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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

Opinion of the CCJE Bureau

following a request by the Association of European Administrative

Judges (AEAJ) as regards the legal setting

of the position of the president (vice-president)

of the Administrative Court of Vienna, Austria

INTRODUCTION

1. The CCJE has received a letter from the Association of European Administrative Judges (AEAJ) dated 19 January 2019 concerning the legal setting of the position of the president (vice-president) of the Administrative Court of Vienna.
2. The letter speaks of specific problems in this context and asks the CCJE to render its Opinion as to whether the legislation regarding the president (vice-president) of the Administrative Court of Vienna is in line with European standards, in particular as regards: A) selection and appointment; B) powers and jurisdiction; C) relations between the president and the government of the province of Vienna. The AEAJ has doubts as to whether the legislation on the role, the position, the organisational setting and the powers of the president are in line with European standards concerning the protection of judicial independence and protection against undue pressure.
3. Having examined the letter of the AEAJ in the light of European standards, including the Council of Europe Committee of Ministers' Recommendations, CCJE and Venice Commission standards, the CCJE Bureau has rendered the below Opinion which contains the legal analysis followed by the corresponding conclusions in each respective section in bold for easy reference. A summary of conclusions is provided at the end in order to facilitate a quick reference to the key findings of the CCJE Bureau.
4. The CCJE Bureau wishes to make a reservation that its Opinion is based on the report made and concerns raised by the AEAJ, however the Bureau has not had an opportunity to examine in-depth the relevant legislation. Therefore, the views of the CCJE Bureau concern the allegations made by the AEAJ, however the CCJE Bureau emphasises that it is not in a position to confirm the factual basis for such allegations.

OPINION

A. Selection and appointment of the president (and vice-president) of the Administrative Court of Vienna

5. As the AEAJ reports, the selection and appointment of the president (and vice-president) of the Administrative Court of Vienna remain within the full discretionary power of the executive power – the government of the province of Vienna, without involvement of the committee of judges of the Administrative Court of Vienna, as it is foreseen for the other judges of the court. This is on the basis of Article 132, para 2, of the Austrian Federal Constitution, which allows a difference between the appointment procedure for judges on the one hand and for president and vice-president on the other hand. Consequently, the AEAJ concludes that allowing direct political influence on the selection process results in a high risk of a politically based decision as to who will be a successful candidate for the position of court president (vice-president).
6. Section 3 of the Law of the Administrative Court of Vienna (VGWG)) stresses that for the selection of the president (and vice-president) of the Administrative Court of Vienna, a Commission composed of representatives of the judiciary, the scientific community and the administration, should test and rank the candidates. No further legal prerequisites of selection criteria (except formal prerequisites like law studies, certain practical experience and managerial skills) are provided by law. Explicitly, the

government is not bound by the ranking of candidates made by the commission (which is not specifically framed to be independent, and not all members are free of hierarchical structures).

7. The questions related to electing or appointing judges, including court presidents, have been highlighted in depth in various instruments of Council of Europe bodies, notably the CCJE itself, the Venice Commission and GRECO.
8. First of all, the CCJE has noted that, while “the manner in which presidents of courts are selected, appointed or elected varies in the member States”¹, these procedures “should follow the same path as that for the selection and appointment of judges. This will include a process of evaluation of the candidates and a body having the authority to select and/or appoint judges in accordance with the standards established in Recommendation CM/Rec(2010)12 and previous Opinions of the CCJE”².
9. The CCJE has emphasised that “it is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary”³.
10. The CCJE has emphasised that “where more senior posts are concerned, particularly that of a head of jurisdiction, general profiles containing the specificities of the posts concerned and the qualities required from candidates should be officially disseminated by the Council for the Judiciary in order to provide transparency and accountability over the choice made by the appointing authority. This choice should be based exclusively on a candidate’s merits rather than on more subjective reasons, such as personal, political or an association/trade union interests”⁴.
11. These CCJE standards are mirrored in Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (hereafter Rec(2010)12) which provides that “the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers”⁵.
12. The CCJE has considered that, based on the standards for election/appointment mentioned above, “the judges of the court in question could be involved in the process. This can take the form of a binding or advisory vote”⁶.
13. Furthermore, “in some member States, presidents of courts are not selected and/or appointed but are elected by their peers - the judges of the court. The CCJE is of the opinion that in such a system, objective criteria of merit and competence should also prevail”⁷.

¹ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 37.

² See CCJE Opinion No. 19 (2016) on the role of court presidents, para 38.

³ See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 48.

⁴ See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 51.

⁵ See Rec(2010)12, para 46.

⁶ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 39.

⁷ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 40.

- 14. In the opinion of the CCJE Bureau, the difference between the process of selecting the president and vice-president of the Administrative Court of Vienna, compared to that of other judges, contravenes these standards.**

Council for the Judiciary

15. The request of the AEAJ underlines that no Council for the administrative judiciary exists in Austria and that this fact is a problem not only for the appointment of judges, but implies that no institution exists which could control and balance the powers of the president of the Administrative Court of Vienna.
16. The CCJE Bureau underlines the importance of the Council for the Judiciary or an equivalent body, which provides for consultation and participation of judges, for the appointment of judges and court presidents.
17. It should be added, however, that the role of the Councils for the Judiciary or an equivalent body, of consultation and participation of judges, is not only about the questions of appointment. It is rather a comprehensive role. These are the bodies, the purpose of which is to safeguard the independence of the judiciary and of individual judges, and in this way to promote the efficient functioning of the judicial system. Their introduction has been recommended by the Committee of Ministers of the Council of Europe, by the CCJE and by the Venice Commission⁸.
18. The Venice Commission has pointed to a phenomenon that “in older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time”⁹. The AEAJ points out that administrative courts of first instance were introduced in Austria only in 2014. The CCJE Bureau agrees that the argument of “traditions, which have grown over a long time” could be questioned under these circumstances.
19. This is especially important in the light of what the AEAJ reports about the absence of formal procedures or competent authorities in place for judges who feel that their independence is threatened to have recourse to.
- 20. In this regard, the CCJE Bureau endorses Rec(2010)12, in particular its paras 8 and 26-29.**

Judicial background of the candidates for the post of court president (vice-president)

21. The AEAJ claims that the prospective candidate for the post of president (vice-president) needs not be a judge prior to their appointment as president of the court.
- 22. According to the CCJE, “the minimum qualification to become president of a court is that the candidate should have all the necessary qualifications and**

⁸ See Rec(2010)12, paras 26-29; see also CCJE Opinions No. 1(2001), para 45, and No. 10(2007); see also the Venice Commission’s Report on the Independence of the Judicial System, Part I: the Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para 32.

⁹ See the Venice Commission’s Report on Judicial Appointments adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), para 45.

experience for appointment to judicial office in that court”¹⁰. And, as already mentioned above, “the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges”¹¹.

23. Furthermore, since it is of essential importance that court presidents administer courts in strict accordance with fundamental principles of judicial power, “in general, this requires that those who are appointed as court presidents should have an extensive experience in adjudicating cases”¹².
24. It is also worth noting that the CCJE considers “it very important that court presidents, after appointment, continue to perform as judges. A continuing practice is not only important to allow presidents to ensure their continuing professionalism and maintaining contact with other judges in accordance with the principle of *primus inter pares*¹³, but also to best fulfil their organisational role through direct awareness of issues arising in daily practice. The caseload of court presidents may be reduced having regard to their managerial tasks”¹⁴.

B. Powers and jurisdiction of the president of the Administrative Court of Vienna

25. The AEAJ reports about the rather broad range of powers of the president of the Administrative Court of Vienna, which includes:
 - hiring, supervising and dismissing all court staff;
 - designing, fixing and changing the internal organisation of the court (with no transparency and no possibility to challenge such decisions);
 - controlling all material resources of the court (again with no transparency and no possibility to challenge such decisions);
 - supervising judges in areas outside of their judicial office, i.e. granting permission for leave, assigning and changing office premises for judges etc.;
 - handling the mechanism of complaints against judges from outside and inside of the court;
 - initiating disciplinary investigations against judges in all cases of “reasonable suspicion of a disciplinary behaviour” (with no known criteria having been published by the president despite the need expressed by judges);
 - supervising the work of judges in that, by law, the president must initiate a preliminary disciplinary investigation in case he/she finds the reasons for the length of proceedings in a pending case to be not “coherent/plausible” (with no regulation existing on a possible meaning of “coherence” or “plausibility”, and no transparent criteria);
 - when disciplinary investigations are initiated by the president of the court, it is also the president who decides at his/her free discretion which judge is to investigate the facts and report to the disciplinary prosecutor.
26. As regards the powers of the court president listed above, as the AEAJ points out, these powers are not balanced by mechanisms to ensure transparency, participation,

¹⁰ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 34.

¹¹ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 38.

¹² See CCJE Opinion No. 19 (2016) on the role of court presidents, para 14.

¹³ “First among equals” in Latin.

¹⁴ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 15.

and information, or any other mechanism aimed at ensuring that they are exercised with fairness and integrity.

27. The AEAJ also emphasises that for a judge subject to disciplinary proceedings, no judicial protection mechanisms of any kind exist until the case is finally referred to the independent tribunal for a decision on the charges.
28. The CCJE has observed that the role of court presidents, which differs significantly between the member States, is to represent the court and fellow judges, to ensure the effective functioning of the court and thus to enhance its service to society and to perform jurisdictional functions, and in performing their tasks, court presidents protect the independence and impartiality of the court and of the individual judges¹⁵. That is in fact the idea behind the institution of the court presidency as such. As it was mentioned above, court presidents interact with other judges in accordance with the principle of *primus inter pares*¹⁶.
29. Regarding transparency, as the CCJE has underlined, “court presidents should lead by example and create a climate where the judges can address them when they need support and assistance in relation to the exercise of their functions, including in matters of ethics and deontology”¹⁷.
30. Regarding participation, the “courts are essentially collegial bodies. The CCJE encourages the establishment of bodies composed of judges of the court which play an advisory role and which cooperate with the court president and give advice on key issues”¹⁸.
31. When it comes to handling complaints against judges, the court president “should have due regard to the principle of independence of judges, as well as to the legitimate expectations of the parties to the case and society as a whole”¹⁹.
32. As regards disciplinary proceedings against judges, the CCJE has never pronounced itself on the role of the court president in this matter. The president may have a role in this when it comes to the court staff. However as regards judges, “disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court”²⁰. “The intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline”²¹.
33. Indeed it seems problematic if sufficiently clear criteria are not in place for the president to observe when initiating a procedure, and even more if it is up to him/her to choose the investigative judge. The CCJE is of the view that procedures leading to disciplinary

¹⁵ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 6.

¹⁶ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 15.

¹⁷ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 18.

¹⁸ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 19.

¹⁹ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 23; see also CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, paras 42 and 64.

²⁰ See CCJE Magna Carta of Judges (Fundamental Principles) (2010), para 6.

²¹ See CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges), para 60(b).

procedure must be formalised and that member States should define, as far as possible, the failings which may give rise to a disciplinary procedure²².

34. As regards monitoring the length of proceedings and actions to be undertaken by court presidents to speed up the disposition of cases, this “must be balanced with the judges’ impartiality, independence and with judicial confidentiality”²³.
35. It is true that court presidents may have a role as regards court staff, infrastructure and resources: they “are responsible for managing the operation of the court, including managing court staff and material resources and infrastructure”²⁴. At the same time, for example, “where court presidents intend to make significant changes in the organisation of the court, the judges should be consulted”²⁵.
36. Moreover, “as it is in the case of relations between court presidents and other judges, the managerial functions of the presidents are also based on these fundamental values. The presidents should never engage in any actions or activities which may undermine judicial independence and impartiality”²⁶.
37. **The CCJE Bureau notes that the powers of the president of the Administrative Court of Vienna are very broad. The participation of bodies of elected judges of the court may be advisable. The strong power of the president as regards resources and their allocation could indirectly influence the work of an individual judge and hamper his/her independence. This danger is even greater in respect of the role of the president in disciplinary procedures, as reported by AEJA.**
38. **The most important requirement, when presidents are entrusted with such broad powers, is transparency. The more powerful the presidents of courts are, the more there is a need to protect them from undue influence. Any possibility for the executive power to exert pressure on them and, through them, on the judges, would be very problematic. As mentioned above, presidents should protect judges from external influence and not be an instrument for such influence. This is the reason why the question of the subordination of the president to the orders of the provincial government is particularly important (see part C).**

Evaluation of the work of the court president

39. The AEAJ mentions that the law explicitly exempts the president (only the president, not the vice-president) in his/her judicial work from any kind of evaluation.
40. The CCJE has highlighted all issues pertaining to the evaluation of judges in its Opinion No. 17 (2014). It took into account the variety of evaluation systems and methods that exist in member States, and concluded that since the two key requirements of any judicial system must be to produce justice of the highest quality

²² See CCJE Opinion No. 3 (2012) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, para 68.

²³ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 17.

²⁴ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 27.

²⁵ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 31.

²⁶ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 25.

and proper accountability in a democratic society, some form of evaluation of judges is necessary to meet these requirements.

41. As regards particularly court presidents, the CCJE noted that “in general, the performance of court presidents is subject to evaluation in the same way as the work of ordinary judges, with all the necessary safeguards to be respected”²⁷. The CCJE also noted that “only few member states indicate that they have specific appraisals for court presidents. This appraisal assumes the existence of objective indicators. In general, the evaluation of judges may indeed be based on a number of quantitative and qualitative criteria. However, there are very few specific practices in member states when it comes to evaluating the managerial performance of a court president”²⁸.

Thus, when it comes to the president of the Administrative Court of Vienna, the CCJE Bureau considers that at least the evaluation of his/her adjudicatory work should be done in the same way as for all other judges in the court, and that there should not be any kind of positive discrimination, as exempting the court president from such evaluation could be said – and perceived – to be.

C. Relations between the president of the Administrative Court of Vienna and the government of the province of Vienna

42. As the AEAJ reports, the president of the Administrative Court of Vienna is subordinated to the orders of the government of the province of Vienna in matters of judicial administration (reportedly, section 20 of the Viennese Law on Public Service applies to the president, where it is explicitly regulated that employees must follow orders).
43. However, the information gathered through the comments of the CCJE member in respect of Austria shows that, as regards the issue of orders of the executive (government of the province or its administration) to the president of the court, there is no explicit legal provision which states that such orders are possible and that the president has to follow them. The legal provision which is quoted in the request of the AEAJ (section 20 of the Viennese Law on Public Service) regulates the general duties of public servants in relation to their superiors. The question is whether this provision is applicable to the relations between the president of the court and the administration of the Provincial government, and if so, then in which circumstances. **In all provinces, including Vienna, the law states that judges of the court are independent in their judicial tasks but have to follow orders of the president which do not concern their judicial function.** In other Provinces, the law goes further and explicitly states that the president of the Administrative Court of the respective Province is not subordinated to the orders of the government of the Province.
44. The CCJE has dealt in depth with the role of court presidents in its Opinion No. 19 (2016). First of all, the CCJE emphasised that “the main duty of court presidents must remain to act at all times as guardians of the independence and impartiality of judges and of the court as a whole”²⁹.
45. As regards in particular the administrative (managerial) role of court presidents, the CCJE pointed out that “the relations of court presidents with other organs of the state

²⁷ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 41.

²⁸ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 43.

²⁹ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 7.

should be based on the fundamental principle of equality and separation of state powers. In some countries, the executive power exerts, through Ministries of Justice, considerable influence on the administration of courts through directors of courts and judicial inspections. The CCJE has taken the position that the presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence. Anyway, in such cases, court presidents have an important role to prevent possible interferences into the court activities by the executive”³⁰.

46. Rec(2010)12 also established that “the administration of courts should help improve efficiency and preserve the independence and impartiality of judges”³¹.
47. **The unclear legal regulations regarding the possibility of the Provincial government to give orders to the president of the court (see paras 42-43 above) are of concern to the CCJE Bureau given the sensitivity of the issue and the importance of protecting the independence of the court president and the confidence of the public in that independence. Taking into account the broad powers of the president of the Administrative Court of Vienna, it would be very problematic if the exercise of these powers could in any way be influenced by orders from the Provincial government. The independence of the judges could be endangered. Therefore, any legal regulations in this regard should be abolished.**
48. **If orders in fact cannot be issued by the Provincial government, it would be desirable to state that explicitly in the law.**

SUMMARY OF CONCLUSIONS

49. The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, agrees with the AEAJ that the provisions of the legislation on the role, position, organisational setting and powers of the president (vice-president) of the Administrative Court of Vienna in some regards deviate from European standards, and that as a consequence the protection of judicial independence and against undue pressure may in some respects be endangered.
50. In light of the shortcomings identified above, the CCJE Bureau recommends the following:
 - **The selection and appointment procedure of the president and vice-president of the Administrative Court of Vienna should be the same as for the other judges of this court;**
 - **As regards a Council for the Judiciary or an equivalent body, which provides for the consultation and participation of judges in selection and appointment procedures, the CCJE Bureau endorses Rec(2010)12, in particular its paras 8 and 26-29;**
 - **The broad powers of the president of the Administrative Court of Vienna should be complemented by criteria for their application and exercised in transparency;**

³⁰ See CCJE Opinion No. 19 (2016) on the role of court presidents, para 11.

³¹ See Rec(2010)12, para 46.

- **This is of particular importance as regards the role of the president in supervising the length of procedures and in initiating disciplinary procedures;**
- **The situation as regards the possible subordination of the president (vice-president) of the Administrative Court of Vienna to the orders of the government of the province of Vienna in matters of judicial administration is unclear and should at least be clarified and, if it exists, be abolished through a change in legislation.**