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A comparative analysis of Disciplinary Systems for European judges and prosecutors

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Introduction

« The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice »¹.

Judges' standards of conduct, usually referred to as their professional code of conduct, are in practice guaranteed by disciplinary rules (I). European disciplinary systems may emanate from national laws (II), but they have one purpose – the trust of the citizen – which extends beyond their borders (III).

I. Ethics – professional misconduct justifying disciplinary proceedings

The word « ethics » comes from the Greek word *ethos*, meaning morality and thus a science of morals, or the art of managing one's conduct². In Common Law countries, Ethics often conveys the idea of good professional conduct. It is also described as « the main rules which the exercise of a profession requires its professionals to respect »³, like the french “*déontologie*”⁴.

With regards judicial functions, ethics exist specifically for judges and prosecutors, barristers and solicitors. Talking about judicial ethics is particularly relevant because judges hold public office.⁵

This report will focus on what is called a “*magistrat*” in French, that is to say, strictly speaking, “*a person belonging to the judicial authorities who is professionally able to judge (the Bench) or to demand justice (Public Prosecutors)*”⁶.

Thus, judges have to be dignified, honest, independent and loyal.

While professional conduct is guaranteed by a disciplinary system, the two concepts are different. Disciplinary rules may be defined as « the main duties which have to be respected by all members of the same profession, or who are attached to a particular position, and whose disciplinary sanctions are independent of the body which imposes them, the procedure followed, the definition of the offence and the nature of the sanctions »⁷.

Indeed, the Consultative Council of European Judges (CCJE) pleads in favor of this distinction. In 2010, The CCJE presented the Magna Carta of European Judges, a unique document summarizing, updating and codifying the main conclusions of the CCJE opinions. The 18th article tells us that « *deontological principles, distinguished from disciplinary rules, shall guide the actions of judges* ». The type of behavior that is likely to be harmful to the reputation of Justice and, more seriously, to those subject to trial, has to be flagrantly serious to justify disciplinary

1. Opinion no. 3 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality ; 19 November 2002 , §8.

2. REY Alain, *Le grand Robert de la langue française, Dictionnaire alphabétique et analogique de la langue française* (French dictionary), Tome 4, p. 187, 1

3. *Ibid.*, p. 9

4. A previously philosophical notion, « deontology » is today systematically associated with professional law. Cf : CANIVET Guy, JOLY-HURARD Julie, *La déontologie du magistrat* (Judicial Conduct), 2ème édition, Dalloz 2009, p. 7

5. « Magistrat » comes from the latin word « magistratus » which means « public office ». Cf : CORNU Gérard, Association Henri Capitant, *Vocabulaire juridique* (Legal Vocabulary), 8ème édition, PUF, 2007, p. 564.

6 CORNU Gérard, Association Henri Capitant, *Vocabulaire juridique*, préc., p. 565, « magistrat » sens n°1.

7. *Ibid.*, p. 313

proceedings. Failure to observe professional standards is governed by codes of conduct. In other words, the difference does not really concern the nature of misconduct but rather its seriousness. Professional conduct or ethics refers to prevention, whereas disciplinary proceedings constitute a sanction. But at the same time, « a disciplinary system is necessary to take professional conduct seriously »⁸, and it is precisely disciplinary case law which illustrates professional codes of practice. In conclusion, both concepts are bound for practical purposes.

So, judges are **responsible**. « There is no power without responsibility and the greater the first, the stronger the second »⁹. Nonetheless, we have to be careful with the way such liability is admitted because independence needs to be protected¹⁰. The concept of responsibility expresses « the obligation to bear the consequences of damaging a trial »¹¹. If judges are civilly and criminally responsible, this report focuses on disciplinary liability. The CCJE considers that all legal systems need some form of disciplinary proceedings¹². Disciplinary action is justified if the judge has committed a disciplinary fault in his private life or in the exercise of his professional duties. But this must constitute flagrant non-respect of his ethics.

The purpose of this report is to focus on the disciplinary liability of the Bench and Public Prosecutors, that is to say their disciplinary systems and ethics, which are at the root of disciplinary proceedings.

According to the advisory body of the Council of Europe, every State has to specify which type of behavior justifies disciplinary proceedings in its law.

II. The origins of disciplinary systems in Europe

The origins of professional conduct and disciplinary rules are national.

Firstly, we can refer to judicial statutes whose purpose is to « officially organize and coordinate a profession, to guarantee the protection of professional rights and the respect of professional obligations »¹³. Certain ethical rules are often described therein, but it is not just a question of professional conduct. Above all, the statutes explain what the disciplinary system is, in particular disciplinary misconduct. Rules concerning judicial appointments and promotion are also determined. Besides, the European Charter on the Statute for Judges specifies that « in each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level »¹⁴.

Secondly, another important source for professional conduct today is the Code of Ethics which emanates from the profession itself. In States where these codes exist, judicial inspectorates outline judges' duties and obligations which may be subject to disciplinary action.

It is very important to underline that, on a European level, professional conduct and disciplinary systems are the subject of in-depth study. The work undertaken does not necessarily carry legal weight but is or will be a model for national governments. Thus, the Council of Europe has worked a great deal on the topic of Justice in a State

8. VIGOUROUX Christian, *Déontologies des fonctions publiques* (Civil Service Professional Conduct), Praxis Dalloz 2006 , p. 26, 01-61

9. CANIVET Guy, JOLY-HURARD Julie, *op.cit.*, p. 46

10. Opinion no. 3 of the CCJE, *op.cit.*, §51

11. Gérard CORNU, *op.cit.*, p. 821

12. *Ibid*, §58

13. CANIVET Guy, JOLY-HURARD Julie, *op.cit.*, p. 20

14. European Charter on the Statute for Judges , 8 - 10 July 1998, article 1.2

governed by the rule of law. Its greatest work, the European Convention on Human Rights, and above all article 6§1, sets out ethical obligations for judges. In addition, the Council of Europe created two other consultative councils, the Consultative Council of European judges, which wrote the Magna Carta, and the Consultative Council of European Prosecutors (CCPE) created by the Committee of Ministers in 2005. Furthermore, the European Network of Councils for the Judiciary (ENCJ) writes reports, some of which are about judicial ethics, for instance the important « Judicial Ethics Report 2009-2010 »¹⁵.

The scope of this study is the investigation of the different disciplinary systems for judges and prosecutors in Europe (Member States of the European Union and States intending to integrate the Union and already members of the Council of Europe). Furthermore, we will adopt a supranational perspective in order to envisage a unification of national disciplinary systems for European judges and prosecutors. Indeed, the aim of the disciplinary systems is not only national.

III. The role of disciplinary systems: to preserve the trust of the citizen

Civil service codes of conduct are the result of a will to inspire trust. Trust is embodied by hope which ensures a feeling of safety¹⁵ : « *Reputation, consideration, credibility, respect, image and popularity – the Administration wants recognition. To achieve this, it cannot ignore ethical requirements* »¹⁶.

In a democracy, Justice is devised according people's interests. The right to a fair trial is possible only if the judge's behavior ensures the efficiency of his office. No matter what the methods of recruitment, training or the extent of his duties are, a judge has enormous power and can use it in some essential areas of a citizen's life.

Likewise, over the last few years, democratic societies have experienced the phenomenon of going to court for anything and everything. Countries in Eastern Europe with recent access to democracy hope to find legitimacy in the rebuilding of their democracies in law and justice. Expectations in the justice system are commensurate with its position in society. « Confidence in the justice system is all the more important in view of the increasing globalization of disputes and the wide circulation of judgments »¹⁷.

Confidence in the judge is based on the certainty that his conduct is ethical. Many States work in this way. A good example is the opportunity in some States, such as in France quite recently¹⁸, for a litigant to take out disciplinary proceedings against a judge.

To sum up, public confidence in judges and the justice system is directly related to the right balance between judicial independence and responsibility.

Does evolution in disciplinary systems, both in the present day and the future, reinforce trust in Justice?

A comparative analysis of current disciplinary systems for judges in Europe (I) and the prospects for judicial disciplinary systems in the same area (II) will help answer this question.

15. REY Alain, *Le grand Robert de la langue française, op.cit.*, Tome 2, p. 806, 1

16. VIGOUROUX Christian, *Déontologies des fonctions publiques, op.cit.*, p. 43, 02-11

17. Opinion no. 3 of the CCJE, *op.cit.*, §9

18. Constitutional Law of 23 July 2008 of modernization of V Republic's institutions

PART 1 : Comparative analysis of disciplinary systems for judges in Europe

In spite of the differences between the systems, there is a common aim: a balance between judicial independence or the authority of Judges' and Prosecutors' decisions and the Disciplinary liability. In a European context, « *restoring public trust in the Administration of Justice* »¹⁹ by establishing the rule of law and a legal framework is necessary. Various Member States of the European Union and EU applicants have undergone disciplinary evolutions or revolutions²⁰.

The European influence and the explosion of Disciplinary cases relayed by the media (« Dutroux » in **Belgium**²¹, « Outreau » in **France**, « Juge Pickles » in **England**) have brought to light the importance of reinforcing the Disciplinary system. In **Italy**, the State decided to reinforce the Disciplinary system and make it more precise.

In **Germany** and **Spain**, there is no debate about the Disciplinary liability perhaps for several reasons. According to Valéry TURCEY, Liaison Magistrate in Germany, the federal structure and *Länders* are a stumbling block to a disciplinary unification, as the State prefers self-discipline. In Spain, the Law of 1985 provides for a clear and precise disciplinary system which seems to work.

Under pressure from either European Union or the Council of Europe, some Eastern European States have accepted a change in their Disciplinary system or the creation of one in order to be in compliance with the European actions (CCJE, Stockholm values²²). With regard to Member States (**Poland**²³, Bulgaria, Romania), complex reforms have been implemented, inspired by Western European systems. In **Bulgaria** and **Romania**, the difference between their traditions (continental law) and the content of the reform (inspired by Common Law) creates disorder and lack of understanding on the part of the practitioners and society. Concerning UE applicants, much effort has been made to create new disciplinary systems. In **the Republic of Serbia**²⁴, the former Liaison Magistrate, Stéphane THIBAUT, and the present one, Alain BIROT, underline the consequences of European pressure: the lack of Disciplinary action because of a slow start²⁵. It appears that the link between the legally constituted state and its citizens is fragile. In **the Republic of Macedonia**, as in Serbia²⁶, there is a complex system initiated by a Strategy which creates doubts on its efficiency.

Within diversity, there are common matters concerning the definition of a Disciplinary system: reinforcing or creating such a system presupposes that States question the standards for judges' conduct and the content of a

19. Judges' Association of Serbia, *Evaluation of Judicial Performance*, December 2005 – October 2007

20. GABORIAU Simone, PAULIAT Hélène, *La responsabilité des magistrats* (judicial liability), Presses universitaires de Limoges, 2008, p. 37

21. Les cahiers de l'Institut d'Etudes sur la Justice, *La responsabilité professionnelle des magistrats* (professional responsibility of judges), Actes du colloque organisé le 15/02/2007 à l'université catholique de LOUVAIN, p. 85 ; Law of 7 July 2002 on the amendment of the 2nd part, Book II, Title V Judicial Code on the discipline, M. B. 14 August 2002, pp 34919 à 34932 ; Law 7 May 1999 on the amendment of the Judicial Code relative to Disciplinary system implemented to the Judicial Order's members, M. B. 30 juillet 1999, pp 28453 à 28460

22. Stockholm Programme - An open and secure Europe serving and protecting citizens (« Europe of Justice »), Official Journal C 115 of 4 May 2010.

23. Law on common courts Organization, 27 July 2001 ; Act of 12 May 2011 on the National Council of the Judiciary (NCJ) ; Resolution of the NCJ of 22. July 2011 regarding the regulation of the detailed procedure of the NCJ ; The Set of Professional Ethical Rules for judges, appendix to the Resolution of the NCJ of 19 February 2003

24. Serbian Laws n° 116/08 of 27 December 2008 on Public Prosecution, on Judges, on High Judicial Council ; Code of Ethics of 14 December 2010, by the High Judicial Council

25. Judges' Association of Serbia, *Evaluation of judicial performance*, December 2005-October 2007

26. *National Judicial Reform Strategy in Republic of Serbia*, Ministry of Justice, April 2006 ; *The Reform of Judicial System in the Republic of Macedonia*, June 2005.

Disciplinary offence (I). Even if there are many differences in Judges and Prosecutors' Disciplinary liability, most of States experience the same evolution (II).

I. From Standards for Judicial Conduct to Disciplinary Offences

The first task is to define the Standards for Judicial Conduct (A). Then, the diversity of disciplinary offences on duty and off-duty exists in many States (B)

A. Standard conduct for Judges and Prosecutors

Most States impose the same professional conduct for Judges and Prosecutors. However, some, like in Serbia, provide different provisions for each function. There are different sources of Ethical principles: Constitutional and Legal sources (1) and other sources (2).

1. Constitutional and Legal sources

If the Constitution sets out Judicial independence, the law is often the foundation of Ethical Standards. Three States in this comparative analysis demonstrate the importance of legal sources. In **Italy**²⁷, there are general principles provided by the law of 2007: firstly, « the Judge or Prosecutor must exercise his functions without ardour, in a relevant, correct, diligent, careful, well-balanced way »; secondly, « in all his/her actions within the exercise of his/her duty, the Judge or Prosecutor must respect people's dignity »; thirdly, « even off-duty, no conduct, even if is legal, should jeopardise his/her personal credibility, or the prestige and dignity of the Judiciary ».

In **Romania**²⁸, like in Italy, Law 303/2004 for Judges and Prosecutors provides for many professional duties: « In their entire activity, the judges and public prosecutors shall ensure the supremacy of the law, observe the persons' rights and freedoms, as well as their equality before the law, make sure a non-discriminatory treatment is applied to all participants in judicial procedures » ; secondly, the Chapter II presents *Incompatibilities and interdictions*, such as exercising other public or private duties apart from teaching, and being members of political parties or organizations ; thirdly, all provisions listed under Disciplinary offences constitute forbidden conduct (such as gross or repeated negligence, or repeatedly missing work without leave).

2. Other sources

In order to introduce more transparency in Disciplinary proceedings, some States have decided to codify their Professional Rules of Conduct. If the CCJE encourages these efforts²⁹, other States, like Belgium, refuse to codify professional duties, which does not mean that the Ethical principles are ignored.

In **Bulgaria**³⁰ and **Serbia**³¹, there is a substantial Code of Ethics: the Bulgarian Code of Ethical Behavior

27. Law « Mastella » of 31 July 2007 ; Law « Castelli » n°150/2005 of 25 July 2005 ; Legislative Decree n°109/2006 of 23 February 2006 relative to the Disciplinary offences and Disciplinary penalties' Rules ; Legislative Decree n°511/1946.

28. Romanian Law n° 303 of 28 June 2004 on the by-law of judges and public prosecutors, No. 826 of 13 September 2005 ; Romanian Law n°317 of 1 July 2004 on the Superior Council of Magistracy, No. 827 of 13 September 2005 ; Romanian Law n° 24/2012 of 24 January 2012, No. 51 dated January 23, 2012

29. Opinions n°3 of the CCJE, *ibid.*, §41 et seq.

30. Code of Ethics for the Behaviour of Bulgarian Judges, passed by the Supreme Judicial Council

31. Code of Ethics by the Association of Public Prosecutors and Deputy Public Prosecutors in 2005 ; Code of Ethics for Judges passed by the High Judicial Council in 2010.

shall apply to all judges, prosecutors and investigators whereas in Serbia Judges and Prosecutors are submitted to different Ethical Codes. For example, in the Serbian Code for Judges, the value of « dignity » is detailed by seven points³² called « implementation » for the sake of practicality. In a different way, in **England and Wales**, the Judges' Council issued its own Guide to Judicial Conduct in 2004, with general principles and guidelines. For instance, the « Guide » indicates that « They may not undertake any task or engage in any activity which in any way limits their ability to discharge their judicial duties to the full (...) If any doubt arises in the application of these principles, a judge should seek *guidance* from a senior colleague or Head of Division or the Lord Chancellor ». Contrary to the structures above, in **France**, values should be expressed without the necessity of having a Code³³. In the Ethical guidelines which were published C.SM.'s Report 2009, there are six themes³⁴ ; each value is detailed through personal, functional and institutional aspects. For example, Integrity includes obligations of probity, a general requirement of honesty, which includes that the Judge being forbidden to use his/her position to obtain benefits (personal), efficient practice in Court duties (institutional) and rejection of favouritism (functional). However, these Standards are not always the source of Disciplinary proceedings. If a State decides to codify Judges' and Prosecutors' Ethical rules, it does not mean that these rules should serve for Disciplinary proceedings. As Mr De RIEMAECKER, Prosecutor at the Supreme Court in Belgium, explains, Discipline does not exhaust all the Ethical Rules. Sometimes, there are Ethical rules, while at other times there are Disciplinary offences. In **Serbia**³⁵ and **Bulgaria**³⁶, articles relative to the Disciplinary offences expressly mention departure from the Code of Ethics. However, in **France**, there is a debate over the efficiency of the Ethical guidelines for Disciplinary proceeding.

B. The application of Disciplinary offences

If States choose either list of Disciplinary offences or a vague definition in respect of the law, it is useful to make a distinction in their application : on duty (1) or off-duty (2).

1. Disciplinary offences on duty

Most States make a list of Standards for judges' and Prosecutors' conduct and a list of prohibited behavior. In **Italy**, breaches in discipline can be divided into two categories: in the exercise of judicial duties, and out of court. Article 2 of the legislative decree³⁷ sets forth a detailed list of 25 mandatory cases of breaches in discipline in the exercise of the judicial duties: for example, serious violations of the law caused by inexcusable ignorance or negligence and the misinterpretation of facts caused by inexcusable negligence. Article 4 of the decree identifies breaches in discipline that result from the commission of an offence, establishing a kind of automatic functioning

32. Art. 4 of Code: « During the performance of judicial function and in their activities outside the court, judges must develop standards of conduct which shall contribute to the protection of reputation and dignity of the court and judges » ; 4. 2 : « Judges must protect the reputation of the court and the judicial function through written and spoken word ».

33. Organic Law n° 2010-830 of 22 July 2010 relative to the application of article 65 of the Constitution ; Organic Law n° 2010-541 of 25 May 2010 extending the office of the High Council of the Judiciary's members ; Constitutional Law n° 2008-724 of 23 July 2008 of modernization of V Republic's institutions ; Organic Law n°2007-287 of 5 March 2007 relative to appointment, training and Judges' and Prosecutors' Liability ; Organic Law n°2001-539 of 25 June 2001 relative to Judges' and Prosecutors' Statute and to the High Council of the Judiciary; 1958 Statutory law on rights, obligations and the career of members of the Judiciary

34. *Ethical guidelines*, the High Council of the Judiciary (France), Dalloz, 2010: « Independence, impartiality, integrity, legality, carefulness, discretion and reserve »

35. Law on Judges, art. 90 : « a serious violation of provisions of the Code of Ethics »

36. The Judiciary System Act 2007, Chapter 16, art. 307 3. « the breaking of professional ethic rules »

37. Legislative Decree n°109/2006 of 23 February 2006 relative to the Disciplinary offences and Disciplinary penalties' Rules

between the facts at the basis of a conviction for an intentional offence and disciplinary proceedings. In **Spain**, there are 3 categories of disciplinary offences³⁸: very serious offences, serious offences and minor offences: intentional misconduct regarding towards the Constitution; lack of respect for the Hierarchy; or unjustified or without-cause non-observance of legal times-limits fixed for handing down rulings. If in Italy and Spain, breaches in discipline are divided in different categories, others make the choice of a vague definition of professional misconduct: in **Belgium**, article 407 of CJ has, to doctrine an incantatory effect and may include many professional breaches in conduct.

2. Disciplinary offences off-duty

Either the State makes provisions for Disciplinary offences while off-duty or they emerges from Ethical rules that dictate that if the prestige of the Judiciary is at risk, judicial disciplinary liability should be submitted to the authorities. Firstly, In **Italy**, article 3 of legislative decree lists 8 cases of breaches in discipline perpetrated out of court: using the title of judge to obtain an unfair advantage for oneself or others for example; or participating in secret associations or associations whose membership is objectively incompatible with the exercise of judicial duties. In **Germany**³⁹, breaches in discipline can be divided into two categories, in particular while off duty; if it is an intentional offence, a ruling rightful dismissal shall be made against the Judge⁴⁰. Since Law of 2012, **Romanian** disciplinary system admitted the inclusion of offences affecting the prestige of justice into the category of « serious misconduct ». Secondly, contrary to the Italian, German and Romanian laws, in **Bulgaria**, it seems easier to deduce disciplinary offences out of service from the vague provision of the Judiciary System Act « any action undermining the prestige of the Judiciary ». In **France**, the 1958 Statute⁴¹ does not expressly mention disciplinary offences while off duty, but it is sure that private misconduct (written or spoken words) may constitute breaches in Discipline. If the structure (code or otherwise) of Standards for judicial conduct is different between the States, content may be deemed similar and may serve the same purpose: a balance between the Independence and Liability.

II. Judges and Prosecutors at the hands of the Disciplinary Liability

In order to reinforce trust between citizens and Justice and under European influence, most States have reformed their disciplinary systems from the interests of transparency : a multi-faced disciplinary framework (A) , several key points for disciplinary proceedings (B),and a list of disciplinary sanctions (C).

A . A Multi-faceted Disciplinary framework

There is diversity in disciplinary authorities : some States have established a disciplinary Council or Commission, while others have preferred to make provisions of several disciplinary institutions (1). The

38. Organic Law of 1st July 1985 relative to Judiciary power : articles 417 (very serious offences), 418 (serious offences), 419 (minor offences). In Italy, being a member of Freemasonry is forbidden.

39. Report of French Senat of 2004, Disciplinary System for Judges, p. 3 et seq.

40. Federal Law of 9 July 2001 for federal servants ; Federal Law of 8 September 1961 on the Magistrate ; Basic Law for the Federal Republic of germany of 23 May 1949.

41. 1958 Statutory law on rights, obligations and the career of members of the Judiciary

composition of these institutions is also variable (2).

1. One or several disciplinary authorities?

Sometimes, one disciplinary structure is concerned, while at other times it is a question of several institutions being set up in order to respect the independence and transparency of the Judiciary.

Concerning a disciplinary organ's unity, three States made this choice with the same question : how does the system take into consideration the substantial difference between Judges and Prosecutors ? In **France**, since Constitutional Reform in 2008, there is a High Council of the Judiciary in charge of Judges and Prosecutors' discipline and made up of 3 groups: one for Judges, another for Prosecutors and the last is a plenary group for specific questions about the Judiciary's independence. In **Romania**, the Superior Council of Magistracy, through its two divisions (one for judges, another for prosecutors) accomplishes the role of a court dealing with matters of disciplinary liability. It is the « guarantor of the independence of justice »⁴²

However, the **Italian** CSM is the self-regulation body of the judiciary (for judges and prosecutors); pursuant to the legislation on the judicial system, it is the relevant disciplinary body for members of the Judiciary. However, in March 2011, the Italian Ministry of Justice presented a Constitutional reform of the Judiciary: the separation of judges' and prosecutors' careers in order to promote equality between the defence and the prosecution; the creation of a dual C.S.M; and the establishment of a Court of Discipline containing two groups, one for judges, and the other for prosecutors.

Concerning systems with several disciplinary authorities, there are many systems which insist on the respect of independence and transparency. In **Macedonia**⁴³ and **Serbia**, there are one for judges and another for prosecutors. To be more precise, in Serbia, there two structures with a specific disciplinary commission: the High Judicial Council for judges and the State Prosecutorial Council. According to Mr BIROT, the recent reform of the disciplinary system is fully functional yet : it is running.

In **Bulgaria**, some disciplinary sanctions may be imposed by a resolution of the Supreme Judicial Council whereas other sanctions are imposed by a reasoned order of the administrative head of a judge, prosecutor or investigating magistrate⁴⁴. Furthermore, in **Belgium**, it depends on the penalty and judge or prosecutor. For Belgian Judges, the disciplinary authority of the administrative head or a court may impose sanctions on judges: each disciplinary authority depends on the Judge's rank or degree of penalty (minor penalty, major 1st degree penalty, major 2nd penalty). Moreover, for Belgian prosecutors, the disciplinary authority of the administrative head or superior administrative head, Minister of Justice or the King may impose sanctions on prosecutors in the same way.

In **Germany**, the President of the court to which of the judge or prosecutor belongs or the Attorney General of *Länders* are competent⁴⁵. In **Poland**, Discipline courts are set up to hear disciplinary cases against judges : in the lower instances, this occurs at the courts of appeal; in the higher instances, at the Supreme Court⁴⁶. In **England and**

42. Romanian Law n°317 of 1 July 2004 on the Superior Council of Magistracy, No. 827 of 13 September 2005: art. 1

43. Law on the Judicial Council of the Republic of Macedonia adopted in 2006, No 60/2006

44. *Ibid.*: art. 308 and 314 « reprimand, censure ».

45. Federal Law of 8 September 1961 on the Magistrate : art. 77, 78, 79

46. Law on common courts Organisation of 27 July 2001: art. 110

Wales, since the Constitutional reform Act 2005 and the Concordat⁴⁷, the Lord Chief Justice and Lord Chancellor can impose sanctions jointly. So, there are various authorities for exercising disciplinary action.

2. Composition of disciplinary institution

Most of the disciplinary authorities have a mixed composition, for fear of breaking the transparency if there are only judges and prosecutors. However, most of the Council or Commission's are judges and prosecutors elected for disciplinary duties. In **Italy**, Act no. 44/2002 provides that the CSM is made up of 24 elected members, of which 16 shall be career members and 8 shall be lay members. The competent authority is the Disciplinary Division of the CSM, made up of 6 members : the Vice President of the CSM, who acts as the president, and 5 members elected by the CSM itself among its own members, of which one is elected by Parliament, a one is a supreme court judge actually exercising supreme court duties and the others are 3 judges of merit. In **France**⁴⁸, the High Council of the Judiciary in its Disciplinary composition for Judges is made up of a Chairman, who is Chief Justice of the Court of Cassation, 5 Judges, a Prosecutor, a Councillor of Council of State, a lawyer, and 6 qualified members. For prosecutors, the group is made up of the Chairman who is Chief Prosecutor of the Court of Cassation, 5 prosecutors and a Judge, a Councillor of the Council of State, a lawyer and 6 qualified members. The **Romanian** CSM⁴⁹ is made up of 19 members with the similar authorities than in France. So, in these countries, judges and prosecutors are not sanctioned only by their peers, which would prove a liability without bias.

B. Key points for Disciplinary proceedings

European influence is deemed particularly by States in the organization of disciplinary proceedings: transparency, efficiency and respect of judge or prosecutor's statutes are necessary at all stages of proceedings : commencement of proceedings (1), the investigating procedure (2), rights for the defence (3).

1. Commencement of Proceedings

If a Minister of Justice⁵⁰, administration head⁵¹, Chief Justice of a Supreme Court or Chief Prosecutor⁵² and the Judicial Inspection⁵³ can initiate the proceedings against judges and prosecutors, a few States have given litigants the right to initiate disciplinary proceedings as well. In **Germany**, there is an original provision about commencement of proceedings: the judge himself can initiate proceedings when he wants to prove that suspicions are unfounded.

47. The « Concordat » between the judiciary and the Government in January 2004 in order to result in the transfer of many of the functions of the Lord Chancellor to the Lord Chief Justice and create the Office of Judicial Complaints and the Judicial Appointments and Ombudsman Conduct.

48. Art. 65 of the Constitution amended by the Organic Law of 22 July 2010

49. Law 317/2004: 9 judges and 5 public prosecutors elected at the general meetings of the judges and prosecutors who form the two divisions of the Council, one for judges and the other for public prosecutors; two representatives of civilian society, who are specialists in law, have a good professional and moral reputation, and are elected by the Senate; the president of the High Court of Cassation and Justice, representing the judicial powers, the Minister of Justice and the general public prosecutor of the Public Prosecutor's Office next to the High Court of Cassation and Justice, who are members of the Council *de jure*

50. In Italy, Spain, Romania, Republic of Macedonia, Belgium, France for Judges (art. 50-1 of the 1958 Statute), Romania (Law of 2012)

51. In Belgium, Spain, Republic of Macedonia

52. France: art. 50-2 of the 1958 Statute ; in Romania : the President of the High Court of cassation and Justice (only for judges), the Prosecutor General (for prosecutors).

53. Law n°24/2012 : the disciplinary action is being exercise by the Judicial Inspection of the SCM (for judges and prosecutors).

Individual complaints

Is this a sign of openness or the consequence of the lack of classical proceedings against judges and prosecutor?⁵⁴ In **Italy**, disciplinary proceedings are instituted on the initiative of the Minister of Justice and the Prosecutor General of the Court of Cassation. But the CSM has received all complaints from individuals since the Law 2005. Those that may constitute charges are passed on to the Minister of Justice who may ask the Judicial services Inspectorate to investigate. Furthermore, anyone can present complaints and grievances directly to the Minister of Justice or to the Chief Prosecutor. As there are already many proceedings in Italy (150 annually), it is a sign of openness, or a way to reinforce the link between Justice and the public. In **England and Wales**⁵⁵, initially, individuals used to send complaints to the Judicial Correspondence Unit which was in charge of checking the facts. Since April 2006, complaints are submitted to the Lord Chief of Justice, Lord Chancellor, the Office of Judicial Complaints and the Judicial Appointments and Ombudsman Conduct. If there are not enough charges, the Office may reject the request in the name of Lord Chief of Justice and the Lord Chancellor. For serious offences, files are sent to these disciplinary authorities.

In **France**, since the Constitutional Reform of 2008, an individual may submit his/her complaints to the High Council of the Judiciary in respect of legal terms: the judge or prosecutor's professional conduct is likely to be considered as a disciplinary offence⁵⁶. As a person subject to trial, the judge or prosecutor is discharged of the proceedings and the complaint has to be submitted in the year following the definitive decision. In all these proceedings, individuals cannot change the decision of the trial but they may throw light on disciplinary offences of judges and prosecutors on or off duty. Transparency is also ensured by the presence of an Ombudsman.

The Ombudsman's positions

In the **Polish system**, the National Council of the Judiciary elects a disciplinary ombudsman from common court judges. He is a legally accuser in a disciplinary court in cases concerning appellate courts judges, as well as circuit court presidents and vice-presidents. The Ombudsman undertakes disciplinary measures against a judge on the instructions of the Minister of Justice, a president of an appellate or circuit court, a court college, National of the Council for the Judiciary or on his own initiative. Besides, in the **English and Welsh system**, the Judicial Appointments and Conduct Ombudsman can investigate complaints from members from members of the public or judges, about how their complaint was handled by the Office for Judicial Complaints (OJC), a Tribunal President or a Magistrates' Advisory Committee. If the complaint meets all the criteria⁵⁷, the Ombudsman may consider it and on finding that something has gone wrong with the handling of the original complaint, may recommend that an investigation or ruling should be reviewed by a Review Body. The Ombudsman can also ask the institution to write to the plaintiff and apologise for what went wrong or suggest payment of compensation for a loss which appears to

54. In Spain, individual's complaints are also provided.

55. The Constitutional Reform Act 2005, 17 January 2005, Bill No 18 of 2004-05

56. The 1958 Statute, art. 43

57. 1° the private individual have already made a complaint to the three institutions mentioned above about the conduct of a judicial office holder 2° the private individual is not happy with the process that one of the three institutions mentioned above followed 3° make a complaint within 28 days of the final letter that the individual received from the one of the three institutions.

the Ombudsman to have been suffered as a direct result of the mishandling of your complaint.

2. The Investigating Procedure

Many authorities can participate here: specific commissions, administration heads⁵⁸, investigating divisions or the Judicial Services Inspectorate. Most States have handed over the investigating proceedings to the Judicial services Inspectorate: Spain, England and Wales, Italy and Bulgaria. In **England and Wales**, the Crown Prosecution Service heads inspections regarding suspicion of a breach in discipline. In **Spain**, the Spanish General Council of Judicial power is in charge of investigating into the charges submitted to the disciplinary institutions. In **Bulgaria**, the Inspectorate at the Supreme Judicial Council makes proposals for the imposition of disciplinary sanctions on judges, prosecutors and investigating magistrates⁵⁹.

However, in **France**, The Inspectorate General of Judicial Services, employed by the Ministry of Justice, may be in charge by an exclusive decision of the Minister of Justice to investigate into breaches in discipline by judges or prosecutors (pre-disciplinary proceedings). This inspection may be relevant to conditional disciplinary proceedings. The Chief Justice of the Court of Cassation, as Chairman of the Discipline Council, designates a discipline commissioner among the members who is in charge of investigating if necessary.

3. Rights of the defence in disciplinary proceedings

Rights of the defence are claimed in the name of the right to a fair trial⁶⁰.

In the Investigating process, the Disciplinary system guarantees the respect of rights of the defence: in **Italy**, from the beginning, notice of disciplinary proceedings must be given to the accused and the accused can be assisted by another judge or a lawyer. In **Serbia**, a judge or a prosecutor has the right to be notified promptly of a motion by the Disciplinary Prosecutor, to examine the case file and the supporting documentation, and to present explanations and evidence for his/her statements, in person or through a representative. They have the right to present orally their explanations. In **France**, the 1958 Statute (art.51) provides that during the investigation, the discipline commissioner can hear the judge or prosecutor who has the right to be assisted by another judge or Prosecutor or a lawyer, if necessary with the complainant or witness.

At the Disciplinary Hearing, the concept of transparency is not always appropriate. States are divided on this point, preferring hearings in secret or in public. According to Mr Guy CANIVET⁶¹, if the Pellegrin case-law excluded the disciplinary litigation of Article 6 of the Convention, the European Court⁶² considers that being a public agent, such as a judge and prosecutor, is not enough to exclude the right of fair trial. At present, **Bulgaria** and **Spain** refuse a public hearing whereas **France**⁶³, **Belgium**, **Poland**, **Italy** and **Romania** admit public hearings. In **Italy** for example, the discussion of a case within disciplinary proceedings, which occurs by public hearing, consists of hearing the report of one of the members of the Disciplinary Division, gathering ex officio

58. In Romania, a priori and mandatory investigation can be led by the President of the High Court of cassation and Justice (only for judges), by the Prosecutor General (for prosecutors) or by the Minister of Justice (for judges and prosecutors).

59. The Judiciary System Act 2007, Chapter 3, Section 3 Inspectorate powers: art. 54

60. The influence (non official) of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

61. GABORIAU S., PAULIAT H., *op. cit.*, p. 67 et seq.

62. CEDH PELLEGRIN v/ France of 8 December 1999 ; CEDH VILHO ESKELINEN and others v/ Finland of 19 April 2007

63. The 1958 Statute amended by the Organic Law 2001: art. 57 The principle is public hearing except if there is a breach of public order.

evidence, and hearing the reports, inspections, procedures and evidence gathered, as well as the discovery of documents. The Disciplinary Division makes a decision after having heard the parties and the said judgement can be opposed before the Joint Divisions of the Court of Cassation. However, it is original that in the States where hearings are in secret, disciplinary decisions are published in an official journal or on the CSM's web site like in France, Bulgaria and Italy (where they are even a broadcast).

As Right of the defence implies the Right to complain about disciplinary sanction, most States provide an appeal against a decision. In **Poland**, the accused, the disciplinary commissioner, as well as the National Council of the Judiciary and the Minister of Justice may all appeal against the disciplinary court's judgements rendered in the lower instance through the disciplinary court of higher instance but the judgement of the disciplinary court of the higher instance is not subject to cassation. In **France**, the Council of State is competent for an appeal from the judge or the prosecutor against a disciplinary sanction. Disciplinary sanctions are always provided by the laws, but it appears that from the commencement of proceedings to the decision, the disciplinary system does not seem to be so efficient.

C. The time set for disciplinary sanctions

All States set sanctions for breaches in discipline, but the lists of disciplinary sanctions may be long or short and divided into 3 groups: 1° « moral » sanctions : reprimand, censure, admonition; 2° financial sanctions : reduction of remuneration, fines; 3° serious sanctions: transfer, suspension of duties, devolution, dismissal. In **Germany** and **England and Wales**, there is a short list of sanctions: reprimands, fines and dismissal, proportionate to the seriousness of the disciplinary offence. However, in other States, like **France**, **Belgium** and **Italy**, there is a long list of disciplinary sanctions that the disciplinary authorities consider in respect of the judge and prosecutor's rights. The Belgian system is particularly interesting as regards the penalty scale: minor penalties consist of warnings and reprimands; major penalties in the 1st degree constitute a 2-month deduction from Judge's salary, disciplinary suspension and/or relief of office; major penalties in the 2nd degree cover dismissal and discharge without the right to a pension. Finally, in **Bulgaria**, a disciplinary sanction, with the exception of relief from office or of dismissal, shall be deleted one year after having been served. Early deletion of a disciplinary sanction may occur at the initiative of the administrative head or of bodies, or of the people that proposed its imposition in the first place. According the CEPEJ's Report⁶⁴, the difference between the number of « open disciplinary proceedings » and the number of « finally imposed sanctions » can be explained by the fact that some cases are discontinued or ended due to the lack of an established violation, or because of the judge's resignation before the final decision.

If the Disciplinary system is precise or complex, the reality is different. This does not mean, however, that trust between citizens and Justice is not being reinforced. The prospects for judicial disciplinary systems are expressed thereafter in order to reinforce this trust.

64. European Commission for the Efficiency of Justice, Report on « Efficiency and quality of Justice », 2010, p. 247

PART 2 : The prospects for judicial disciplinary systems

The recommendation by the Committee of Ministers to Member States on *judicial independence, efficiency and responsibilities* stresses the need to « *reinforce all measures necessary to promote judges' independence and efficiency, guarantee and make more effective their responsibility and strengthen the role of individual judges and the judiciary generally* »⁶⁵.

Judicial disciplinary responsibility is a balance of two things: on the one hand, the obligation to penalize judges who engage in prohibited conduct which infringes on their Ethics; and on the other, the necessity to preserve judges' independence and the power of their decisions. This balance is a necessity to preserve the confidence of citizens in the justice system.

At a European level, two issues are at stake here : firstly, the applicability of article 6§1⁶⁶ of the European Convention on Human Rights to judicial disciplinary systems (**I**); secondly, the creation of a European judicial disciplinary system for European prosecutors (**II**).

I. The applicability of article 6§1 of the European Convention to judicial disciplinary systems

The applicability of article 6§1 to judicial disciplinary litigation is a necessity for the standardization of disciplinary proceedings, the reinforcement of the protection of judicial independence, thanks to procedural safeguards whose violation is penalized by the European Court of Human Rights, and in making the Court competent to ensure the fundamental balance between judicial independence and the effectiveness of judges' responsibilities. Furthermore, this applicability of article 6§1 will undeniably help to preserve the confidence of citizens in their judges also because the lawsuit will be public. In order to achieve this, the European Court of Human Rights has to change its PELLEGRIN ruling (**A**), which is very criticized (**B**), by adopting a new criterion of applicability of article 6§1 (**C**).

A. The PELLEGRIN ruling of the European Court of Human Rights

The Council of Europe and the European Union – both expressing procedural safeguards for judicial disciplinary proceedings – speak in favor of the reinforcement of protection of judges' independence. However, the European Court of Human Rights refuses to impose on Member States the respect of article 6§1 for judicial disciplinary proceedings. The Court's position seems to be inappropriate. Actually, it can be harmful for judicial independence, especially in Eastern Europe, where independence may have a limited protection. The lack of supranational and uniform safeguards can lead to an incomplete application of the independence principle.

The European Court of Human Rights considers that article 6§1 does not apply to judges' disciplinary litigation because it is not linked to a civil law dispute. Consequently, judges' disciplinary litigation does not belong

65. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges : independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010.

66. « In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. »

to the scope of article 6§1 and the European Court of Human Rights declares itself incompetent to judge. In a decision of 1 July 2003⁶⁷, the European Court of Human Rights found the application of article 6§1 inadmissible in a case concerning a Lithuanian prosecutor, M. DZIAUTAS, who was removed from office because he had worked for a Lithuanian section of the KGB before Lithuanian independence in 1990. The applicant complained that he could not benefit from the following two rules: public proceedings and access to a final court of appeal. The European court of Human Rights considered this case had nothing to do with « *civil law rights and obligations* ».

In actual fact, the European Court of Human Rights resorted to a criterion drafted in its PELLEGRIN ruling. The Court ruled that « *the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities* »⁶⁸. According to the court, this new criterion is independent of the qualification of the duties of the person concerned at a national level. Consequently, this new criterion makes it necessary to ascertain in each case « *whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities* »⁶⁹. From this point of view, judges and prosecutors work in a sphere in which States exercise sovereign powers. However, the PELLEGRIN ruling leaves room for criticism.

B. Shortcomings of the PELLEGRIN ruling

In the PELLEGRIN ruling, four European Court judges issued a dissenting opinion based on the risk of discrimination between citizens⁷⁰. According to them, article 6§1 and preparatory works on it, « *do not provide a decisive argument as to whether there should be a restrictive or narrow interpretation of the concept 'civil rights and obligations'* ». They proposed that « *that provision applies to all disputes that are decisive for a person's legal position, even if he or she is a civil servant* ». The dissenting judges could see no valid reason « *for depriving persons in the public service of the legal protection which is regarded for other workers as a safeguard so essential as to constitute a fundamental right* »⁷¹.

The criterion of the PELLEGRIN case may cause discrimination not only between persons vested with the prerogatives of power and those who are not, but also discrimination within the category of persons vested with the prerogatives of power, depending on the dispute they are involved in. A civil servant, faced with criminal proceedings because of professional misconduct, benefits from the safeguards of article 6§1. For the same facts, if he is subject to disciplinary or administrative proceedings, he does not benefit from the safeguards of article 6§1.

67. Eur. Court Hum. Rights, Section 2, 1st July 2003, Dziautas vs Lituania

68. Eur. Court Hum. Rights, Chamber, 8th December 1999, Pellegrin vs France

69. Eur. Court, Section 2, 8th February 2001, Galina Pitkevich vs Russian Federation : « The Court observes that the judiciary, while not being part of ordinary civil service, is nonetheless part of typical public service. A judge has specific responsibilities in the field of administration of justice which is a sphere in which States exercise sovereign powers. Consequently, the judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the State ». Eur. Court, 1st July 2003, prec. « There is no reason to depart from that reasoning and conclusion with respect to a member of the prosecution service in so far that such a service contributes to the administration of justice. »

70. Ms Tulkens and Thomassen and Mrs Fischbach and Casadevall

71. Dissident opinion, §5

By refusing to apply article 6§1 to judges' disciplinary litigation, the Court gives an opportunity to States to penalize its civil servants choosing disciplinary proceedings rather than criminal ones.

The criterion of the PELLEGRIN ruling is based on the implementation of powers conferred on the Administration by public law. The State has a legitimate interest in requiring of these civil servants, who wield a portion of the State's sovereign power, « *a special bond of trust and loyalty* »⁷², whose sanction is not covered by the provisions of article 6§1. However, where judges are concerned, the bond of trust and loyalty is very particular: in the course of their duties, judges, contrary to military personnel and policemen, are not subject to the instructions given by their superiors. On the contrary, judicial independence is a fundamental principle recognized in all Council of Europe Member States. As a result, by deciding not to impose respect of article 6§1 for judicial disciplinary litigation on States, the European Court of Human Rights lets the States themselves protect the independence of judges. The risk is that some States, whose domestic rules do not sufficiently protect the independence of judges, might be tempted to use this lack of procedural safeguard, based on the bond of trust and loyalty, as an instrument of pressure on judges.

The PELLEGRIN ruling deprives judges of two other fundamental rights. The reason is that the right to a fair trial is not recognized for judges. Consequently, they cannot use the right of an effective remedy before a court and the prohibition of discrimination in the exercise of a right to a fair trial. In these conditions of almost state-immunity, the independence of judges appears to be at risk because it is only guaranteed by domestic law, whose interpretation is up to judges.

C. A new criterion for the applicability of article 6§1 to judges' disciplinary litigation

Under this scenario, article 6§1 would be applicable to judicial discipline. Consequently, the concerned persons' request invoking the violation of article 6§1 would be declared admissible by the European Court of Human Rights. In order to achieve this, we should adopt a new criterion for the applicability of article 6§1 to public officials. According to the European Court of Human Rights, the general interest and the efficient functioning of the States justify, on the one hand, that some public officials' careers obey particular rules and, on the other hand, that procedural safeguards do not apply to them. This premise explains the restrictive reading of article 6§1.

Why not limit the scope of the PELLEGRIN ruling to public employment requiring officials' political subordination?⁷³ On the contrary, litigation concerning politically neutral public employment could be subject to article 6§1, even if officials exercise powers conferred by public law and wield a portion of the State's sovereign power directly. According to this definition, members of the judiciary belong to this category. The Court's criterion for « *modification of a person's legal position* » is very broad and includes all Administration litigation, whereas the criterion for « *political subordination of public officials* » leaves some public employment out of the application of article 6§1, that is to say out of the application of the right to a court hearing and the right to a fair trial.

The other prospect for disciplinary system is to imagine a disciplinary proceedings for European Public Prosecutors.

72. Pellegrin Case, *op.cit.*, §65

73. Mazvydas Michaluskas, Paris 1 University Doctor in Private law

II. The implementation of European disciplinary responsibility for European Public Prosecutors

The implementation of European disciplinary responsibility for European Public Prosecutors could be a first step towards standardizing disciplinary law of national judges and prosecutors at a European level in the future.

The differences between the disciplinary systems in European Union requires that the European Public Prosecutors has its own disciplinary system, adapted to its specificity (A), that is to say its ethical obligations (B) and disciplinary proceedings (C). The trust of citizens depends on this conditions.

A. European Public Prosecutors' office: presentation of the project.

During the second half of 2013⁷⁴, the European Commission will propose a directive on the creation of the European Public Prosecutors' Office. The European Public Prosecutors' Office would be competent in pointing out offences against European Union financial interests (in conjunction with EUROPOL) and taking public action before competent Courts of the Member States⁷⁵.

According to the Green Paper, the chief of the European Public Prosecutors' Office would be in charge of management and coordination of investigations and proceedings, so he would have the power to investigate Deputy European Public Prosecutors. These Deputy European Public Prosecutors would belong to national judicial systems and would take public action⁷⁶. Either the Deputy European Public Prosecutor's mandate would be exclusive of any other mandate, which would ensure specialization, or Deputy European Public Prosecutors would prosecute unlawful acts detrimental to national and European interests with priority given to European interests.⁷⁷

B. What Ethical obligations should be fixed for European Prosecutors ?

Since 2001, the European Commission has been working on a disciplinary system for European Public Prosecutors in general terms. However, it is necessary to define Ethics before thinking about a disciplinary system. The Council of Europe's papers and works are at the cutting edge of thinking in the area of judicial responsibility. On the basis of article 18 of the judges' Magna Carta, Ethics has to come from judges themselves. Consequently, preparing ethics for judges can be an appropriate mission for the European Network of Councils for the Judiciary⁷⁸. A general framework already exists with the judicial ethics report 2009-2010. This document comprises a list of ethical obligations that judges have to respect (independence, integrity, impartiality, reserve and discretion, diligence, respect and the ability to listen, and competence), but the specific nature of the European Public Prosecutors' Office has to be taken into account.

In fact, independence has to be specified. European Public Prosecutors have to be independent from the executive and legislative powers, as well as the media and public opinion. Furthermore, European Public Prosecutors have to be independent of Member States and European Union institutions, and more particularly of

74. <http://www.senat.fr/rap/r11-279/r11-2794.html>, 31 March 2012

75. Article 86 of the Treaty on the functioning of the European Public Prosecutors' office.

76. Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11.dec.2001, presented by the Commission, p.29, § 4.1.3 et 4.2

77. *Ibid*, p.30-31, §4.2.1.1.

78. It is legitimate because it is composed of national institutions of European Union Member States, and it works with European Union support.

the Commission, the Council of Europe and European bodies, offices and agencies⁷⁹. This independence would have to take into account the hierarchy of the European Public Prosecutors' Office⁸⁰. This «*Code of Ethics* » would be fixed by a European Regulation in order to ensure uniform application for all members of the European Public Prosecutor's Office, whatever their nationality. This Code of Ethics would be annexed to existing national Codes of Ethics.

C. What disciplinary system should be implemented for European Public Prosecutors ?

According to the Green Paper, the members of the European Public Prosecutors' Office would either be European Union officials, or would benefit from a self-generated status that would allow them to be judges in their national judicial systems and exercise their functions within the European Public Prosecutors' Office. The Commission does not want to propose an autonomous European status for Deputy European Public Prosecutors. They will keep their national status and be subject to European disciplinary and hierarchical systems during their mandate. In other words, it is necessary to envisage in the national status not only the possibility of secondment but also the consequences in terms of discipline and hierarchy. Judges working within the European Union should not be subject to a national disciplinary system when they act under a European mandate. A European Regulation is necessary to integrate all these specific provisions into national status. In fact, according to article 19 of the judges' Magna Carta, the status or fundamental charter applicable to judges has to define all faults which might lead to disciplinary action and also disciplinary proceedings.

Consequently, the creation of a complementary specific disciplinary fault is necessary. This fault would lead to penalizing judges who have prioritized national interests over European ones.

The ultimate disciplinary sanction would be the loss of the European mandate. If Deputy European Public Prosecutors were able to hold two functions, they would be subject to two disciplinary systems depending on whether the fault was committed in the exercise of their national mandate or their European one. On the basis of European law, the loss of the European mandate for Deputy European Public Prosecutors would not have a consequence on the national mandate. However, at the loss of the national mandate, the Deputy European Public Prosecutor would lose his European mandate automatically.

Concerning disciplinary proceedings for the European Public Prosecutors' Office, a European court would be competent because the goal of the European Public Prosecutors' Office is to serve European interests. The Green Paper suggests that the Court of Justice of the European Union is competent for the disqualification of a European Public Prosecutor or the removal of a European mandate in the case of serious misconduct. On the basis of a good judicial system, European Public Prosecutors cannot be penalized on disciplinary matters by only one Court⁸¹. Consequently, the Court of Justice will be competent in the case of an appeal lodged against the decision of the European Union Civil Service Tribunal, which will have exclusive jurisdiction at first instance⁸².

79. Green Paper , *op.cit.*, p. 28, §4.1.1

80. *Ibid*, §4.2.2 : The Deputy Prosecutors, for the duration of their term of office, would be subordinate to the European Public Prosecutor on an exclusive or non-exclusive basis, depending on the option selected, and would be bound by his instructions in both general and specific matters.

81. *Ibid*, p29-30, §4.2.1.1 and §4.1.2.2

82. According to the 270 TFEU, it is competent for law cases about work relations

According to article 13 of the judges' Magna Carta⁸³, a court's composition is an important issue. With regards to their members, the European Union Civil Service Tribunal and the Court of Justice of the European Union⁸⁴ abide by the requirements set out by the Council of Europe, subject to some adjustment. It has to be noted that these requirements are necessary to carry out the skills of a Justice Council. A special training body would be competent in matters of disciplinary litigation of European Public Prosecutors. For example, the plenary assembly of the Court of Justice would impose disciplinary sanctions on European Public Prosecutors⁸⁵. This specific competence would be added to the Tribunal and Court status.

Concerning the authorities which can call on the Justice Councils, according to the Green Paper, planned that the European Public Prosecutors may be ordered to resign at the request of Parliament, Council of Europe or Commission. The European Public Prosecutor, hierarchical superior of the European Public Prosecutors' Office, would have a role to play in the disciplinary proceedings of the Deputy European Public Prosecutors. The Member States would be at the origin of disciplinary proceedings if a Deputy European Public Prosecutor or a European Public Prosecutor wanted to serve the interests of his country of origin rather than European interests. Therefore, a collective request from the national Parliament could be envisaged, with the agreement of at least a quarter of the national Parliament. Disciplinary proceedings have to respect the safeguards of article 6§1⁸⁶.

Today, the Council of Europe does not want to set supranational standards concerning judges' disciplinary systems in Member States but prefers to set principles as guidelines for the implementation of these standards by the States themselves. This does not ensure a balance between the effectiveness of judges' responsibilities and the protection of their independence in case of failing states. The applicability of article 6§1 to judges' disciplinary litigation would standardize judicial disciplinary proceedings thanks to a European Court of Human Rights sanction in cases of violation of procedural safeguards. However, in Europe, disciplinary Law for judges is an open field. As such, the implementation of a disciplinary system for the European Public Prosecutors' Office could be a first step and a significant opportunity.

Concerning disciplinary sanctions against judges, or more generally speaking, against persons with politically neutral public employment, the authority of the European Court as a last resort could be considered in the future. The case law emerging on the basis of this litigation would enable the principles of European texts to be given legal scope. For example, the European judges' and prosecutors' advisory Councils, composed exclusively of judges, would have to rethink a European Code of Ethics whose violation would be penalized by the European Court of Human Rights as a last resort. Given that the differences between disciplinary systems in Europe, the authority of the European Court of Human Rights as a last resort would be very useful because it would lead to a progressive standardization of judges' disciplinary faults and sanctions at a European level.

83.« The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. »

84. The Tribunal is composed of seven judges and the court is composed of 27 judges and 8 prosecutors.

85. This would be consistent because the plenary assembly must remove the European Ombudsman or a Member of the European Commission who has failed to fulfill his obligations.

86. Today, this is not really a possibility. It is politically difficult for disciplinary sanctions from the Court of Justice to be subject to a right to appeal to the European Court, even if the EU becomes a member of the Council of Europe. The mutual influence of law cases and texts would lead to a convergence.

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