

Lisbon/The Hague, 9 October 2011

Dear Sir,

First of all thank you for the letters of 25 September 2011 and 5 October 2011 that were sent on your behalf by Myriam Verger to respectively the Dutch foundation Judges for Judges and to Magistrats européens pour la démocratie et les libertés (MEDEL).

It cannot be underlined enough that for the establishment of a truly independent and impartial judiciary it is of the utmost importance that judges having permanent tenure should only be removed from office either after a disciplinary procedure which fulfils all guarantees of a fair trial or if the judge in question becomes unfit to perform the duties of the office of judge.

Both Judges for Judges and MEDEL still have serious concerns about the way the review procedure is carried out by the High Judicial Council (HJC) at the moment. The termination on December 31st 2009 of the office of 837 judges including those who had permanent tenure was in breach of international standards. It seems the review procedure as conducted cannot repair the fundamental flaws concerning the non re-appointment of these judges.

The reason we approach you again on this matter is because we would like to share our findings also based on the working visit by the undersigned to Belgrade, Serbia from 2-4 October 2011. Our purpose was to observe several hearings conducted by the High Judicial Council (HJC) within the scope of the review procedure concerning the non re-appointed judges. Also considering the fact that the the Commission Opinion on Serbia will be published on the 12th of October.

Critique relevant stakeholders on finalised HJC-guidelines May 2011

It is true that broad consultations were held with all relevant stakeholders in the run-up to the determination of the guidelines (rules of procedure) for the review procedure. However contrary to what was stated in the letters of Ms Verger, the OSCE nor the Judges Association Serbia (JAS) agreed to the set of guidelines that were finalised in May 2011, this because none of their crucial proposals were adopted in the final version. In their view the adopted guidelines did not provide guarantees that the shortcomings, which made the review of the 2009 non re-appointments necessary, would be eliminated.

The JAS made this very explicit in their Statement published on May 24th 2011 (<http://www.sudije.rs/en/actuals/public-statements/jas-statement-from-24-5-2011>). The main reason being that the outcome of the review procedure cannot be other than arbitrary as long as the HJC-guidelines do not allow for the application of the same standards to (and therefore a comparison between) re-appointed and non re-appointed

judges. The starting point of the discussion is then the minimum of performance which was evidently accepted by the High Council in the previous decisions of re-appointment in December 2009.

After all the reason for the re-appointment procedure was to separate the sheep from the goats in the Serbian judiciary on the basis of objective criteria.

We therefore regret the fact that judge Gerhard Reissner (President of the European Association of Judges) was not asked anymore for his expert opinion on the final set of HJC-guidelines. That is surprising, as he was to our understanding just engaged as an expert by the EC Enlargement Directorate General (Unit Serbia) in order to assess the compliance of the HJC guidelines for the review procedure with the Council of Europe acquis and to assess the way the review procedure would be conducted.

Observations Judges for Judges and MEDEL HJC-hearings on 3 October 2011

Positive is that the hearings were open to the public and that the proceedings could also be followed via a live videolink in the HJC-cafeteria next to the room where the hearings were held. All hearings were observed by members of the EU Delegation in Belgrade. During the hearings we attended, the petitioners/non re-appointed judges (and their representative) were given the opportunity to present their case after the introduction of the facts in the case by the HJC judge-rapporteur.

Case of Ms Liljana Vejnovic (hearing scheduled at 12 o'clock)

This hearing concerned the case of a non-reappointed judge that had never received an individualised decision. The HJC confirmed that in her case such decision was never made. We understand that only 564 of the 837 non re-appointed judges received an individualised decision in June 2010, it is therefore interesting to see how the HJC will handle this type of cases at the end.

Not much fantasy is needed to understand that the absence of an underlying decision in this case led to a rather kafkaesque situation during the hearing in which the petitioner asked in despair against which allegations she had to defend herself.

In spite of the suggestion by the HJC-commission that she was invited to talk about her judicial functioning in general terms, the case was closed after ten minutes.

Case Ms Dragana Boljevic (hearing scheduled at 13 o'clock)

The committee in front of which the case of Judges' Association President Dragana Boljevic was held, consisted of President Mira Ivic, member Branka Bancevic and Prof. Dimitrijevic (judge rapporteur).

It is important to note that The Anti-Corruption Agency decided on 9 March 2011 that the HJC-member Prof. Dimitrijevic violated the law by holding on to both his function as Dean of the Law College of Nis and to his membership of the HJC. The Agency therefore asked the National Assembly of the Republic of Serbia to dismiss him as a member of the HJC. The decision on this issue has however not been taken yet.

Prof. Dimitrijevic acknowledged the existence of the aforementioned decision of the Anti-Corruption Agency and asked to be recused - after having read the recusal motion that was filed by ms. D. Boljevic - until the issue of his status will be resolved by the National Assembly. This led to another postponement of the hearing of the JAS president.

To our surprise and unbelief Prof. Dimitrijevic however continued reviewing later that afternoon (as well as during the hearings of October 5th) the cases of other non-reappointed judges in his capacity of HJC member. As long as the status of his HJC membership is unsure, this obviously brings into question the legality of every decision that will be taken by the HJC.

The HJC announced on Friday October 7th on its website its decision of 30 September 2011 (coming into force on 6 October 2011) concerning the dismissal of Prof. Dimitrijevic of his duties as a HJC Commission member from all cases but the twelve cases (including the case of ms D. Boljevic) in which he was appointed as a rapporteur. He will be replaced by other HJC-members. This decision seems to have been passed retroactively.

It is unclear what effect this decision will have on the 27 cases in which he acted as a HJC commission-member, whether or not as judge-rapporteur.

Our other concerns

During our meeting with EU-ambassador Vincent Degert of October 3rd, it was pointed out by members of the JAS delegation that the High Judicial Council does not have a quorum for rendering decisions in the reappointment review procedure. Decisions of the High Judicial Council (HJC) are taken by majority so by at least six of its eleven members.

The rules of procedure do not explicitly contain an article on which Council-members are allowed to take part in the voting on the proposed decision of the HJC-commission. But it follows logically from the spirit of article 9 - in which is stipulated that the members of the First Composition of the Council which participated in the adoption of the disputed decision shall not be included in the commissions - that those HJC-commission members of the First Composition of the Council should not take part in the voting on the proposed decision of the HJC-commission either.

Four of the eleven HJC members participated in the adoption of the disputed decisions. That leaves six HJC members in theory.

However out of that group of six, HJC member Judge Jaksic was arrested on September 23rd 2011 and has been detained since then. And - as mentioned above- since HJC member Prof. Dimitrijevic was found to be in conflict of interest by the Anti-Corruption Agency, the legality of his status has therefore been questionable. With this status quo it is not clear at all how the re-appointment review procedure could be continued, as there is no majority of HJC-commission members that can vote on the proposed decisions of both HJC-commission that are conducting the hearings now.

Conclusion

Ms. Viviane Reding, vice-president of the European Commission wrote in her letter to JAS of August 24th 2011:

The European Commission is closely monitoring the developments related to judicial reform in Serbia, and in particular the reappointment process of all judges and prosecutors. The way the reappointment process is carried out represents an important issue for a positive European Commission Opinion on Serbia's EU membership application, as it was underlined in the 2010 Progress report.

It is just a few days now before the EC's Opinion on Serbia will be published. And it has to be concluded that so far the review procedure shows fundamental (material and procedural) flaws.

That is a serious issue that can not be pushed away. The HJC-decisions following this procedure will undoubtedly be appealed before the Constitutional Court and the European Court of Human Rights. Thus this issue will cast a shadow on the Serbian judiciary during the years to come.

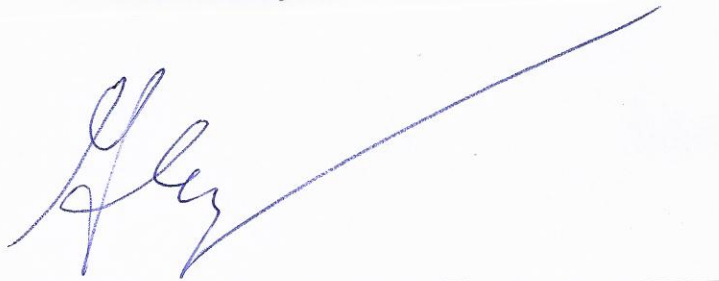
For the record it is obviously not up to our organisations to tell you whether or not Serbia should be granted the EU candidate-member status.
That is a political decision for which lots of factors should be taken into account.
The way the judicial reform was conducted is – albeit it a very important one - therefore not the only factor.

But we urge you to let the decision concerning the EU candidate-membership be a fully informed choice . The forthcoming Commission Opinion should therefore give a fair reflection of the non re-appointment procedure without covering up the fundamental flaws that the review procedure has shown, keeping in mind that at the end it concerns the organisation of a truly impartial and independent judiciary in Serbia.

Both our organisations will keep following this issue closely.

We look forward to hearing from you on this important matter.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'A. Cluny', followed by a long, sweeping horizontal line that extends across the page.

Antonio Cluny
Vice-President
MEDEL

A handwritten signature in blue ink, appearing to be 'T. Trotman', followed by several diagonal and horizontal strokes.

Tamara Trotman
Vice-President
Judges for Judges