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TEAM FRANCE 2

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It is a principle of natural justice that no-one should be a judge in his own cause (*nemo iudex in causa sua*). Impartiality has always been at the heart of rendering justice and a requirement particularly scrutinized by citizens. Indeed, concerns about individual judges' conduct and the risk of bribery might be as old as justice. "How can a man who judges rightly behave incontinently?" asked Aristotle in Nichomachean Ethics¹.

A century ago, the House of Lords enlightened this with the words of Lord Hewart CJ who wrote in an opinion that: "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"². Lord Hewart CJ's quote has since been popularized by the case law of the European Court of Human Rights (hereinafter "ECtHR") when implementing article 6§1 of the European Convention on Human Rights: "justice must not only be done: it must also be seen to be done"³. The idea behind this adage is that justice can only be done if citizens trust their judiciary. Public confidence in a national system is a fundamental pillar of democracies and is mainly based on the impartiality and independence of judges and prosecutors.

In the past few years, the impartiality and independence of members of the judiciary have been challenged through the issue of conflicts of interests which concerns most holders of public offices. Judges and prosecutors do not escape this trend, although impartiality and independence are ancient to the European judiciary. To illustrate this situation, a European study showed that about half of the respondents at European Union level trust their national justice system, including the independence of the courts and judges. The study presents the figures in a positive way, stressing that trust in justice is very country-specific⁴. But what really stands out is a worrisome level of mistrust: about half of European citizens tend not to trust their national judiciary.

¹ Aristotle, *Nichomachean Ethics*, chapter 2, 350 BCE.

² House of Lords, *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER Rep 233.

³ ECtHR, *De Cubber v. Belgium*, judgment of October 26th 1984, Series A, No. 86, para 26.

⁴ European Commission, *Justice in the EU Report Flash Eurobarometer 385*, publication November 2013:

"A majority of people at EU level (53%) trust their national justice system. However, the national results paint a more complex picture and show that, while trust is very high in some countries, like Denmark and Finland (85% in each), there is a low level of trust in other Member States, for instance Slovenia (24%)"; "Perceptions of the justice system are very country-specific" "A majority of respondents (53-54%) rate court systems as good in terms of the independence of the courts and judges", available at: http://ec.europa.eu/public_opinion/flash/fl_385_en.pdf

Public trust in the justice system is especially vulnerable to accusations of conflicts of interest and the attendant publicity that comes with such grave charges. In particular, conflicts of interests are often pointed out as being a source of corruption heavily undermining public trust. Fighting against corruption is now a requirement to enter the European Union. Indeed new Member States have to build strong anti- corruption and conflicts of interests programs in order to reinforce confidence in their judicial system. Preventing conflicts of interests and dealing with them is therefore a key issue for European States, especially for States who recently joined the European Union. In order to do so, it is first important to agree on what conflicts of interests are, although there is not a single and universal definition at the moment. Indeed, the Council of Europe gave one definition in 2000⁵, followed by another, elaborated by the Organisation for Economic Co-operation and Development in 2003⁶.

Having regard to these definitions, we decided to rely on a more recent and comprehensive one, written by a French committee presided by the Vice-President of the *Conseil d'Etat* which presented its report in January 2011. The conflict of interest is defined as such: “*a conflict of interest is a situation of interference between a public service mission and the private interest of a person who contributes to the performance of this mission, when this interest in nature and intensity, can reasonably be regarded as likely to influence or appear to influence the independent, impartial and objective exercise of his duties*”⁷. This definition also seems particularly relevant as it takes into account the case law of the ECtHR, in particular the impartiality required through the subjective and objective approach tests.

Besides their definitions, conflicts of interests have also been taken into account by international soft law in the last few decades. Indeed, in 1985 the *Basic Principles on the Independence of the Judiciary* endorsed by the United Nations General Assembly pointed out in article 2 that “*the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*”⁸. The 2002 *Bangalore principles of judicial conduct* by the Judicial Group on Strengthening Judicial Integrity go further

⁵ Committee of Ministers of the Council of Europe, *Recommendation of the Committee of Ministers to Member States on codes of conduct for public officials*, No. R (2000) 10, 2000, article 13.1: “*Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties*”.

⁶ OECD, *Managing Conflict of interest in the Public Service - Guidelines and country experiences*, 2003, p. 24: “*A ‘conflict of interest’ involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*”.

⁷ Commission de réflexion pour la prévention des conflits d'intérêts dans la vie publique, *Pour une nouvelle déontologie de la vie publique*, presented by Jean-Marc SAUVE, 26 January 2011, p. 14.

⁸ United Nations General Assembly, *Basic Principles on the Independence of the Judiciary*, Resolutions 40/32 of 29/11/1985 and 40/146 of 13/12/1985.

and invite judges to take into account their own conduct⁹. These international instruments have then been brought back home by European States through the adoption of the European Charter on the Statute for judges in 1998¹⁰ and the Judicial Ethics Report 2009-2010. The latter deals with conflicts of interests, in particular with the values of impartiality and transparency¹¹.

Conflicts of interests have always been an issue for judges and prosecutors in Europe. Most European countries have been managing conflicts of interests both at national and international level for many years. However over the last decades, European citizens have been losing confidence in holders of judicial office, creating a risk of weakening the Rule of Law that judges and prosecutors have the duty to safeguard.

Expectations of the public with regard to conflicts of interests are always increasing, so as to leave members of the judiciary caught between two conflicting situations (I). Is it possible to restore the lost confidence of citizens in their judges and prosecutors? How can we conciliate the requirements of impartiality, independence and transparency with the existence of conflicts of interests among the European judiciary? Solutions to deal with conflicts of interests must be assessed and questioned in order to answer legitimate public needs (II).

⁹ United Nations, *Bangalore Principles of judicial conduct*, 2002, E/CN.4/2003/65.

¹⁰ Council of Europe, *European Charter on the statute for judges*, 8-10 July 1998.

¹¹ European Network of the Council for the Judiciary, *Judicial Ethics Report*, 2009-2010, 2010.

I. CONFLICTS OF INTERESTS:

EUROPEAN JUDICIARY CAUGHT BETWEEN OPPOSING RIGHTS

A. Independence versus Accountability

Two opposing principles. Born with the United Kingdom Act of Settlement in 1702 and promoted as a constitutional principle by the French Revolution, independence of the judiciary became the cornerstone of a democratic state ensuring the Rule of Law in all European countries. The independence of the members of the judiciary from legislative and executive powers is consequently guaranteed by life tenure, a decent salary until retirement and the self-administration of justice.

With the weakening of public confidence in justice, the necessity has arisen in the last few decades to build strong judicial accountability attesting that judges and prosecutors are really acting impartially and efficiently. They are therefore more and more accountable towards the public, their administration and hierarchy. However, this growing accountability has placed judges and prosecutors on a slippery path. It clearly gives them less leeway. But does it really wilt their independence?

The risks of strong ethical accountability. Accountability is “*the combination of methods, procedures and forces determining which values are to be reflected in administrative decisions*”¹². Therefore, accountability is a request for more information about judicial organization on the one hand, and a demand for ensuring its functioning¹³ on the other. It has therefore produced major changes in any judicial system.

Firstly, control by the European Court of Human Rights (ECtHR) can be considered as part of a new judicial legal accountability. Could it be considered as an encroachment on the independence of a national judicial system especially with regards this delicate question of conflicts of interests? In *Piersack v. Belgium* and *De Cubber v. Belgium*¹⁴ the ECtHR recalled the necessity for judges to recuse themselves if they had already dealt with a case as a prosecutor or an investigating judge. Regarding this case, we understand that the impartiality requirement was effectively breached. But

¹² CONTINI F., MOHR R., “*Reconciling independence and accountability in judicial systems*”, *Utrecht Law Review*, 3(2), December 2007, 26-43.

¹³ *Idem*, p.26 “[Accountability] conveys information about the functioning of the organisation to those having the right to know. This information may include its objectives, its fundamental values, and the interests it is dedicated to protecting. Second, it must provide for methods and techniques to ensure that the members of the organisation act consistently with those values and interests”.

¹⁴ ECtHR, *Opere. citato.* note 3.

one could easily imagine that excessive legal control over conflicts of interests could become harmful. Pushing this control to the extreme could force individual judges to literally motivate the absence of conflict of interests in every decision they take. So far, this control has been, on the contrary, well balanced and valued as a way to improve court independence and impartiality.

Secondly, one goal for European countries is to have the careers of members of the judiciary organized mainly by the judiciary itself¹⁵. This call for more independence necessarily brings more accountability for judges and prosecutors. Article 13 of the *Basic Principles on the Independence of the Judiciary* endorsed by the UN General Assembly stresses that “*promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience*”¹⁶. Article 14 also promotes that “*the assignment of cases to judges within the court is an internal matter of judicial administration*”. The idea is to protect judges from possible influence from the executive or legislative powers over the pursuance of investigations in exchange for career advancement. In most European countries Councils for the Judiciary have indeed tried to organize appointments and promotions based on objective indicators measuring ability and experience. But conflicts of interests are still a strong source of suspicion when it comes to careers. A survey conducted last year by the European Network of Councils for the Judiciary (ENCJ)¹⁷ showed that an average of 40% of judges and prosecutors in Europe believe that appointments and promotions are given on bases other than ability and experience.¹⁸ Could this problem be solved at a European level? In any case, it could be taken into account by the action plan for Independence and Accountability that members of the ENCJ are preparing for 2018 to improve independence and accountability in European countries’¹⁹ justice systems.

Thirdly, accountability has a tendency to increase pressure on judges and undermine their independence because of the growing transparency expected by the public. Comments on the conduct of judges and prosecutors are already flourishing in traditional media and even more in social networks. Implementation of a declaration of interests (see part I-C.) could add to this phenomenon. A party in civil litigation or in a criminal court will be tempted to consult the

¹⁵ Consultative Council of European Judges (CCEJ), *Opinion no. 3 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 behaviour and impartiality*, 19 November 2002.

¹⁶ United Nations General Assembly, *Basic Principles on the Independence of the Judiciary*, Resolutions 40/32 of 29/11/1985 and 40/146 of 13/12/1985.

¹⁷ ENCJ is an association founded in 2004 in Belgium to unite the national institutions in the member states of the European Union which are independent of the executive and legislature and which are responsible for the support of the Judiciaries in the independent delivery of justice and to improve cooperation between the Councils for the judiciary and the members of the judiciary of the European states.

¹⁸ ENCJ, Report “*Independence and Accountability of the Judiciary and of the Prosecution*”, Performance Indicators 2015, 2014-2015, p.48.

¹⁹ ENCJ, *Strategic & action plan 2014-2018*, p.5

declaration via his/her lawyer. It could also bring suspicion in the case of refusal. If this public scrutiny encourages judges' ethical behavior, it can also become an excessive and aggressive flood and place unnecessary pressure and suspicion on judicial decisions. Members of the judiciary facing attacks or unfounded criticism have to remain impassive in order to protect their impartiality. To help them, communication with the media should be taken over by hierarchical superiors as already happens in several European countries²⁰.

Judges and prosecutors are also facing an increasing demand for transparency from their hierarchy and administration. The necessity to refer to a hierarchical superior about a potential risk of conflict can be helpful in resolving it. Still, European countries should be careful not to exaggerate this oversight. Implementation of too many conditions and indicators could obliterate judges' and prosecutors' independence. Resolution of potential conflicts has to be restricted to the interests that could have a real impact on a judicial decision. And this hierarchical control should not become too intrusive in order to protect the private life of judges and prosecutors and their capacity to have independent opinions.

Nevertheless, it seems possible to find the right balance between accountability and judicial independence in our European countries. This is indeed the strong conviction of the ENCJ: *“Judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society and will not achieve the independence for which it strives”*²¹. It requires serious brainstorming to evaluate the possible consequences of new regulations on conflicts of interests, to observe them in a critical way and adapt them if necessary. This could be done at a national level but could also be part of a European thought process.

B. Impartiality versus civil and political rights

Judges and prosecutors live in the heart of the *polis*; therefore, they ought to have the same rights as any other member of the *polis*, including freedom of association, freedom of speech, the right to unionize, and so on. But the judge or prosecutor, owing to his/her crucial role in polity life, is also simultaneously subjected to a strict duty of impartiality. These manifestly contradictory rights and duties threaten to cause conflicts of interests; the member of the judiciary's involvement in society as a citizen may jeopardize his/her impartiality in his/her judicial role. A reasonable balance therefore needs to be struck between these apparently opposing demands.

²⁰ Interview with Bertrand Louvel, President of the French Council for the Judiciary (Conseil Supérieur de la Magistrature), Gazette du Palais, 16th May, n°12, p. 136

²¹ *Ibidem*.

Impartiality is a key duty for the judge or prosecutor, both as a matter of principle and a matter of trust. That is why impartiality features as the second value of the Bangalore Principles of Judicial Conduct, which reminds us that “*impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made*”²². Likewise, Article 6 of the European Convention on Human Rights requires tribunals to be independent and impartial²³. The European Charter Statute of Judges defines impartiality as “*(...) the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment*”. The same text stresses that in order to guarantee impartiality, the judge needs to adopt among other duties “*both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimizes the situations which might lead to a recusal*”²⁴. In this line of reasoning, impartiality is not only a professional duty for the judge or the prosecutor, but also a structuring principle for his/her personal life. Conflicts of interests can arise from the conduct of judges in any given case.

At the same time, members of the judiciary’s civil and political rights are essential in a democratic society respectful of the Rule of Law and human rights. Principle 8 of the *Basic Principles on the Independence of the Judiciary* provides that “*(...) in accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*”²⁵. Freedom of association also enables judges to better defend their independence, impartiality and other professional interests. In exercising their rights, judges and prosecutors should always conduct themselves in accordance with the law and the recognized standards of their profession, in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Two examples will be stressed to demonstrate the sensitive balance between judges’ rights and duties.

Right of association. A major political right in democratic societies is that of free association. Principle 8 of the UN Basic Principles on the Independence of the Judiciary, Principle 4.2 of the Bangalore Principles of Judicial Conduct, and Principle 9 of the UN Basic Principles all endorse the right of judges to freely form and participate in associations. But some issues arise out of this fundamental right. The most glaring example is the Pinochet Case, in which Lord Hoffman, a British judge, who was connected with Amnesty International, a human rights group supporting the

²² United Nations, *op. cit.* note 9.

²³ Council of Europe, *European Convention on Human Rights*, 1950.

²⁴ ENCJ, *op. cit.* note 11.

²⁵ United Nations General Assembly, *op. cit.* note 16.

Spanish extradition request, had an obvious conflict of interests. A panel of other Lords thus declared that Justice Hoffman was facing a conflict of interests and had to be set aside. Because of the judge's ties to Amnesty International, his first ruling was reversed. The House of Lords, which reviewed the case with another panel of judges, eventually issued a similar judgment. This example is particularly noteworthy for several reasons. Firstly, it gives a concrete example of a conflict of interests stemming from a judge's connection to an association. Secondly, it outlines the specific conditions in which such connection gives rise to a conflict of interests: indeed, in this specific case, the Lords held that a conflict of interests existed not because of the judge's affiliation to Amnesty International, but because of Amnesty International's status as a civil party in the case.

Another example is the AZF case²⁶, in which the French Supreme Court, *Cour de cassation*, stated that a member of the judiciary's membership and active participation in an association dedicated to defending the rights of the AZF catastrophe's victims was a breach of impartiality, liable to instigate doubts amongst the citizenry. *"If a judge's membership in an association aiming (...) to guarantee victim's rights is not per se likely to prejudice to the presumption of impartiality (...) it becomes problematic when close ties exist between one of the civil parties and the judge hearing the case"*²⁷.

Right to join a trade union. Being a member of a trade union is among the fundamental principles of liberty. According to the ECHR (article 11) it is a fundamental human right²⁸. The key question is to know where the judge's inalienable right as a citizen to be part of a trade union conflicts with his/her judicial duties of impartiality. It is fundamental that while the right to unionize is protected, the public should have the impression that no personal bias is involved in public decision making.

Public trust has been affected by debates involving judges and prosecutors being part of trade unions. Indeed, the public identifies trade unions as an external activity and situation bearing the potential for a conflict of interests (see figure)²⁹. In order to avoid any conflicts of interests, some European countries forbid judges to be part of a trade union (for instance Spain³⁰ or Romania³¹).

²⁶ On September 21st 2001, a mass explosion of products containing ammonium nitrate occurred at the AZF chemical plant in Toulouse and left 31 people dead and 2400 injured, apart from considerable material damage. An entire district had to be razed. Due to a large number of complainants and witnesses, the trial was held under exceptional circumstances. Different theories surrounded the case : terrorism, a military failed test, State set-up...This historical case was called the "AZF disaster". The heart of the case lay in the question of the State's liability, and of individual criminal liability of the CEO who allowed the warehousing of dangerous goods, as the chemical plant was a subsidiary of the Total group.

²⁷ French Cour de Cassation, Criminal Chamber, 13 January 2015, *Case n ° 12-87.059*.

²⁸ Council of Europe, *op.cit.* note 20, article 11.

²⁹ OECD study 1999, p.64, <https://www.oecd.org/gov/ethics/48994419.pdf>

³⁰ Constitution of Spain, article 127, December 1978.

³¹ The Parliament of Romania, *Article 4 of Law No 54 on the Trade Union*, January 2003.

This is because some trade unions have a clear political tone. For instance, the French trade union *Syndicat de la Magistrature* is ideologically stamped left-wing. As politicians' misbehavior can lead to legal proceedings, some people feared that such membership would affect the impartiality of judges. This is the reason why in France, some right-wing politicians denounced a French Investigating Judge. They stated that her trade union membership was a breach of impartiality when she indicted the former French President, member of the Conservative Party. France is not the only European country with a judges' trade union that has a political leaning. In Italy for instance, there are three major trade unions of judges and prosecutors: *Magistratura indipendente* (right/ center); *Magistratura Democratica* (left wing trade union); *Unita per la Costituzione* (left/ center)³². In addition to the risk of being politically branded, judges can face attacks. The former Italian President, Silvio Berlusconi, accused judges of trying to eliminate him while he faced indictment. These attacks are a political strategy to cast opprobrium on judges, but it still undermines public trust.

As the right to join a trade union is strictly personal and should not enter the public debate or be revealed by the media, trade union membership does not, *per se*, prevent a judge from being impartial. What is more disturbing however is the tendency involving more transparency in judges' and prosecutors' extra-judicial conduct.

C. Transparency requirements versus privacy rights

Transparency requirements of citizens versus privacy rights of judges and prosecutors. While in a media society, where information circulates extremely fast from one person to another, European citizens tend to consider transparency as an ultimate requirement expected of holders of public office, judges and prosecutors included³³. Transparency is one of the values/merits upheld by the European Network of Councils for the Judiciary. The Judicial Ethics Report 2009-2010 indicates that “*In his private life and in society, the judge is always vigilant to avoid any conflict of interest. By doing so, he ensures transparency regarding his impartiality*”³⁴. In this sense, the transparency requirement can be considered as preventing the creation of conflicts of interests. Indeed, one may reasonably expect that a judge or prosecutor would ideally refuse to have a private interest, which s/he knows will be made public, if it could be seen as interfering with his/her judicial duties.

³² DI FEDERICO Giuseppe “Judicial Independence in Italy”, in SEIBERT-FOHR Anja, *Judicial Independence*, Springer, 2012.

³³ Christoph DEMMKE, Thomas HENÖKL, « *Managing Conflicts of Interests – Ethics Rules and Standards in the Member States and the European Institutions* », *EIPASCOPE*, num. 3, 2007, pp. 35 – 41 [http://www.eipa.eu/files/repository/eipascope/20080313162334_CDE-THE_SCOPE2007-3_Internet-5.pdf].

³⁴ ENCJ, *op. cit.* note 11, p. 9 – 10.

Nevertheless, depending on the definition and scope of what “private interest” is, privacy rights of judges and prosecutors could easily be violated. As citizens, they are protected by article 8 of the European Convention on Human Rights ensuring the right of everybody to respect for private and family life. Thus, it is a question of balancing two contradicting interests, such as the legitimate transparency requirement of society with regard to its judges and prosecutors on the one hand, and the protection of their privacy rights on the other. On this very issue, debates tend to focus on the declaration of interests and assets which judges and prosecutors would have to make to meet the transparency requirement regarding conflicts of interests.

The declaration of interests/assets. The Committee of Ministers of the Council of Europe issued a recommendation to Member States on codes of conduct for public officials in 2000, although this code does not apply to judges and prosecutors³⁵. Nonetheless, this code gives an example of how a register of interests works : *“The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests”*³⁶. In practice, private interests would have to be listed in this register. The register of interests would either be made public to all citizens and litigants or be communicated to either the President of the judge’s/prosecutor’s court or the supervisory body of the judiciary.

It is possible to consider that a register of interests can legitimately apply to judges and prosecutors according firstly to the Bangalore principles of judicial conduct. Indeed, article 4.7 states that: *“A judge shall inform himself or herself about the judge’s personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge’s family”*. One may understand from this article that a register of interests would respond to this goal. Secondly, the Commission Directive 2006/70/CE of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council targeted specific members of the judiciary by the declaration of interests following article 2.1(c) which indicates: *“members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances”*. But this directive expressly excludes *“middle ranking or more junior officials”* from its scope of application. Nonetheless, these different texts show that establishing registers of interests is recent but not new to the European judiciary, as may be seen in the following examples.

³⁵ Committee of Ministers of the Council of Europe, *op. cit.* note 5, article 1.4.

³⁶ *Idem*, article 14.

Should registers of interests for European judges and prosecutors exist? The leading example would be the European Courts as they have an exemplary role to give to the member states of their jurisdiction. The Court of Justice of the European Union adopted a code of conduct in 2007 bearing an article 4 entitled “*Declaration as to financial interests*” which reads as follows: “*On taking up their duties, Members shall submit a declaration as to their financial interests to the President of the Court of justice. The declaration referred to in paragraph 1 shall be worded as follows: ‘I declare that I have no interest in any property or asset which might compromise my impartiality and my independence in the performance of my duties’*”. According to article 7 of this code, it is the President of the Court of Justice assisted by a Consultative Committee composed of three senior members of the Court who are responsible for ensuring the application of the code. But, as some critics note, this code of conduct put a self-regulation system in place which “*may lack both credibility and deterrent effects*” as “*it is questionable as to whether the office of the president has the necessary means and resources to “manage” the monitoring of registers*”³⁷. Moreover, the register of interests is limited to the financial interests of the members of the Court, as they are not submitted to the public scrutiny of European citizens or litigants and no specific sanctions are attached to the violation of this code of conduct.

On the contrary, the European Court of Human Rights, which also adopted a soft law text entitled “*Resolution on Judicial Ethics*” in June 2008, does not ask its own judges to make a declaration of interests. With regard to conflicts of interests, the Court has adopted articles on independence³⁸, impartiality³⁹ and additional activity⁴⁰ but without a specific provision implementing a register of interests for the judges of the Court. However, the Resolution lays emphasis on the educational role of the President of the Court as the final provision states “*In case of a doubt as to application of these principles in a given situation, a judge may seek the advice of the President of the Court. The president may consult the Bureau if necessary*”.

³⁷ Christoph DEMMKE, Thomas HENÖKL, *op. cit.* note 29, p. 38.

³⁸ ECtHR, *Resolution on Judicial Ethics*, I : “*In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.*”

³⁹ *Ibid.*, II : “*Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.*”

⁴⁰ *Ibid.*, VII : “*Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.*”

Declaration of assets/interests for judges and prosecutors is mostly used in European countries where there is a high level of perceived corruption among holders of public office⁴¹. For public authorities, the rationale behind the implementation of declarations of interests/assets is to reinforce public trust in holders of judicial office. Although research shows that it is arguable whether the registers of interests of judges/prosecutors may reduce conflicts of interests (and the corruption attached), they do enhance public confidence in the judiciary⁴². It seems that few of the "old European democracies" have put mandatory declaration of assets/interests for their judges and prosecutors into place whereas "young European democracies" tend to have stricter systems of declaration of interests⁴³.

This opposition can be illustrated by the latest findings of the Group of States against Corruption of the Council of Europe (hereinafter "GRECO") which show, for example, that judges and prosecutors in the following countries - Germany⁴⁴, Belgium⁴⁵, Sweden⁴⁶, France⁴⁷ and the United-Kingdom⁴⁸ - do not have a mandatory declaration of interests/assets system (except in specific situations). However, countries such as Croatia⁴⁹ and Latvia⁵⁰ have implemented registers of interests because they are facing a high level of perceived corruption from their citizens and/or have faced several cases of corruption among members of their judiciaries⁵¹. Registers of interests can be deemed as violating privacy rights if information is released without using a proportionality test. Moreover, it is not sure whether this measure is appropriate to prevent conflicts of interests in all European countries as public confidence in the judiciary is not the same in each European Member State.

⁴¹ SIGMA, *Conflict-of-interest policies and practices in nine EU member states : a comparative review*, written by Manuel VILLORIA-MENDIETA, GOV/SIGMA(2006)1/REV1, 18 June 2007, p. 8.

⁴² Christoph DEMMKE, Thomas HENÖKL, *op. cit.* note 29, pp. 39-40.

⁴³ *Ibid.* ; EU Delegation in Sarajevo, Bosnia and Herzegovina, *TAIEX Seminar on "Conflict of Interest in the Judiciary"*, 4-5 February 2015.

⁴⁴ GRECO, *Fourth evaluation report - Germany*, 28 January 2015, para 115 and 167.

⁴⁵ GRECO, *Fourth evaluation report - Belgium*, 28 August 2014, para 115 and 167.

⁴⁶ GRECO, *Fourth evaluation report - Sweden*, 12 November 2013, para 128 and 174.

⁴⁷ GRECO, *Fourth evaluation report - France*, 27 January 2014, para 103 and 163.

⁴⁸ GRECO, *Fourth evaluation report - United Kingdom*, 6 March 2013, para 132-133 and 170-171.

⁴⁹ GRECO, *Fourth evaluation report - Croatia*, 25 June 2014, para 116-119 and 166-168.

⁵⁰ GRECO, *Fourth evaluation report - Latvia*, 17 December 2012, para 129-132 and 185-186.

⁵¹ SIGMA, *op.cit.* note 41.

II. EUROPEAN JUDGES/PROSECUTORS AND CONFLICTS OF INTERESTS: SOLUTIONS?

A. To prevent the risk of conflicts of interests

The interest of prevention. Reinforcing prevention against risks of conflicts of interests is essential for two reasons. The first is obvious: if the conflict does not occur, the reputation of members of the judiciary and justice is preserved. The second is more of an empirical observation: ignoring the risk is a source of potential conflict⁵². If individual judges and prosecutors pay close attention to this subject they will automatically try to avoid situations with potential conflicts of interests.

This implies that judges and prosecutors are trained on this specific question and able to build a professional code of practice around it. For this purpose they can be helped by their professional statutes and the existence of national codes of ethics and European recommendations. It would be helpful if European organizations and associations involved in the independence and quality of justice worked on common recommendations regarding the specific question of prevention of conflicts of interest.

Thinking about the consequences of potential conflicts of interests is important in order to improve prevention. Therefore ethical codes and codes of conduct should become living tools. Not only should they be taught to trainee judges, but they should also be the subject of further discussions and collective consideration for appointed judges at a national or European level. The European Judicial Training Network (EJTN), principal platform and promoter for the training and exchange of knowledge of the European judiciary could be a leading actor in this field. It could also be interesting to consult the whole community of individual judges and prosecutors in Europe and use *intervision*⁵³ methods to help in the building of European recommendations on conflicts of interest.

Various options to prevent the risk. There are efficient ways to prevent the occurrence of a conflict. A ban on gifts for members of the judiciary is meaningful. The Consultative Council of European Judges (CCJE) also recalls the necessity to impose incompatibilities in opinion n°3: *“it requires judges to refrain from any professional activity that might divert them from their judicial*

⁵² Christoph DEMMKE, Thomas HENÖKL, *op. cit.* note 29.

⁵³ *Intervision* is an organized dialogue between people working or training in the same field. Discussing the work done and the related problems, its aim is to increase the expertise of stakeholders and improve the quality of work

*responsibilities or cause them to exercise those responsibilities in a partial manner*⁵⁴. In most European states, incompatibilities with the function of judge and prosecutor are clearly defined by statute. Members of the judiciary are often forbidden to give legal advice for remuneration outside the course of their official duties. They generally may not carry out any professional or paid activity, with some exceptions for educational, research or cultural activities⁵⁵. The compatibility of a judge's duties with certain political mandates is a subject of debate in different European countries. Most have forbidden certain political mandates for judges and prosecutors (in the national parliament, European Parliament or local council) and some have even prohibited judges' and prosecutors' spouses or partners from taking up such positions⁵⁶.

Judges and prosecutors have to be able to evaluate the potential influence of their personal financial investments, family connections and ties to associations or political organizations. Therefore motives for disqualification laid down in the different national Codes of Conduct should be taken into account: personal financial interest in the outcome of a dispute, a family-link to a party, a close friendship or professional relationship with a party, knowing a lawyer or a witness, membership in an association related to the case, and so on. Declaration of interests as implemented in Latvia for instance, can also be a good instrument for the prevention of conflicts. Should it be discussed with a hierarchical superior in an ethical interview, as is considered in France?⁵⁷ This is an option. But to preserve judges' and prosecutors' independence, this discussion could also take place with an ethical mentor located in another jurisdiction.

Ethical advisory bodies for members of the judiciary as created in several European countries (France, Armenia, Latvia, Montenegro), seem efficient in responding on a day to day basis to specific questions that judges and prosecutors ask themselves in terms of conflicts of interests⁵⁸. Answers and advice given by these ethical boards or committees can be anonymized and published so that judges and prosecutors in the same situation can benefit. French administrative jurisdictions created such an Ethical advisory committee three years ago. It has been perceived as an innovation worthy of interest. This committee has published around thirty answers to individual judges that had ethical issues. Most of them were related to a potential risk of conflicts of interest⁵⁹.

⁵⁴ Consultative Council of European Judges, *op. cit.* note 15, p. 30-32.

⁵⁵ CEPEJ, Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 343-344.

⁵⁶ *Idem*

⁵⁷ GRECO, *op. cit.* note 44, para 103.

⁵⁸ CEPEJ, Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice".

⁵⁹ Collège de déontologie de la juridiction administrative, Annual reports and recommendations, [<http://www.conseil-etat.fr/Conseil-d-Etat/Organisation/Deontologie-des-membres-de-la-juridiction-administrative>]

This ethical consultation of experts can be very useful because it stimulates thought and discussion. It can also be used to declare conflicts of interests that appear in a court and affect fellow judges. If it is possible to discuss a conflict of interest with a colleague, it is sometimes better to have the point of view of a trustworthy third party. This type of advisory body could also propose solutions to prevent specific recurrent cases of conflicts. It should be composed of a majority of judges and prosecutors to protect judicial independence but also host experts in ethics and deontology. To guarantee its efficiency, it should be a consultative body rather than a coercive power. Indeed an ethical advisory body having the power to punish would not be consulted so freely. However it would be interesting for such ethical boards to be consulted before taking professional sanctions after a conflict of interests occurred. It would give ethics specialists the opportunity to evaluate the nature of the conflict and its severity.

B. To control / face conflicts of interests

Conflicts of interests have first to be faced by judges and prosecutors themselves. According to the judicial ethics report of the ENCJ, to respect the impartiality value the "*judge has a duty of care to prevent conflicts of interests between his judicial duties and his social life. If he is a source of actual or potential conflicts of interests, the judge does not take on, or withdraws immediately from, the case, to avoid his impartiality being called into question*". This idea stems from the natural justice principle that *nemo iudex in causa sua* (no-one should be a judge in his own cause). This principle of universal nature is such that all European legal systems (based on statutes or case law) use the system of withdrawal to deal with actual or potential conflicts of interests of judges⁶⁰.

If this principle can go without saying, one must however note that the judge or prosecutor must first recognize/acknowledge that s/he has a conflict of interests. Indeed, facing a conflict of interests necessarily implies that judges and prosecutors are aware and sufficiently trained to identify potential or actual conflicts of interests. Once this first step is acquired, judges and prosecutors must then withdraw from a case in which they have a personal interest. Failing to do so would be a violation of the right to a fair trial before an impartial tribunal as guaranteed by article 6§1 of the European Convention on Human Rights. Indeed, when there is a legitimate reason to fear a lack of impartiality, the judge must withdraw⁶¹.

⁶⁰ Consultative Council of European Judges, *op. cit.* note 15, p. 30-32.

⁶¹ ECtHR, *Castillo Algar v. Spain*, Judgment of 28 October 1998, Series A, no 95, para 45.

However it is a subjective and personal mechanism left to each judge or prosecutor to apply in his/her judicial duties. In this sense, one may question the efficiency of the requirement to withdraw as it is an issue of personal ethics. Failing to do so can cause litigants, who are aware of a conflict of interests, to ask for the disqualification of a judge.

Conflicts of interests can then be controlled by the litigants. If a situation of conflict of interests arises in a case, litigants usually have three options. The first one being the acceptance of the conflict of interests if they consider that it does not violate the right to a fair trial. The second option is a forced acceptance of the conflict of interests because there is a situation of necessity where no other judge or prosecutor can take up the case, thus creating a risk of miscarriage of justice if the judges withdraw (see below).

Finally, the litigants can deal with a conflict of interests of a judge/prosecutor by objecting to him/her. Many European countries have a recusal/disqualification system for judges. For example, in Spain, there is an extensive list of grounds to object to a judge and a "blanket provision" dealing with any sort of private direct or indirect interest⁶². Moreover, it is possible to review a Spanish decision if it appears that it was delivered by a biased judge⁶³. Spanish litigants can also require the disqualification of a prosecutor for the same reasons as a judge⁶⁴. In Germany, judges can be objected to by all parties if there is a legal ground for disqualification or a fear of bias⁶⁵. As far as German prosecutors are concerned, there are not any legal provisions to disqualify them, although some *Länder* have specific provisions in this respect and in practice prosecutors tend to follow the rules applying to judges⁶⁶.

Conflicts of interests can be controlled by a disciplinary body. European countries all have disciplinary procedures to sanction judges and prosecutors who violate their judicial duties. Conflicts of interests fall under the duty for judges and prosecutors to remain impartial and independent. Therefore, creating a conflict of interests is logically subject to disciplinary liability.

⁶² GRECO, *Fourth evaluation report on Spain*, 15 January 2014, §105.

⁶³ *Id.*, §106.

⁶⁴ *Id.*, §157.

⁶⁵ GRECO, *Fourth evaluation report on Germany*, 28 January 2015, §161.

⁶⁶ *Id.*

Conflicts of interests can be subject to criminal proceedings. Conflicts of interests can lead to criminal offences. A topical case is the one of corruption in the worst cases. European Member States all have provisions condemning corruption amongst members of the judiciary. Moreover, conflicts of interests can also fall under specific offences such as “trading in influence” under French criminal law⁶⁷.

In its fourth evaluation round, GRECO observed that some European States have put efficient measures in place (soft law, disciplinary procedures, criminal offences, etc.) to deal with conflicts of interests, ensuring public confidence in members of the judiciary. Nevertheless, it remains questionable as to whether or not conflicts of interests should endlessly be an issue for public authorities.

Finally, when facing conflicts of interests in the judiciary through a disciplinary perspective, we tend to favor an educational approach. Indeed, before starting disciplinary proceedings against a judge or prosecutor due to a situation of a conflict of interests, it does seem appropriate or proportionate to ask the hierarchy of the professional involved to put a stop to the situation. Failing to comply with this request in due time, the judge or prosecutor concerned would logically face disciplinary action.

C. To question the regulation of conflicts of interests

In order to prevent and face conflicts of interests and deal with existing cases, many standards have been implemented to deter judges and prosecutors from questionable behavior. However, deeper analysis demonstrates that the regulation of conflicts of interests itself is questionable and does not necessarily lead to a decrease in the number of conflicts. So far, only a few studies have concluded that an increase in regulation leads to a decrease in the number of conflicts of interests⁶⁸. Rules and standards in the field of conflicts of interests policies are often subject to challenges, and commonly give rise to unexpected side effects. Thus some studies point to the conclusion that handling conflicts of interests through more regulation is not always effective. A critical approach must be attempted.

⁶⁷ France, *Criminal Code*, art. 434-9, 434-9-1 and 435-2.

⁶⁸ European Commission Bureau of European Policy Advisers, European Institute of Public Administration in cooperation with the Utrecht School of Governance, the University of Helsinki and the University of Vaasa, *Regulating Conflicts of Interests for Holders of Public Office in the European Union, A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions*, presented by C. DEMMKE/M. BOVENS/T. HENÖKL/K. VAN LIEROP, T. MOILANEN/G. PIKKER/A. SALMINEN, October 2007, p.107

Firstly, some critics contend that **the proliferation of ethical rules may undermine public trust**. In their view, mushrooming regulations aimed at tackling conflicts of interests and public discussions of the matter do not contribute to a rise in public confidence⁶⁹. On the contrary, calls for more and better ethical standards have the opposite effect as this sends the wrong signal: “(...) critics argue that more rules of ethics do not necessarily provide a more efficient response to the decline of public trust and integrity issues”⁷⁰. Overly zealous policies are thus likely to be ineffective. Calls for higher standards, instead of promoting public trust in the integrity of judges, might have the opposite effect, generating previously inexistent suspicion towards judges and prosecutors. These effects also apply to members of the judiciary in a European framework. Besides, stricter regulations also create more instances of violations of ethical rules, and therefore more scandals and more investigations⁷¹.

Thus the growing number of rules and standards aimed at preventing conflicts of interests leads to more offences. “There are many more laws to be broken nowadays”⁷². This may be interpreted by the public as a sign of declining ethical standards when in fact it is a sign of better investigated cases involving conflicts of interests. An increase in the number of cases (and subsequent scandals) leads to the perception of an increase in unethical behavior⁷³.

Another recurrent problem is **the use of ethical rules as a political instrument**⁷⁴. Politicians will at times announce a crackdown on conflicts of interests to try and increase public trust by emphasizing the ethics gap. The aim is to signal that something has been done after a scandal occurs. It in fact undermines the legitimacy of the institution. Such hasty responses are moralistic instruments poorly drafted and not requisite technical barriers⁷⁵.

⁶⁹ MACKENZIE G.S, *Scandal Proof Do Ethics Laws make government better?*, Brookings Institution, Washington, 2002

⁷⁰ Christoph DEMMKE, Thomas HENÖKL, *op. cit.* note 29, p.38

⁷¹ *Id.*

⁷² ROSENTHAL A., “The effects of legislative ethics law: an institutional perspective”, in: SAINT-MARTIN D. and THOMPSON T., *Public ethics and governance standards and practices in comparative perspective*, vol 14., 2006, Amsterdam/Oxford/Tokyo, p.163

⁷³ BEHNCKE N., “Ethics as Apple Pie: The arms race of ethical standards in congressional and presidential campaigns”, EGPA-Paper, *Ethics and Integrity of Governance: A transatlantic dialogue*, Leuven, June 2005.

⁷⁴ European Commission Bureau of European Policy Advisers, European Institute of Public Administration in co-operation with the Utrecht School of Governance, the University of Helsinki and the University of Vaasa, *op. cit.* note 68, p.109

⁷⁵ WILLIAMS R., “the ethics eruption: sources and catalysts” in: SAINT-MARTIN D. and THOMPSON T., *Public ethics and governance standards and practices in comparative perspective*, vol. 14., 2006, Amsterdam/Oxford/Tokyo, p.41

In addition, there is **no correlation between the number of rules and their effective implementation**. For instance, the process of accession by new Member States to the European Union in 2004 and 2007 pushed all new Member States to reform their laws on ethics, corruption and conflicts of interests, to the extent that today, regulation density is often higher in these countries than in older member countries. This is certainly a positive thing. But these countries often suffer from a relatively high level of perceived corruption and fraud⁷⁶. In contrast, most Scandinavian countries achieve relatively lower levels of corruption and bribery despite far fewer rules and standards. This trend supports the hypothesis that more regulation does not necessarily lead to less corruption. The link is not certain between stricter rules and lower levels of conflicts of interests⁷⁷.

Furthermore, the **regulation of conflicts of interests is limited by the doctrine of necessity**. Judicial impartiality requires the disqualification of a judge with conflicts of interests. But conflicts of interests will arise in front of any judge, and the doctrine of necessity holds that a judge may still hear a case when all the judges of the same court, including himself, could be disqualified. This doctrine of necessity was used, for instance, in cases involving matters related to the remuneration of judges or the allocation of resources incident to their office. In theory, all judges are subject to conflicts of interests with regards such questions, but if all judges recused themselves, then a denial of justice would occur. Rules of necessity, however, may only be used as a last resort. This exception to conflicts of interests regulation clearly shows the limits of the regulatory approach. It is impossible to rule out and regulate all possibilities involving conflicts of interests.

⁷⁶ STARK A., *Conflicts of Interests in American Public Life*, Harvard, Cambridge, 2000 p.264

⁷⁷ European Commission Bureau of European Policy Advisers, European Institute of Public Administration in cooperation with the Utrecht School of Governance, the University of Helsinki and the University of Vaasa, *op. cit.* note 68, p.110-111

In the end, it is clear that European judges and prosecutors are torn between their rights and obligations. Conflicts of interests may arise from different points of tension: independence versus accountability, the duty of impartiality versus the member of the judiciary's civil and political rights, transparency requirements versus privacy rights. A delicate balance needs to be found in order to reduce conflicts of interests. There are however no miracle solutions to face conflicts of interests. A focus must be made on how to prevent them arising. There are then different ways to control conflicts of interests when the phase of preventing them was not efficient.

Solutions can be proposed at a European level, where countries should strive to exchange good practices and recommendations. Intervision used at European level could lead to conferences, workshops and even to the publication of common guidelines with the help of associations like the ECJN or the EJTN. Peer evaluation and consultation with colleagues are always excellent tools in sharing professional experience and enabling judges, if willing, to have their work assessed and analyzed by other judges from different social cultural backgrounds who have different methods and approaches towards the issue of conflicts of interests. Besides, the use of European barometers and surveys such as the ones conducted by the ECJN and the CEPEJ, or the evaluation and compliance procedures put in place by the GRECO in the matter of corruption and conflicts of interests could give precious information about the extent of the problem and possible and suitable solutions⁷⁸. European organizations such as the Consultative Council of European Judges (CCJE) or the Consultative Council of European Prosecutors (CCPE) could even edit recommendations on the specific issue of conflicts of interest.

These questions are not the sole matter for professionals, as they also strengthen public debate about the judge and the prosecutor's role, which are daily and ongoing issues according to Judge Buergenthal's dissenting opinion: "*Judicial ethics are not matters strictly of hard and fast rules (...) – I doubt they can ever be exhaustively defined – they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy [...]*"⁷⁹.

⁷⁸ Council of Europe, "How does GRECO work?"

[http://www.coe.int/t/dghl/monitoring/greco/general/4.%20how%20does%20greco%20work_EN.asp?].

⁷⁹ ICJ, *Legal consequences of the construction of a wall in the occupied Palestinian territory*: Advisory opinion of 9 July 2004 and order of 30 January 2004, p. 10.