President of the SAC, with regard to the salary increases connected with the granting of the title of "titular Supreme Administrative Court judge";
- drawing up the annual budget of the administrative courts system;
- supervising the rules of procedure of administrative courts;
- initiating disciplinary proceedings against court leaders;
- designing (shaping) the new system during the transition period;
- transferring administrative court judges to various public authorities.

40. It is clear that the Minister accumulates extensive powers as regards the new administrative courts and administrative judges.

administrative courts for a very long time, and a third tier of jurisdiction was introduced in the second half of the 20th century.

¹⁴ See also CDL-AD(2012)020, para. 89, CDL-AD(2012)001corr.

¹⁵ See CDL-AD(2013)012, Opinion on the fourth amendment to the Fundamental Law of Hungary, para. 68; See also: CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts of Hungary, para. 118; CDL-AD(2012)020, Opinion on the cardinal acts on the judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, para. 88.

41. The question arises as to what checks and safeguards are provided for in the Law, notably where the powers of the National Administrative Judicial Council (NAJC) are concerned and in particular those of its structures tasked with personnel issues, to counterbalance the Minister's powers and ensure that the Minister exercises the duties of system manager without encroaching upon judicial independence.

b. National Administrative Judicial Council (NAJC)

42. The National Administrative Judicial Council (NAJC) is defined in the Law as a "consultative, advisory and decision-making body" with regard to the overall situation of administrative justice and the more specific issues of administrative judges and judicial staff. The NAJC comprises eleven members: the President of the SAC, who is also the President of the Council, and ten other members elected by the administrative judges. The Minister, or their representative, takes part in its meetings and sets deadlines for its decisions on budgetary matters (see Articles 25 to 27 of the Law). There will be administrative judicial councils carrying out similar tasks, with five members elected by the plenary meeting of judges for six years, at the level of each administrative court; these councils act, depending on the case, as "personnel councils" or "administration councils" (Article 59 of the Law).

43. In addition to its managerial role (opinions and consultation on administrative courts, the judges and their status, remuneration, tasks, practice and rules for the running of administrative courts), this Council has budgetary functions (apportionment of the budget allocated to administrative courts) and, in general, a role of adviser to the Minister of Justice. This mission has parallels with the administrative functions of the *Conseil d'Etat* in France.¹⁶

44. It may seem paradoxical to create, without a basis in the Constitution, a specific body for administrative judges, moreover whose powers are more limited than the body competent for ordinary court judges, whereas the law provides for a unified corps of judges of which administrative judges are part. And yet the fact that there are two bodies with slightly differing powers is not questionable, especially as, on principle, certain specific powers of the Minister are not called into question. Comparison of the powers of the two bodies shows that the prerogatives of the National Administrative Judicial Council are more limited than that of its counterpart, the National Judicial Council, particularly as regards the appointment of judges and court presidents (see more detailed comments below¹⁷). This differentiated treatment of the future administrative judges and the safeguards for their status provided by the law may appear to clash with the single status of judges in Hungary (by way of a reminder, Article 64 § 1 of the Law stipulates that "the administrative judge shall be a member of the single judiciary".)

45. The prerogatives assigned to the NAJC by the Law are mostly limited, with extensive powers reserved instead for the Minister or, for certain aspects, the future President of the SAC (see below). Of its eight missions listed in Article 25 of the Law, the Council has decision-making power, as its consent is indispensable, solely with regard to changing the budget of administrative courts during the financial year, as well as the power to establish honorary titles or other forms of recognition for outstanding work by judges/courts (Article 25 § 2 h). The Council's consent is also required to validate a third term of office for an administrative court president or vice-president (Article 43 § 5). On the other hand, the NAJC gives only an advisory opinion, without having any

¹⁶ In France, the management of the corps of administrative judges is handled by the *Conseil d'Etat*, which is assisted by an independent advisory body, the High Council of administrative courts and administrative appeal courts made up of representatives of administrative judges and qualified eminent figures. While it is the case in France that the Prime Minister or the Minister of Justice may chair the general assembly of the *Conseil d'Etat*, it is chaired in practice by the Vice-President of the *Conseil d'Etat*.

¹⁷ In particular, the NAJC does not have the power to refuse deviation on the part of the Minister from the ranking submitted to him or her for the appointment of judges, whereas the NJC does have this power with regard to the President of the NJO under Article 18 para. 5 of Law CLXII of 2011. Nor may it refuse to give its consent to the Minister for the appointment of a court president who is not backed by the majority of the evaluation bodies. The NJC has this power vis-à-vis the NJO under Article 132 para. 6 of Law CLXI of 2011.

decision-making power, regarding key issues such as the recruitment of administrative judges, their career, the budget of administrative courts or even these courts' training systems¹⁸ (Articles 25 § 2 and 40 §1). According to the information provided by the Minister of Justice, if he failed to request this opinion, the decision would be invalid under public law.

46. To deal with matters concerning judges' careers, a "Personnel Council", chaired by the President of the SAC, is set up within the NAJC, comprising four members who are judges elected by the NAJC from among its members¹⁹ and four eminent figures appointed by the National Assembly's justice committee, the Prosecutor General, the Minister for Public Administration and the President of the Bar association respectively (Article 28 of the Law).

47. It is clear that in the system introduced by the Law, given its very limited and above all advisory powers, the NAJC does not seem capable of acting as an effective counterbalance to the Minister of Justice. With regard to its membership, it is noted that the NAJC's members do not include external eminent figures. The national system can make provision for different ways for including other members who are not judges, such as academic or lawyers. While reiterating that, as envisaged by the Venice Commission, it would be preferable for such a council to include eminent figures from outside the sphere of judges, with the idea of balancing powers and avoiding the risk of corporatism, it is also true that, as the NAJC does not, itself, have powers relating to the careers of judges, corporatism is far less of a risk. As for the Minister's automatic right to attend the NAJC's meetings, this could be replaced by a rule more compliant with a strict notion of the separation of powers and allowing the Minister to be *invited* to attend by the President in a *consultative* capacity. The Commission notes that the draft amendments already submitted to Parliament would make the participation of the Minister optional and subject to an invitation.

48. The following sections provide more detailed analysis of the provision made for the Minister's exercise of these prerogatives, as well as the role and functions reserved by the Law for the other parties involved, notably the NAJC and its "Personnel Council".

c. Powers regarding administrative court personnel

1. Recruitment/appointment of judges

Procedural issues

49. Under the recruitment procedure governed by Article 67 and following of the Law, it is the Minister who announces the call for applications for administrative judge positions (Article 67 § 1). The Personnel Council of the NAJC establishes a ranking based on candidates' scores (Article 70 § 7) after adding the portion of the score based on objective criteria (80%) to the part reflecting Council members' subjective opinions (the other 20%). The Minister is not bound by the ranking submitted by the Personnel Council of the NAJC and can amend it, although he or she must give reasons for his or her decision (Article 72 § 1). If the Minister disagrees with the classification presented by the Personnel Council of the NAJC he or she interviews the candidates, in which case representatives of the Personnel Council of the NAJC and other persons proposed by the Minister may attend the interview. Finally, the Minister will decide to assign the judge candidate ranked first in the amended ranking to the vacant position (Article 72 § 2b). The Minister will submit to the President of the Republic the proposal for appointment of the "non-judge" candidate ranked first (Article 72 § 1a) and, in the case of the "judge" candidate, decides himself to assign the judge ranked first to the vacant position (Article 72 § 1b).

¹⁸ In accordance with Article 40 para. 2, it is the President of the SAC who establishes the training programme, having first sought the opinion of the NAJC.

¹⁹ For the transition period, pending the setting up of the NAJC, an evaluation committee is involved in recruitment procedures (see below). The judges who are members of it are not elected but drawn by lots.

50. Similar rules apply to SAC judge positions, for which the opinion of the President of the SAC must be attached to the application sent to the Minister. If the opinion of the president differs from the ranking submitted by the Personnel Council, the Minister must interview the candidates before taking his or her own decision (Article 73 § 2 and § 3).

51. The above procedures clearly reflect the Minister's powerful position in the recruitment of judges at all levels of the new system. Nonetheless, while existing standards in this field reflect a preference, including by the Venice Commission, for the judicial council to have a leading role in appointment of judges, other systems are considered acceptable.²⁰ Systems in which the power to submit an appointment proposal to a country's president is assigned by law to the government or a minister do not raise any objections as such.²¹ Such a system is justified by the democratic legitimacy implicit in election by Parliament or appointment by a parliamentary majority.

Role and composition of the Personnel Council of the NAJC

52. However, if such a system is chosen, special care and attention are required regarding guarantees of independence. This entails, on the one hand, appropriate guarantees for the recruitment/appointment procedure but also, on the other, a genuine concern to appoint candidates meeting the standard required and not having an overly political background. As for the procedural aspect, it is essential in such a system that, if a judicial council exist it should have a real and effective influence on decision-making.²² These guarantees are an important tool that has proved effective in other Council of Europe States.

53. The Hungarian law assigns recruitment powers to the Personnel Council of the NAJC.²³ However, the composition of this council,²⁴ given its role in judges' careers and appointment, is open to question. Although formally its composition meets the aforesaid standards, including Venice Commission recommendations, it could be improved, along the lines of the above-mentioned Recommendation CM/Rec(2010)12 of the Committee of Ministers,²⁵ if its "judge" component was bolstered by the addition of a judge elected from among NAJC members or of an independent external member. The Commission notes that the draft amendments already submitted to Parliament foresee the addition of two more judges as members of the Personnel Council of the NAJC.

54. To assess the influence of the "judge" members of the Personnel Council of the NAJC, it should be remembered that the President of the SAC, who has the casting vote, is elected by the National Assembly. Under Article 44 § 1b of the Law, the candidate for President of the SAC must indeed be a judge but may be a recent appointee if they have ten years of legal practice in the field of administrative law (including in the public institutions named in Article 66 of the Law).²⁶ He/she may therefore have personal relations with the legislature or executive. The "judge" members, for their part, do not have the highest degree of independence, since it is enough for disciplinary proceedings to be pending against them for their membership of the council to be terminated (Article 28 § 5e, referring to Article 8 § 5c of the Law).

²⁰ See CDL-AD (2010) 004, paras 28 - 30 and CM/Rec(2010)12 of the Committee of Ministers, paras 44 and 46-47.

²¹ See CDL-AD (2012) 001, para. 57.

²² CDL-AD (2007) 028, paras 48 - 49; see also CM/Rec (2010)12 of the Committee of Ministers, para. 47.

²³ At the local level, these powers fall to the personnel council of the administrative court where the position is vacant. See Article 25 § 3e and Articles 69 - 70 of the Law.

²⁴ The Personnel Council, chaired by the President of the SAC, consists of four judges elected by the NAJC from among its own members and four figures appointed by the National Assembly's Justice Committee, the Prosecutor General, the Minister for Public Administration and the President of the Hungarian Bar Association respectively (Article 28).

²⁵ Recommendation CM/Rec(2010)12: "27. Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."

²⁶ According to this article, the President of the SAC can thus be elected from among "the persons appointed to judicial service for an indefinite term and having a total of at least ten years' legal practice in the field of administrative law [...]".

Assessment criteria for applications

55. The fact that the Minister has the power to determine the percentage points to be assigned as a rule, to each criteria used to decide the candidates' objective score, which accounts for 80% of the overall assessment (the Personnel Council of the NAJC decides this score) is also to be noted (Article 70 § 3 of the Law).²⁷ For the future administrative judges this score also includes any periods of legal practice in a field of administrative law without being a judge.

Candidate ranking

56. The most problematic provisions, in practice giving the Minister the final decision in the appointment procedure, are those allowing the Minister, after he or she has interviewed one or more candidates, to amend the ranking submitted by the Personnel Council of the NAJC. While it is of course positive that the Law requires the Minister to provide a written justification for changing the ranking and to organise candidate interviews in a transparent manner, the fact remains that it contains no conditions or criteria specifying when the Minister can deviate from the ranking. Nor do there seem to be any checks or balances limiting the Minister's power in this respect. Similar provisions allowing the Minister to amend the candidate ranking appear in Article 13 of the Transitional Rules.

57. It seems clear that in its current form the Law contains no explicit and effective means of controlling the use of the power conferred on the Minister regarding the appointment of future administrative judges. This is all the more regrettable as, although the law draws a parallel between the powers of the President of the NJO in the ordinary court system and those of the Minister in the administrative court system, the comparison shows that the Minister's powers are much wider. This is an unfortunate step backwards, since in their dialogue with the Venice Commission the Hungarian authorities had amended the legislation in 2011-2012 to allow for stricter legal control of the powers of the President of the NJO in the area of appointments. Thus, in the ordinary court system the NJC lays down the criteria and principles that the President of the NJO must follow when appointing judges without regard to the ranking; the President of the NJO can only amend the ranking of candidates for a judge's position if he or she applies the general principles established by the NJC, and the NJC must agree to the amendment in each case. In addition, judges can bring an appeal before an administrative court, a labour tribunal or a disciplinary tribunal against a decision by the President of the NJO not to appoint them. It is a matter of concern to find that these safeguards have not been taken on board in the procedure applying to administrative judges.

58. Consequently, it is encouraging that, in his exchanges with the rapporteurs, the Hungarian Minister of Justice has shown himself open to enshrining in the law an appeal against the Minister's decision to amend the candidate ranking. Nevertheless, as observed by the Minister, it remains to be seen whether in strictly legal terms – and this will have to be established by the courts – a judicial appeal is possible in Hungarian administrative law: 1) against the appointment proposal sent by the Minister to the President in the case of a “non-judge” candidate (Article 72 § 2a of the Law) prior to the appointment decision by the President; 2) against the assignment of a judge candidate to a vacant position (Article 72 § 2b of the Law).²⁸ At the same time it is important to note that even if a complaint against the Minister's amendment were to be treated as an administrative dispute within the meaning of Article 1 § 3 of the Law, or if a complaint against the appointment decision taken by the Minister were to be admissible under Article 21 of the law on the legal status and remuneration of judges, the Law ought to specify the criteria to be

²⁷ The score must be based on the criteria specified in the 2011 law on the legal status and remuneration of judges (Article 14 §§ 4 and 5 of this 2011 law, which apply to the new administrative court system under Article 84 § 1 of the Law), taking account of experience in public administration (see Articles 65 - 66 of the Law). This includes the period of assignment, by decision of the Minister, to a general government body among those specified in Article 81 of the Law).

²⁸ For judge candidates, the assignment decision for a vacant position rests with the Minister without the President being involved.

used by the Minister in his or her justification so that the courts can rule on the decisions concerned. The Commission notes that the draft amendments submitted to Parliament explicitly provide for the possibility of a judicial appeal against the decision on the appointment of the successful candidate. The scope of this appeal remains to be clarified.²⁹

59. As stated above, the Venice Commission does not exclude systems with a decision-making process within the sphere of a minister for justice accountable to Parliament, if such a system has been proved to work in the country concerned³⁰ without negatively affecting judicial independence.³¹ To avoid this, the relevant provisions must be amended, following the example of the corresponding provisions in the legislation on the ordinary court system in Hungary, in order to lay down the criteria allowing the Minister to amend the ranking, as well as the requirement of consent to this amendment from the Personnel Council of the NAJC, and a judicial remedy enabling candidates to challenge the Minister's decision, while specifying the procedures and conditions of this remedy.

Unsuccessful procedure

60. Article 72 § 4 allows the Minister, in a reasoned decision, to declare the application procedure unsuccessful if: 1) during assessment of applications, participants in the assessment procedure commit a serious procedural irregularity that cannot be remedied; 2) after announcement of the call for applications, circumstances arise that require the position to be filled without a call for applications. To avoid any risk of wrongful or arbitrary annulment of the procedure it is important to provide for stricter and more precise legal conditions under which the Minister can use this measure.

2. Appointment to positions of responsibility, promotions

61. Appointment to the positions of administrative court president and vice-president also comes within the Minister's purview, "with the contribution of the judicial bodies as specified in this Law" (Article 51 § 2). The Minister also appoints and dismisses the administrative court registrar on a proposal from the administrative court president (Article 57).

62. As provided for in Article 42 § 3 of the Law, the detailed conditions of the appointment must be specified by the Minister in the announcement of the call for applications for a position of administrative court leader, depending on the nature of the office and the specific duties attached to it. The same article states that, when assessing an application, "special consideration shall be attributed to the administrative activity performed during the period of assignment under Article 81". Only an administrative judge appointed for an indefinite term can hold the position of administrative court leader (Article 43 § 1).

63. Similarly to the appointment of judges, the final decision regarding assignment to a position of responsibility lies with the Minister (Article 81 § 1 of the Law). Admittedly, the Personnel Council of the NAJC is involved in the procedure and draws up the shortlist of candidates submitted to the Minister (Article 76 of the Law). However, it falls to the Minister to take the decision, without knowing the scores established by the Personnel Council (Article 76 §§ 2 and 4 of the Law). Presidents are appointed for six years, and their term of office can be renewed once, without the consent of the NAJC. The law provides for only two successive terms of office but does however allow an exception to extend the tenure of a court president or vice-president beyond two terms if the NAJC gives its consent (Article 43 §§ 1, 4 and 5).

²⁹ Referral is made to Article 72§6 which does not provide the necessary criteria for such an appeal.

³⁰ During the rapporteurs' visit to Hungary, the powers of the Minister of Justice in Austria and the Minister of the Interior in Bavaria were mentioned. It should however be noted that Bavaria is not the federal level and there are 17 different models of appointment procedure in Germany, ranging from this example to consensual models in other *Länder*.

³¹ See CDL-AD(2012)001 para. 44.

64. The Venice Commission believes that it is hard to justify the Minister's powers, already considerable for the appointment of administrative judges, being even greater with regard to these positions of responsibility, which are more politically sensitive, and also greater than the powers of the President of the NJO in the ordinary court system. In the ordinary system the President of the NJO must have the consent of the NJC to appoint court presidents and vice-presidents if the candidate has not been approved by the reviewing board (see Law CLXI of 2011 on the organisation and administration of courts, Article 132 § 6). It is recommended that the procedure be reconsidered so as to involve the Personnel Council of the NAJC, in an effective role, in the Minister's final decision and to provide for judicial remedy against such decisions.

65. The appointment procedure for the position of SAC administrative judge adds another important prerogative to the Minister's powers. The procedure, while granting a role to the Personnel Council of the NAJC and the President of the SAC (whose opinion is required for each application), gives the final say, and thus the ability to have an influence on the composition of the SAC, to the Minister. The above comments and recommendations, particularly concerning a means of reviewing the Minister's decision, also apply in this case. The Commission notes that the draft amendments submitted to Parliament provide for the application of the rules on the call for applications for judicial posts, including rules of appeals, also in relation to the call for applications for the positions of heads of jurisdiction.

3. Transition period; establishing the new system

66. As noted above, it is understood – and welcomed by the Venice Commission – that existing administrative judges can continue to sit in the new system by requesting transfer no later than 30 April 2019 (see Transitional Rules, Articles 2 and 9 § 2). It seems that the new courts will have more judges than there are current administrative judges. The judges thus transferred will take up their positions as administrative judges from January 2020, with the same level of remuneration as before, unless, for reasons specified by law, higher remuneration is applicable.

67. The Transitional Rules, fundamental to the quality of the new administrative justice system, nevertheless raise a number of questions that have to be settled before the start of 2020: the future of judges who have not opted to change, and the number and quality of new administrative judges, including court presidents and particularly the president of the Supreme Administrative Court.

68. Under Article 4 § 1 of the Transitional Rules, judges in existing administrative courts and labour tribunals who have not requested transfer within the prescribed time-limit will keep their status as judges in a court at the same level.³²

69. The safeguards provided by the Law to protect the judicial status of current administrative judges seem adequate, whether or not the latter express a wish to be transferred to the new system. This being said, within the profession, uncertainty subsists.

70. A little over a month before the statutory time-limit for requesting transfer to the new system, the Venice Commission has, for example, received conflicting information about the number of judges prepared to work in the new administrative courts as well as reports of fears and reluctance among administrative judges who will only have information about key elements of the new system after the time-limit for requesting transfer expires. These elements include the jurisdiction of the future courts, the number of judges expected to work in them and the figure of the first President of the SAC, who will have extensive powers under the new system. In its Observations, the Ministry insists that, although the introduction of a new organisational system is bound to create uncertainty, the Ministry of Justice, the committee of experts and the

³² The situation of these judges should be covered by Article 34 of the 2011 law on the legal status and remuneration of judges (which governs cases in which a court's jurisdiction is reduced and it is impossible to keep one or more judicial positions).

Association of Hungarian Administrative Judges provide judges with systemic information encompassing all issues.

71. According to some representatives of the authorities, and also of the judiciary, most of the current administrative judges will opt for transfer, and only labour judges will choose to continue working in the ordinary court system. However, the various figures cited during the rapporteurs' visit to Budapest³³ might also betoken a situation in which, once the current judges had been transferred, the Minister would have to appoint persons of his own choosing to a considerable number of judicial positions – and all the court leader positions (see Transitional Rules, Article 5 §1).

72. Quite clearly, extensive powers regarding the introduction and shaping of the new system are being granted, even before the Law enters into force, to the Minister of Justice, who becomes a key decision-maker within it, able to:

- determine, after consulting the President-elect of the SAC, the initial number of administrative judge positions for each court, which must be at least equivalent to the number of judges having requested transfer to that court (Transitional Rules, Article 2);
- announce, in July 2019, a call for applications for vacant administrative judge positions in each court;
- examine the ranking of applications established by a provisional evaluation committee set up by law for the duration of the transition period (Transitional Rules, Article 9 § 2 and Articles 10 and 11) and, if deemed necessary, amend this ranking;
- assign the candidate ranked first in the initial or amended ranking to the vacant position (Transitional Rules, Article 13 § 2b);
- appoint, under similar rules also requiring the opinion of the President of the SAC, administrative judges to the SAC; if this opinion differs from the ranking submitted by the evaluation committee the Minister will interview the candidates and have the final decision on the ranking and choice of candidate for the position (Transitional Rules, Article 14);
- appoint without an application procedure, after consulting the evaluation committee and interviewing the candidates, the first administrative court presidents and vice-presidents, as well as the division heads, for an interim period of one year at most (Transitional Rules, Article 15 §§ 1 and 2).

73. The questions already raised above concerning appointments, in particular the Minister's option of amending the ranking if he or she gives reasons for the decision (see Transitional Rules, Article 12 and Article 13 §§ 2 and 4), still apply. Despite strict procedures for the transition period and the involvement of the evaluation committee (which does not include any peer-elected judges), key power in personnel matters remains in the Minister's hands. It will be up to the Minister both to determine the number of administrative judge positions to be filled in each court and to appoint a large number of new judges (who could outnumber the judges having requested transfer and could include non-judges with experience in public authorities). With a composition reflecting the choices of the Minister of Justice during the transition period, the administrative courts will be passing judgment for a number of years.

74. The Venice Commission wishes to point out that the introduction of a new court system requires robust safeguards to ensure efficient, independent and impartial operation of the new courts. Initial recruitment is crucial here. The evaluation committee, set up for the transition period, will have an advisory role in the recruitment procedure, just as the Personnel Council of the NAJC usually does. The committee, chaired by the President-elect of the SAC, will consist of

³³ The Minister of Justice believes that 220 judges will request transfer, whereas the President of the Curia thinks that the figure will be only 100 judges from the lower courts and 18 judges from the Curia. The Minister was aiming for a total of 300 judges over the next two years, with 40 newly appointed judges in 2019 and 40 more in 2020. If only around 120 judges request transfer, the number of vacancies (up to 300) will rise considerably to almost twice the number of judges transferred from the ordinary courts. This would allow the Minister to fill the majority of judge positions – and all the court leader positions – over a two-year period.

eight members, including four judges drawn by lots by the Minister from among the judges transferred to the new system.³⁴

75. While the committee's involvement in the procedure is commendable, the fact that it has no peer-elected judges raises questions. It might well be asked whether, instead of making a random selection from judges having opted to transfer to the new system, it would not be preferable to have judge members elected by their peers, since they will already be known and it is between them that lots are to be drawn. The argument raised in the Observations, that such an election lacks legitimacy because the jurisdictional body is not yet established is not entirely convincing. A drawing of lots confers less legitimacy than an election among future administrative judges already known. Of course, the key questions – the existence (or lack) of initial criteria or principles for any amendment of the ranking by the Minister, and the consent of the evaluation committee to, or judicial review of, the Minister's decisions in the recruitment procedure – also apply to the transition period.

76. Just as concerning is Article 15 of the Transitional Rules, allowing the Minister, without a call for applications and after simply consulting the evaluation committee, to appoint the first presidents and vice-presidents of the new courts for a maximum period of one year. While this procedure may be justified by the need to introduce these courts quickly and efficiently, it is nevertheless problematic given the uncertain situation of these presidents, who may or may not be reappointed to those leading positions.

77. In the light of the above, it is recommended that the judge recruitment procedure for the transition period, together with the appointment system for positions of responsibility in the new administrative courts, be reviewed in order to provide for initial criteria or principles for any amendment of the ranking by the Minister as well as judicial review of decisions taken by the Minister in this connection.

4. Salary-related benefits

78. The Minister also seems to have complete discretion to confer ("the Minister may award") the title of "titular Supreme Court judge" – on a proposal from the President of the SAC but without the involvement of the Personnel Council of the NAJC – on a judge of a regional administrative court who has worked as a judge for at least twelve years at the level of that court (Article 83 § 1, first sentence, of the Law). The Minister **must** award ("the Minister shall award") this title to judges having worked for at least twenty years in a court. This also entails an earnings supplement for the judge concerned (see Article 83 § 1, third sentence, of the Law and Article 174 of the law on the legal status and remuneration of judges).

79. Admittedly in the first case (following twelve years of judicial practice) the title can be conferred by the Minister only on judges whose work has been appraised as "excellent". However, the Law says nothing about the conditions of appraisal for such judges (when? by whom? over what period?). Nor is it clear why the president of the court in which the judge works, or the NAJC, is not involved in the procedure, as is the case for the President of the SAC.

80. Allowing the President of the SAC and the Minister, a member of the executive, to choose which judges should receive a distinction associated with higher remuneration raises concerns regarding judicial independence. A judge's remuneration must be established by law and be equal for all judges performing the same duties; differences may exist based on seniority, court level or other reasons clearly laid down by law but not as a result of an individual decision reserved by the Law for a member of the executive. In its *Report on the Independence of the*

³⁴ The four non-judge members will be chosen from distinguished law specialists by the Committee on Justice of the National Assembly, the Prosecutor General, the minister with responsibility for public administration and the President of the Hungarian Bar Association.

Judicial System: Part I: The Independence of Judges, the Venice Commission voiced considerable reservations about awarding bonuses or benefits to members of the judiciary.³⁵

81. A similar mechanism exists for ordinary judges under Article 174 of the law on the legal status and remuneration of judges, which confers the power to grant these benefits on the President of the NJO (this has already been criticised by the Venice Commission). However, whereas ordinary judges must have at least six years of service to be eligible for the title and associated salary-related benefit, this minimum length of service has been set at twelve years for administrative judges, which seems to conflict with the principle of uniform status for judges in Hungary. Article 83 ought to be reviewed and clarified in the light of the above observations.

82. In the Observations, the Ministry insists that these rules were formulated at the explicit request of the judges. In accordance with the principle of the unique status of judges, the law allows for the recognition of administrative judges in the same way as that currently provided for in the organisation of ordinary justice. In Decision No. 38/1993. (VI.11) AB the Constitutional Court explicitly held that "the claims that the Minister's right to award titles can influence judicial activity are unfounded". The allocation of the titles does not have the effect of changing the assignment of the judge resulting from the rules of compulsory promotion, specified by a separate law. The Observations conclude that no benefit is associated with securities that could jeopardise impartial judicial activity.

83. The Venice Commission maintains its reservations with regard to the honorary titles to judges by the executive, even if they are not accompanied by financial benefits.

5. Transfer of judges

84. Under Article 80 of the Law the Minister will transfer an administrative judge to another administrative court with the consent of the presidents of the courts concerned. This very succinct article does not state whether the consent of the judge in question is required, although it specifies that of the heads of the two courts. Article 80 also calls for the requirements laid down in the law on the legal status and remuneration of judges to be met for such a transfer, without however specifying which requirements and which provisions of that law are meant.

85. Article 34 of the law on the legal status and remuneration of judges allows transfer in cases where a court ceases to exist or has to cut back on its activities and gives the judges concerned (in order of seniority when several transfers are necessary because more than one judicial position has been cut) a period of eight days to choose from the positions offered by the President of the NJO. If no position is available or the judge concerned has not chosen any of the positions offered, he or she will be assigned by the President of the NJO – and therefore in the case of the future administrative courts by the Minister – to a court of the same level or the level immediately below, taking account of the judge's "fair interests" and maintaining his or her rank and salary.

86. The Observations make it clear that the provisions of the Law on the Status of Judges are also applicable in this area, under which, as a rule of principle, the consent of the judge is necessary. The transfer without consent is limited in time and in many cases it is excluded (pregnancy, judge raising a minor child alone, permanently sick judge or caring for a family member). In practice, in courts operating with a limited number of judges, temporary replacement cannot be provided otherwise, according to the Observations. The Constitutional Court considers that the procedure established by the cardinal law and its conditions provide adequate safeguards for judicial independence (decision no. 13/2013 (VI. 17.) AB, [126.]). The

³⁵ CDL-AD(2010)004, para 51. According to the Venice Commission: "For judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out."

Observations point out that since 2012, within the judicial jurisdictions, no transfer without consent has taken place.

87. Nonetheless, the Commission is of the opinion that since the administrative courts' personnel requirements (including decisions to cut back on a court's activities) are determined largely by the Minister (see Article 61 § 4 of the Law), one may legitimately wonder whether the new system offers adequate safeguards to prevent transfers being forced on future administrative judges, even without their consent.

6. Accountability of heads of court; other powers regarding personnel

88. The Law does not specifically lay down a general principle of independence. Such a principle is however enshrined indirectly in Article 60, establishing the principles governing the powers of the Minister of Justice, through a reference to Article 26 §1 of the Fundamental Law. This independence is also secured, in terms of principles, by Article 64, which provides that "the administrative judge shall be a member of the single judiciary".

89. Under Article 38 § 3 of the Law, the Minister has employer's rights over administrative court presidents. Although it is impossible to tell from this wording whether or not the Minister can intervene in a judge's judicial work, since it is generally accepted that an employer's authority is hierarchical authority this sentence will need to be clarified in order to ensure that these rights do not affect the judges' independence. The Observations emphasise that in many matters relating to the rights of the employer, the law prescribes special provisions. For example, according to the law, the examination of the heads of the administrative courts upon termination of employment (Article 42) or the disciplinary power do not fall within the competence of the Minister (in accordance with Article 61, paragraph 5, the Minister can only propose the initiation of a disciplinary procedure). According to the Observations, among the rights of the employer, only less important issues fall within the Minister's jurisdiction, such as leave authorisation or the conclusion of a study contract. The Observations point out that the term "the rights of the employer" may be misleading because of differing legal terminology.

90. Under Article 61 § 5 the Minister is empowered to supervise and monitor the administrative work of court presidents and registrars and, if need be, propose initiating disciplinary proceedings (it may be assumed that, under Article 60 § 3 of the Law, these conditions tally with those laid down for the President of the NJO in the ordinary system in the law on the legal status and remuneration of judges). It is regrettable that, given the extent of the Minister's powers in this respect, there is no NAJC involvement. It is recommended that the NAJC be given a clearly defined role in these proceedings.

d. Oversight of administrative courts' rules of procedure

91. The internal organisation of the administrative courts – apart from the SAC – is covered by rules of procedure prepared by the registrar which, after consultation of the administrative judicial council, must be approved by the Minister (Article 34). The Minister can object if he or she deems them unlawful, without any provision having been made for an appeal against this decision. One may legitimately wonder whether an appeal against the Minister's decision should not be available, with the subsidiary question of the court before which it should be brought. In all events, the Law should require the Minister to provide reasons for the decision.

92. At the same time, it may be pointed out on the positive side that the Law clearly specifies, in Article 37, that the "*judicial bodies of the administrative courts and the NAJC shall themselves determine their rules of procedure in accordance with the provisions of this Law*".

e. Budget of the administrative courts

93. Article 1 of the Law states that the budget of the administrative courts forms a separate heading in the structure of the central budget. Managing and implementing the budget is the responsibility of the Minister of Justice, who establishes the budget based on a proposal submitted by the President of the SAC on which the NAJC (for the SAC budget) or the administrative judicial councils (for the other courts) have been consulted for an opinion.³⁶ The absence of an opinion from those bodies is taken to mean that they support the proposed budget, while the absence of a budgetary proposal from the President of the SAC by the prescribed deadline results in the Minister presenting a budget proposal identical to that of the previous year.

94. The budget may be modified in the course of the year by the National Assembly (Article 29). The modification of the manner in which the budget appropriation of the administrative courts is reallocated requires the consent of the President of the SAC or the NAJC, as appropriate (Article 32). That condition may be considered as a guarantee designed to prevent the government from unilaterally reducing the resources of the administrative courts.

f. Election of the President of the Supreme Administrative Court

95. The President of the Supreme Administrative Court is elected for a nine-year term of office by a two-thirds majority of the members of the National Assembly (Article 26 § 3 of the Fundamental Law) from among those administrative judges with at least five years' experience in judicial service in the field of administrative law, or from "people appointed to judicial service who have at least ten years' legal practice in the field of administrative law" (Article 44). It is not clear whether the President can be re-elected. The Law does provide, however, for the President to remain in post after their term of office ends, until the new President is elected (Article 45 § 4 of the Law). This arrangement helps guarantee the stability and continuity of the judiciary as a key function of the State.

96. The rules mentioned above make reference to provisions applicable to judges in the ordinary courts. The principle of that reference must be approved insofar as it guarantees equivalent independence. Nevertheless, even if it does require a broad consensus as a result of the two-thirds majority requirement, the appointment may have a political dimension, in respect of which the Venice Commission has expressed reservations. In its report on judicial appointments³⁷ the Commission stressed that "*while [election systems] are sometimes seen as providing greater democratic legitimacy, [they] may also lead to involving judges in the political campaign and to the politicisation of the process [...] In the light of European standards,³⁸ the selection and career of judges should be "based on merit, having regard to qualifications, integrity, ability and efficiency." Elections by parliament are discretionary acts, therefore [...] it cannot be excluded that [...] political considerations may prevail over the objective criteria.*"

97. Efforts should be made, therefore, to ensure that the conditions of election help to minimise the political aspect while at the same time avoiding deadlock. To achieve this, it is important to strictly circumscribe the conditions of eligibility to the office, among which the question of experience is paramount. In the new system introduced in Hungary, while the appointment of judges with administrative experience is to be welcomed, at least five years' experience as a judge should be required for appointment to the post of President of the SAC. The conditions of election of the President of the Curia and the President of the SAC would thus be harmonised. The condition laid down in Article 44 § 1 b) should thus be amended, within the

³⁶ In France the budget of all the administrative courts is administered by the *Conseil d'État* and appears in the Finance Act under programme 165 of the section on "*Conseil et contrôle de l'État*" (State control and oversight). The *Conseil d'État* manages the budget of the administrative courts, the administrative appeal courts and of course the *Conseil d'État* itself.

³⁷ CDL-AD (2007) 28, Venice Commission, Report on Judicial Appointments, §§ 9 and 10

³⁸ Recommendation no. R (94)12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges

framework of the Fundamental Law, so that a person appointed judge because of his or her lengthy experience in the public administration could not be appointed President of the SAC until several years after their recruitment as an administrative judge. One may note in this connection that appointment by an executive authority, such as the Head of State, with proper guarantees, may be less political in nature than election by Parliament.³⁹ The Commission notes that the draft amendments submitted to Parliament require at least five years of experience as a judge as a condition for the election of the President of the SAC.

2. Internal independence. Powers of court presidents

98. Under Article 26 § 2 of the Fundamental Law of Hungary judges “are subordinate only to the law”. In the first place that principle protects the judges from undue outside influence. It also applies, however, within the judiciary. In its Report on the independence of the judicial system the Venice Commission emphasised that “*The principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity*”.⁴⁰ A hierarchical organisation of the judiciary which made judges subordinate to court presidents or higher instances in their judicial decision-making activity would be a clear violation of that principle.

99. The presidents of the administrative courts and in particular the President of the SAC are in a strong position. Among other questions already noted, the following issues seem more problematic:

a. The powers of the President of the Supreme Administrative Court

100. The President of the SAC, elected by the National Assembly, has a wide range of powers not only in relation to the other judges of the SAC, but also in relation to the judges of the other administrative courts and administrative court staff. In particular the President of the SAC:

- convenes the local plenary meetings of judges of all the administrative courts (Article 7 § 2);
- appoints two full members of the administrative judicial council when acting as a personnel council (Article 8 § 4);
- may attend in person or delegate someone to attend all meetings of administrative judicial councils in all the administrative courts (Article 9 § 3) and is a member of the Personnel Council and the Administrative Council of the SAC (Article 14);
- is authorised to convene and preside over the NAJC (Article 26) and has the casting vote in the event of a tie (Article 27); also presides over the Personnel Council of the NAJC (Article 28);
- determines the order of assignment of cases and may initiate the uniformity procedure and have the Constitutional Court review the compatibility of laws with the Fundamental Law;
- decides on the content of the organisational and operational regulations of the court (Article 34);
- has the broadest of powers in the administrative court system with regard to the budget (Articles 30 to 33);
- plays an important part in choosing all the judges appointed (including administrative court managers) (Article 47 § 4, Article 73 § 2);
- establishes the training programme for all administrative court staff (Article 40).

³⁹ In France the guarantees surrounding the appointment of the Vice-President (who is in fact the President) by the President of the Republic in the *Conseil des Ministres* are more the fruit of practice than of the texts, the appointments having never given rise to any real objections. There is no such thing as a perfect procedure where such appointments are concerned, however.

⁴⁰ CDL-AD(2010)004, § 82.15

101. Taken individually, most of these powers should not raise any problem regarding the independence of justice and the assignment of powers. That said, however, when they are taken together, and above all considered in combination with the election of the President of the SAC by the National Assembly and the broad powers of the Minister of Justice, with whom the President acts in concertation on many matters, these powers may raise questions. It would be useful to examine means of counterbalancing the powers of the President through more substantial involvement of the judges or their elected representatives, the administrative judicial councils and/or the NAJC in dealing with the different matters. In addition, as with the decisions of the Minister, judicial oversight of the President's decisions could be envisaged when the decisions affect a person's rights or interests.

Uniformity procedure

102. In conformity with the Fundamental Law of Hungary following its 7th amendment, like the Curia the SAC must guarantee the uniform application of the law by the other courts (Article 21 § 1 of the Law). Its task is to guarantee that uniformity not only by ruling on appeals against decisions of lower courts or on petitions for review, but also as part of a uniformity procedure, through decisions in the interest of uniformity of the law which are binding on the lower courts.

103. The uniformity procedure (Articles 16 to 24 of the Law) may be implemented at the suggestion of the President or Vice-President of the SAC, the president of a regional administrative court, the president of a section of the SAC, or the Prosecutor General (Article 17 § 1 a) and § 3 a) of the Law). Article 16 provides for uniformity panels, which appear to be different from court sections.⁴¹ It is also the President of the SAC who chooses the members of the uniformity panels (Article 16 § 2 of the Law).

104. In itself, this procedure, which is part of Hungary's legal tradition⁴² and is not specific to the administrative courts, has the advantage of helping to harmonise case-law, which is positive from the point of view of legal certainty. However, in its previous work on Hungary the Venice Commission has expressed concern about the effect this harmonisation procedure and its supervision by court presidents might have on the independence of the judges.⁴³

105. The provisions of Article 19 of the Transitional Rules concerning decisions pronounced before 1 January 2020 in the interest of the uniformity of administrative law raise questions as to their justification, as well as concerns about legal certainty and continuity. According to Article 19 § 2, "As of 1 January 2020, no authoritative Curia decision or authoritative court decision concerning administrative matters shall be published and those published earlier are not applicable." These provisions should be re-examined in the light of the principles of legal certainty and continuity mentioned above.

Referral to the Constitutional Court

106. The President of the SAC has a right of appeal in proceedings for (abstract) review of the law (Article 48 of the Law). Although there may be a historical explanation for that (the existence of an *actio popularis* until 2010/2011), it is highly unusual in constitutional justice for judges not to be able to address the Constitutional Court solely where matters arise from their proceedings (concrete legal review procedures) and yet to be allowed to do so on matters not related to proceedings before them. This once again makes the President of the SAC a more political figure, which, seen together with the other characteristics of their position, may raise an issue of independence of the "ordinary" administrative judges and indeed of administrative justice as a whole. This problem was already identified by the Venice Commission in respect of the

⁴¹ In addition, a case-law analysis group may be set up in the Supreme Administrative Court (Article 24 of the Law).

⁴² According to the information available to the Venice Commission, the procedure dates back to the 19th century and already existed in Hungarian law prior to the reforms made to the country's judicial system in 2011.

⁴³ CDL-AD 2012)020, § 52; CDL-AD(2012)001, §§ 69 and ff.

power of the Curia to bring legislation before the Constitutional Court for review.⁴⁴ As a general rule this power should be restricted to the court section responsible for adjudicating the case in which the constitutionality of the legislation relied on was challenged.

b. Case assignment

107. Article 36 of the Law regulates how cases are assigned in courts. The president of the court is responsible for case assignment,⁴⁵ after consulting the administrative judicial council for opinion (which is not binding on the president).⁴⁶ These provisions also allow court presidents to determine the composition of court sections. The principle is that cases must be distributed in such a way that the competent section is determined in advance by general rules, with no intervention in the assignment of specific cases. If it considers that the composition of the court sections or the order of distribution of cases does not conform to the law, the administrative judicial council may refer the matter to the disciplinary court, which must rule within eight days, and this is a positive point.

108. A predictable and transparent predetermined plan for case assignment is important not only to guarantee an independent and impartial tribunal established by law, as required under Article 6 of the European Convention, but also to guarantee the internal independence of the judges. From that point of view the fact of making court presidents responsible for establishing the case assignment plan may raise questions. It is recommended that the case assignment system be re-examined in the light of the relevant recommendations already addressed to Hungary by the Venice Commission.⁴⁷ Particular attention should be paid in this context to the need to establish general criteria for case assignment. It will be noted in this connection, as an example, that in a less hierarchical structure this prerogative would be left to a body composed of judges, such as the administrative judicial council.

VI. Conclusion

109. The Venice Commission has examined the new system of administrative courts chosen by Hungary in the light of existing principles and standards for the independence of justice and separation of powers, which are key requirements of the rule of law.

110. The Commission's analysis has placed special emphasis, beyond the individual provisions of the two laws, on the accumulated effect of those provisions, within the legal framework governing Hungary's legal system in the wake of the large-scale constitutional and legislative measures adopted by the country, in this area, in the last decade.

111. The principle of creating a new separate legal order in the area of administrative law falls within the sovereign right of the national legislature and is fully in line with European standards

⁴⁴ CDL-AD(2013)012, §§ 119-120

⁴⁵ France has a similar practice, where the president of the court establishes the system of case assignment.

⁴⁶ Law CLXI of 2011 on the organisation and administration of the courts lays down the basic rules on case assignment. According to the information supplied to the Venice Commission, detailed provisions on case assignment appear in decree no. 14/2002 of the Ministry of Justice and Resolution no. 6/2015. (XI. 30) of the President of the NJO.

⁴⁷ See CDL-AD(2012)001corr, para 91 : *"In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, eg in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges sit in on that case. The criteria for making such decisions by the court president or presidium should, however, be defined in advance."*

and practices. Moreover, the guaranteeing of the transfer of all current administrative judges wishing to be incorporated in the new administrative courts and the opening up of access to the function of administrative judge to individuals with substantial experience of working in public administration are to be commended.

112. That said, it is the Venice Commission's duty, in preparing its opinion, to examine the actual modalities of implementing the chosen, model and above all, to check whether the necessary safeguards are in place to ensure full respect for the principle of independence as regards the newly created courts and also the judges who will be members of those courts.

113. The organisational and administrative model adopted for the administrative courts has some of the same drawbacks as the one which, on the basis of the legislation passed in 2011, had been selected for the organisation and administration of ordinary courts and had come in for criticism from the Venice Commission in its analysis. The major drawback is that very extensive powers are concentrated in the hands of a few stakeholders and there are no effective checks and balances to counteract those powers.

114. While the role of system manager attributed to the Minister of Justice is beyond question, the broad powers reserved for the Minister by the law as regards the appointment and career of judges, promotion to positions of responsibility, salary increases and so on raise questions over the lack of real review procedures. Although, compared with the President of the NJO within the ordinary system, the Minister is accountable to Parliament, the fact is that, in certain areas, the Minister's powers are more extensive than those of the President of the NJO. In dealings with a future NAJC, and above all its body responsible for personnel matters, the Minister is vested with extensive powers including in the areas of recruitment and appointments to posts of head of court, without adequate criteria and principles being established to provide a framework for the Minister's decisions (particularly when establishing the final ranking of candidates) or any express provision for remedies for challenging those decisions.

115. Furthermore, the Minister of Justice is given a central role, with commensurate powers, in the setting up and shaping of the new system of administrative courts during the transition period, including in the determining of the scale of those courts, the selection of future judges and the first heads of court. Those powers should also be circumscribed by review procedures.

116. The broad powers conferred by the Law on the President of the future Supreme Administrative Court, as well as on the future heads of court, raise questions.

117. The Venice Commission has noted that the Hungarian authorities are prepared to re-examine and amend the legislation submitted for analysis in order to ensure that the legal framework governing the creation and operation of the new system of administrative courts fully complies with European requirements in this area.

118. The Commission invites the Hungarian authorities to re-examine the legislation submitted to its assessment and, in so doing, take into consideration, in consultation with all the parties concerned, in particular the following recommendations:

- to amend the recruitment procedure, with a view to providing for criteria for the Minister to change the ranking of candidates established by the personnel council of the NAJC, and introduce a requirement of consent from the council for that change and, at the very least, a judicial remedy enabling candidates to challenge the Minister's decision; to provide for stricter and more precise legal supervision of the conditions in which the Minister may declare the recruitment procedure unsuccessful;
- to examine the possibility of strengthening the "judges" component within the personnel council of the NAJC (see para. 51 above);

- to amend the procedure for appointing heads of court so as to involve, in an effective role, the personnel council of the NAJC in the Minister's final decision in the same way as for the initial appointment of judges, and to provide, at the very least, for a judicial remedy against that decision;
- to make provision, among the selection criteria for candidates to the post of President of the Supreme Administrative Court, for the requirement of fairly extensive experience (of at least five years for example) of working as a judge;
- to identify means of counterbalancing the prerogatives of the presidents, including the President of the Supreme Administrative Court, by more heavily involving the judges or their elected representatives, the administrative judicial councils and/or the NAJC in dealing with the different issues; to provide for a legal remedy against certain binding decisions of the President.

119. The Venice Commission welcomes that draft amendments to both laws have been supported by the Ministry of Justice in the light of the draft opinion and submitted to Parliament. If the draft amendments were adopted, some of the criticism of the Commission would be moot.

120. The Venice Commission remains at the disposal of the Hungarian authorities for any assistance they may need.