Strasbourg, 13 June 2023 **CDL-AD(2023)015**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

FRANCE

JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE SUPERIOR COUNCIL OF MAGISTRACY AND THE STATUS OF THE JUDICIARY AS REGARDS NOMINATIONS, MUTATIONS, PROMOTIONS AND DISCIPLINARY PROCEDURES

Adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023)

On the basis of comments by

Ms Nina BETETTO (Expert, Slovenia)
Mr Iain CAMERON (Member, Sweden)
Mr António Henriques GASPAR (Member, Portugal)
Mr Martin KUIJER (Substitute Member, The Netherlands)
Mr Cesare PINELLI (Substitute Member, Italy)
Ms Hanna SUCHOCKA (Honorary President of the Venice Commission)

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I. Introduction

1. By letter of 28 April 2023, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on article 65 of the French Constitution on the composition of the Superior Council of Magistracy (hereinafter, "the CSM", CDL-REF(2023)021) and the Ordinance n° 58-1270 of 22 December 1958 establishing an organic law on the status of the judiciary on nominations, mutations, promotions and disciplinary procedures of magistrates (hereinafter, "the organic law", CDL-REF(2023)022). This request was decided by the Monitoring Committee within the framework of the preparation of its report as part of its regular periodic reviews of the compliance of the obligations entered into upon their accession to the Council of Europe by member states.

2. Ms Hanna Suchocka (Honorary President), Mr Iain Cameron (Member, Sweden), Mr António Henriques Gaspar (Member, Portugal), Mr Martin Kuijer (Substitute Member, the Netherlands), Mr Cesare Pinelli (Substitute Member, Italy) and Ms Nina Betetto (Expert) acted as rapporteurs for this joint opinion with the Directorate General on Human Rights and the Rule of Law of the Council of Europe.

3. On 24 and 25 May 2023, a delegation of the Commission composed of Ms Suchocka, Mr Gaspar, Mr Kuijer, Mr Pinelli and Ms Betetto, accompanied by Ms Martina Silvestri and Ms Caroline Martin, from the Secretariat, visited Paris and had meetings with representatives of the Senate, the National Assembly, the Ministry of Justice, the Superior Council of Magistracy, the Conseil d'Etat, the Bar Association, the Unions of magistrates as well as with civil society. The Commission is grateful to the French authorities for the efforts put in the organisation of this visit.

4. This joint opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 24 and 25 May 2023. On 6 June 2023, the French authorities submitted a note containing comments, which are reported and taken into consideration in this text. Following an exchange of views with Ms Isabelle Jegouzo, Diplomatic Adviser to the Minister of Justice, it was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Background

5. In the French system, the judicial authority is composed of judges (*magistrats du siège*) and prosecutors (*magistrats du parquet*) who follow the same education, training and have a similar way of access to the magistracy (Chapter II of the organic law, "Recruitment and professional training of magistrates", Articles 14 to 25-4). Judges and prosecutors are part of a single body of magistrates, and they can move between the two functions in the course of their career. Nevertheless, different rules apply to these two categories providing a different level of guarantee of independence.[1]

6. The Superior Council of Magistracy (or High Judicial Council, the CSM), who assists the President of the Republic as guarantor of the independence of the judicial authority[2] (Article 64.1 and 2 of the Constitution), has different powers with respect to judges, on the one hand, and prosecutors, on the other hand, in particular as it concerns the nominations (but also promotions and changes in conditions in function or position, hereafter "mutations") as well as disciplinary proceedings.

[1] As a most striking example, security of tenure is guaranteed in the constitution for judges, who shall be irremovable from office (article 64.3), but not for prosecutors.
[2] The Conseil Constitutionnel has specified that the judicial authority is composed of both, judges and prosecutors, Decision n. 2010-14/22 QPC of the 30 July 2010.

7. In the past, the role of the executive power in the justice sector was preponderant: until 2008 the President of the Republic was the President of the CSM and until 2013 the Minister of Justice, who would also sit in the CSM, had the power to give instructions to prosecutors in individual cases.

8. In the last years (or rather tens of years) the judicial authority has been evolving and freeing itself more and more from the executive power, reinforcing the principle of independence of the judiciary, which constitutes a pillar of the rule of law. The unity of the magistracy in one body (*siège et parquet*) in the French understanding, consecrates the integrity of the judicial function. At the same time, the French culture and tradition remain strongly attached to a notion of a public prosecution service (*le parquet à la française*) which is firmly hierarchical, under the authority of the Minister of Justice, who can give general instructions to conduct the national criminal policy. These two conceptions have been taken into account in the analysis below.

9. Between October 2021 and April 2022, a major exercise of review of the justice system and public consultation in relation to the need for institutional reforms in the justice sector has been carried out and it resulted in the Report "Bringing justice to citizens" (*Rapport du comité des Etats généraux de la justice*, EGJ).[3]

10. There appears to be a lack of trust in the judiciary which has become a leitmotiv of the public debate about the justice sector. It does not seem to have one single root-cause, but rather to be related to several factors and to a more general democratic crisis and distrust in the public institutions.[4]

11. Aimed at better understanding the crisis of the justice sector, the EGJ report identifies a series of challenges in the justice system, some of which have inspired a draft law that is currently under discussion in the government,[5] which adds up to a Constitutional bill of 2019 that is still pending.[6] Among other things, the report reiterates the essential hierarchical connection between the Minister of Justice and the public prosecution, as well as the importance of the unity of the magistracy.[7] At the same time, it has identified the need, on the one hand, to reinforce the independence of the *parquet* evolving towards the model of the *magistrats du siège*[8] and, on the other hand, to limit the possibility of switching between the two functions after five years from the start of the career of a magistrate.[9]

III. Analysis

12. During the visit, several issues have been raised by different interlocutors as regards the judiciary (at times recalling those identified by the EGJ report), such as that it is dysfunctional and inefficient, that it suffers from budgetary constraints and lack of public trust; the fear of corporatism, the independence of magistrates versus their democratic legitimation, the growing relevance of administrative justice for issues touching upon individual rights and freedoms were also mentioned as reasons for concern.

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[3] Rapport du comité des Etats généraux de la justice (EGJ report), April 2022, available at : https://www.vie-publique.fr/rapport/285620-rapport-du-comite-des-etats-generaux-de-la-justice-oct-2021-avril-2022.
[4] See also, CEVIPOF, Report « La confiance dans la justice comme test démocratique », May 2023, page 1.
[5] The draft organic law on the opening up, modernisation and accountability of the judiciary has three major objectives: (i) greater openness of the judiciary; (ii) to improve the career development of magistrates and social dialogue; (iii) the development of magistrates' accountability and protection.
[6] The Constitutional bill n. 2203 for a renewal of democratic life (*Projet de loi constitutionnelle pour un renouveau de la vie démocratique*) registered at the National Assembly on 19 August 2019, foresees, among other things, the reinforcement of the independence of the parquet (Public prosecutors would be appointed with the assent of the relevant panel of the CSM, rather than with a simple opinion. This panel would also be competent to act as a disciplinary board for these magistrates).
[7] EGJ report, op. cit., page 110.
[8] EGJ report, op. cit., page 115.
[9] EGJ report, op. cit., page 117.

13. The Venice Commission recognises that all these issues would deserve proper consideration. It also recognises the link, in public perception, between the value of judicial independence, and the accessibility and efficiency of the justice sector. However, due to the time constraints, it will focus on the issue of the independence of the judiciary and, in light of the request of the PACE Monitoring Committee, it will address the aspects raised by the latter.

14. Therefore, the present opinion will cover the following points:

- the composition of the CSM
- the nomination (but also promotions and mutations) of judges and prosecutors
- the disciplinary proceedings and the difference between judges and prosecutors

A. Composition of the Superior Council of Magistracy

15. The CSM was established as an autonomous constitutional body by the French Constitution of 27 October 1946, marking the intention to found an independent justice system. Different laws reformed the institution, its composition and powers. The constitutional law n. 2008-724 of 23 July 2008 (reform of 2008) on the modernisation of the institutions of the 5th Republic[10] and the constitutional by-law n. 2010-830 of 22 July 2010[11] reformed profoundly the CSM regarding its composition and operating procedures, the appointments of members of the judiciary and complaints of citizens.[12]

16. The reform of 2008 is particularly relevant as it replaces the Presidency of the CSM, which was previously held by the President of the Republic. The Venice Commission welcomes this change. As to the participation of the Minister of Justice to the CSM, the Commission notes that article 65.9 of the Constitution reads: "The Minister of Justice may participate in all the sittings of the sections of the Superior Council of Magistracy except those concerning disciplinary matters." It is unclear from the text whether the Minister would have the right to speak and/or to vote during the meetings. However, it has been clarified, during the visit in Paris, that the Minister of Justice has never attended any meeting of the CSM, and this does not seem to raise any concern in terms of a risk of interference by the Minister in its deliberations. The Venice Commission has so far been cautious in its approach (while the Group of States against corruption, GRECO, has taken a stricter position in this regard). In an opinion on Montenegro, it stated that "it is wise that the Minister of Justice should not him- or herself be a member".[13] Similarly, in an opinion on Moldova: "The self-governing nature of the SCP might be questioned given the ex officio membership of the Minister of Justice".[14] If the participation of the Minister of Justice in the work of the CSM is maintained, it is welcome that the Minister cannot participate in disciplinary proceedings against *magistrats du siège*. However, given the fact that the provision appears to be obsolete in French practice and in light of the recent judgment of the ECtHR stating, with respect to the Minister of Justice, that "the presence, even if only passive, of a member of the Government on a body empowered to impose disciplinary sanctions on members of the judiciary is, in itself, extremely problematic in the light of the requirements of Article 6 of the Convention and, in particular, the requirement that the disciplinary body be independent",[15] the Venice Commission recommends consideration of the continued merit of this provision in light of evolving best practices.

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[10] Constitutional law n. 2008-724 of 23 July 2008 : Cinquième République - Sénat (senat.fr).
[11] LOI organique n. 2010-830 du 22 juillet 2010 relative à l'application de l'article 65 de la Constitution (1) - Légifrance (legifrance.gouv.fr).
[12] csm_france.pdf (encj.eu).
[13] Venice Commission, CDL-AD(2014)042, Montenegro, Interim opinion on the draft law on the state prosecution office of Montenegro, para. 38.
[14] Venice Commission, CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, para. 131.
[15] ECtHR, Catana v. Republic of Moldova, 21.02.2023, application no. 43237/13, para. 75.

17. The following sub-sections will focus on the proportion between judicial and non-judicial members of the CSM and on the manner in which the members are selected.

18. The Venice Commission recalls that according to well-established European standards, High Judicial Councils "are independent bodies, established by laws or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system."[16] "The Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in Article 6 of the ECHR in order to reinforce public confidence in the justice system [… It] should be protected from the risk of seeing its autonomy restricted in favour of the legislature or the executive through a mention in a constitutional text or equivalent."[17] Entrusting an independent judicial council with the decisions on the appointment, career and discipline of judges "is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration."[18] The independence of judges, including impartiality, is also a value in the EU legal system, especially in Article 47 of the EU Charter of fundamental rights. "Although there are different structures for ensuring judicial independence all Councils nevertheless are governed by the same general principles. Some Councils are competent with regard to career decisions for judges, selection, recruitment and evaluation and disciplinary actions whereas others, in general more recently established Councils, have competencies that include policy and managerial tasks in the fields of efficiency and quality, budget and budgeting procedures."[19] "The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary and avoids any perception of political influence, self-interest or cronyism".[20]

1. The proportion between judicial and non-judicial members

19. The CSM is composed of two sections: one with jurisdiction over judges and the other with jurisdiction over public prosecutors.[21]

20. Article 65.2 of the French Constitution states that the section of the CSM with jurisdiction over judges shall be comprised of: the Chief President of the Cour de cassation (acting as the Chair of the section), five judges, one public prosecutor, one Conseiller d'Etat appointed by the Conseil d'Etat, one practising lawyer, and six qualified prominent citizens. This means that the section has a total of 15 members, out of which 7 are magistrates (including one prosecutor).

21. Correspondingly, article 65.3 provides that the section with jurisdiction over public prosecutors shall be presided over by the Chief Public Prosecutor at the Cour de Cassation. It shall comprise, in addition, five public prosecutors and one judge, as well as the Conseiller d'Etat and the lawyer, together with the six qualified prominent citizens that also sit in the section with jurisdiction over judges. This means that the Section has a total of 15 members, out of which 6 are prosecutors (7 magistrates).

22. When deciding on disciplinary proceedings, the two sections consist of 16 members each, including respectively, for the section that decides over the discipline of judges, the judge that normally sits in the section with jurisdiction over prosecutors, and vice versa, for the section that

[16] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 26.
[17] CCJE, Consultative Council of European Judges, Opinion n. 10 (2007), point A.
[18] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 81.
[19] ECNJ, European Network of Councils of the Judiciary, Compendium on Councils for the Judiciary, page 4.
[20] CCJE, Consultative Council of European Judges, Opinion n. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, conclusions point 10.
[21] Article 65.1 of the Constitution.

decides over the discipline of prosecutors, the prosecutor that normally sits in the section with jurisdiction of judges.[22] This brings the number of magistrates on a par with the non-judicial members of the section.

23. The Venice Commission has previously stated that: "[i]n order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council. Only a balanced method of appointment of the SCM members can guarantee the independence of the judiciary. Corporatism should be counterbalanced by the membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society."[23] The Committee of Ministers of the Council of Europe recommends that "not less than half the members of judicial councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".[24] The "Magna Carta of Judges" of the Consultative Council of European Judges requires even a higher proportion of judges: "The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers".[25] Similarly, the Venice Commission stated that: "in order to perform its primary role of an independent guarantor of judicial independence, an independent judicial council should have a decisive influence on decisions on appointment and career of judges.[…] In all cases the council should have a pluralist composition with a substantial part, if not majority, of members being judges."[26]

24. The composition of the CSM described in article 65 of the French Constitution does not seem problematic as concerns the proportion between judicial and non-judicial members of the CSM as far as the sections on disciplinary proceedings are concerned, as well as the section with jurisdiction over public prosecutors, for which there are no strict standards. As the Venice Commission stated "where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority."[27] However, concerning the section with jurisdiction over judges, the judicial representation falls short of at least a member of the judiciary.

25. The Venice Commission is aware of the suggestion of the *comité des Etats généraux de la justice* to actually increase the number of non-judicial members,[28] and, during the visit in Paris, the delegation of rapporteurs has carefully listened to the generalised perception (with the exception of the representatives of a union of magistrates) that the fact that the judicial members are in a minority in the CSM does not affect the independence of the judiciary and is rather preferable for reducing the risk of corporatism within the CSM. Nonetheless, the Commission – in line with general recommendations promulgated by relevant Council of Europe bodies– invites the authorities to contemplate a constitutional amendment aimed at increasing, at least by one member, the number of judicial members of the section with jurisdiction on judges.

[22] Article 65.6 and 65.7 of the Constitution.
[23] Venice Commission, Republic of Moldova, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56.
[24] Recommendation CM/Rec(2010)12, op. cit., para. 27.
[25] Magna Carta of Judges, CCJE (2010)3, 17 November 2010, para. 13.
[26] Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system, Part I: The independence of judges, para. 32.
[27] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 66.
[28] The EGJ report suggests the opposite, namely to increase the number of non-judicial members in the CSM. Report ECJ, op. cit., page 113: "In particular, it seems that the presence on the CSM's panels of a majority of members who do not belong to the judiciary is an essential element in demonstrating, against recurrent criticism, that magistrates do not manage themselves. To counter these criticisms more effectively, and because the independence of the judiciary must be based on pillars other than the judiciary itself, consideration could even be given to increasing the number of qualified persons on the CSM."

2. The selection of members of the CSM

26. The eight non-judicial members of the CSM comprise: one Conseiller d'Etat appointed by the Conseil d'Etat, one practising lawyer, and six qualified prominent citizens, who do not belong to the Parliament, the Judiciary or the administration and are appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate.[29] Each of the latter institutions appoint two members, a man and a woman.[30]

27. The non-judicial members selected by the President of the Republic have a stronger democratic legitimacy while those selected by the President of the Senate and of the National Assembly, have a weaker democratic legitimacy inasmuch as they require the assent of the permanent commission in charge of constitutional law[31] of each assembly, in the form of a negative vote below the threshold of three fifth of the voters.[32] Neither eligibility nor ineligibility criteria are set out in the law.

28. The Commission has previously criticised the lack of clarity of the notion 'prominent lawyer'[33] and the need to elaborate a number of basic (in)eligibility criteria for the selection of non-judicial members. In addition, the Commission recalls that "[w]hen lay members are elected by parliament this should be done with the broadest consensus, in principle by a qualified majority vote which involves the opposition, following an open and transparent competition. Effective anti-deadlock mechanisms should be provided."[34]

29. During the visit in Paris, some interlocutors criticised the limited democratic legitimation conferred by the voting method for selecting the prominent citizens chosen by the assemblies and pointed to the fact that the prominent citizens may have a professional background in the judiciary (former magistrates), which would distort the proportion between judicial and non-judicial members, as well as impact their function of countering the risk of corporatism.

30. With the aim to perfect the composition of the CSM and to ensure the necessary diversity of its members, in light of the principles recalled above, the Commission recommends elaborating some (in)eligibility criteria for the selection of the prominent citizens and setting the requirement of a qualified majority (with due anti-deadlock mechanisms) for the selection of the prominent citizens, in order to ensure the maximum diversity.

31. As to the selection of judicial members by their peers,[35] the Commission reiterates the principle of broad and fair representation of all levels and types of courts.[36] At present, 2 out of 5 positions are allocated to magistrates of 1st instance, on the basis of an indirect suffrage by "collège de grands électeurs". Given the fact that most judges work in these courts, the Commission recommends considering re-balancing the representation of lower and higher courts. It also endorses the proposal currently in the draft organic law to abolish the indirect suffrage by "collège de grands électeurs".

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[29] Article 65.2 of the Constitution.
[30] Article 5.2 of the organic law n. 94-100 on the Superior Council of Magistracy.
[31] Article 5 of the law n. 2010-838 of 23 July 2010.
[32] As provided by article 13.5 of the Constitution, referred to by article 65.2 of the Constitution: "The President of the Republic may not make an appointment when the sum of the negative votes in each committee represents at least three-fifths of the votes cast in both committees." This means that the candidates do not need even a simple majority to be elected.
[33] Venice Commission, CDL-AD(2021)032, Serbia, Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, paras. 68-69; and, Venice Commission, CDL-AD(2022)030, Serbia, Opinion on three draft laws implementing the constitutional amendments on Judiciary, para. 75 et seq.
[34] Venice Commission, CDL-PI(2022)005, International Round Table - "Shaping judicial councils to meet contemporary challenges", Rome (Italy), 21-22 March 2022 - General conclusions.
[35] Articles 1-12 of the organic law n. 94-100 of 5 February 1994 on the Superior Council of Magistracy.
[36] Venice Commission, CDL-PI(2022)005, op. cit., General conclusions; and, Venice Commission, CDL-AD(2021)043, Cyprus, Opinion on three Bills reforming the Judiciary, paras. 49 and 60.

B. Judicial appointments: Nominations (and promotions or mutations)

1. Judges (*magistrats du siège*)

32. There exists a great variety in the method by which judges are appointed in domestic legal orders. No single 'model' exists which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.[37] But it is fair to say that international standards are more in favour of the extensive depolitisation of the process.[38] Political considerations should not prevail over the objective merits of a candidate. At the same time, the Commission has remarked that in some older democracies systems exist in which executive power has a strong influence on judicial appointments. Such systems may work in practice, given that the executives in this matter may be largely restrained by legal culture and traditions.[39]

33. In the French system, admission to the judiciary (*la magistrature*), which is regulated by Chapter II of the organic law (articles 14 – 25), can be done through two modalities essentially based on merit: either by passing a competitive examination in order to become *auditeurs de justice* and receiving professional training in the *École nationale de la magistrature*, or by direct integration under certain conditions (age, qualifications, experience) and within a certain quota, following a positive assessment of a technical body (*commission d'*avancement), composed mainly of magistrates.[40]

34. The system is built upon two levels of hierarchy: magistrates of the first grades are higher than those of the second grade (article 2 of the organic law). Eligibility for promotions between grades is also based on merit (positive assessment of the *commission d'avancement*),[41] while the actual nomination follows the general rules for appointments, based on the inscription in the advancement table (*tableau d'avancement*), which is notified to all magistrates.[42] The same applies to magistrates who wish to change position or function (mutations).

35. In line with article 65.4 of the Constitution, the section of the CSM with jurisdiction over judges has the power to propose appointments for judicial positions at the Court of Cassation (first president, division president, trial judges, special judges, auxiliary judges and junior officers), first presidents of Court of Appeal and presidents of lower courts (*tribunaux judiciaires*). Concerning these most important positions on the bench (about 400 positions), the CSM enjoys full power of choice. It receives applications, examines candidate files, interviews some of the candidates and adopts proposals. According to article 28.1 of the organic law, the President of the Republic issues the decree of nominations for these higher positions following the proposal of the CSM.

36. The Venice Commission has recognised that in certain systems the Head of State can directly appoint judges, but a distinction needs to be made between those systems where the President has more formal powers and is withdrawn from party politics (usually parliamentary systems) and those systems where the President plays a prominent role with a clear political drive (usually presidential or semi-presidential systems). In the first case, the influence exercised by the

[37] Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 3.
[38] Venice Commission, CDL-AD(2007)028, op. cit., para. 3.
[39] Venice Commission, CDL-AD(2007)028, op. cit., para. 5. However, one should also note what the ECtHR stated in Guðmundur Andri Ástráðsson v. Iceland [GC], 1.12.2020, application n. 26374/18, that the established "by law" requirement in Article 6, entailed relevant domestic law on judicial appointments being couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interference in the appointment process (paras. 229–230).
[40] Article 35 of the organic law: 16 of its 19 members are members of the judiciary elected by their peers, the other members are ex officio the President of the Cour de Cassation, the Avocat Général of the Cour de Cassation, and the Chief Inspector of the Judiciary.
[41] Chapter II, the career of magistrates, and Chapter III, the evaluation of magistrates' professional activity, of the Decree no. 93-21 of 7 January 1993 implementing Order no. 58-1270 of 22 December 1958, as amended, laying down an organic law on the status of the judiciary.
[42] Article 27 of the organic law.

President constitutes less of a danger for judicial independence. France rather belongs to the second model, given the President's leading role within the executive, and his/her consequent capacity of influencing the government's choices on justice. Yet Article 64.1 of the Constitution not only entrusts the President with the power to appoint judges but even makes the President the guarantor of the independence of the judicial authority.[43] It should be stressed in this respect that the ECtHR has already established that "the mere appointment of judges by the executive does not entail a relationship of subordination if, once appointed, they are free from influence or pressure when carrying out their adjudicatory role."[44] The Venice Commission has also stated that "[w]hat matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council […], the appointment by the President does not appear to be problematic."[45]

37. As described above, the nominations of the higher judicial positions by the President of the Republic follow the proposal of the CSM and this practice seems to be consistent, as has been confirmed in the exchanges with all interlocutors during the visit of the rapporteurs in Paris. The Commission therefore acknowledges that the role of the President of the Republic does not seem problematic in this respect, at least as regards these high-level positions, especially after the reform of 2008.[46] Nonetheless, the Commission invites the authorities to contemplate a constitutional reform amending the first paragraph of article 64 in order to clarify the primary role of the CSM as guarantor of the independence of the judiciary. The fact that at present the President of the Republic does not wield political influence does not necessarily mean that the current constitutional set-up prevents such a situation in the future. What is more, given the wording of Article 64.1 of the Constitution, it is uncertain whether such increased political influence could be regarded as unconstitutional.

38. Concerning all other judicial appointments,[47] the power to make proposals belongs to the Minister of Justice, Keeper of the Seals.[48] The CSM gives its opinion on the proposed appointment submitted by the Minister. This opinion may indicate "assent" (*avis conforme favorable ou positif*) or "non assent" (*avis conforme négatif ou défavorable*). The section of the CSM with jurisdiction over judges not only examines the files of judges whose appointment is proposed by the Minister of Justice, but also those candidates whose appointment is not proposed by the Minister.[49] Candidates, notably those excluded by the proposal of the Minister of Justice, can address observations to the CSM and to the Minister of Justice. According to the Constitution, a judicial appointment can only be made if the section of the CSM approves the Minister's proposal (veto power). Prior to issuing a negative opinion, the CSM has the possibility to recommend or signal a magistrate for a certain position[50] but such a recommendation is not binding and the CSM does not have the power to modify *motu proprio* the proposal of the Minister, only to reject it as a whole. Also in this case, the President of the Republic nominates (or

[43] Article 64.1 of the Constitution.
[44] ECtHR, Thiam v. France, 18.10.2018, application n. 80018/12, para. 80.
[45] Venice Commission, CDL-AD(2007)028, op. cit., para. 13-14.
[46] Before 2008 the President of the Republic was also the President of the CSM.
[47] There are about 9000 magistrates in France. In 2022, the CSM has given 2162 "avis" on the proposal of nominations, out of which 1532 for judges and 630 for prosecutors. The observations of excluded candidates were 253 for judges and 89 for prosecutors (this number has been constantly decreasing in the last years). To this, it has to be added 1212 mutations examined for the judges and 526 for prosecutors. In total, there may be about 4000 judicial appointments every year, including new nominations, promotions and mutations.
[48] Article 65.4 of the Constitution.
[49] Conseil Supérieur de la Magistrature (conseil-superieur-magistrature.fr) and Activity Report of the CSM 2021, page 38 et seq.
[50] Activity Report of the CSM 2022, pages 31-32.

promotes) the candidates proposed by the Minister of Justice, following the *avis conforme favorable* of the CSM.[51]

39. As it has been assessed above, the role of the President of the Republic in the appointment of judges is formal. What is more controversial is the fact that in this case the proposal does not come from the CSM but from the Minister of Justice.

40. In fact, the Minister of Justice is able to select the candidates he/she wishes to put forward and could favour or punish the judges who appear more or less compliant, whereas the CSM does not have the power to modify the proposal of nominations. The Venice Commission is of the opinion that this system allocates an undesirable power to the executive in the field of judicial appointments. It creates a risk, not purely theoretical,[52] that political considerations are taken into account when proposing candidates for a judicial post. The power of the CSM to reject some candidates does not appear sufficient to counter this risk nor does it fulfil the role that is proper to this institution, namely safeguarding the independence of the judiciary. In this respect, the Venice Commission has clearly expressed the view that a judicial council should have a decisive influence on the appointment and promotion of judges.[53]

41. Considering that the CSM is already screening all profiles of candidates (proposed and excluded), making the necessary comparisons to formulate recommendations and opinions, assessing the observations of excluded candidates, it should be possible, as a first step, to modify the organic law in order to entrust it with the power to modify the proposal of the Minister of Justice, by reintegrating or replacing certain candidates, where it considers it appropriate.

42. The Venice Commission therefore recommends attributing to the CSM, at least, the power to modify the proposal of appointments made by the Minister of Justice.

2. Prosecutors (*magistrats du parquet*)

43. In France, prosecutors are part of the judicial authority, as set out in article 64.1 of the Constitution[54] but the guarantees of their independence are less stringent than those of judges, as, pursuant to Article 64.3 of the Constitution, only judges enjoy security of tenure. This difference is reproduced in the organic law, where article 4 reads that "Judges are irremovable. Consequently, a judge may not receive a new assignment without his or her consent, even for promotion", while article 5 provides that "Prosecutors are placed under the direction and control of their hierarchical superiors and under the authority of the Minister of Justice. In court, they are free to speak".

44. There is no common European standard on the organisation of the prosecution service. In countries where the prosecution service is regarded as a part of the executive, it is not uncommon to find a hierarchical model. A hierarchical system should lead to unifying proceedings, nationally and regionally and can thus contribute to legal certainty.[55] Therefore, according to the Venice Commission's standards,[56] the hierarchical model is acceptable and some form of hierarchical

[51] Article 28.2 of the organic law.
[52] That such a risk is not merely theoretical is demonstrated by recent news coverage: https://www.lemonde.fr/societe/article/2022/03/24/l-intervention-embarrassante-de-dupond-moretti-dans-la-nomination-des-juges_6118957_3224.html.
[53] Venice Commission, CDL-AD(2007)028, op. cit., para 49.
[54] Conseil Constitutionnel, Decision n. 2010-14/22 QPC of the 30 July 2010.
[55] Venice Commission, CDL-AD(2008)019, Republic of Moldova, Opinion on the draft law on the Public Prosecutors' service of Moldova, para. 15.
[56] Venice Commission, CDL-AD(2010)040, op. cit., paras. 28, 30 and 31.

control over the decisions and activities of prosecutors is allowed.[57] Nonetheless, sufficient autonomy must be ensured to shield prosecutorial authorities from undue (political) influence.[58]

45. The peculiarity of the French system lies in the fact that on the one hand, the prosecution service is built upon a hierarchical system under the authority of the Executive, that can give general instructions and it follows the opportunity principle in the criminal proceedings,[59] and on the other hand, prosecutors belong to the judicial authority and constitute, together with judges, a single body of magistrates, with the possibility to move between the two functions in the course of their career. The Venice Commission does not question the principle of unity of the body; however, this peculiarity carries a risk of vulnerability if the safeguards of prosecutorial autonomy are not sufficiently strong as regards political interference both at the stage of appointments and promotions and during the exercise of the prosecutorial activity. In this respect, the EGJ proposal to limit the possibility of switching between the two functions after five years from the start of the career of a magistrate could be taken into consideration.[60]

46. The Venice Commission has clarified that guarantee of non-interference "means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process."[61]

47. As to the guarantees during the prosecutorial activities, taking in due consideration the prominent role of the Minister of Justice in the conduct of the criminal policy, the Venice Commission is satisfied with the principle that public prosecutors are independent in the exercise of public action taken on a case-by-case basis[62] and it welcomes that, following the reform of 2013,[63] the Minister of Justice cannot anymore give instructions in the individual cases, which has been consistently applied in practice.[64] Another crucial element to be taken into consideration is related to the issue of disciplinary proceedings, which will be addressed in the next section.

48. As to the safeguards from political interference at the stage of appointments, the Commission has previously stressed that "the qualities required of a prosecutor are similar to those of a judge and require that suitable procedures for appointment and promotion are in place."[65]

49. According to article 65.5 of the Constitution the section of the CSM with jurisdiction over public prosecutors "shall give its opinion on the appointment of public prosecutors". It is for the Minister of Justice to propose candidates (including those for high-level positions) and – contrary to the CSM's role with regard to judicial appointments – the CSM is merely able to give its advice which is not binding (no requirement of "avis conforme" of the CSM). Although the Minister of Justice has systematically followed the negative advice of the CSM in the last fifteen years, the executive through its proposals exerts significant influence over the appointment process of prosecutors, which may create a risk of politicisation.[66]

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[57] It is one of the reasons for which the Venice Commission prefers to use the word 'autonomous' over 'independent' with respect to public prosecutors.
[58] Venice Commission, CDL-AD(2016)007, op. cit., para. 91.
[59] The prosecutor has discretion not to prosecute where the public interest does not demand it.
[60] EGJ report, op. cit., page 117.
[61] Venice Commission, CDL-AD(2010)040, op. cit., para. 32.
[62] Article 31 of the Code of Criminal Procedure.
[63] Law n. 2013-669 of 25 July 2013 relating to the powers of the Keeper of the Seals and the magistrates of the Public Prosecutor's Office with regard to criminal policy and the implementation of public action.
[64] Article 30 of the Code of Criminal Procedure. Only the chief public prosecutor may issue individual instructions to the public prosecutor, provided that they are intended solely to initiate proceedings (not to close a case) and that they are in writing and form part of the case file (article 36 of the Code of Criminal Procedure).
[65] Venice Commission, CDL-AD(2010)040, op. cit., para 18.
[66] That this risk is not merely theoretical is demonstrated by the 2018 statement of former Prime Minister Édouard Philippe to the National Assembly when debating the appointment of a new prosecutor in Paris: "(...) I fully acknowledge the fact that I will be meeting with candidates and satisfying myself that the one who will be put

50. The CSM proposed in the past to align the procedure for appointment of prosecutors with the procedure followed in case of judicial appointments as regards the requirement of an "avis conforme".[67] As a matter of fact, there seems to be a consensus on this solution,[68] and during the visit in Paris, most interlocutors have expressed their agreement in this respect, underlining that such a legislative proposal had already been approved both by the Senate and the National Assembly. However, the reform process, which was suspended during the covid pandemic, was not resumed after the crisis. As the French authorities have explained in their comments provided on 6 June 2023, the reasons is that the current existence of a political majority for constitutional reform is doubtful. All interlocutors have also confirmed that since 2008 the Minister of Justice has always followed in practice the advice of the CSM.

51. The Venice Commission considers that the alignment of the appointments' procedure of prosecutors to the current procedure for judges would indeed be more in line with the principle of prosecutorial autonomy and European practice, although there are no clearcut 'standards' as to how national authorities should organise the manner of appointment of prosecutors.[69] This formal alignment would be particularly valuable in the French system, characterised by the unity of the body of magistracy. The Commission therefore recommends proceeding with such a legislative and constitutional reform which seems to be based on a consensus, in consideration of the fact that a fifteen-year long practice is not necessarily ever-lasting.

C. Disciplinary proceedings

52. The disciplinary regime is an essential component of the legal status of magistrates. In the field of judicial discipline, a balance needs to be struck between judicial independence (necessary to avoid political interference by the executive), on the one side, and the necessary accountability of the judiciary, on the other, averting possible negative effects of corporatism within the judiciary.

53. Chapter VII of the organic law regulates the "Discipline" and its first section (articles 43 – 48-1) sets out the general provisions applying to both judges and prosecutors. Magistrates are subject to disciplinary responsibility under the terms set out in article 43 of the organic law: "Any breach by a member of the judiciary of the duties of the office, honour, courtesy (*délicatesse*) or dignity shall constitute a disciplinary offence", the law specifying that one of the violations of the "duties" is a "serious and deliberate violation by a judge of a procedural rule constituting an essential guarantee of the rights of the parties, established by a court decision that has become final".

54. The grid of disciplinary sanctions is ordered by criterion of gravity into eight categories, from a registered reprimand to a revocation.[70] Article 46 of the organic law fixes the rule of application of a single sanction in case of multiple infractions. However, there is no provision on the proportionality of disciplinary sanctions.

55. With regard to magistrates of the *siège* (judges), disciplinary power is exercised by the CSM, and with regard to magistrates of the *parquet* (or magistrates seconded in the exercise of

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forward for appointment and approval by the Superior Council of Magistracy will be wholly in line with the government and that I will be entirely comfortable with that prosecutor." Philippe assume un droit de regard sur la nomination des procureurs | Reuters. In this respect, it is worth noting that the ECtHR held, although in a specific case, that public prosecutors in France did not satisfy the requirement of independence from the executive. See, ECtHR, Moulin v. France, 23.11.2010, application n. 37104/06, para. 59.

[67] See for example the Annual Report of the CSM 2005, pages 191-192, until the most recent Annual Report 2022, page 126.

[68] See Report EGJ, op. cit., page 118. Likewise, the Report n. 3296 of the commission of enquiry of the national assembly about the obstacles to the independence of the judicial power came to a similar conclusion, page 35.

[69] Venice Commission, CDL-AD(2010)040, op. cit., para. 48 et seq.

[70] Article 45 of the organic law.

administrative functions at the Ministry of Justice or in inspection service), disciplinary power is exercised by the Minister of Justice.[71]

56. While acknowledging that "there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations",[72] the Venice Commission favours specific and detailed description of grounds for disciplinary proceedings,[73] whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility.[74]

57. Moreover, the Committee of Ministers stated that "Disciplinary sanctions should be proportionate".[75] Similarly, the Venice Commission stated that the "imposition of the sanction should be subject to the principle of proportionality".[76]

58. On this matter, the ECtHR found that in the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: "the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects".[77] Increased sensitivity regarding the issue of disciplinary offences and their impact on the independence of the judiciary is also demonstrated in the case-law of the Court of Justice of the European Union.[78]

59. In light of the above, the notions of "duties of the office, honour, courtesy and dignity"[79] are to be considered excessively general and vague. During the meeting with the rapporteurs in Paris, the CSM was assured that a consistent practice exists in assessing the different conducts of magistrates, also in consideration of the principle of proportionality of sanctions.[80] This practice

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[71] Article 48 of the organic law.

[72] Venice Commission, CDL-AD(2014)018, Kyrgyz Republic, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, para. 23.

[73] See, for example, Venice Commission, CDL-AD(2014)006, Republic of Moldova, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, para. 15.

[74] See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria, Opinion on the Judicial System Act, para. 108; and Venice Commission, CDL-AD(2019)024, Armenia, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, para. 40. See also ECtHR, Oleksandr Volkov v. Ukraine, 9.01.2013, application n. 21722/11, para. 175 et seq.

[75] Recommendation CM/Rec(2010)12, op. cit., para 69.

[76] Venice Commission, CDL-AD(2007)009, Georgia, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, para. 9. See also, Venice Commission, CDL-AD(2016)009, Albania, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 34.

[77] ECtHR, Oleksandr Volkov v. Ukraine, op. cit., para. 185. See also, ECtHR, Denisov v. Ukraine, 25.09.2018, application n. 76639/11.

[78] CJEU, C-204/21, 5 June 2023, Commission v Poland, ECLI:EU:C:2023:442, CJEU, C 791-19, 15 July 2021, Commission/Poland (Disciplinary liability of judges), EU:C:2021:596, Joined Cases C-558/18 and C-563/18, 26 March 2020, Miasto Łowicz (Disciplinary regime for magistrates), ECLI:EU:C:2020:234, and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, 18 May 2021, Forum of Romanian Judges, ECLI:EU:C:2021:393.

[79] Article 43.1 of the organic law.

[80] In line with article 20-2 of the organic law n. 94-100 on the Superior Council of Magistracy, the CSM has developed a Compendium of deontology for magistrates (*Recueil des obligations déontologiques des magistrats*). As the CSM explains in its website, the Compendium has no regulatory force: "This Compendium is not a code of discipline but a guide for judges and prosecutors who belong to the same body in France. Its publication is intended to strengthen public confidence in the independent and impartial operation of the French judicial system": http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques/recueil-des-obligations-deontologiques-des-0.

has also been confirmed by the Conseil d'Etat, which acts as final instance (cassation) with respect to the sanctions imposed on judges and as court of first instance for sanctions imposed on prosecutors.[81] Nevertheless, in the "Opinion to the President of the Republic" issued by the Plenary section of the CSM on 24 September 2021, the CSM proposed to reword article 43.1 of the organic law involving the explicit inclusion of a list of the statutory duties of office of a judge: independence, impartiality, integrity and probity, fairness, professional conscientiousness, dignity, respect and consideration for others, confidentiality and discretion; the addition of references to obligations arising from other provisions of the statute, which form part of the duties of office of a judge, whilst not being incorporated in the above-mentioned principles (particularly declarations of interest and incompatibilities); a reference to an infringement of honour.[82] The Venice Commission considers that this proposal should be endorsed and thus recommends rewording article 43.1 of the organic law in order to define in a more complete and concrete manner the duties of office of a judge and the other notions in the provision, as well as to explicitly mention the principle of proportionality of disciplinary sanctions.

1. Judges (*magistrats du siège*)

60. According to articles 50-1 to 50-3 of the organic law, various persons may initiate disciplinary proceedings against a judge:

(i) the Minister of Justice, who is entitled to request an investigation, prior to any proceedings, by the General Inspectorate of the Justice System (IGSJ) which comes under the Ministry of Justice;
(ii) the President of the Court of Appeal under which the disciplined judge is serving; and
(iii) (since 2010) any person who considers that the conduct of a judge, in the course of legal proceedings concerning him or her, is likely to be classified as a disciplinary offence. In the latter case, a filtering panel first examines the admissibility of the complaint.

61. The procedure (Articles 50-5 – 58 of the organic law) entails communication of the file to the judge concerned, the appointment of a rapporteur among the members of the CSM to carry out any inquiry needed, and the possible protective suspension of the judge concerned. When the inquiry has been completed, or if there is no need for an inquiry, the judge concerned is summoned, if necessary, with the assistance of his or her lawyer and the file is disclosed to him or her. During a public hearing,[83] the rapporteur makes a report presenting the case to the panel. After evidence has been taken from the director of judicial services and the report has been read, the judge concerned is asked to submit his/her explanations and any pleas in his/her defence. The deliberations take place in camera, and then the decision, for which reasons are given, is

[81] The Conseil d'Etat (CE) informed the Venice Commission that "as the court of cassation for CSM sanctions imposed on sitting magistrates, it reviews the legal characterisation of the facts […] as regards the facts that justified the sanction (Section 14 March 1975 Sieur Rousseau p. 194; Section 6 November 2002 M. Wargniez p. 385; CE 15 March 2006 M. Renard). This same review of the legal characterisation of the facts is also carried out with regard to the choice of sanction, but this is a more recent development (CE 30 June 2010 Mme Ponsard n°325319). With regard to sanctions imposed by the Keeper of the Seals on public prosecutors on the advice of the CSM, for which the CE has 1st instance jurisdiction, the review is described as "normal" or "full" (as opposed to limited or manifest error of assessment). Cf the CE decision of 27 May 2009 Hontang n°310493, this decision specifying in its file in the Recueil Lebon that "The Conseil d'Etat verifies that a sanction imposed on a magistrate is not disproportionate to the facts of which he is accused". (See also the decision itself, which states: "in view of the seriousness of these facts, which have been proven, the Minister for Justice, the Keeper of the Seals, did not impose a disproportionate sanction on him by dismissing him without suspension of pension rights")."

[82] CSM, Opinion for the President of the Republic, page 20, http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_20210924_avis_pr.pdf.

[83] This requirement was introduced by the law of 25 June 2001. If the protection of public order or private life so require, or if there are any special circumstances that may undermine the interests of the justice system, the hearing room may be closed to the public, for all or part of the hearing, by the disciplinary board, if necessary of its own motion.

delivered in public. The sanction is decided by the majority of votes and the decision may be appealed against before the Conseil d'Etat (as a court of cassation).

62. The Venice Commission has previously stated that disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority".[84] Similarly, in its 2016 Rule of Law Checklist the Venice Commission stressed that "[t]he disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s)".[85] Also the ECtHR refers to the importance of an appropriate framework for independent and impartial review.[86] Likewise, the European Charter on the Statute for Judges requires *inter alia* that the proceedings should be of an adversarial character involving full participation of the judge concerned. The Committee of Ministers stated that "disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction".[87]

63. The issues of typicity of the disciplinary violations and proportionality of sanctions have already been addressed in the previous section. As to the rights of defence, the procedural safeguards seem to be formally guaranteed, although it is not expressly provided for in the law (article 52 of the organic law) that all useful acts of investigation may (or should) also be carried out at the request of the accused magistrate, in fulfilment of his or her right of defence.

64. The Commission is concerned about the power of initiative and investigation of the Minister of Justice and the lack of such power in the hands of the CSM. Albeit tasked with conducting disciplinary proceedings, the CSM enjoys no correlated power in the conduct of administrative inquiries. The body which is entrusted with the task of conducting the investigation is the IGSJ, which is under the authority of the Minister of Justice, while the rapporteur of the CSM carries out a second investigation only if needed, after the preliminary inquiry, and does not seem to be granted full means of investigations (article 52 of the organic law).

65. In this respect, it is noteworthy that the "Report of the commission of enquiry of the national assembly about the obstacles to the independence of the judicial power" proposed to enshrine in the Constitution that the CSM may raise, of its own motion, any question relating to the independence of the judiciary; and to provide that the Minister of Justice may make the members of the IGSJ temporarily available to the CSM, at its request.[88] It also proposed to enshrine in the Constitution that all members of the judiciary must be able to refer a matter to the CSM if they consider that their independence or impartiality is called into question. Similarly, GRECO recommended that: "the disciplinary procedure relating to judges should be the sole prerogative of the CSM, which should be able to have proper powers of investigation and be allowed to make use of a service with an investigative capacity, such as the IGSJ, even before proceedings are

[84] Venice Commission, CDL-AD(2007)009, op. cit., para. 9. See also, Venice Commission, CDL-AD(2016)009, op. cit., para. 34.
[85] Venice Commission, CDL-AD(2016)007, op. cit., para. 78.
[86] ECtHR, Volkov v. Ukraine, op. cit., para. 184. See also the European Charter on the Statute for Judges requiring inter alia that disciplinary proceedings should be of an adversarial character involving full participation of the judge concerned.
[87] Recommendation (2010)12, op. cit., para 69.
[88] Report n. 3296 of the commission of enquiry of the national assembly about the obstacles to the independence of the judicial power, pages 38-39.

opened. The intervention of the Minister of Justice should be restricted to receiving complaints and filing a case for possible deficiencies with the CSM". [89]

66. The Minister of Justice, upon receipt of a complaint or informed of facts that could lead to disciplinary proceedings, may, in urgent cases, propose to the CSM the suspension of the judge in question (article 50,1 of the organic law); he or she may, on their own initiative, ask the IGSJ for an investigation; in case of preliminary rejection or inadmissibility of a complaint by the *commission d'admission des requêtes* (filtering panel), the Minister of Justice retains the power to bring the CSM to intervene (art 53-3,8 of the organic law); and is informed of the rejection of the complaints and of initiation of the disciplinary procedure (art 53-3,9 of the organic law). Although the Minister of Justice does not have final decision-making power, the nature of the competences related to disciplinary matters regarding judges is such as to create a high risk of upsetting the balance of powers in such a sensitive matter like the exercise of disciplinary action.

67. The Venice Commission therefore recommends shifting the power of initiation from the Minister of Justice to the CSM, that should be able to initiate the disciplinary proceedings also *ex officio*, and should be able to request the IGSJ to carry out an investigation. The Venice Commission welcomes the fact that in the current draft organic law, broader powers of investigation would be assigned to the filtering panel (*commission d'admission des requêtes*). The French authorities, in their comments submitted on 6 June 2023, underline that the draft reform relaxes the conditions governing the admissibility of complaints from litigants, improves the CSM's powers of investigation into such complaints, and also provides that the CSM will systematically hear any magistrate accused by a litigant.

2. Prosecutors (*magistrats du parquet*)

68. The disciplinary regime applicable to prosecutors diverges, in an essential aspect, from the regime of the judges. The CSM, through the section relating to the prosecutors, has competences to receive complaints, to verify, through the filtering panel, the inadmissibility or the manifestly ill-founded nature of the complaint, and in the case of admission of the complaint, to carry out the necessary investigations. However, the CSM does not have decision-making powers on disciplinary responsibility; its competence is only advisory and the decision on the verification of the existence of the infraction and the application of the sanction fall within the competence of the Minister of Justice (articles 48 and from 58-1 to 66 of the organic law). In addition, prosecutors do not have security of tenure. Admittedly, the decision taken by the Minister of Justice may be subject to review for abuse of authority before the Conseil d'Etat. In their comments of 6 June 2023, the French authorities stress that both on disciplinary matters and in the case of mutations, the simple advice of the CSM is respected in practice.

69. The Venice Commission has previously recognised that the effects of the decisions of prosecutorial councils can vary and, whereas in certain systems their decisions could have a direct effect on the prosecutors, in others they are only of advisory nature, thus requiring their implementation by the Minister of Justice. However, the Commission has expressed a clear preference for the first model "because it takes away discretion from the Minister and leaves less opportunity for political interference in the prosecutors' careers."[90]

70. As already stressed in the section about the appointment of prosecutors above, the French system carries a risk of vulnerability if the safeguards of prosecutorial autonomy are not sufficiently strong as regards political interference, not only at the stage of appointments and promotions, but also during the exercise of the prosecutorial activity and in particular in the

[89] Corruption prevention in respect of members of parliament, judges and prosecutor: Evaluation report France, Greco Eval IV Rep (2013) 3E, para. 126. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c5df9.
[90] Venice Commission, CDL-AD(2010)040, op. cit., para.67.

context of disciplinary proceedings.[91] Thus, the Venice Commission reiterates that "[i]t is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision."[92]

71. The Venice Commission therefore recommends to entrust the sole authority to impose disciplinary sanctions on prosecutors to the CSM and to align, in line with previous GRECO recommendations,[93] the disciplinary procedure for members of the prosecution service with that applicable to judges.[94]

IV. Conclusion

72. The Venice Commission has been asked by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe to give an opinion on article 65 of the French Constitution on the composition of the Superior Council of Magistracy and on the organic law on the status of the judiciary on nominations, mutations, promotions and disciplinary procedures of magistrates.

73. The joint opinion covers the following points:

- the composition of the CSM
- the nomination (but also promotions and mutations) of judges and prosecutors
- the disciplinary proceedings and the difference between judges and prosecutors

74. The Commission acknowledges that the French judicial system presents several specificities, notably that the judicial authority is composed of judges (*magistrats du siège*) and prosecutors (*magistrats du parquet*) who are part of a single body of magistrates, and can move between the two functions in the course of their career, while subject to different levels of guarantees of independence. The Supreme Council of Magistracy assists the President of the Republic as guarantor of the independence of the judicial authority and has different powers with respect to judges, on the one hand, and prosecutors, on the other hand, in particular as concerns the nominations (but also promotions and mutations) as well as disciplinary proceedings.

75. This judicial system has been reformed in recent times (e.g. 2008 and 2013), progressively emancipating the judicial authority from the executive power and reinforcing the principle of independence of the judiciary, and is currently undergoing a further process of reform based in particular on the results of a major exercise of review of the justice system and public consultation in relation to the need for institutional reforms in the justice sector carried out between October 2021 and April 2022 (the Report "Bringing justice to citizens" of the *comité des Etats généraux de la justice*). The reflection, which adds up to a pending project of constitutional reform from 2019, concerns possible amendments at both the constitutional and the legislative levels.

76. The Venice Commission welcomes this domestic process of reflection and analysis of the judicial system, and hopes that this opinion may represent a constructive and useful contribution to such process.

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[91] That this is not a purely theoretical risk is again revealed by the news coverage: https://www.lemonde.fr/societe/article/2022/09/21/enquetes-administratives-lancees-par-eric-dupont-moretti-aucune-sanction-disciplinaire-reclamee-contre-le-vice-procureur-du-parquet-national-financier_6142563_3224.html.

[92] Venice Commission, CDL-AD(2010)040, op. cit., para. 18.

[93] Greco Eval IV Rep (2013) 3E, op. cit., para. 148.

[94] Activity report CSM 2022, page 126. Etats Generaux de la Justice page 118. The Report n. 3296 of the commission of enquiry of the national assembly about the obstacles to the independence of the judicial power came to a similar conclusion, page 35.

77. Concerning the composition of the CSM, the Commission recommends:

- envisaging a constitutional amendment aimed at increasing, at least by one member, the number of judicial members of the section with jurisdiction on judges;
- providing in the organic law appropriate (in)eligibility criteria for the selection of the prominent citizens and at constitutional level, setting the requirement of a qualified majority (with due anti-deadlock mechanisms) for the selection of the prominent citizens, in order to ensure the maximum diversity;
- considering re-balancing the representation of lower and higher courts and abolishing the indirect suffrage by "collège de grands électeurs", as regards the selection of judicial members by their peers;
- considering, in light of evolving best practices, the continued merit of Article 65.9 of the Constitution according to which the "Minister of Justice may participate in all the sittings of the sections of the Superior Council of Magistracy except those concerning disciplinary matters".

78. Concerning the power of the CSM to propose the nomination (but also promotion or mutation) of judges, the Venice Commission recommends:

- attributing to the CSM, at least, the power to modify the proposal of appointments made by the Minister of Justice. The Commission also recommends proceeding to the legislative and constitutional reforms needed to align the appointments' procedure of prosecutors to the current procedure for judges;
- pursuing the constitutional reform and amend the first paragraph of article 64 in order to clarify the primary role of the CSM as guarantor of the independence of the judiciary.

79. As to disciplinary proceedings, the Venice Commission, while welcoming the proposal of the current draft organic law to assign some powers of investigation to the filtering panel of the CSM, recommends:

- shifting from the Minister of Justice to the CSM the power to initiate the disciplinary proceedings *ex officio*, and to request the IGSJ to carry out an investigation;
- aligning the disciplinary procedure for members of the prosecution service with that applicable to judges.

80. In addition, the Venice Commission, while acknowledging the added value of the Compendium of deontology for magistrates developed by the CSM, recommends:

- rewording article 43.1 of the organic law in order to define in a more complete and concrete manner the duties of office of a judge and the other notions in the provision, as well as to explicitly mention the principle of proportionality of disciplinary sanctions;
- expressly providing in the law that all useful acts of investigation may also be carried out at the request of the accused magistrate, in fulfilment of his or her right of defence.

81. The Venice Commission remains at the disposal of the French authorities and the Parliamentary Assembly for further assistance in this matter.