

Katia Dubreuil
Chairwoman of the *Syndicat de la magistrature*

Céline Parisot
Chairwoman of the *Union syndicale des magistrats*

Ms. Věra Jourová
Values and Transparency Commissioner

Mr. Didier Reynders
Justice Commissioner

Commission Européenne
Rue de la Loi 130
1040 Bruxelles
BELGIUM

Paris, October 12, 2020

Re: serious violations of Judicial independence in France

Ms. Jourová, Values and Transparency Commissioner,
Mr. Reynders, Justice Commissioner,

We are bringing to your attention, in our capacity as representatives of the two main unions of French *magistrats* (judges and prosecutors), serious violations of the independence of the French judiciary and, more generally, of the Rule of Law. These took place in a highly sensitive criminal case, involving Mr. Nicolas Sarkozy, former President of the French republic, a high profile criminal defense lawyer, Mr. Thierry Herzog, who is a very close friend of the current Justice minister, Mr. Eric Dupond-Moretti, and a member of the parquet général of the French Cour de cassation, Mr. Gilbert Azibert.

I. Chronology of events

At the end of a long criminal investigation, the investigating judges in charge have, in an order dated March 26, 2018, ordered that Mssrs. Sarkozy, Herzog and Azibert be tried for corruption. The trial is due to take place at the Paris criminal court, 32nd panel, from November 23, 2020, onwards.

In substance, Mr. Nicolas Sarkozy, his attorney Mr. Thierry Herzog are charged with promising Mr. Gilbert Azibert that they would help him getting a position in Monaco in exchange for, among other things, information on a the so-called « Bettencourt » case, in which Mr. Sarkozy was involved, and

which was before the criminal panel of the Cour de cassation. The evidence consists mainly of wiretaps of a phone line used by the former President but opened under the false identity of « Paul Bismuth ».

As these investigations were proceeding, the investigators and the newly created national prosecutor's office for financial crimes (hereinafter: PNF) became convinced that a third party had warned the three suspects, and notably Mssrs. Herzog and Sarkozy, that their phone lines had been tapped. As part of the investigation into this third party, investigators have obtained the phone records (known as « *fadettes* » in French police jargon) of several attorneys known to be close to Mssrs. Herzog & Sarkozy, including Mr. Eric Dupond-Moretti, as well as those of a magistrat (judge or prosecutor). The source of the leak was never identified.

The existence of this second « *fadettes* » investigation was revealed by weekly magazine *Le Point* on June 24, 2020, with a deliberately misleading headline, suggesting that the phones of attorneys had been wiretapped. At that time, the investigation had already been closed.

https://www.lepoint.fr/politique/exclusif-affaire-bismuth-sarkozy-la-nouvelle-affaire-des-ecoutes-24-06-2020-2381670_20.php

The following day, in an interview with LCI TV station, Mr. Dupond-Moretti stated he wanted to file a criminal complaint and mentioned the « second-rate spy methods » (« *méthodes de barbouzes* ») of the PNF. On June 30, 2020, daily *Le Parisien* reported that Mr. Eric Dupond-Moretti had filed a criminal complaint alleging, among other things, criminal invasion of privacy.

On July 1, 2020, Ms Nicole Belloubet, Justice minister, announced she was ordering an investigation into the workings of the PNF (« *inspection de fonctionnement* »), in connection with the « *fadettes* » investigation, in order to evaluate whether the measures taken were « proportionate ».

Both our unions immediately criticized this end-run around procedural safeguards. Indeed, the Minister was using a type of investigation which can be used to evaluate how well a given department is working in order to lay the groundwork for disciplinary proceedings based on a judicial decision. We considered that this was illegal, as such an investigation could not be focused on only one investigation, since the Inspectorate do not have jurisdiction to evaluate investigative decisions taken by prosecutors, and that this was an intrusion into the core function of the judiciary. The Conseil d'Etat – France's highest administrative court, has ruled that such an investigation could not, in any way, give an opinion on a given decision by a judge or prosecutor (CE, 23 mars 2018, n° 406.066). The French Justice Inspectorate General (IGJ) is placed under the authority of the Justice minister.

On July 6, 2020, Mr. Eric Dupond-Moretti was named Justice minister by the President of the Republic, Mr. Emmanuel Macron, in lieu of Ms. Nicole Belloubet. The same day, Mr. Eric Dupond-Moretti announced he was « withdrawing » his complaint. Yet, under French law, such a « withdrawal » has no consequences on the prosecution.

On July 9, 2020, Ms. Nicole Belloubet, at a hearing of the parliamentary investigating commission on the obstacles to the independence of the judiciary, confirmed that if the Inspectorate found a breach of ethics rules, she would not fail to bring charges in front of the High Council of the Judiciary (*Conseil Supérieur de la Magistrature* – hereinafter CSM). In other words, the investigation was a disguised disciplinary investigation.

At the beginning of August, *Paris-Match* magazine (owned by the Lagardère group, whose supervisory board includes Mr. Nicolas Sarkozy) published a piece in which the reader found out that Mr. Eric Dupond-Moretti had spent part of his holidays with Mr. Thierry Herzog. Asked about Mr.

Dupond-Moretti, Mr. Herzog described him as his « *lifelong pal* ».

<https://www.parismatch.com/Actu/Politique/Exclusif-Eric-Dupond-Moretti-et-Isabelle-Boulay-vacances-amoureuses-sur-la-Cote-d-Azur-1697235>

The report of the Inspectorate General was forwarded to Mr. Eric Dupond-Moretti, who made it public on September 15, 2020.

It concluded that (pp. 6-7) :

« No interview, search, or measure involving coercion or deprivation of freedom was used in the investigation.

The reasons why said measures were necessary are laid out in investigative records (PV) that are both clear and based on facts. The way said records were drafted shows that the investigators took care not to excessively infringe upon the private life or the legal privilege (secret professionnel) of the owners of the phone lines used in the investigation.

The only information put in writing, with names of the individuals involved, was that useful to the investigation.

The articles of the code of criminal procedure regarding subpoenas sent to phone operators do not provide any protection for attorneys. »

The report observed that the investigation possibly lasted too long, and that the higher echelons may not have been informed in due time. Both of these problems are unfortunately, due to the chronic lack of resources of the French judicial system, common.

In spite of these conclusions, the minister announced, in a press release dated September 18, 2020 that an administrative investigation, preliminary to disciplinary proceedings, was being opened against two named PNF prosecutors who were still active (Mme Lovisa-Ulrika Delaunay-Weiss et M. Patrice Amar), as well as against the former head of the PNF (Ms Eliane Houlette), for possible breaches of the duties of diligence and loyalty, in the following terms: (<http://www.presse.justice.gouv.fr/communiqués-de-presse-10095/communiqués-de-2020-12975/communiqué-de-presse-33488.html>) :

« The report of the « inspection de fonctionnement » conducted by the IGJ has been examined by the directorate of judicial services.

After analysis, some of the facts mentioned in the report could be seen as breaches of the duty of diligence, of professional rigor, and loyalty.

Consequently, the IGJ is now in charge of an administrative investigation concerning both prosecutors of the PNF in charge of the case in dispute, Mr. Patrice Amar and Ms. Lovisa-Ulrika Delaunay-Weiss, as well as their supervisor at the time, Ms. Eliane Houlette, head of the PNF.

Reminders regarding administrative investigations

The Justice minister puts the IGJ in charge of administrative investigations, before potential disciplinary proceedings, regarding a department's deficiencies, or on the behavior of a magistrat or clerk. Investigations regarding the personal or professional behavior of magistrats can only be run by inspectors or inspector generals who are themselves magistrats.

The inspectorate must report, analyse, and provide legal categorization for those facts it believes could be ethical breaches. It does not have to determine whether it is appropriate to initiate disciplinary proceedings, which is the minister's exclusive prerogative. »(underlining added)

This press release directly affected the reputation of the magistrates designated therein. It is the first time that magistrates are cited, by name, in a press release relating to the initiation of an administrative (i.e. pre-disciplinary) investigation.

That very evening, the High Council of the Judiciary (CSM), which, since the targets are prosecutors, will give an opinion on what – if any – disciplinary sanction should be imposed (the final decision lies with the Justice minister, issued a press release in which, on the one hand, it expressed its surprise that the magistrates being targeted were cited by name, and, on the other hand, stated it would be « especially vigilant », regarding the independence of the judiciary. <http://www.conseil-superieur-magistrature.fr/actualites/communique-du-conseil-superieur-de-la-magistrature>

On October 12, after both our unions had stated they would not meet with the Minister until the conflict of interests had been dealt with, the Minister published on Facebook a video entitled « *Le Mur Des Nons* » (the « Wall of Nos »).

He stated, again, that he was not operating under a conflict of interests, made several false statements regarding the merits of the case (for instance « *the cellphones of twenty-odd attorneys have been searched* », when only the phone records covering a few days were concerned). He stated that, to answer our unions' « weaponizing » of a trumped-up case against him for political aims, because we did not fathom that one could call magistrates to account, and were creating a « diversion » to avoid addressing the real issues, he was withdrawing from the administrative investigations, to the benefit of the Prime Minister. He concluded: « *No one will have grounds not to show up here to work.* » <https://www.facebook.com/107048187789195/videos/383349399464386/>

II. Unprecedented violations of the independence of the judiciary, without any reaction from its constitutional guarantor, the President of the Republic

A. The Minister has a two conflicts of interests, affecting the independence of both prosecutors and judges.

The Minister threatens the independence of prosecutors in several ways. First, he is using his prerogatives as Justice minister to initiate an investigation by the IGJ, and the IGJ reports to him. Even though some of its members are *magistrats*, they do not enjoy legal protections allowing them to be really independent. This, no doubt, predates the arrival of Mr. Dupond-Moretti at the helm of the Ministry. However, the lack of protection becomes much more of an issue because of the blatant conflicts of interests affecting the Minister:

- he has filed a criminal complaint against prosecutors from the PNF, criticizing their « *two-bit spy methods* » (« méthodes de barbouzes ») arguing that his private life had been invaded (affaire « des fadettes ») ;
- he has a deep – and notorious – friendship with Mr. Herzog, one of the defendants in the case that is due to be tried in November (Sarkozy - Herzog – Azibert case).

Opening an investigation is clearly an appropriation by the Minister of his powers to influence the PNF and the outcome of a case in particular, in his own interest, and in the interest of his close friends.

On the other hand, Mr. Dupond-Moretti committed a major breach of the independence of prosecutors as he claims he can initiate disciplinary proceedings against prosecutors, in a case in which he is involved personally. Moreover, for disciplinary proceedings involving prosecutors, the High Council of the Judiciary (CSM) can only recommend a sanction (or a lack thereof), and only the Minister can decide, following articles 58 et 59-1 of *Ordonnance* n° 58-1270 from December 22 , 1958 (as

modified). Over the last few years, the Justice minister has systematically followed the CSM's recommendations, but this is merely practice, and the Minister is not bound by it.

The highest-ranking French magistrates were not fooled.

Indeed, Mr. François Molins, Prosecutor General of the Cour de cassation, and Ms. Chantal Arens, Chief Justice of said Cour de cassation have issued several statements, including a common op-ed published in Le Monde on September 28, 2020, denouncing these threats against the independence of the Judiciary, as well as the Minister's many derogatory comments directed at French *magistrats*.

For a foreign viewpoint, see, inter alia: <https://www.letemps.ch/economie/attaques-serie-contre-parquet-national-financier-francais>

This situation also creates a risk for the independence of sitting judges, because of the lack of legal protections under French law.

Indeed, with the rare exception of positions for which the High Council of the Judiciary (CSM) has a power of appointment (chief judge of a court, for instance), only the Minister can appoint a candidate to a position, in application of articles 27-1 et 28 of the aforementioned *ordonnance*. The CSM can refuse such a nomination, but no sitting judge can obtain a position without the ministry's – and, in the last instance, the Minister's – agreement.

In both cases, these are major threats to the Rule of Law, because the Minister has taken position in a case that concerns him directly and enjoys, because of the peculiarities of French law, considerable means of action – and intimidation.

The High Authority for the Transparency of Public Life is also questioning whether the Justice Minister is under a conflict of interests : https://www.lemonde.fr/societe/article/2020/10/08/la-hatvp-a-demande-des-precisions-a-dupond-moretti-sur-de-possibles-conflits-d-interets_6055283_3224.html

The Minister had a way to overcome these conflict of interests, if he had acknowledged them. Indeed, the conflict of interests of ministers are dealt with by article 2-1 of decree n°59-178 of January 22, 1959 (modified) dealing with the ministers' duties and powers: « *a minister who thinks he or she is affected by a conflict of interests informs the Prime Minister in writing, stating the issues as to which he or she thinks he or she cannot exercise his duties and powers. A decree sets forth, as a result, the powers exercised by the Prime Minister in lieu of the affected minister. Said minister refrains from giving instructions to administrative departments placed under his authority, which will receive instructions directly from the Prime Minister.* ».

The fact that the Minister announced yesterday he was « withdrawing » [from the investigation] shows that there is, indeed, a conflict of interests. The Minister keeps denying there is one, using very strong terms against the *magistrats*, whom he is accusing of « weaponizing » the case for political ends.

It is not known what exactly the Minister is « withdrawing » from. Only the decision regarding the administrative investigation appears to be covered, and not the decisions concerning nominations to the PNF. Nevertheless, the initial decision to open an investigation against three PNF prosecutors was taken by a minister operating under a conflict of interests. It will keep a pall of intimidation over those magistrates who will be prosecuting the case during the November trial.

The Minister's refusal to acknowledge the initial conflict of interests, the accusation of all magistrates who have criticized this situation of « weaponizing » the case for political ends, to wit our unions, the Chief Justice and Prosecutor General of the Cour de cassation, and all of those who have massively voted motions in the courts – is supported by the Government. Under these conditions, the « withdrawal » and the Prime Minister's stepping in is no solution to the institutional crisis and to the threat to the independence of the Judiciary.

B. The lack of action of the constitutional guarantor of the independence of the Judiciary in France: the President of the Republic

Faced with such a shocking situation, by letter dated September 18, 2020, we have called upon the President of the Republic to take position.

Magistrats from all over France have supported us, voting 105 motions during Extraordinary General Meetings organized, under the applicable law.

Indeed, the President of the Republic is, under article 64, al. 1, of the Constitution, « *the guarantor of the independence of the Judicial Authority* ».

Thus, we have attempted to follow the logic of the French institutions. This was done in vain.

Indeed, when we had an appointment with Ms. H el ene Davo, advisor on Justice issues to Mr. Emmanuel Macron, she stated Mr. Macron supported his Minister and had full confidence in him, despite the blatant violations of the Rule of Law highlighted above.

The French institutional system is thus powerless to put an end to the unprecedented attacks on the Rule of Law we are highlighting.

Moreover, Mr. Emmanuel Macron had stated during the campaign for the Presidential elections and upon taking power, that he would change the rules governing the career of prosecutors. France has told the GRECO that this reform is still in progress – even though it has been blocked for several years.

This reform would have given jurisdiction over disciplinary proceedings against prosecutors to the CSM, taking such power away from the Ministry. It would, however, not have given to the CSM the power to appoint judges or prosecutors.

At any rate, this reform – the vote of which is not yet scheduled – would not solve the institutional problem completely. Nominations would stay completely dependant upon the Justice minister. Moreover, the IGJ would remain under the authority of the executive branch, while the GRECO recommends that it be placed under the authority of the CSM.

III. The broader context, and the need for the Commission's intervention

This lack of action from the constitutional guarantor of the independence of the Judiciary raises questions, in the broader context showing political proximity between people close to Mr. Emmanuel Macron and people close to Mr. Nicolas Sarkozy.

https://www.lemonde.fr/politique/article/2018/12/11/sarkozy-conseiller-de-l-ombre-de-macron_5396008_823448.html ; https://www.lemonde.fr/politique/article/2019/11/16/emmanuel-macron-et-nicolas-sarkozy-une-proximite-assumee_6019415_823448.html ; https://www.lemonde.fr/politique/article/2020/10/10/emmanuel-macron-et-nicolas-sarkozy-partenaires-particuliers_6055546_823448.html

By way of example, Mr. Jean Castex, who became Prime Minister on the same day that Mr. Dupond-

Moretti became Justice minister, was then-President Nicolas Sarkozy's Deputy Chief of Staff (secrétaire général adjoint).

Moreover, this is not the first time during Mr. Macron's presidency that a *magistrat* is targeted by a disciplinary investigation because of actions that have displeased the executive branch. This was the case for Mr. Eric Alt, *magistrat*, and vice-president of anti-corruption NGO « Anticor », which was the target of a disciplinary investigation following said NGO's filing of a criminal complaint against Mr. Richard Ferrand, chairman of the Assemblée Nationale and close to Mr. Emmanuel Macron. This administrative investigation lasted almost a year, and yielded no disciplinary action, after both magistrates and civil society actors mobilized themselves.

https://www.lemonde.fr/idees/article/2019/12/13/l-enquete-qui-vise-eric-alt-opere-un-retour-a-une-vision-perimee-du-role-du-magistrat_6022705_3232.html

Faced with such systemic breaches of the Rule of Law, we can only call upon European institutions which have demonstrated the will to enforce the rules and values essential to Europe, starting with the independence of the Judiciary.

The fact that these breaches take place in France, one of the founding members of the European Community and the European Union, only makes them more serious.

We, therefore, wish that the European Commission ensures that, first, France put in place all necessary safeguards to put an end to conflicts of interests in ongoing cases before the courts, and, second, that the reforms necessary to protect the independence of the Judiciary are finally enacted.

We remain at your disposal and are confident in your willingness to enforce European principles.

Respectfully yours,

Céline Parisot



Katia Dubreuil

