



AEAJ

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Associazione dei Magistrati Amministrativi Europei /
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To:

Ms Vera Jourova, EU Commissioner for Justice and Consumers

Mr Petro Poroshenko, President of the Republic of Ukraine

Mr Pavlo Petrenko, Minister of Justice of the Republic of Ukraine

Concerns: the „Law of Ukraine on the Judiciary and the Status of Judges“

Vienna, 13th June 2016

Honourable Madame,

Honourable Sir,

On the basis of the letter of the High Administrative Court of the Ukraine (hereinafter: HACU), AEAJ wants to express its concern with respect to the provisions contained in the „Law of Ukraine on the Judiciary and the Status of Judges“.

AEAJ can only base its considerations on the basis of the letter of HACU to the President of the Ukraine of June 2016, as the final version of the – already passed – law does not yet exist.

First, let me stress that organisational changes of judiciary must be based on the respect of keeping full structural independence as well as individual independence of each judge.

Therefore, transitory provisions in case of any changes do have much weight and must be well balanced.

AEAJ is not informed on such transitory provisions of the new Law on Judiciary and Status of Judges, which would be able to guarantee relevant basic safeguards of independence of this legal reform.

Furthermore, let me stress that Supreme Administrative Courts have the function to uniform existing jurisprudence of the lower courts, by this giving legal security and also to compensative mistakes which have occurred in the decision making processes of the lower instances. Through legal clarity and security also trust into judiciary is enhanced.

HACU is the High Administrative Court of the Ukraine and member of IASAJ (International Association of Supreme Administrative Jurisdictions). Thus, with respect to administrative matters also HACU has the above mentioned function to uniform existing case law in administrative judiciary.

HACU has therefore (also) effectuated these functions (including other first instance-court functions) for more than 10 years already. Reasons for this change of organisation have not come to the knowledge of AEAJ so far. For a court of this level this role is vital for judiciary in a democratic state.

Administrative justice has special needs e.g. with respect to the broad range of administrative law areas and need of such a specialisation, furthermore the needs of strong safeguards of independence towards the executive power, which is controlled by administrative judiciary, but again which partly has some influence on the organisation of administrative judiciary (through budgetary and other means; regarding Public Integrity Council see below).

Therefore a specialized supreme administrative court within a system of specialized administrative jurisdiction as last instance court is of relevance and of advantage. Specialisation of a court has advantages and disadvantages. AEAJ is not of knowledge of specific disadvantages out of the existence of HACU as administrative court (not having any specific specialization within the field of administrative law). AEAJ comes to this preliminary assessment on the basis of the Opinion No. 15 of the Consultative Council of European Judges (CCJE) of 13 November 2012 (which gives an outline of possible advantages and disadvantages of specialized jurisdictions¹). The assessment of the - installed with the new Law on Judiciary and Status of Judges - Anti Corruption Court and Intellectual Property

1

<https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE%282012%294&Language=ianEnglish&Ver=original&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>

Court, might be different, as these courts (at least as far as we are informed) are highly specialized.

In case of any organisational changes, the status of judges before and after must not be attacked. Again, let me stress the importance of adequate transitory provisions also in this respect:

Opinion of the CCJE No. 1 (2001) explicitly notes that an essential element for judicial independence is the tenure of office of the judge, which is a pre-requisite to the maintenance of the rule of law and the fundamental guarantee of a fair trial. Security of tenure and irremovability are key elements of the independence of judges (see recommendation Council of Ministers , CM/Rec (2010)12, para. 49).

A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform his judicial functions (see Recommendation CM/Rec (2010) 12 para 50).

In all these exceptional cases strict procedural rules have to be followed. Such proceedings should be conducted by an independent authority or a court and there must be a full guarantee of a fair trial. The procedural rules must provide the judge with the right to challenge the decision and sanction proposed. Disciplinary sanctions should be proportionate (see in detail and for further information: Recommendation CM/Rec (2010) 12 para 69; see also CCJE Opinion No 3 para 77).

Therefore, the organisational changes and the new disciplinary provisions, both allegedly contained as such in the new Law on Judiciary and Status of Judges, might be in conflict to European standards, which should be applied in a democratic state, governed by the rule of law.

Therefore, the legal basis of the Public Integrity Council in the new Law on Judiciary and Status of Judges, its control functions and the scope of competences as well as the composition of it, might be in conflict to European standards, which should be applied in a democratic state, governed by the rule of law.

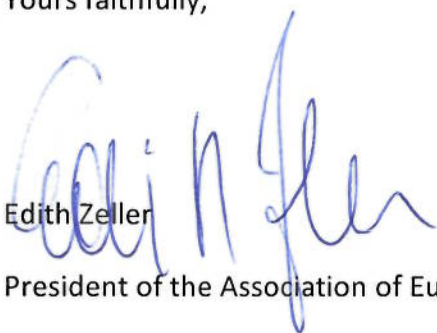
Finally, let me express our concern about the widespread obligations of judges to give full declaration of family connections and also other declarations (of private assets). All over Europe the tensions of the executive and also of the media towards judiciary have risen. Measures like this do not show that the state powers are driven by mutual respect, but lead to irritations and violations of a right to privacy, in principle anti corruption measures

(applying then to all representatives of all state functions in a specific higher position to an equal level!) should respect also Art. 8 ECHR. Let me draw your attention to the principles points, laid down also in the Opinion No 18 of CCJE².

On the basis of the letter of the president of HACU to the president of the Ukraine of June 2016, AEAJ wants to stress that the integrity of judges might be violated, structural independence attacked through the overacting needs (with even disciplinary sanctions) of publishing (and also publishing of family members) private data. The respect of Art. 8 ECHR also applies to judges, as they are also citizens. These measures would not help to establish proper accountability and transparency in preventing corruption, but deter judges.

To summarize, AEAJ wants to express its hope that the ongoing judicial reform, affecting our Ukrainian judge colleagues, will follow existing European standards. A constructive dialogue would be a profound basis for such a result, including a dialogue with judges as members of the judiciary. As the Ukrainian Association of Administrative Judges is member of our European Association, in the name of which I address you, let me conclude by reassuring our AEAJ support for this dialogue.

Yours faithfully,



Edith Zeller

President of the Association of European Administrative Judges