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## **Committee on Legal Affairs and Human Rights**

### **Judicial Corruption: urgent need to implement the Assembly's proposals**

Rapporteur: Mr Kimmo Sasi, Finland, EPP/CD

#### **Background document prepared by the European Human Rights Association: Judicial corruption in Europe. Extent and impact<sup>1</sup>**

##### **Abstract**

*This report provides a general overview of the extent and impact of judicial corruption in Europe. The comparative research focuses on presenting the legal framework for preventing and combatting judicial corruption, certain aspects related to its implementation, as well as the perception of such corruption and certain challenges and recommendations. The possible impact of corruption is considered in the light of the principle of independence and impartiality of national courts i.e., the fair trial requirement guaranteed by the European Convention on Human Rights. An overview of the relevant Strasbourg case-law, as well as certain aspects related to the implementation of the Court's judgments, are presented in support of these arguments.*

##### **Coverage and methodology**

The report focuses on the general concept of corruption and the international legal framework covering the issue, a comparative analysis and the impact of corruption on human rights protection mechanisms.

The comparative analysis covers:

- (1) the national legal framework, comprised of the legal provisions for combatting corruption and adjacent legal provisions having an impact on possible judicial corruption
- (2) its implementation
- (3) the perception of judicial corruption, including the position of the media and civil society

An important component of the comparative research was aimed at synthesising the main challenges and recommendations for improvement of the national systems, as identified by the international monitoring bodies (GRECO, OECD, UNCAC etc.), as well as by the main civil society actors (Transparency International, Freedom House etc.).

The present report includes a thematic overview of the findings, summarising the main points and referring to countries for purposes of illustration. A table containing the data collected and a list of sources can be found in the Addendum.

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<sup>1</sup> The present report was drafted by the European Human Rights Association (EHRA), founded by a group of legal professionals committed to bringing their professional knowledge and the experience gained working at the European Court of Human Rights, to improving the effectiveness of the system. Through its Europe-wide network of legal experts the Association develops and delivers tailor-made training for contracting States' judicial and legal communities, provides awareness-raising activities and carries out research and other knowledge assignments. More information about EHRA can be found at [www.ehra.fr](http://www.ehra.fr).

The research was carried out as an overview assessment of the relevant information gathered through desk research, which included the examination of relevant legal provisions and academic papers, assessments and reports by international bodies and national institutions, collection and analysis of statistics. The data was verified against publicly available sources, as far as possible. All qualitative assessments are gathered from external sources.

For each of the elements of the comparative research, the data collection was carried out in respect of as many of the 47 member States of the Council of Europe as possible in order to give an illustrative overview of the matter.

## **I. The concept of corruption**

### **1. Definition**

Generally speaking, corruption is defined as “the abuse of entrusted power for private gain”.<sup>2</sup> That definition ensures that both private and public corrupt practices are covered. Corruption can be individual or institutional. The term is not precisely defined in the 2003 UN Convention against Corruption. The forms of corruption evolve continuously. It goes further than paying or taking a bribe and encompasses a large range of acts and omissions including bribery, abuse of functions, misappropriation of State funds, illicit enrichment, or trading in influence.

Criminalisation of corruption is one of the main pillars in the fight against such practices and the Council of Europe provides a special instrument in this regard (the Criminal Law Convention on Corruption) setting the standards for the elements to be considered by member States. Nevertheless, even the most adequate legal framework for fighting corruption remains ineffective without proper implementation. Various international bodies revealed scant implementation and generally few reported cases of convictions (for instance, OECD in its reports concerning the implementation of its own Anti-Bribery Convention).

In a judicial system context, corruption is conduct that undermines the effectiveness and confidence necessary to carry out the public purpose. It has been defined as “acts or omissions that constitute the use of public authority for the private benefit of court personnel and result in an improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain”.<sup>3</sup>

### **2. Elements considered for the purpose of the report**

The present report focuses on corruption in the judiciary (i.e. of judges). It takes into consideration the various facets of corruption (bribery, facilitation, influence peddling), with a focus on case-related corruption, alongside elements concerning career-related corruption.

The three main elements to be considered in order to effectively and accurately assess the corruption level within the judiciary are (1) the legal framework, (2) its implementation and (3) the perception of corruption.

With regard to the first element, the legal framework related to corruption is composed of direct provisions regulating the prevention of corruption (criminal liability, disciplinary measures), as well as adjacent provisions such as regulations on assignment of cases, on recruitment, career advancement, declaration of assets etc.. Alongside a brief overview of the main features of the legal framework in the countries examined, certain aspects have been highlighted in the light of various studies carried out by specialised bodies (international organisations and civil society).

In relation to implementation, the assessment focuses on information available on investigated/prosecuted/convicted cases of corruption (typology, statistics, accessibility of information etc.).

Regarding perception of corruption, the findings of certain specialized bodies have been considered.

### **3. CoE specific standards and instruments**

- Criminal Law Convention on Corruption (CETS No.: 173): opened for signature on 27 January 1999, entered into force on 1 July 2002. As of April 2014: 45 ratifications/accessions; 5 signatures were not followed by ratification.

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<sup>2</sup> Definition used by Transparency International.

<sup>3</sup> Definition used by Transparency International in its *Global Corruption Report 2007 : Corruption in Judicial Systems* ; for an overview of the different facets of the concept, see Magdalena Sepulveda Carmona and Julio Bacio-Terracino, *Corruption and Human Rights: Making the Connection*.

- Civil Law Convention on Corruption (CETS No.: 174): opened for signature on 4 November 1999, entered into force on 1 November 2003. As of April 2014: 35 ratifications/accessions; 7 signatures were not followed by ratification; it is the first attempt to define common international rules in the field of civil law and corruption.
- Additional Protocol to the Criminal Law Convention on Corruption (CETS No.: 191): opened for signature on 15 May 2003, entered into force on 1 February 2005; this Protocol extends the scope of the Convention to arbitrators in commercial, civil and other matters, as well as to jurors, thus complementing the Convention's provisions aimed at protecting judicial authorities from corruption.

#### *Committee of Ministers*

[Recommendation No. R \(2003\) 4 on common rules against corruption in the funding of political parties and electoral campaigns](#)

[Recommendation No. R \(2000\) 10 on codes of conduct for public officials](#), including a Model code of conduct for public officials (in appendix) - [Explanatory Memorandum](#)

[Resolution \(97\) 24 on the twenty Guiding Principles for the fight against corruption](#)

#### **4. Other international standards**

##### United Nations instruments:

The **UN Convention against Corruption** (29 September 2003) is the major legal instrument governing anti-corruption activities. Surprisingly, the Convention gives no definition of corruption, based on the idea that the concept evolves continuously but gives examples instead: bribery, influence peddling, abuse of functions, illicit enrichment (including in the private sector), laundering of proceeds of crime, concealment, obstruction of justice. 141 States have signed and 170 State have ratified the Convention, which entered into force on 14 December 2005.

##### European Union:

[Convention on the protection of the European Communities' financial interests](#) [Official Journal C 316 of 27.11.1995]: a Convention drawn up by the Council to tackle fraud affecting the financial interests of the European Communities. The Convention and its protocols are aimed at creating a common legal basis for the criminal-law protection of the European Communities' financial interests; entered into force on 17 October 2002, along with its first protocol and the protocol on its interpretation by the Court of Justice. The second protocol entered into force on 19 May 2009. The convention and its protocols are open for signing by any country that joins the EU.

**Convention against corruption involving officials** [Official Journal C 195 of 25 June 1997]; signed in Brussels on 26 May 1997; entered into force on 28 September 2005.

##### OECD:

**Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**, adopted by the Negotiating Conference on 21 November 1997.

## **II. Comparative overview**

### **1. The legislative framework**

#### The legal framework on combatting corruption

##### Criminal law

All countries examined have criminal provisions in place with regard to corruption activities, the most commonly considered crimes being bribery (active and passive), abuse of office, undue advantage, trading in influence. With respect to bribery and trading in influence generally both forms of these conducts are

incriminated, while some countries consider only the passive or the active form.<sup>4</sup> Some countries outlaw other conduct as well, such as facilitation or pressure.<sup>5</sup>

In this regard, in its third phase evaluation reports GRECO conducted an analysis of the legal framework outlawing corruption in the member states and has given certain recommendations for amendments, such as, for instance, that certain incriminations be extended so as to comprise both forms (active and passive) or to clarify that undue advantages include advantages intended for third parties and not just the officials themselves and that they cover all forms of advantages, material as well as immaterial and low value ones.<sup>6</sup>

In most countries, the general provisions applicable to public agents cover members of the judiciary; some countries<sup>7</sup> have special regulations in place for this category, with additional or specific provisions targeting members of the judiciary.

With regard to sanctions, depending on the gravity of the act, the relevant criminal provisions provide for prison sentences, fines,<sup>8</sup> suspension or exclusion from judicial office.

Many countries impose confiscation of the benefits<sup>9</sup>, although in some cases the provisions do not provide for confiscation in equivalent<sup>10</sup> or they are rarely applied.<sup>11</sup>

In most countries, a special mandate is required<sup>12</sup> in order to initiate investigations, prosecute judges or place them in custody, their immunity being lifted either by a judicial authority<sup>13</sup> or by a non-judicial body.<sup>14</sup> Most of these countries provide for an exception in case of *flagrante delicto*. Monitoring bodies have emphasized the need to avoid full discretion of a political entity with regard to the lifting of immunities for the judiciary (GRECO). In other countries, there are no immunities for judges.<sup>15</sup>

Many countries have special investigative and/or prosecuting bodies dealing with anti-corruption - in the form of special units within the police departments and the prosecutor's office<sup>16</sup> or else functioning as separate entities.<sup>17</sup> In some countries, the authorities mandated to carry out the investigation and prosecution of judicial corruption allegations are the general ones.<sup>18</sup> In other countries, the courts have the capacity to press charges against judges<sup>19</sup> or other authorities are mandated in this regard.<sup>20</sup>

Jurisdiction for corruption cases in respect of members of the judiciary lies mostly with common courts,<sup>21</sup> sometimes in special compositions<sup>22</sup> or specialized units.<sup>23</sup> Some countries have specialized courts for corruption cases<sup>24</sup> or the competence is given only to certain courts within the territory.<sup>25</sup> Other countries allocate special jurisdiction to higher courts than those normally in charge of corruption cases, due to the status of judges,<sup>26</sup> or to courts different than those of the place of employment of the respective judges.<sup>27</sup>

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<sup>4</sup> E.g. Estonia, Luxembourg, Moldova (passive trading in influence only).

<sup>5</sup> E.g. Lithuania

<sup>6</sup> E.g. Ukraine, which complied with these recommendations.

<sup>7</sup> E.g. Albania, France.

<sup>8</sup> Andorra, Russia

<sup>9</sup> E.g. Albania, Armenia, Austria, Bosnia and Herzegovina, Cyprus, Denmark, Spain, Estonia, Finland, Georgia, Greece, Ireland, Monaco, Romania, Ukraine.

<sup>10</sup> Andorra.

<sup>11</sup> Austria.

<sup>12</sup> Andorra, Armenia, Azerbaijan, Croatia, Georgia, Estonia, Hungary, Lithuania, Latvia, the Former Yugoslav Republic of Macedonia, Poland, Romania, Russia, Serbia, Switzerland.

<sup>13</sup> Azerbaijan, Croatia, the Former Yugoslav Republic of Macedonia, Poland, Romania, Russia, Serbia.

<sup>14</sup> like the President (Armenia, Estonia, Hungary) or the Parliament (Lithuania, Latvia, Switzerland).

<sup>15</sup> Austria, Denmark, Spain, France, Iceland, Italy, Netherlands, Sweden, United Kingdom.

<sup>16</sup> Armenia, Belgium, Croatia, Estonia, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Latvia, the Former Yugoslav Republic of Macedonia, Montenegro (as of end 2014), Poland, Portugal, Romania, Serbia, Slovenia, Sweden, United Kingdom.

<sup>17</sup> Austria, Spain, France, Netherlands.

<sup>18</sup> Azerbaijan, Bulgaria, Czech Republic, Denmark, Finland, Luxembourg, Russia, Switzerland, Ukraine.

<sup>19</sup> E.g. Andorra.

<sup>20</sup> For example the Chancellor of Justice/Parliamentary Ombudsman in Finland, for bringing criminal charges.

<sup>21</sup> Azerbaijan, Finland, Italy, Switzerland.

<sup>22</sup> E.g. Finland, Romania.

<sup>23</sup> Croatia, France

<sup>24</sup> Slovakia.

<sup>25</sup> Croatia, The Former Yugoslav Republic of Macedonia.

<sup>26</sup> Andorra, Lithuania, Romania, Sweden.

<sup>27</sup> Estonia.

Most countries have statutes of limitations<sup>28</sup> for investigating and prosecuting/sentencing corruption offences.<sup>29</sup> Limitation periods vary from 3 to 20 years.<sup>30</sup> These periods can be extended if suspension or interruption conditions apply, such as the incidence of immunities in some countries<sup>31</sup>. Absolute statutes of limitation, beyond which one cannot be held liable anymore, stretch from 5 to 24 years.<sup>32</sup> Several issues arising from the system of statutes of limitations with regard to corruption offences have been highlighted by various international bodies,<sup>33</sup> such as the short periods compared to the time needed in practice to effectively prosecute or very narrow grounds for suspension or interruption of these periods, especially in countries in which immunities exist and the time needed to lift them does not constitute such ground.

### Disciplinary

The disciplinary procedure, as well as the relevant bodies and authorities involved in initiating, conducting proceedings and deciding on sanctions is comprehensively synthesized by the CEPEJ reports on the evaluation of European Judicial Systems.<sup>34</sup>

In some countries, disciplinary proceedings are suspended pending the outcome of criminal prosecution<sup>35</sup> or initiated after there is a final conviction.<sup>36</sup> In certain countries the judges can be suspended during criminal trials.<sup>37</sup> Sanctions for corruption include dismissal; a criminal record for corruption taints the good reputation needed to (re-) enter the profession.<sup>38</sup>

Disciplinary proceedings must comply with strict standards on the independence and impartiality of the disciplinary bodies.<sup>39</sup>

### Other provisions relating to judicial corruption

#### Conflict of interest and impartiality

Most countries have rules on conflicts of interests. Judges deemed to be lacking impartiality can be challenged<sup>40</sup>, although in some countries such motions are rarely successful<sup>41</sup>; cases in relation to which judges have been convicted for corruption can be reopened in many countries.<sup>42</sup> Some countries have been invited to consolidate their provisions on conflict of interest.<sup>43</sup>

Most countries have Codes of Ethics for the members of the judiciary. These should be compiled into a single regulation.

<sup>28</sup> Except for Cyprus, Ireland and UK, where there are no statutes of limitations; the research covered the EU countries.

<sup>29</sup> Offences considered: active/passive bribery, trading in influence, abuse of public functions.

<sup>30</sup> Active bribery : shortest period is 3 years (Czech Republic, France, Greece, Hungary, Spain) and longest is 20 years (Luxembourg) ; passive bribery statutes of limitations stretch from 3 years (France, Greece) to 20 years (Luxembourg) ; trading in influence : shortest period is 3 years (France, Greece) and longest is 20 years (Luxembourg, Slovakia) ; abuse of public functions : the statutes of limitations stretch from 3 years (Greece, Hungary) to 15 years (Portugal).

<sup>31</sup> Except for Bulgaria, Denmark, Estonia, Finland, Greece, Italy, Lithuania, Malta, the Netherlands, Romania, Spain, in which the presence of immunities does not constitute a ground for suspension or interruption.

<sup>32</sup> Active bribery : from 7,5 years (Italy, Romania) to 24 years (Netherlands) ; passive bribery: from 8 years (Greece) to 24 years (Netherlands) ; trading in influence : from 5 years (Latvia) to 15 years (Portugal) ; abuse of public functions : from 5 years (Latvia) to 22,5 years (Portugal).

<sup>33</sup> UNCAC, OECD, GRECO.

<sup>34</sup> [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp).

<sup>35</sup> E.g. Albania, Austria

<sup>36</sup> E.g. United Kingdom

<sup>37</sup> E.g. Azerbaijan, Estonia, Luxembourg, Latvia, the Former Yugoslav Republic of Macedonia, Romania, Russia, Serbia

<sup>38</sup> E.g. Albania, Azerbaijan, Estonia, Finland, Lithuania, Latvia, Russia.

<sup>39</sup> E.g. The Former Yugoslav Republic of Macedonia; with regard to disciplinary proceedings, the European Court of Human Rights communicated to the Macedonian Government applications of six judges complaining about dismissal proceedings under Article 6: *Gerovska Popčevska and 5 others applications v. the former Yugoslav Republic of Macedonia* (see <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117473>). In 2012 the Court has also communicated an application lodged by a former judge and President of the Constitutional Court who was dismissed in relation to lustration proceedings, *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11 (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115519>).

<sup>40</sup> E.g. Azerbaijan, Croatia, Spain, Estonia, Finland, France, Lithuania, The Former Yugoslav Republic of Macedonia, Romania, Russia, Slovenia, United Kingdom.

<sup>41</sup> For instance, Monaco and Luxembourg in 2008 and 2010, as well as Bulgaria in 2010 have not had any successful similar requests (CEPEJ).

<sup>42</sup> Azerbaijan, Croatia, Spain, Estonia, France, Lithuania, The Former Yugoslav Republic of Macedonia, Romania, Switzerland, Russia.

<sup>43</sup> E.g. Poland.

### Ancillary activities

According to the data collected for the CEPEJ reports, most countries allow judges certain ancillary activities, remunerated or not.

The vast majority of countries<sup>44</sup> allow remunerated teaching activities, while some<sup>45</sup> only allow this activity on a non-remunerated basis. Research and publications are permitted in most countries<sup>46</sup> (in one country<sup>47</sup> only non-remunerated).

Some countries allow judges to sit as arbitrators, remunerated<sup>48</sup> or not.<sup>49</sup> Remunerated consultancy work is only allowed in a few countries.<sup>50</sup>

Remunerated cultural functions are allowed in some countries<sup>51</sup>; non-remunerated ones in others.<sup>52</sup> Some other activities are compatible with judicial functions in certain countries, such as involvement in charitable organisations.<sup>53</sup>

Political activities are restricted in most countries.<sup>54</sup> In countries where political affiliation of judges is permitted, monitoring reports have highlighted the political involvement of judges (and subsequent support) as a challenge in the fight against corruption.<sup>55</sup>

With regard to permission for exercising secondary activities, some countries<sup>56</sup> impose that judges inform or request permission before exercising them.

### Income, declaration of assets and regulations on gifts

In some countries the low salaries of judges have been identified as a major challenge for fighting corruption.<sup>57</sup> Other countries<sup>58</sup> pay judges low salaries, in relative terms, but do not appear to have a major problem of judicial corruption.

Many countries provide for the obligation of members of the judiciary to declare their assets and/or interests,<sup>59</sup> others do not.<sup>60</sup> Many monitoring reports have highlighted the need to set in place a more efficient system,<sup>61</sup> for instance with regard to liability for false declarations<sup>62</sup> or with regard to the verification of declarations.<sup>63</sup>

Certain countries regulate the acceptance of gifts, which often falls outside of the criminal scope, by expressly banning such practices<sup>64</sup> or by allowing low-value or symbolic gifts.<sup>65</sup> Some countries have been

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<sup>44</sup> except Andorra, Armenia, Cyprus, Ireland, Luxembourg, Malta, Portugal and UK.

<sup>45</sup> Cyprus and Malta.

<sup>46</sup> except Andorra, Armenia, Malta and UK (Northern Ireland).

<sup>47</sup> Ireland.

<sup>48</sup> Estonia, Finland, Germany, Greece, Iceland, Montenegro, Netherlands, Norway, Slovenia and Sweden.

<sup>49</sup> UK (Scotland).

<sup>50</sup> Austria, Czech Republic, Finland, Germany, Iceland and Netherlands.

<sup>51</sup> Austria, Bosnia and Herzegovina, Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Montenegro, Netherlands, Norway, Russia, San Marino, Slovenia, Spain, Sweden and Ukraine.

<sup>52</sup> Azerbaijan, Denmark, Poland, Portugal, Romania, Slovakia, Switzerland, FYRO Macedonia and UK (England and Wales).

<sup>53</sup> Albania, UK

<sup>54</sup> except Austria, Finland, France, Germany, Norway and Sweden (remunerated), while Albania and Iceland allow it on a non-remunerated basis.

<sup>55</sup> E.g. Austria (GRECO).

<sup>56</sup> E.g., Estonia, Finland, France, Italy, the Netherlands, Norway and Slovenia.

<sup>57</sup> E.g. Armenia, Poland.

<sup>58</sup> E.g. Germany, France.

<sup>59</sup> Albania, Armenia, Austria, Azerbaijan, Croatia, Czech Republic, Estonia, Finland, Georgia, Hungary, Lithuania, Latvia, FYRO Macedonia, Poland, Romania, Russia, Serbia, Slovenia, United Kingdom, Ukraine.

<sup>60</sup> Andorra, Denmark, Spain, France, Ireland, Iceland, Luxembourg, Sweden.

<sup>61</sup> GRECO 4<sup>th</sup> round evaluation reports.

<sup>62</sup> Armenia, Poland.

<sup>63</sup> Hungary.

<sup>64</sup> Andorra, Spain, Hungary, Iceland, Netherlands, Slovenia, Sweden.

<sup>65</sup> Albania, Austria, Denmark, France, FYRO Macedonia, Serbia.

invited to clarify the scope of acceptable gifts.<sup>66</sup> Some countries have no specific regulations on the matter, but refer to the general principle of not accepting advantages, which could put the judges' authority into question.

#### Recruitment/advancement/dismissal

The status and career of judges are comprehensively set out in the CEPEJ reports on the evaluation of European Judicial Systems.<sup>67</sup>

Recruitment to start-of-career positions, in most countries, is managed by judicial bodies, while appointments to higher judicial offices are usually the responsibility of a legislative authority, executive body or the head of the state. In most countries judges' terms of office are indefinite, sometimes following initial probation/evaluation periods. Some countries provide for fixed terms, renewable or not.

Promotion or advancement is done either by merit or by seniority, the authority in charge in most countries being the judicial self-administration body; in some countries, other authorities are in charge or play significant roles in these proceedings.

Dismissal of corrupt judges is the consequence of their conviction by a criminal court, either automatically or following a separate disciplinary procedure.

Various monitoring reports have recommended less interference by non-judicial actors in matters of recruitment, promotion and dismissal of judges.

#### Case-assignment

In some countries, cases are assigned by lottery or otherwise at random,<sup>68</sup> others use certain principles and criteria, such as the alphabetic order of judges or of defendant parties, combined with the sequence of incoming cases; or specialization.<sup>69</sup> Some countries have electronic assignment systems.<sup>70</sup> In most countries allocation is seen as an administrative procedure, in others the court president<sup>71</sup> decides more or less freely.

It would appear that automatic assignment of cases following pre-established criteria prevents undue influence by court presidents and attempts at "forum shopping" by parties, both of which provide openings for corrupt practices.

#### Whistleblower protection

Most countries provide protection for whistle-blowers, although in many cases enhanced measures have been recommended<sup>72</sup> or existing protection is deemed limited, weak or ineffective.<sup>73</sup> Some countries have no regulations in place with regard to protection measures for whistle-blowers.<sup>74</sup> Certain regulations are in place for repentance,<sup>75</sup> alleviating charges/sanctions, or even exempting from criminal responsibility for reporting to the authorities before proceeding with the commission of the offence. In a few of these countries,<sup>76</sup> the provisions apply automatically, which has been considered problematic in various monitoring reports. In some countries, provisions allow for the return of the benefit to the repentant;<sup>77</sup> in this regard, recommendations have been made to exclude this possibility from the legal framework.<sup>78</sup>

<sup>66</sup> GRECO, for instance with regard to FYRO Macedonia.

<sup>67</sup> [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp).

<sup>68</sup> E.g. Albania, Azerbaijan (coding system), Denmark, Finland, Serbia, Sweden.

<sup>69</sup> Poland, Sweden, United Kingdom.

<sup>70</sup> Croatia and Russia (introduced gradually), Estonia, Lithuania, Latvia, FYRO Macedonia, Romania.

<sup>71</sup> E.g. France, Ireland, Iceland, Luxembourg.

<sup>72</sup> E.g. Albania, Germany, Moldova, Sweden.

<sup>73</sup> E.g. Armenia, Albania, Spain, Estonia, Georgia, Moldova, Montenegro, Slovakia.

<sup>74</sup> Czech Republic, Finland, Hungary.

<sup>75</sup> Albania, Andorra, Armenia, Austria, Bulgaria, Bosnia and Herzegovina, Spain, Georgia, Greece, Hungary, Lithuania, Latvia, Moldova, Montenegro, Portugal, Romania, Russia, Slovakia, Slovenia, Turkey.

<sup>76</sup> Georgia, Moldova

<sup>77</sup> E.g. Serbia

<sup>78</sup> GRECO.

## **2. Implementation/Practice**

### Transparency

#### Availability of information

Although most countries are operating (or setting up) online case-law databases, thus providing wider access to the national courts' rulings, it is often not possible to perform targeted thematic searches on the number and typology of cases of corruption decided against judges.

Some information is offered by the media and local or international NGOs (mostly in the form of press releases), but it remains difficult to undertake meaningful research over certain periods of time. In some countries, such information is available on the websites of the national anti-corruption bodies,<sup>79</sup> mostly in the form of statistics,<sup>80</sup> in published reports<sup>81</sup> or news sections.<sup>82</sup> In other countries, information on judicial corruption can be extracted from analytical reports published by private entities,<sup>83</sup> but only for the period covered by the respective reports.

There do not seem to exist any international reports providing consolidated information on cases of judicial corruption which are investigated/prosecuted/decided. References to certain cases are made throughout reports, but do not give an accurate image of the extent of corruption, its typology and the ratio of accountability.

The examples presented below are for purposes of illustration and details on the cases identified can be found in the Addendum.

#### Typology of identified corrupt practices within the judiciary

Cases of facilitation and favours among judges are reported to exist, though no information is available with regard to them being brought to justice. Most sources mention bribery as the most common practice.<sup>84</sup> There are reports of cases of speeding up a trial in order to benefit parties,<sup>85</sup> as well as delaying proceedings for the same purpose.<sup>86</sup> Other reports mention biased rulings.<sup>87</sup>

Some information has also been found regarding corruption related to certain types of cases, such as bankruptcy/liquidation proceedings,<sup>88</sup> criminal cases,<sup>89</sup> or investment disputes.<sup>90</sup>

There is not much information available about proven cases of career-related corruption, but a number of international reports have highlighted wide-spread corrupt practices in some countries in relation to recruitment, advancement,<sup>91</sup> and job competitions.<sup>92</sup>

Some countries have no up-to-date record of cases of judicial corruption,<sup>93</sup> or only document isolated incidents.<sup>94</sup> In other countries, the lack of cases brought to justice, despite the alleged existence of wide-spread bribery practices, was criticised at the national level.<sup>95</sup>

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<sup>79</sup> E.g. Poland, Romania, Russia.

<sup>80</sup> Austria, Ireland, Portugal, Slovenia, Sweden.

<sup>81</sup> Spain, Germany.

<sup>82</sup> Lithuania, Romania.

<sup>83</sup> Montenegro.

<sup>84</sup> E.g. in Armenia, Azerbaijan, Czech Republic, Estonia, Greece, Italy, Lithuania, Latvia, Moldova, Romania, Serbia, Slovenia, Turkey.

<sup>85</sup> E.g. in Croatia.

<sup>86</sup> E.g. in Estonia.

<sup>87</sup> E.g. in Italy, Moldova, Malta, Turkey, Romania.

<sup>88</sup> E.g. in Czech Republic, Hungary, Poland.

<sup>89</sup> E.g. in Lithuania, France, Malta, Moldova.

<sup>90</sup> E.g. in Ukraine.

<sup>91</sup> E.g. in Albania, Azerbaijan, Moldova.

<sup>92</sup> E.g. in Romania.

<sup>93</sup> In Denmark, Finland, Iceland, Norway, Sweden.

<sup>94</sup> In Hungary, Slovenia.

<sup>95</sup> Armenia (by the Ombudsman).



### **3. Perception and attitude of civil society**

Trends in the perception of corruption may serve as an indicator of the effectiveness of the efforts undertaken by national authorities to tackle judicial corruption. Yet, in some countries, the perception of corruption is stagnating despite clear improvements in the system, which reveals the difficulty in reestablishing the trust of the population in the institution.<sup>96</sup> The perception of corruption among judges varies considerably across member States, with the judiciary being considered the most corrupt institution in some, and the least corrupt in other countries.

The media is considered as playing a key role in exposing corruption cases, although in some countries it is considered to be influenced,<sup>97</sup> under self censorship,<sup>98</sup> not entirely free to publish on the matter<sup>99</sup> or as being at risk of defamation proceedings.<sup>100</sup> There are also situations in which the media has been seen as exerting undue pressure on judges by way of overexposure of ongoing cases, thus possibly influencing the latter's outcome.<sup>101</sup>

Civil society is mostly active in the fields of awareness raising and policy-making. In some countries, NGO and civil society platforms have been set up for exposing corruption.<sup>102</sup> Several cases of judicial corruption have been reported so far.

### **4. Challenges identified and recommendations made in relevant reports**

One of the major causes for corruption that emerged in respect of a considerable number of the countries examined is undue political influence or pressure exercised upon the judiciary<sup>103</sup> – either institutional (appointments, removals from office, promotion) or procedural (in individual cases).

Other important obstacles to the eradication of corruption are the (absolutely or relatively, in comparison with average salaries) low salaries of judges,<sup>104</sup> weak regulations concerning conflict of interest and ancillary activities,<sup>105</sup> low or no protection of whistleblowers<sup>106</sup> or ambiguous legislation.<sup>107</sup>

Some of these challenges have been tackled over time by reforms which most countries undertook in order to comply with international standards and in the follow-up to recommendations made mostly by the specialised monitoring bodies (GRECO, OECD, UNCAC). Some recommendations can also be found in the international reports issued by specialized civil society organisations (Transparency International, Freedom House etc.). They mirror the challenges identified and invite countries to address the issues accordingly.<sup>108</sup>

### **5. Issues arising from the findings of the comparative research**

While there is easily accessible information on the legal framework for combatting corruption, as well as on regulations with regard to matters serving as indicative factors for assessing the corruption potential (regulations on conflict of interest, case-assignment, recruitment etc.), the research was severely impaired by the lack of information on the implementation of these regulations. Most notably, in very few countries cases related to judicial corruption are monitored, in order to assess whether (1) alleged judicial corruption is investigated, (2) brought before courts, (3) and whether proved corruption cases result in convictions.

The assessment on the general framework related to corruption can only serve as an indicator for potential causes, setbacks or loopholes in the system. Seen in conjunction with the perception of corruption within the judicial system, however, it can send strong signals about the credibility of corruption allegations.

<sup>96</sup> Georgia, Czech Republic.

<sup>97</sup> Belgium, Bosnia and Herzegovina, Cyprus Romania.

<sup>98</sup> Bulgaria, Greece, Moldova, FYRO Macedonia, Serbia, Turkey, Ukraine.

<sup>99</sup> Albania, Azerbaijan.

<sup>100</sup> Austria, Poland.

<sup>101</sup> E.g. in Romania.

<sup>102</sup> Georgia.

<sup>103</sup> In Albania, Armenia, Azerbaijan, Belgium, Bulgaria, Croatia, Spain, France, Georgia, Germany, Hungary, Ireland, Italy, Lithuania, Latvia, Moldova, FYRO Macedonia, Montenegro, Romania, Russia, Serbia, Slovakia, Slovenia, Turkey, Ukraine.

<sup>104</sup> E.g. in Armenia, Ukraine, Poland.

<sup>105</sup> E.g. in Finland.

<sup>106</sup> E.g. in Czech Republic, Hungary.

<sup>107</sup> E.g. Denmark.

<sup>108</sup> Examples of challenges identified and recommendations made can be found more in detail in the Addendum.

However, legally, the existence of corruption can only be established through effective prosecution and punishment of perpetrators.

The inaccessibility to information or lack thereof concerning the implementation of the provisions on combatting corruption make it difficult to establish the effectiveness of the system.

### III. Corruption and its implications on human rights protection

Is the prevention of corruption a human right? The preamble to the Council of Europe Criminal Law Convention on Corruption stresses that “[c]orruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society”.

By weakening the system entrusted with upholding the rule of law, judicial corruption can lead to violations of human rights. States are responsible for human rights violations when it is shown that their actions (or lack thereof) do not conform with the requirements of international or domestic human rights norms. Human rights obligations apply to the judicial branch at all levels; States are responsible for any act of or omission attributable to that public authority.

Legal doctrine seems to go along the same line, considering corruption a human rights issue from the perspective of the impact it has on the enjoyment of these rights.<sup>109</sup> This is all the more relevant in the context of judicial corruption, as the latter directly impairs fair trial guarantees, while at the same time having an indirect impact on the substantive rights at stake in court proceedings.

In this regard, such practices can be considered as a breach of Article 6 of the European Convention on Human Rights from the point of view of the impact they have on the independence and impartiality of courts, one of the main guarantees upon which a fair trial is built. The European Court of Human Rights can hold contracting States accountable for such violations.

#### 1. The direct effect – fair trial guarantees

Corruption can have a direct effect on human rights: a bribe accepted by a judge directly affects the principle of independence and impartiality of the judiciary. The right to a fair trial by an independent, impartial and competent tribunal is the corner stone of Article 6 of the ECHR. All contracting States are responsible under the Convention to ensure, through Constitutional or legal norms and corresponding practice, judicial independence and due process as well as equality before the law.

The fair trial guarantees can be undermined in various ways through corruption, which can impede the administration of justice (if related to career steps, for instance), the rights of the parties involved (e.g. by unbalancing the equality of arms) or the efficiency of the procedure (by corrupting judges into delaying proceedings, for instance in order to secure impunity by reaching time-limits, in criminal cases).

While case-related corruption can sometimes consist in isolated situations and might not affect the overall career-long conduct of the respective judges involved, career-related corruption can have more extended effects, as judges who were appointed or promoted through such practices are prone to partiality (especially towards the parties having supported them) and vulnerable to blackmail and pressure. Questions about their professional competences and the quality of their work may arise, even if they are formally impartial and independent.

The case law of the ECHR covers criminal, civil and commercial matters and addresses various breaches of the rights protected by the Convention. From its early years, the Court has attributed particular significance to cases addressing potential violations of the Convention due to misconduct of members of the judiciary or failures in the judicial organisation of contracting States. The Court, through its judgments, guarantees an independent and impartial justice system characterised by, *inter alia*, institutional independence (*Beaumartin v. France*, 24 November 1994, ECHR, A series no. 296-B; *Stafford v. the United Kingdom* [GC], no. [46295/99](#), ECHR 2002-IV – independence from the executive), impartiality (*Sarcilor-Lormines v. France*, n°[65411/01](#), ECHR 2006-XIII; *Volkov v. Ukraine*, n°21722/11, 9 January 2013 – independence and objective impartiality), access to justice (*Fayed v. the United Kingdom*, 21 September 1994, ECHR A series no. 294-B;

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<sup>109</sup> E.g. John Hatchard, *Adopting a Human Rights Approach towards Combatting Corruption*; Magdalena Sepulveda, Carmona and Julio Bacio-Terracino, *Corruption and Human Rights: Making the Connection in Corruption and Human Rights: Interdisciplinary Perspectives*, Martine Boersma, Hand Nelen (Ed.), Intersentia, 2010.

*Bayar et Gürbüz v. Turkey*, no. [37569/06](#), 27 November 2012 (in French), and effective enforcement of court decisions (*Hornsby v. Greece*, 19 March 1994, ECHR Reports 1997-II).

Furthermore, as to the independence and impartiality of the judiciary, the Court has elaborated specific principles for assessing the framework related to the organisation of the profession and the administration of justice.

The mere appointment of judges by members of the executive/legislative bodies does not necessarily pose problems under the Convention with regard to their independence (*Gasper v. Sweden* (dec.), no. [18781/91](#), 6 July 1998; *Filippini v. San Marino* (dec.), no. [10526/02](#), 26 August 2003). However, removal from office in the same circumstances can raise issues in certain cases, for instance when it is done from a position of hierarchical subordination (*Brudnicka and others v. Poland*, no. [54723/00](#), 3 March 2005).

The terms of judges' mandates is another element which has been taken into consideration by the Court in assessing the independence of courts (*Le Compte v. France, Campbell and Fell v. UK*, nos. [7819/77 and 7878/77](#), 28 June 1984, in which the fixed terms were considered reasonable, as opposed to *Incal v. Turkey*, no. [22678/93](#), 9 June 1998).

With regard to impartiality, the Court distinguishes between the subjective and the objective elements of this safeguard. The former implies the lack of actual prejudice on the part of the judge (which is presumed until proof of the contrary), whereas the latter refers to the guarantees offered in order for the exclusion of any legitimate doubt on the matter (*Piersack v. Belgium*, no. [8692/79](#), 1 October 1982).

The Court has ruled in a number of cases in which issues arose with regard to conflict of interest of the judges sitting in specific cases, but it has to date refrained from making explicit mention of allegations of corruption. However, since the Court established in some cases that the conflict of interest was so obvious that it altered the impartiality of the judge, it can be inferred that certain solid risks of corruption might have been at stake. Regular and lucrative links with one of the parties (a university sued by the applicant) was considered as a justified reason to be concerned about a possible lack of impartiality (*Pescador Valero v. Spain*, no. [62435/00](#), 17 June 2003); a similar conclusion was reached when a judge had previously requested and benefitted from assets for free from one of the parties (*Belukha v. Ukraine*, no. [33949/02](#), 9 November 2006), or with regard to the involvement of a judge in a financial agreement between her husband and a bank party to the proceedings (*Sigurdsson v. Iceland*, no. [39731/98](#), 10 April 2003). The Court also sanctioned the lack of provisions at national level allowing parties to challenge judges deemed partial due to a sibling relationship with the lawyer of the other party (*Micaleff v. Malta (GC)*, [17056/06](#), 15 October 2009).

Corrupt practices with regard to cases, can also indirectly affect other rights at stake in a given set of proceeding (for instance, a corrupt judge sitting in a case concerning property and serving a biased judgment).

## 2. General measures

In the cases in which the Court found violations of Article 6 of the Convention with regard to the independence and impartiality of domestic courts, certain shortcomings have been expressly identified,<sup>110</sup> opening the possibility for the respondent State concerned to tackle the issues in the execution of the judgments, by adopting general measures in order to improve the system and prevent similar situations in the future. The process of implementation of these judgments is often complex and lengthy, due to the elaborate reforms needed at national level,<sup>111</sup> but also due to the large backlog of cases pending before the Committee of Ministers, not permitting to bring these cases forward for discussion for long periods,<sup>112</sup> despite decisions to submit some of them to the enhanced supervision mechanism.<sup>113</sup>

<sup>110</sup> See, for example, the state of execution in *Belukha v. Ukraine* ([http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=belukha&StateCode=&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=belukha&StateCode=&SectionCode=)).

<sup>111</sup> See, for example, the respondent Government's undertakings in the execution of the general measures indicated in *Sigurdsson v. Iceland* ([http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=sigurdsson&StateCode=&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=sigurdsson&StateCode=&SectionCode=)).

<sup>112</sup> See supervision measures taken in *Sigurdsson v. Iceland*.

<sup>113</sup> E.g. see *Belukha v. Ukraine*.

### **3. Conclusions**

The struggle to improve the general framework for preventing corruption among judges and upholding the principle of independence and impartiality of courts as a guarantee of fair trials needs to be a concerted effort. Standard setting and monitoring bodies need to cooperate closely with national authorities to identify and tackle possible issues arising.

#### **IV. Possible inferences to be drawn from the present findings**

The inferences which can be drawn from the comparative research mostly relate to implementation. Efforts at the international level with regard to the assessment of corruption prevention mechanisms at national level (such as GRECO's 4<sup>th</sup> Round of Evaluation Reports) are commendable, for they shed light on possible ways to tackle corruption within the judiciary.

As mentioned above, lack of information concerning proven cases of judicial corruption can be interpreted in two ways: (1) there are no cases of proven judicial corruption, or (2) there is no information available about the cases of proven corruption.

If one is to interpret the lack of information as lack of actual cases of proved judicial corruption, this deduction can only stand valid and in favour of the respective state if it is backed by an assessment of the legal framework concluding to an efficient and clearly framed system, compounded by a perception indicating lack of corruption and trust in the system. However, if the legal framework is found to be flawed and/or the perception indicators show lack of trust in the judiciary, the conclusion to be drawn is that judicial corruption may benefit from impunity and the system is overall prone to corruption.

Similarly, exposing cases of corruption can also be seen from different perspectives: (1) proven cases of corruption indicate a corrupt judicial system, or (2) proven cases of corruption indicate a functional, 'self-cleaning' system.

Again, both inferences have to be considered in the light of the findings with regard to the corruption indicators, namely the assessment of the legal framework and the perception of corruption.

In both situations, transparency in exposing cases of judicial corruption by making information about the investigations and convictions publically available and accessible easily and in a consolidated manner is beneficial for member States, as it is likely to ameliorate public perception about the integrity of the judicial system.

#### **V. Further thoughts for debate**

The judiciary, as one of the three pillars of state power, alongside the legislative and the executive, is the regulating body of any democratic system. In the absence of a functional and efficient judicial mechanism, the legal framework protecting, regulating and imposing obligations on the subjects of a country cannot effectively fulfil its purpose of interpreting the law and delivering justice. It is the judiciary that reviews cases of alleged corruption (wherever it occurs), being the authority mandated to establish the existence thereof and to sanction such conduct.

In light of the above, it is all the more important that the very entity which decides upon allegations of corruption is itself free from it. The reasoning can extend to the overall body of cases brought before courts.

Corruption in the judiciary, where it is found to exist, cannot be considered as an isolated phenomenon. Most often, in cases in which it is wide-spread, it is only the tip of the iceberg of a whole public system tainted by corruption. Pressure on the judiciary is most often exerted in order to cover, credit, validate or offer impunity for unlawful acts performed in other sectors. This vicious circle offers no opportunity for the country concerned to improve its system and wipe out corruption.

The extent of judicial corruption within the purpose of the present report is left unaddressed, as the presence of judicial corruption as such has not been solidly revealed if one is to accept the statement that only corruption that is proven following final court decisions can be included in this category covered by the term. All the other aspects pertaining to the legal framework, the identified challenges and the various recommendations, as well as the perception of corruption and the occasional reports concerning the existence of corrupt practices, are speculation at best and can at most indicate a system which is prone to corruption.

All the steps to be taken with a view to preventing and eradicating corruption are in fact not the sole responsibility of the judiciary itself, but also that of the legislative and executive powers. It is then for the repressive bodies to effectively identify such cases and prosecute them. Lastly, it is the job of the judiciary itself to ensure that cases of alleged judicial corruption are thoroughly assessed and, if proven, to adequately penalise the perpetrators.

As to the impact of corruption, the present findings further suggest that legal provisions, mostly pertaining to procedural matters, can be misused to facilitate corruption among judges. Trials can be artificially accelerated or, on the contrary, stalled, to accommodate interests, with the connivance or (active) support of judges. Evidence can be misadministered, equality of arms can be violated, judgments can be rendered on the basis of biased arguments or partial interpretation of the facts and pertinent law. Judicial review by higher courts can be abused for confirming such unfair rulings or quashing fair judgments and expose cases to a biased reassessment.

It is clear that a strong and trustworthy judicial system needs to be free from corruption, just as it is important that it is free from interference and pressure from outside, if it is to function in compliance with relevant national and international standards. As part of a mechanism which is interrelated with other parts composing any national system, it cannot function properly if impeded, just as it impedes the proper functioning of the other parts once its functioning is altered. The fight against corruption in the judiciary must therefore be part and parcel of the overall effort to fight against corruption.