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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# THE NETHERLANDS

# JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

# ON

# LEGAL SAFEGUARDS OF THE INDEPENDENCE OF THE JUDICIARY FROM THE EXECUTIVE POWER

**Adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023)**

**On the basis of comments by**

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**Mr Christoph GRABENWARTER (Member, Austria)**
**Mr Eirik HOLMØYVIK (Member, Norway)**
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## I. Introduction

1. By letter of 2 June 2023, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the Judiciary Organisation Act of the Netherlands (hereinafter: "the Judicial Act", CDL-REF(2023)038). This request was decided by the Monitoring Committee within the framework of the preparation of its report as part of its regular periodic reviews of the compliance of member states' obligations entered into upon their accession to the Council of Europe.

2. Mr Richard Barrett, Ms Renata Deskoska, Mr Christoph Grabenwarter, Mr Eirik Holmøyvik, Mr Cesare Pinelli, Ms Hanna Suchocka and Ms Nina Betetto acted as rapporteurs for this joint opinion with the Directorate General on Human Rights and the Rule of Law of the Council of Europe.

3. On 11 and 12 September 2023, a delegation of the Commission composed of Ms Deskoska, Mr Barrett, Mr Holmøyvik, Mr Pinelli, and Ms Suchocka, accompanied by Ms Martina Silvestri, from the Secretariat, visited the Hague and had meetings with the President of the Supreme Court, the Vice-President of the Council of State and the Head of the Administrative Jurisdiction Department; the President and other representatives of the Council for the Judiciary; the Attorney General; the Head of the International Department of the Public Prosecutor's Office; Members of Parliament from different political parties as well as the Committee for Justice and Security of the House of Representatives; the Director of the European and International Affairs Department (DEIA) and the acting Director of the Department for the Legal System of the Ministry of Justice and Security; the President of the Association for the Judiciary as well as with academics. The Commission is grateful to the Dutch authorities for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the Judicial Act and other related legislation. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings held on 11 and 12 September 2023, as well as the comments submitted by the Dutch authorities on 4 October 2023. The draft opinion was examined at the meeting of the Sub-Commission on 5 October 2023. Following an exchange of views with Ms Anneke Van Dijk, Director General for the Administration of Justice and Law Enforcement of the Netherlands, it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

## II. Scope of the opinion

6. The Monitoring Committee has focussed its request on the legal safeguards of judicial independence, notably from the executive power. This opinion does not try nor purport to carry out a thorough examination of the Dutch Judicial System in all its aspects, but will only address the following aspects:

- the role of the Parliament in the designation and appointment of the judges of the Supreme Court,
- the Council of State, the double mandate of state councillors and the disciplinary regime of its judicial members,
- the role of the Minister of Justice and Security with regards to the Council for the Judiciary and the court management boards, in terms of appointments of and disciplinary powers against the respective members, as well as to the Public Prosecution Service,
- the double mandate of judges and members of parliament.

The Venice Commission underlines that the present opinion addresses only the subjects listed above and that the following remarks should not be seen as an endorsement of what has not been commented upon.

## III. Analysis

### A. General remarks

7. According to the Venice Commission's Rule of Law Checklist, "[t]he judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation."[1]

8. When it comes to the modalities of guaranteeing judicial independence, the Venice Commission is not in favour of one single model. The importance of a country's legal culture and traditions has been pointed out by the Commission on several occasions.[2]

9. The Dutch judicial system is built upon a combination of formal safeguards set out in the constitution and laws, and informal safeguards entrenched in the political culture and practice. The Venice Commission and DG I acknowledge that informal norms are crucial in sustaining the rule of law and states should strive to establish such informal norms and practices supporting the rule of law in their democratic and legal cultures. The existence of such norms accepted by all institutions is evidence of a strong culture for the rule of law in the Netherlands, as already noted by the Venice Commission opinion on the Legal Protection of Citizens (hereinafter, the "2021 Opinion").[3]

10.The Venice Commission stresses that informal norms should complement and support, and not substitute formal safeguards altogether. A general question to be explored in this opinion is how certain well-entrenched informal norms and practices that are particularly important for the independence of the judiciary should be formalised in statutory law. Experience from other countries has shown that in a polarised political context, informal norms sustaining the rule of law offers little resistance against powerful forces determined to use all available legal and constitutional provisions.

11. On another note, the Venice Commission and DGI recognise that attacks to judicial independence may come also from outside the national institutional setting. The Commission and DGI take note of the reported increase in security threats related to the organised crime targeting also the judicial branch.[4] Underestimating such dangers may result in unprecedented undue pressure exerted on the judiciary.

### B. The constitutional framework and the general principle of independence of the judiciary

12. As recalled in the Rule of Law Checklist, "[t]he European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.[5]"[6]

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[1] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 74.
[2] Venice Commission, CDL-AD(2016)007, ibid., para. 82.
[3] Venice Commission, CDL-AD(2021)031, Opinion on the Legal Protection of Citizens, para. 32.
[4] European Commission, 2023 Rule of Law Report. Country Chapter on the rule of law situation in the Netherlands. SWD(2023) 819 final. Brussels, 5.7.2023, page 5. The issue was raised also during the meetings with the national authorities.
[5] See, in particular, ECtHR, Campbell and Fell v. the United Kingdom, 28 June 2014, applications n. 7819/77 and 7878/77, para. 78.
[6] Venice Commission, CDL-AD(2016)007, op. cit., para. 75.

13. The Constitution of the Netherlands establishes the exclusive authority of the judiciary to dispense justice[7] and it sets several principles and rules to secure independence to the status of the judiciary vis-à-vis the executive power. Namely, Article 117 guarantees judges' security of tenure, it prohibits any interference of the government or legislature with decisions on dismissal or suspension of judges, and it requires the legislature to regulate other aspects of the legal status of judges by Act of Parliament. In addition, Article 116 states that "[t]he courts which form part of the judiciary shall be specified by Act of Parliament", which also regulates the organisation, composition and powers of the judiciary.

14. In the constitutional framework, whose historical heritage dates back to 1814, when the constitutional monarchy was established, the independence of the judiciary relies predominantly on the role of Parliament as a bulwark against the executive. Likewise, the ban on judicial review of legislation, explicitly established in Article 120,[8] confirms the original intent of maintaining the judiciary's subjection to the legislature.

15. Nevertheless, in the last two centuries, a system of checks and balances has been developed, partially through statutory law and, more importantly, through the above-mentioned system of informal norms and practices. A method of consensus decision-making among the different institutional stakeholders, the so-called "polder model" anchored in the Dutch tradition, appears to maintain its effectiveness in the modern society.

16. During the meetings in the Hague, it has become clear that the duty to protect the independence of the judiciary is (and is perceived as) shared between the Council for the Judiciary, the Council of State, the Ministry of Justice and the Supreme Court. Such a balanced approach appears to work well in practice, but it has to be highlighted that the Council for the Judiciary is not an institution embedded in the Constitution.

17. Moreover, although no formal provision in the Constitution explicitly protects the independence of the judiciary as a whole, nor does any provision entrust a specific body with the duty to protect it, the perception of judicial independence is rated as 'fairly or very good' by 70% of the Dutch population.[9] During the meetings in the Hague, most of the interlocutors confirmed a firm trust in the independence of the judiciary and referred to a recent report based on the self-assessment of judicial officers that rated their own perception of independence at 95%.

18. Furthermore, Article 17 has been inserted in 2022 in the Constitution,[10] stating that "[e]veryone shall have the right, in the determination of his rights and obligations or of any criminal charge against him, to a fair trial within a reasonable time before an independent and impartial court", together with Article 6 of the European Convention on Human Rights (ECHR), which has direct effect in the Dutch legal system, concur to satisfy de facto the European standards requiring that "the independence of the judiciary should be set out in the Constitution".[11]

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[7] Articles 112 and 113 of the Dutch Constitution.

[8] Article 120 of the Constitutions states: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts".

[9] European Commission, 2023 Rule of Law Report, op. cit., page 3.

[10] The explanatory memorandum of this constitutional amendment makes reference to the "institutional" independence of the judiciary.

[11] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System, para. 22; Consultative Council of European Judges (CCJE), Opinions No. 10 (2007) on the Council for the Judiciary at the service of society, para 11, and No. 24 (2021), Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 10; Committee of Ministers of the Council of Europe, Appendix to Recommendation CM/Rec (2010)12 adopted on 17 November 2010, Chapter 1, para. 7.

19. However, the Venice Commission and DG I reiterate the 2021 Opinion's conclusion that "it is for the Dutch authorities to consider whether Article 120 of the Constitution should be amended, or other mechanisms of constitutional review are required. In any case, introducing constitutional review should not be considered as a quick fix, but should be based on a profound analysis of the rights protection in the Dutch legal system and its institutions".[12] 'The Venice Commission and DG I welcome the debate on this subject.

### C. The Supreme Court and the role of the Parliament in the designation and appointment of its judges

20. According to Article 118 of the Constitution, Supreme Court judges are appointed by Royal Decree from a list of three persons drawn up by the Lower House of the States General. However, this provision is supplemented by legislation providing the Supreme Court with a substantial influence on the appointment. According to section 5c(6) of the Judicial Officers Act, the Supreme Court will recommend six candidates from which the Lower House of the States General is required to select its three candidates. Members are appointed on recommendation of the Minister for Legal Protection.[13]

21. The attempt to amend Article 118 of the Constitution on the appointment of members of the Supreme Court, envisaging to abolish the selection right of the House of Representatives (giving instead this right to a committee consisting of one member appointed by the House of Representatives and one member appointed by the Supreme Court) was abandoned in February 2023, following the negative advice of the Advisory Division of the Council of State.

22. The argument of the Advisory Division of the Council of State against a reform of the current system is that currently the powers are not vested in individuals but in institutions, which largely mitigates the person-dependent element (especially with regard to the pluralist House of Representatives). In addition, the House of Representatives' right of selection confers a certain degree of democratic legitimacy on the Supreme Court. By narrowing the role of the House of Representatives to a single member in the committee, this element would be weakened.[14]

23. The Venice Commission has previously emphasised that there is no single model for the appointment of judges which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.[15] All systems should strive for a depoliticisation of judicial appointments and promote appointments according to the objective merits of the candidates.[16] Undue influence and/or unfettered discretion of the other State powers in judicial appointments should be avoided.[17] Conversely, involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism.[18]

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[12] Venice Commission, CDL-AD(2021)031, op. cit., para. 29.
[13] Section 2 (a) Judicial Officers Act.
[14] Council of State, Advice W01.20.0485/I/K, Change in the Constitution regarding the provision on the appointment of the members of the Supreme Court of the Netherlands, issued on 7 April 2021, published on 16 June 2022, para. 2.a.
[15] Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 3.
[16] Venice Commission, CDL-AD(2018)028, Malta, Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement of Malta, para. 30; CDL-AD(2016)007, op. cit., para. 79.
[17] ECtHR (GC), *Grzęda v. Poland*, judgment of 12/03/2022 paras.308-309. See also Council of Europe Committee of Ministers' Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.
[18] Venice Commission, CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, paras. 21, 22.

24. Whilst there is no European standard that prohibits nomination of Supreme Court judges by parliament, and parliamentary involvement does provide democratic legitimacy to the highest court, the Venice Commission has been wary of the dangers of politicisation when decisive power in the appointment of judges is placed with a political body and the involvement of that body is not only formal.[19] The Venice Commission has previously expressed the view that the power to appoint Supreme Court judges could – under certain circumstances – be given to an independent body, such as a council of the judiciary.[20] Where parliament is the appointing body or involved in a decisive way, the Venice Commission has recommended that the decision be made with a qualified majority to ensure the broadest possible political support.[21]

25. The Dutch authorities have argued that the risk of politicisation is significantly reduced in the Dutch system, as the Supreme Court itself has a decisive influence over which candidates are to be considered by the Lower House of the States General. In addition, as the Supreme Court is the highest court in criminal, tax and civil cases and also has special (constitutional) statutory duties, such as deciding on the dismissal of judges,[22] the involvement of the three mutually controlling and balancing state powers is particularly important. During the visit in the Hague, the President of the Supreme Court expressed her appreciation for the current procedure,[23] also in consideration of the fact that the House of Representatives usually follows the list of recommendations of the Supreme Court, albeit not being bound by it. The government, in turn, is bound by the nomination of the House of Representatives but it can choose from among the three persons.[24]

26. The Venice Commission notes that under the existing scheme the Supreme Court plays a crucial role, and that none of its interlocutors has expressed criticism of the current procedure in terms of judicial independence.[25] Nonetheless, the process by which the House of Representatives designates Supreme Court judges could be carried out in a more open and reasoned manner.

### D. The Council of State

#### 1. Composition and double mandate

27. The Council of State is a body established by the Constitution[26] and further regulated by the Council of State Act. The Council of State has two primary tasks, carried out by two separate divisions. The Advisory Division advises the government and Parliament on legislation and governance, while the Administrative Jurisdiction Division is the country's highest general

[19] Venice Commission, CDL-AD(2002)026, Latvia, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 13 and 21-23; CDL-AD(2015)008, Preliminary Opinion on the Draft Law on amending the Law on the Judicial System and the Status of Judges of Ukraine, paras. 50 and 51.
[20] Venice Commission, CDL-AD(2017)023, Georgia, Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, para. 45.
[21] Venice Commission, CDL-AD(2020)039, Ukraine, Urgent Opinion on the Reform of the Constitutional Court, para. 72.
[22] Council of State, Advice W01.20.0485/I/K, op. cit., para. 2.a.
[23] The Supreme Court President reiterated her position already reported in the European Commission Rule of Law report 2023, op. cit., page 4.
[24] The recommendation list of the Supreme Court is almost always followed (apart from once since 1945). The government appoints one of the three nominees. In practice, this is always number one on the list. Strictly speaking, the government is allowed to deviate from the nomination when appointing, but that has also happened only once since 1945 (i.e. in 1946).
See also Council of State, Advice W01.20.0485/I/K, op. cit., para. 1.a with further references.
[25] Council of State, Advice W01.20.0485/I/K, op. cit., para. 2.b.
[26] Art. 73, 74 and 75 as well as in the Art. 35, 38, 57 and 81 of the Constitution.

administrative court.[27] The King is the President of the Council of State, but this is a purely symbolical position. The King cannot be a member of either the Advisory or Administrative Jurisdiction Division. Other members of the Royal House may be granted a seat on the Advisory Division of the Council by Royal Decree once they have attained the age of majority. They may take part in deliberations but must abstain from voting.[28]

28. The State Councillors are appointed for life by Royal Decree upon the nomination by the government and recommendation by the Council itself.[29] They can be assigned to the Advisory Division or the Administrative Jurisdiction Division or to both divisions. The number of members appointed to both divisions may not exceed ten.[30] At present, only two members have "double" mandate. It should be noted that, during the visit in the Hague, some interlocutors expressed the opinion that the nominations to the Council of State judicial branch are persons who, while having the formal requirements for appointment,[31] have no judicial experience and are appointed for their administrative experience as former mayors or high-level administrators. While this may add valuable experience and diversity to a high administrative court, it may, on the other hand, be seen by some as bringing a political background. In their comments submitted on 4 October 2023, the Dutch authorities underlined that the only three state councillors that had an outstanding public career outside the judiciary had never held a party-political position and their selection followed the same procedure as all other councillors.

29. In January 2016 the government proposed a formal split of the judicial and advisory branches of the Council of State, in order to merge the two other specialised administrative courts with the judicial branch of the Council of State. However, the subsequent bill "Organisation of the Supreme Administrative Jurisdiction Act" was not passed, and it was withdrawn by the government by letter dated 16 November 2016[32] in the "interest of the (constitutional) unity of the Council of State".[33]

30. In the *Kleyn and Others* case, the ECtHR found that neither the manner and conditions of appointment of the Dutch Council of State members[34] nor the separation of the Administrative Jurisdiction Division from the Advisory Division, with separate functions, violated the guarantee

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[27] Chapter II and III of the Council of State Act.
[28] Section 1(4) of the Council of State Act.
[29] Section 2(1) and (2) of the Council of State Act.
[30] Section 2(3) of the Council of State Act.
[31] Namely, "4. A member may take part in the task of administering justice only if:
a. he has been awarded the degree of Bachelor of Laws and also the degree of Master of Laws by a university or the Open University to which the Higher Education and Research Act applies, for having passed the final examination of a university degree course; or
b. he has obtained the right to bear the title of 'meester' for having passed the final examination of a university law degree course at a university or the Open University to which the Higher Education and Research Act applies. Further rules concerning the professional requirements may be laid down by order in council.
5. Degrees awarded by a university, the Open University or an institution of higher professional education, as referred to in the Higher Education and Research Act, or equivalent certificates may be designated by order in council as equivalent for the purposes of subsection 4 (a) to the degree of Bachelor of Laws referred to in that point." Section 2(4) and (5) of the Council of State Act.
[32] Kamerstuk 34389, nr. 23 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl) (in Duch only).
[33] According to the explanation reported in the letter, a number of constitutional tasks of the Council of State transcend the tasks of the administration of justice and advice. When the Council is too 'strictly' split into two departments, that unity is at risk, according to the government. The constitutional tasks would then be assigned to the advisory department. The Administrative Jurisdiction Department would be separate from this. Moreover, a hierarchy could arise between the two departments.
[34] ECtHR, *Kleyn and Others v. Netherlands* [GC], 6 March 2003, application no. 39651/98 et al., para 195.

of an impartial tribunal for the purposes of Article 6 of the ECHR as long as the same councillors do not exercise both advisory and judicial functions on the "same case" or the "same decision".[35]

31. In its 2021 Opinion on the Netherlands,[36] the Commission pointed out that by reducing the number of members of the Council of State who can sit in both divisions to ten, the Dutch legislator has undertaken certain positive steps to better separate the advisory function from the judicial function. The Commission expressed the view that the legislator could consider removing the possibility of double mandate or separating the divisions institutionally.[37]

32. During the meetings in the Hague, the authorities informed that the double mandate is de facto phasing out. The Venice Commission and DG I welcome these developments.

### 2. Disciplinary measures concerning the councillors of the Administrative Jurisdiction Division

33. With regard to disciplinary sanctions, the Council of State may dismiss or suspend the Vice-President and the members through a reasoned decision; the Vice-President may also issue reprimands to the members.[38] The councillors of the Administrative Jurisdiction Division are subject to the same rules and safeguards as other judges.[39] In compliance with the Venice Commission's parameters,[40] offences are set out clearly in law: Section 46c of the Judicial Officers Act sets forth possible grounds for disciplinary measures,[41] whereas Section 46ca stipulates possible measures.[42] However, the initiative to undertake disciplinary proceedings is in the hands of the Vice-president, who is not a member of the judiciary. He or she must primarily give the councillor the opportunity to express her/his views and then submit a written and reasoned application to the Supreme Court. [43] The latter decides by way of a reasoned ruling.[44] In the event of a written warning issued by the Vice-President of the Council of State, the judge concerned may object but only to the Council of State itself.

34. The Venice Commission and DG I are of the opinion that the position of councillors of the Administrative Jurisdiction Division should be closely aligned to the position of other judges, also with respect to the initiative to undertake disciplinary proceedings which should therefore be entrusted to the Procurator General.[45]

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[35] Ibid., para. 200.
[36] Venice Commission, CDL-AD(2021)031, the Netherlands, Opinion on the Legal Protection of Citizens.
[37] Venice Commission, CDL-AD(2021)031, op. cit., paras. 122-124.
[38] Section 3(2) of the Council of State Act in accordance with chapter 6A of the Judicial Officers Act.
[39] Chapter 6A of the Judicial Officers Act.
[40] Venice Commission, CDL-AD(2016)007, op. cit., para. 78.
[41] Section 46c of the Judicial Officers Act provides that: "A disciplinary measure may be imposed on a judicial officer if he:
a. disregards the dignity of the office, his official duties or his official obligations;
b. violates the provisions that prohibit him from practising a profession, that designate a fixed and permanent place of residence, prohibit him from engaging in any interview or conversation with parties or their lawyers or representatives, or accepting any special information or written documents from them, or impose on him a duty of confidentiality or the obligation to inform the superior of positions which he performs outside his office; or
c. his acts or omissions seriously harm the proper administration of justice or confidence therein. "
[42] Section 46ca (1) of the Judicial Officers Act sets forth: "The disciplinary measures that may be imposed on a judicial officer are: a. written reprimand;
b. withholding of salary amounting to no more than half a month's salary;
c. suspension for three months at most; or
d. discharge."
[43] Section 46o of the Judicial Officers Act.
[44] Section 46p of the Judicial Officers Act.
[45] The Procurator General is an independent office within the Supreme Court.

35. The disciplinary system does not provide for a right of appeal to challenge the decision of the Supreme Court and subsequent sanction.[46] Whilst the Venice Commission and the European Court have consistently recommended a right to appeal against decisions on disciplinary sanctions,[47] this safeguard should be fulfilled when the decision in the first instance is taken by the Supreme Court as the highest tribunal, which, even for criminal matters within the meaning of Article 6 ECHR, is accepted by Article 2(2) of Protocol no. 7 of the ECHR.[48] However, as regards the possibility for the Vice-President to issue a written warning, a remedy to an independent instance should also be provided.

### E. The role of the Minister of Justice and Security

#### 1. With respect to the Council for the Judiciary

36. The European Court of Human Rights has characterised the judicial councils as "a bulwark against political influence over the judiciary" and emphasised "the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers"[49]. There is no single model for organising the judiciary and its administration. Councils for the judiciary is one model chosen by many Council of Europe member states, though it should be noted that the composition, functions and powers of councils for the judiciary vary greatly among the Council of Europe member states.[50] As for the composition of councils, international standards and Venice Commission opinions require a mixed and balanced composition, with at least half judges.[51] When it comes to the manner of appointments, both politicisation and corporatism must be avoided.[52] In particular, to counter the risk of corporatism, the Venice Commission recommended "counterbalancing judicial members with non-judicial (lay) members, representing other "users" of the judicial system (e.g. attorneys, notaries, academics), or a wider civil society."[53]

37. In the Netherlands, the Council for the Judiciary was founded in 2002 and was intended to function as a buffer between the powerful Ministry of Justice and Security and the individual courts,[54] by performing a number of operational tasks such as the preparation of the budget for the Council and the courts jointly, allocation of budget to the courts, supervision of financial management, personnel policy, supporting operations at courts, nationwide activities relating to the recruitment, selection, appointment and training of court staff etc. (Article 91 of the Judicial

[46] Section 47 of the Judicial Officers Act, which had provided for an appeal, was repealed on 1 January 2013.
[47] Venice Commission, CDL-AD(2010)004, op. cit., para. 43; CDL-AD(2016)007, op. cit., para. 78. Recommendation CM/Rec(2010)12 of the Committee of Ministers. See also, ECtHR, Bilgen v. Turkey, 09/03/2021, application no. 1571/07, para. 96; see also, Ramos Nunes de Carvalho e Sá v. Portugal, 06/11/2018, applications n. 55391/13, 57728/13 and 74041/13.
[48] European Network of Councils for the Judiciary (ENCJ), Report - Development of minimum judicial standards V 2014-2015, page 39.
[49] ECtHR (GC), *Grzęda v. Poland*, 12/03/2022, application no. 43572/18, para.346.
[50] CCJE Opinion No. 24 (2021), on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems.
[51] CCJE Opinion No. 10 (2007), op. cit., para. 16; CCJE Opinion No. 24 (2021), op. cit., paras. 29 and 29; Venice Commission, CDL-AD(2010)004, op. cit., para. 32; Recommendation CM/Rec(2010)12, op. cit., para. 27; ECtHR, Oleksandr Volkov v. Ukraine, 9/01/2013, application no. 21722/11, para. 109; Case of Grzęda v. Poland, 15/03/2022, application no. 43572/18, para. 305
[52] Venice Commission, Republic of Moldova, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56.
[53] Venice Commission, Lebanon, CDL-AD(2022)020, Opinion on the draft law on the independence of judicial courts, para. 60.
[54] Geerten Boogaard, "Bipolar Constitutionalism in The Netherlands and Its Consequences for the Independence and Accountability of the Judiciary" in Hirsch Ballin, Van der Schyff & Stremler (eds.), European Yearbook of Constitutional Law 2019, European Yearbook of Constitutional Law 1, p. 109.

Act). It is noteworthy that in the Netherlands, the Council for the Judiciary has less responsibility with regard to the appointment of judges[55] compared to other countries and does not have any competence on disciplinary matters.

38. According to Article 93 of the Judicial Act, the Minister can issue general instructions to the Council concerning its legal duties set out in Article 91 of the Judicial Act. Such instructions must be in writing and justified, and they are furthermore published in the Government Gazette. This transparency requirement allows the public and the Lower House of the States General to hold the Minister accountable. The Minister may also propose to set aside a decision of the Council for the judiciary manifestly contrary to the law or prejudicial to the proper operation of courts.[56] However, a clear safeguard is set out by Article 109 of the Judicial Act, according to which the Minister may not involve himself (or herself) in the procedural aspects or substantive assessment of or the decision in a specific case or category of case. If the Council for the Judiciary takes the view that a certain direction given by the Minister would infringe Article 109, such direction may not be issued.[57] In light of the Dutch system of ministerial responsibility, as well as the defined role of the Council, the Venice Commission considers that the Minister's power to issue general instructions to the Council for the Judiciary is acceptable as long as it is limited to the "necessity with a view to the proper operation of the courts".[58]

39. The power of the Minister with regard to appointments of members of the Council for the Judiciary and disciplinary measures will be analysed in the following sections.

### a. Appointments of the members of the Council for the Judiciary

40. The Council for the Judiciary consists of five members: three judges and two non-judge members.

41. Article 84 of the Judicial Act provides that members are appointed by Royal Decree on the recommendation of the Minister of Justice for a term of six years and may be reappointed once for a term of three years. One of them is also appointed as chairperson of the Judicial Council. Article 85 of the Judicial Act establishes that before making the recommendation, the Minister of Justice must draw up, in agreement with the Council, a list of not more than six persons who appear eligible to fill the relevant vacancy. During the meetings in the Hague, the national interlocutors have explained that the list is prepared taking into account the needs of the Council in terms of technical competences, namely, for judicial members it is important to cover the different branches of law, and for the non-judicial members they are usually an accountant and an IT specialist (but they could also be specialised in housing or other specific fields). The list must be made available to a committee of recommendations consisting of a president of a court, a representative of the Dutch Association for the Judiciary, a member of the Board of Delegates, a director of operations of a court and a person designated by the Minister of Justice. The committee must recommend not more than three persons from the list.

42. In general, as regards judicial members, European standards do not favour systems that involve the executive power at any stage of the selection process of judicial council's members.[59] Moreover, it is a well-established standard that they should be elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of

[55] Candidate judges are selected by the National selection committee for judges, composed of six judges and six non-judge members, among which at least one public prosecutor and one attorney, and subsequently appointed for life by the executive on the proposal of the Minister of Justice..
[56] Article 106 of the Judicial Act.
[57] Article 93(4) of the Judicial Act.
[58] Article 93(1) of the Judicial Act.
[59] CCJE, Opinion No. 10 (2007), op. cit., paras. 31.

gender and regions.[60] On the other hand, the Venice Commission found that "to ensure the democratic legitimacy of [Judicial Councils], lay members may be elected by Parliament (preferably by a qualified majority or through a proportional system, in order to avoid politicisation), or, alternatively, appointed by the Government under the parliamentary control, but a certain number of lay members may also be delegated to the [Judicial Council] by external independent institutions."[61] The larger the responsibilities and powers conferred to a council, the more important it is that its independence be respected by other powers of state.[62]

43. In the Dutch system, the executive makes the final appointment of the members of the Judicial Council, based on a list of candidates selected by an independent committee with a majority of judges, which limits encroachment by the Minister. Also, it has to be noted that most powers of the Dutch Council for the Judiciary are managerial in nature[63] and, although it has an important power to nominate candidates for court management boards,[64] it also lacks the extensive and autonomous powers relating to appointments and career of judges, as well as to disciplinary matters, as found in some other countries.

44. During the meetings, most national interlocutors have confirmed that the Minister of Justice has always followed the proposed list, s/he has never exerted any undue pressure on the Council for the Judiciary and the system seems to work well. Nonetheless, the Venice Commission and DGI are of the view that the process could be carried out in a more open and reasoned manner.

45. Circumscribing the Minister's power in respect of the appointment procedure of candidates to the Council for the Judiciary, but also to the court management boards (see section below), would contribute to soften the relationship between the Minister of Justice and the Council for the Judiciary, and between the Council for the Judiciary and the court managements boards.[65] This becomes particularly important also when considering that in the Netherlands, the Minister of Justice, the Council for the Judiciary and the court management boards concur to determine the financial and operational decisions affecting the whole judicial administration, with the Minister having a final say on the matter, prior to the deliberation in Parliament. As already mentioned,[66] the existence of guarantees against external pressure on the decisions on budgetary matters is an element of judicial independence.[67]

46. The Netherlands has adopted numerous aspects of NPM (new public management) in its judicial management. In spite of the active involvement of a number of judges in the process, developments appear to have been contested by many judges. This is most pronounced in a manifesto of seven appellate court judges of December 2012, signed by 700 judges: "We are deeply concerned about the organisation of the judiciary and the adverse consequences for the internal independence of judges and the quality of the administration of judges. […] Increasingly, courts are managed like large companies, in which output figures are leading, the Council for the Judiciary acts as a 'Board' and court managers as 'Division boards."

47. While essentially nothing is wrong with management boards as such and efficient functioning of courts is an important aspect of court administration, the fact that operational decisions are

[60] CCJE, Opinion No. 10 (2007); op. cit., paras. 18, 25, 26, 27, 30; Recommendation CM/Rec(2010)12, op. cit., para. 27; Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system, Part I: The independence of judges, para. 32.
[61] Venice Commission, Lebanon, CDL-AD(2022)020, op. cit., para. 60.
[62] CCJE, Opinion No. 24 (2021), op. cit., para. 25.
[63] Articles 91 and 92 of the Judicial Act.
[64] Article 15(6) of the Judicial Act.
[65] Bovend'Eert, Judicial Independence and Separation of Powers: A Case Study in Modern Court Management, European Public Law 22, n. 2 (2016), p. 350.
[66] See the section on the constitutional framework above.
[67] ECtHR, *Campbell and Fell v. the United Kingdom*, 28 June 2014, applications n. 7819/77 and 7878/77, para. 78; Venice Commission, CDL-AD(2016)007, op. cit., para. 75.

closely related to the availability of financial resources make the decision on budget and funding of courts crucial for the well-functioning of the courts and the working conditions of judges. The Venice Commission and DGI note that care should be taken so that financial decisions by management boards do not unreasonably interfere with judges' internal independence and responsibility to decide on judicial matters in the specific court cases according to the specificities of each case.

48. It has further been reported that a certain distance is perceived by the majority of judges towards the Council for the Judiciary. In order to bridge such distance, some informal mechanisms[68] are being developed in order to ensure a broader participation of all judges in the selection of the candidates for the list that is submitted to the Minister of Justice and Security.

49. The Venice Commission and DG I encourage setting up such mechanisms and their embedment in the internal regulations which would be a positive step to ensure a broader representation of all levels and types of courts in the Council for the Judiciary in line with European standards.

### b. Dismissal of and disciplinary measures against members of the Council for the Judiciary

50. Article 107 of the Judicial Act sets out that the Minister of Justice may recommend that one or more members of the Council be dismissed on account of their unsuitability, other than for reasons of ill-health. A member can also be suspended if there are good reasons to suspect his or her unsuitability. The suspension or dismissal is effected by Royal Decree.

51. According to Article 108 of the Judicial Act, an interested party may appeal to the Supreme Court against the decree for suspension or dismissal. The Supreme Court can review the Minister's conduct and assess whether the Crown could reasonably have concluded that there is (a serious suspicion of) unfitness and whether the Minister, in making her/his nomination, acted in breach of Article 109 of the Judicial Act.[69]

52. The Venice Commission has already expressed its preference for specific and detailed description of grounds for offences,[70] whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility.[71] The ECtHR also found that: "the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence […] and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their

[68] As referred to in the Position Paper of the Council for the Judiciary issued on 16 May 2023, "a proposal is being developed in which a committee of judges advises the Council and/or Recommendations Committee (which selects candidates) concerning the candidates (based on a selection of letters of application and candidate interviews)."

[69] Article 109 of the Judicial Act: In exercising the powers conferred by or pursuant to this Act, Our Minister may not involve himself in the procedural aspects or substantive assessment of or the decision in a specific case or category of case. See also Council of State, Advice W16.20.0045/II, op. cit., para. 2.4.

[70] See, for example, Venice Commission, CDL-AD(2014)006, Republic of Moldova, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, para. 15.

[71] See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria, Opinion on the Judicial System Act, para. 108; and Venice Commission, CDL-AD(2019)024, Armenia, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, para. 40. See also ECtHR, Oleksandr Volkov v. Ukraine, 9.01.2013, application n. 21722/11, para. 175 et seq.

effects".[72] The CCJE also stated that "Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed. Members may cease to be members in the event of incapacity or loss of the status on the basis of which they were elected or appointed to the Council. If the Council itself or a special body within it are responsible for this decision, the rights of the dismissed member to an appeal must be ensured."[73]

53. Even though the term "unsuitability" is rather broad and this provision has reportedly never been applied in practice, the explanatory note of the legal act shows, as noted by to the Council of State, that this is an *ultimum remedium* in case of gross neglect of duties (e.g., gross mismanagement or deliberate abuse of power).[74] The Venice Commission and DG I nevertheless recommend to define in a more concrete and precise manner the concept of "unsuitability". Moreover, although the Minister's decision is subjected to the control of the Supreme Court, the "serious suspicion" of unfitness cannot be considered as evidence of any misconduct and the wording should therefore be rephrased with reference to concrete elements of proof. As confirmed also during the meetings with the national authorities in the Hague, the suspension or dismissal of a judicial member of the Judicial Council does not affect that member's judicial function.

54. As to the non-judicial members of the Council, they may be subjected to disciplinary punishment, suspended or dismissed by Royal Decree on the recommendation of the Minister of Justice (Article 86 (5) of the Judicial Act.

55. The Venice Commission and DG I recalls the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council: "Judges appointed to the council for the judiciary should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal. Non-judicial members should have equivalent protection."[75]

56. The difference in treatment (albeit reportedly never applied in practice) between judicial and non-judicial members cannot be justified. Therefore, the Venice Commission and DG I recommend the Dutch authorities to modify the law accordingly.

### 2. The court management boards

#### a. Appointments of members of the court management boards

57. According to Article 15 of the Judicial Act, a court management board consists of two judges and a non-judge member. The Minister of Justice and Security plays a crucial role in the appointment procedure since s/he nominates candidates for appointment by Royal Decree. However, the Minister has not full discretion in appointments, as he or she must choose from a list of three candidates proposed by the Council for the Judiciary after hearing the management board at the relevant court.[76] With regard to termination of membership, Article 16 of the Judicial Act stipulates that if the member accepts a position, which is incompatible with the membership, the appointment is terminated by Royal Decree on the recommendation of the Minister. Likewise, the membership of the (sector) chairperson is terminated or suspended if the member's appointment as a judicial officer responsible for the administration of justice is terminated or suspended.

[72] ECtHR, Oleksandr Volkov v. Ukraine, op. cit., para. 185.
[73] CCJE, Opinion No. 24 (2021), op. cit., paras. 37 and 38.
[74] Council of State, Advice W16.20.0045/II, op. cit., para. 2.2.
[75] CCJE, Opinion No. 24 (2021), op. cit., paras. 37 and 38.
[76] Article 15 (5) and (6) of the Judicial Act.

58. In the past, this procedure for appointments to court management boards has been strongly criticised, notably by national judges, for giving the Minister too much power over judicial appointments.[77] However, an agreement between the relevant stakeholders was reached in March 2021 to make the procedure for appointing court administrators more transparent and increase the influence of judges at all levels. This new informal procedure provides that on the basis of the profile drawn up by the Council and the selection of application letters by the Council, confidential selection committees will be set up, comprising four judges, two administrators and two court staff, which carry out the interviews and propose one person to the Council (with the four judges having a casting vote in case of a tie), which in turn recommends this person to the Minister. If the Council rejects the proposal of the committee, the committee will either recommend another candidate or the vacancy will be reopened. During the meeting in the Hague, the national interlocutors have confirmed that the new procedure works well. The Venice Commission and DG I therefore welcome the progress in this respect and recommend integrating the new procedure in statutory law and improve its transparency.

### b. Disciplinary measures against members of the management board

59. The Council for the Judiciary may propose to the Minister that (s)he either recommend dismissal of a member of the management board on the grounds of unsuitability, or suspension if there are good reasons to suspect unsuitability (both other than for reasons of illness). The dismissal or suspension is effected by Royal Decree on the recommendation of the Minister.[78]

60. The same considerations as for the Council for the Judiciary applies. Namely, the Minister's room for manoeuvre is particularly limited by the fact that suspension and dismissal can only take place in cases of gross neglect of duties,[79] but the “serious suspicion” of unfitness cannot be considered as evidence of any misconduct and the wording should therefore be rephrased with reference to concrete elements of proof. In addition, the initiative to take action lies with the Council for the Judiciary which constitutes an important safeguard towards the influence of the executive power. Finally, the suspension or dismissal of a judicial member of the court board does not affect that member's judicial office.[80]

61. According to Article 39 of the Judicial Act, an interested party may lodge an appeal against the suspension or dismissal of a judicial board member to the Supreme Court. The Court may conduct the same review as for the suspension or dismissal of a member of the Council for the Judiciary (see Section on the Council for the Judiciary above). It assesses whether the conclusion that there was unsuitability was reasonable, and whether the Minister acted in breach of Article 109 when making her/his nomination.[81]

62. As to the non-judicial member of the board ("director of operations"), s/he can be subjected to a disciplinary sanction, or her/his appointment can be suspended or terminated by Royal

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[77] One of the justices of the Supreme Court, Marc Fierstra, noted that - even if this has not been the case so far - “less reticent Dutch politicians in that position could, just like in Poland or the US, establish political friends and thus influence the legal process” (in Dutch: https://www.mr-online.nl/marc-fierstra-hoge-raad-het-systeem-hangt-van-plakband-aan-elkaar/), and also academics and journalists stating that the appointment process is not that different from, for example, Poland and Hungary (in Dutch: https://decorrespondent.nl/12166/de-benoeming-van-rechters-in-nederland-is-niet-onafhankelijker-dan-in-polen-of-hongarije/1e8402e1-638a-0dc8-1cdf-be8b55d69177).

[78] Article 38 of the Judicial Act.

[79] Council of State, Advice W16.20.0045/II, op. cit., paras. 2.2 and. 2.4.

[80] Council of State, Advice W16.20.0045/II, op. cit., paras. 2.2., 2.4., 3.3.

[81] Article 109: In exercising the powers conferred by or pursuant to this Act, Our Minister may not involve himself in the procedural aspects or substantive assessment of or the decision in a specific case or category of case. See also Council of State, Advice W16.20.0045/II, op. cit., paras. 2.2 and 2.4.

Decree on the recommendation of the Minister on the proposal of the Council.[82] Moreover, non-judicial members are in an even more vulnerable situation because there is no requirement of a serious suspicion of incompetence. This difference in treatment between judicial and non-judicial members (albeit reportedly never reported in practice) cannot be justified, therefore the Venice Commission and DG I recommend to the Dutch authorities to modify the law accordingly.

### 3. Directions to the Public Prosecution Service

63. In the Netherlands, the public prosecution service is part of the judicial authority, and it is regulated in Chapter 4 of the Judicial Act, but its independence is less stringent than that of the judges. The public prosecution service is organised on the principle of subordination. The heads of the public prosecutor's offices are subordinate to the Board of Procurators General in performing their duties. The other officials working at a public prosecutor's office are subordinate to the head of office in performing their duties.[83]

64. Also, according to Article 127 of the Judicial Act, the Minister of Justice may issue general and specific directions concerning the performance of the duties and the exercise of the powers on the public prosecution service. Thus, the prosecution service is governed by the principle of hierarchy under the authority of the executive power. Yet, several safeguards are provided to curtail the Minister's power. Indeed, Article 128 of the Judicial Act provides that the Minister of Justice must give the Board of Procurators General the opportunity to make known its views before s/he issues a direction concerning the investigation or prosecution of criminal offences in a specific case. The Minister must give the Board written notice of the proposed direction and the reasons for it and may set the Board with a time limit for making known its views. The views of the Board must be given in writing and with reasons. A direction may be given orally only if it cannot be given in writing because time is of the essence. In that case it must subsequently be recorded in writing as quickly as possible and in any event within one week. If the Minister issues a direction not to investigate or prosecute a case or discontinue an investigation or prosecution, s/he must give notice of the direction, the proposed direction and the views of the Board to both Houses of the States General as quickly as possible, in so far as the provision of the relevant documents is not incompatible with the interests of the State.

65. In practice, the right of the Minister to use instructions in individual cases is used very sparingly. Reportedly, as confirmed by all interlocutors during the meetings in the Hague, it has never been used to suspend prosecution or abstain from it since the entry into force of the law in 1999. Cases are discussed in regular meetings between the Minister and the Board of Procurators General, and if necessary, an instruction by the Board ensues.[84] As the Dutch authorities noted in their comments of 4 October 2023, if the Minister is to issue a direction, the procedure in Article 128 of the Judicial Act is applicable.

66. In 2013, GRECO concluded that the "guarantees surrounding the use by the Minister of Security of the right of instruction in specific cases" did not "appear to be at variance with the requirements of Recommendation Rec(2000)19",[85] of the Committee of Ministers of the Council of Europe. Nevertheless, in June 2022, a member of parliament initiated a legislative proposal to remove the possibility for the Minister of Justice to give instructions in concrete cases (inter alia proposing to remove "and specific" from Article 127 of the Judicial Act and to rephrase Article 128 saying "the exercise of the duties and powers of the Public Prosecution Service in a specific case is without subordination to Our Minister"). In the consultations thereafter, the Council of State outlined in its advice of January 2023[86] that the proposal was not supported by sufficient

[82] Article 16 (5) in conjunction with Article 15 (4) of the Judicial Act.
[83] According to Article 139 of the Judicial Act.
[84] GRECO, Fourth Round Evaluation Report on the Netherlands (June 2013), para. 136f.
[85] GRECO, 2013 Report, op. cit., see paras. 135-138.
[86] Council of State, Parliamentary Paper 36125, Nr. 4.

arguments as to why a change to the current balance between the independence of the prosecution service and the political responsibility of the Minister was needed,[87] and argued that, partly in view of the legally non-mandatory nature of international recommendations on this matter, the powers of the Minister did not conflict with international law.[88] Reportedly, the Dutch Bar Association was in favour of the legislative proposal,[89] as was the Dutch Association for the Judiciary.[90] The Board of Procurators General was against.[91]

67. There is no common European model for organising the prosecution service, and in some countries the prosecution service is part of the executive and hierarchically subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, and the Netherlands).[92] In these countries, subordination to the executive also entails the power for the Minister to issue instructions. The major reference documents allow for the prosecution service to be part of the executive as well as being independent. The Council of Europe standards on the role of public prosecution in the criminal justice system emphasise the importance of internal and external independence of the prosecution service.[93] However, they do not categorically prohibit executive instructions in individual cases as long as there are certain safeguards in place. CM/Rec(2000)19 states that where the prosecutor "believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement."[94] In addition, CM/Rec(2000)19 distinguishes between instructions by the executive not to prosecute, which "must be prohibited" or "must remain exceptional" and instructions to prosecute, which "must carry with them adequate guarantees that transparency and equity are respected in accordance with national law"; the government has, for example, the duty to seek the written advice from the prosecutor and to give written instructions and justifications, as well as to attach all these advices to the file.[95] In the same vein, the Consultative Council of European Prosecutors (hereinafter, CCPE) states: "Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation (2000)19."[96] The Venice Commission's Rule of Law Checklist too suggests that if the executive is permitted to issue specific instructions to the prosecution service in particular cases, these should be "reasoned, in writing, and subject to public scrutiny".[97]

68. In the Netherlands, as regards the instructions to prosecute in specific cases, there does not seem to be a provision allowing for the replacement of a prosecutor that considers the prosecution in a given case illegal or against his or her conscience but, in their comments of 4 October 2023, the Dutch authorities have reported that there exists a system of confidential advisors who deal with e. g. breach of integrity. Apart from this, the instruction power of the Minister is circumscribed by a rather elaborate notification and justification scheme described in Article 128 of the Judicial Act. The Minister is required to make instructions in writing with justification concerning the investigation or prosecution of criminal offences in specific cases and it has to seek the prior written and reasoned advice of the Board of Procurators General on the

[87] Council of State, Parliamentary Paper 36125, Nr. 4, Advice para. 2.
[88] Council of State, Parliamentary Paper 36125, Nr. 4, Advice para. 3.
[89] Advice available at (in Dutch): Informatie over Bijlage 1069095 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl)
[90] Advice available at (in Dutch): Informatie over Bijlage 1069096 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl)
[91] Advice available at (in Dutch): https://zoek.officielebekendmakingen.nl/blg-1069097.pdf
[92] Venice Commission, CDL-AD(2010)040, op. cit., para. 26.
[93] Committee of Ministers of the Council of Europe, Recommendation (2000)19 on the Role of Public Prosecution in the Criminal Justice System, paras. 9-14-17-19-36
[94] Committee of Ministers of the Council of Europe, Recommendation (2000)19, op. cit., para. 10.
[95] Committee of Ministers of the Council of Europe, Recommendation (2000)19, op. cit., para. 13. See also, CCPE, Opinion No. 13(2018), op. cit., para. 36.
[96] CCPE, Opinion No. 13(2018), Independence, accountability and ethics of prosecutors, para. 36.
[97] Venice Commission, CDL-AD(2016)007, op. cit., E.1.d.ii.

matter. As a matter of fact, the Minister's right is always subject to control – either by the courts (instruction to prosecute) or by Parliament (instruction to suspend prosecution or abstain from prosecuting).

69. Even if the Minister could be held politically accountable, it would still be within his or her legal powers to issue instructions in individual cases for whatever reason, as the law do not limit the power of instruction to specific situations. As it currently stands, the safeguards against politically motivated prosecutions or non-prosecutions rests upon informal norms of self-limitation in the Dutch political culture. As reported above, the right to instruct is seldom used and has never been used to suspend or abstain from prosecuting since the entry into force of the law in 1999. Indeed, this practice reconfirms the existence of strong informal norms of self-limitation in the Dutch political and legal culture that supplement the formal norms. Whilst such informal norms supported by the transparency requirements in Article 128 of the Judicial Act may be effective under normal political conditions in the Netherlands, they do not render illegal politically motivated prosecutions or non-prosecutions. While the control operated by the courts can be considered a strong safeguard against politically motivated instructions to prosecute, the same is not necessarily true for the control operated by the Parliament on the instructions not to prosecute. As already mentioned, experience from other countries has shown that in a polarised political context, informal norms sustaining the rule of law offers little resistance against politicians determined to use their legal and constitutional powers to full capacity.[98]

70. The Venice Commission has previously remarked that there is a widespread tendency in Europe to make the prosecution service more independent from the executive rather than subordinating it to the executive.[99] The Venice Commission has emphasised that the "main element of such 'external' independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General".[100] In addition to this trend,[101] the Court of Justice of the European Union (hereinafter, the "CJEU") has in several decisions, notably in Case C-510/19 concerning the Netherlands, emphasised that for a prosecution service to qualify as an "issuing judicial authority" under the European Arrest Warrant framework, there must be in place formal guarantees against instructions from the executive.[102] The formal remit of this decision is limited to decisions under the European Arrest Warrant framework based upon the principle of mutual recognition and do not extend to the full range of prosecutorial activities. It is noteworthy that following the CJEU decisions on the European Arrest Warrant, other states that had rules of instruction similar to the Netherlands, have prohibited executive instructions to prosecute in individual cases (functional independence), while maintaining the prosecution service as a part of and hierarchically subordinate to the executive and subject to general instructions.[103]

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[98] For a discussion of the importance and effect of informal norms sustaining the rule of law and democracy, see Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda", *Perspectives on Politics.* 2004/2 (04), p. 725-740.

[99] Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, para. 27.

[100] Venice Commission, CDL-AD(2010)040, op. cit., para. 30.

[101] See also France, following the reform of 2013, the Minister of Justice cannot anymore give instructions in the individual cases. Venice Commission, CDL-AD(2023)015, France - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures, para. 47.

[102] See CJEU, C-510/19, paras. 44, 64, 69. See also C-508/18, C-509/18, Joined Cases C-566/19 and C-626/19, C625/129, and C-627/19.

[103] This is the case for Norway, where the 1981 Criminal Procedure Act was amended in 2019 following the CJEU decisions C-508/18 and C-509/18. A new provision was introduced saying that the prosecution service is independent in individual criminal cases and cannot be instructed in individual cases.

71. The Venice Commission and DG I acknowledge the importance of the existing culture of self-restraint in the Netherlands but nonetheless consider that the safeguards embedded in the law, in particular as regards the instructions not to prosecute, may not be strong enough in the event of a majority of a government in Parliament that frees itself from these rules of self-limitation. Rule of law safeguards should be there precisely to step in when the political, societal and legal culture change and unwritten rules are not valid anymore. The Venice Commission has previously cautioned against making individual cases of prosecution or non-prosecution subject to control and accountability by political bodies such as a minister or the parliament.[104] In its 2010 report on European standards as regards to the independence of the prosecution service, the Venice Commission stated: "The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role."[105] Even in recent opinions concerning well-established democracies, such as the 2023 opinion on France where there has been a strong culture of self-limitation by the executive power,[106] the Commission has taken the view that functional independence is to be preferred.

72. In light of the above, the Venice Commission and DG I recommend removing the Minister's power to give instructions not to prosecute in specific cases, or at least to limit this prerogative to clearly defined exceptional circumstances. In addition, if the system of confidential advisors mentioned by the Dutch authorities in their comments of 4 October 2023 deals with cases in which a prosecutor considers an instruction illegal or against his or her conscience, it is important that the rules that provide for adopting the relevant measures, such as allowing for the replacement of a prosecutor wishing to abstain from prosecuting a case, be formalised in statutory law.

### F. The double mandate of judges and members of parliament

73. In the Dutch system, with few exceptions, there is no legal incompatibility between the position of judge and of Member of either Chamber of Parliament. The exceptions include the judges of the Supreme Court,[107] the office of vice-president and member of the Council of State, the members of management boards[108] and the members of the Council for the Judiciary.[109]

74. In its report of 2013, GRECO stated that there had been some cases of members of the Senate still retaining their function of judge. However, the usual practice, confirmed also during the meetings with the authorities in the Hague, is that judges elected to the House of Representatives are put on special leave for the duration of their term. Against the background of separation of powers and independence of the judiciary, GRECO recommended a restriction on the simultaneous holding of the mentioned offices should be laid down in law.[110]

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[104] Venice Commission, CDL-AD(2016)007, op. cit., para. 91. CDL-AD(2021)032, Serbia – Opinion on the draft constitutional amendments on the judiciary and the Draft constitutional law for implementation of the constitutional amendments", para. 79; CDL-AD(2017)028, op. cit., paras. 91, 95 and 99; CDL-AD(2018)029, Georgia – Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on General Courts and on the provisions on the High Council of Justice in the existing organic Law on General courts, para. 19; CDL-AD(2022)020, Lebanon-Opinion on the Draft law on the independence of judicial courts, para. 38.

[105] Venice Commission, CDL-AD(2010)040, op. cit., para. 43.

[106] Venice Commission, CDL-AD(2023)015, op. cit., paras. 51 and 71.

[107] Article 57 of the Constitution.

[108] Article 8 of the Judicial Act. A member of the management board may not be a) a member of the States General.

[109] Article 84(7)(a) of the Judicial Act (Council for the Judiciary): The members may not also be a member of the States General.

[110] GRECO, 2013 Report, op. cit., para. 96.

75. The Dutch authorities replied that the Netherlands remain strongly convinced that judges should actively participate in society and that having secondary activities is a useful addition to the exercise of the judicial office. They added however that being an active judge and, at the same time, holding a seat in one of the two chambers of Parliament is generally regarded as incompatible by members of the judiciary and such a combination of functions is advised against in the guidelines and codes of conduct, drawn up by members of the judiciary, that list activities incompatible with the judicial office. The Dutch authorities also noted that the simultaneous exercise of judicial office and parliamentary functions has not been encountered in practice in recent years.[111]

76. It is recalled that under ECHR and the European Court's case-law, some of the major criteria by which judicial independence is determined are the existence of guarantees against outside pressure and whether the judiciary appears as independent and impartial.[112] The Venice Commission has stated that "judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges."[113]

77. Nevertheless, there are some countries as well, where judges may simultaneously hold a mandate of Parliament.[114] In Norway, only judges of the Supreme Court are prohibited from standing for election for parliament,[115] while judges from the courts of appeals and courts of first instance can stand for election to parliament. However, if elected, they will be given a leave of absence from the judiciary for the duration of the term. In Austria, this is the case for ordinary judges[116] with regard to mandates of the National or Federal Council, a state parliament or the European Parliament. However, for the duration of this term, they are to be decommissioned without remuneration.[117] The Constitution prohibits a double mandate for judges at the Supreme Court (in civil and criminal matters), the administrative courts of first instance, the Supreme Administrative Court and the Constitutional Court.[118]

78. The Venice Commission and DGI recommend to the Dutch authorities to introduce the obligation of judges to take special leave for the duration of the term. In their comments of 4 October 2023, the Dutch authorities informed the Commission that a draft legislation has been submitted providing for the incompatibility between the position of judge and of member of Parliament, national as well as European.[119] The Venice Commission welcomes this proposal.

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[111] GRECO, Compliance Report of the Fourth evaluation round, RC-IV (2015) 6E, June 2015, para. 36.
[112] See, in particular, ECtHR, *Campbell and Fell v. the United Kingdom*, 28 June 2014, applications n. 7819/77 and 7878/77, para. 78. See also Venice Commission, CDL-AD(2016)007, op. cit., para. 75
[113] Venice Commission, CDL-AD(2012)027, Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, para. 76f; CDL-AD(2010)004, op. cit., para. 62.
[114] Venice Commission, CDL-REF(2012)027, Possibility to simultaneously hold mandates at different levels of power - Comparative table.
[115] Article 62 of the Constitution of Norway.
[116] Courts of the *Länder* as well as the two federal administrative courts, see Article 134(5) of the Federal Constitutional Act of Austria.
[117] Section 79(1) of the Service Act for Judges and Public Prosecutors of Austria.
[118] For the Supreme Court and the administrative courts and the Supreme Administrative Court see Federal Constitutional Act, Article 92(2) and Article 134(5) respectively; for the Constitutional Court see Article 147(4).
[119] Kamerstukken II 2022/23, nr. 36243.

## IV. Conclusion

79. By letter of 2 June 2023 the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to give an opinion on the legal safeguards of judicial independence, notably from the executive power. This opinion does not try nor purport to carry out a thorough examination of the Dutch Judicial System in all its aspects, but only addresses the following aspects:

- the role of the Parliament in the appointment of the judges of the Supreme Court,
- the Council of State, the double mandate of state councillors and the disciplinary regime of its judicial members,
- the role of the Minister of Justice and Security with regards to the Council for the Judiciary and the court management boards, in terms of appointments of and disciplinary powers against the respective members, as well as to the Public Prosecution Service,
- the double mandate of judges and members of parliament.

80.The Venice Commission and DGI recall the finding that: "in general, the Venice Commission is of the opinion that the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law."[120]

81. The Venice Commission and DG I also welcome:

- that the possibility for the members of the State Council to sit in both divisions (Advisory and Administrative Jurisdiction) is de facto phasing out;
- the progress achieved to make the procedure for appointing court administrators more transparent and increase the influence of judges at all levels;
- the pending legislative proposal providing for the incompatibility between the position of judge and of member of Parliament, national as well as European.

82. The Venice Commission underlines that the present opinion addresses only the subjects listed above and that all other remarks should not be seen as an endorsement of what has not been commented upon.

83. The Dutch judicial system is built upon a combination of formal safeguards set out in the constitution and laws, and informal safeguards entrenched in the political culture and practice. The Venice Commission and DG I acknowledge that informal norms are crucial in sustaining the rule of law and states should strive to establish such informal norms and practices supporting the rule of law in their democratic and legal cultures. The existence of such norms accepted by all institutions is evidence of a strong culture for the rule of law in the Netherlands.

84. However, informal norms should not substitute formal safeguards altogether. In this opinion, the Venice Commission and DGI provide the Dutch authorities with proposals and advice concerning rule of law safeguards which should be integrated in the legislation mostly as a preventive measure to protect it against possible political threats to the independence of the institutions examined in the opinion, which may arise in the future if the current political, societal and legal culture happened to change.

85. The Venice Commission and DG I therefore recommend:

- reconsidering the transparency of the process by which the House of Representatives designates Supreme Court judges, as well as the process by which the Minister of Justice nominates members of the Council for the Judiciary;

[120] Venice Commission, CDL-AD(2021)031, op. cit., para. 32.

- aligning the position of councillors of the Administrative Jurisdiction Division of the Council of State to the position of other judges in disciplinary matters, and, as regards the possibility for the Vice-President to issue a written warning against a councillor, providing a remedy to an independent instance;
- integrating in statutory law both the new procedure for appointing court administrators, and the mechanisms (to be developed and implemented) to ensure a broader representation of all levels and types of courts in the Council for the Judiciary;
- defining in a more concrete and precise manner the concept of “unsuitability” and rephrasing the wording “serious suspicion” of unfitness required for the suspension or dismissal of a member of the Council for the Judiciary and of the court management boards by including reference to concrete elements of proof, as well as abolishing differences in treatment between judicial and non-judicial members in disciplinary matters;
- removing the Minister’s power to give instructions not to prosecute in specific cases, or at least to limit this prerogative to clearly defined exceptional circumstances. In addition, if the system of confidential advisors which the Dutch authorities mentioned in their comments of 4 October 2023 deals with cases in which a prosecutor considers an instruction illegal or against his or her conscience, it is important that the rules that provide for adopting the relevant measures, such as allowing for the replacement of a prosecutor wishing to abstain from prosecuting a case, be formalised in statutory law;
- introducing the obligation for judges that become members of the national or European Parliament to take special leave for the duration of the term.

86. The Venice Commission and DG I remain at the disposal of the Dutch authorities and the Parliamentary Assembly for further assistance in this matter.