

**REVIEW OF THE EULEX KOSOVO MISSION'S  
IMPLEMENTATION OF THE MANDATE  
WITH A PARTICULAR FOCUS ON  
THE HANDLING OF THE RECENT ALLEGATIONS**

Report to the attention of  
High Representative / Vice President of the European Commission,  
Ms Federica Mogherini

31 March 2015

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HIGH REPRESENTATIVE

VICE PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 21 NOV. 2014  
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Mr Jean Paul Jacqué  
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Following the announcement of your appointment on 10 November, I would like to first of all thank you for lending your expertise to this review.

The recent publications in the press have the potential to seriously undermine the credibility of our efforts to strengthen the rule of law in the region. Since my first day in office, the handling of these allegations has therefore been a priority for me and my team.

Your review is to look at the Mission's mandate implementation, with a particular focus on the handling of the recent allegations. It is my understanding though that the review will not be in a position or should not be seen as substituting, or duplicating, the ongoing disciplinary or criminal proceedings. The latter proceedings remain a priority. Their effective handling is instrumental to our credibility.

An assessment of the overall handling will however require from you to acquaint yourself, to the extent possible, with the substance of the allegations.

I have therefore asked my services to lend you all the necessary assistance for your review to proceed unimpeded. We have also informed the recently deployed new Head of Mission, who very much welcomes the review. Your conclusions will doubtlessly assist him in taking forward the mandate implementation and a robust handling of the allegations.

You will find enclosed for further reference the terms of reference for your assignment.


I would recommend that the written report be designed to allow for public release towards the end of March. Your findings and recommendations will also inform a revision of the mandate and the design of the Mission, as appropriate.

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I suggest that you remain in contact with my services for a mid-term assessment after the New Year, which may entail an initial briefing to some stakeholders, including selected Members of the European Parliament.

Yours sincerely,



Federica Mogherini

Draft Terms of Reference

EULEX Kosovo Review

- The review will address the mandate implementation of EULEX Kosovo, with a particular focus on the Mission's handling of the recent allegations published in the press.
- The review will entail an analysis of the broader response provided over time by the Mission to these allegations. The review will in particular consider the administrative steps taken by the Mission to ensure that the allegations have been effectively and timely handled.
- The review will in particular focus on the response by the executive division and its prosecutorial arm, including the respect of the privileges and immunities enjoyed by EULEX Kosovo. The review will also assess the judicial executive mandate and its sustainability in this respect.
- The review may not substitute or duplicate disciplinary or criminal proceedings.
- The review will also consider whether appropriate treatment and protection, if applicable, of the person(s) involved was provided.
- The review will be largely conducted in Kosovo with duty trips to Brussels. The expert will be hosted in the EULEX Kosovo Headquarters and within EEAS premises, as and when required. During the stay in Kosovo, all logistics will be provided by EULEX Kosovo.
- The review will be conducted over a period of 40 days to be completed within 3 months of the launch of the assignment;
- The review will be concluded with a public report to be presented to the High Representative with recommendations.
- Adequate arrangements will be devised for the access and handling of classified information.

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## EXECUTIVE SUMMARY

Having spent four months carrying out on-site investigation and reviewing evidence, and having conducted more than 40 interviews with all of the people involved, I have arrived at the following conclusions:

### Regarding the handling of the case

1. It is a fact that [REDACTED] submitted a report to the EULEX Mission authorities via her superiors in June 2012, to which were attached transcripts of a prisoner's tapped telephone conversations revealing that that prisoner wished to have or had had contact with judges and prosecutors in order to arrange for his release and acquittal. These transcripts did not contain any references to money being paid.
2. [REDACTED] could therefore be considered an internal whistleblower and should not have been subject to prejudice on the basis of her actions.
3. The Head of Mission (HoM) and Deputy Head of Mission (DHoM) at the time did not consider that these documents necessitated an internal investigation, because the report and especially the cover note expressed doubts about whether the documents actually reflected reality, and their experience in intelligence led them to the same conclusion. It was not possible to establish whether they made a report to Brussels.
4. In March 2013, new information was gathered by the Mission intelligence services concerning the same corruption allegations; the HoM decided, in agreement with the Commander in Civilian Operations Commander (CivOpsCdr), to task a special group with carrying out an investigation under the authority of the Head of Executive Office [REDACTED] of the Mission.
5. No one other than those mentioned above and the members of the investigation group was informed, either in Priština or Brussels.
6. The preliminary investigation group concluded their report by stating that it had not found any evidence to support the allegations, but that the local intermediaries and lawyers should be prosecuted.
7. The HoM and the CivOpsCdr made a joint decision to appoint a special prosecutor, by way of derogation from the Operational Plan (OPLAN), and to assign this prosecutor to a mixed joint investigation team with a Kosovar prosecutor. Only the people directly involved were informed.
8. The special prosecutor was recruited on the basis of ability and began work.

9. Following the departure of the CivOpsCdr, neither the Acting CivOpsCdr nor the successor to the post were informed of this operation.
10. When rumours began to circulate in the press, the Acting CivOpsCdr was questioned by the [REDACTED] and was able to reply in good faith that no investigation was in progress even though a short time later a request to waive immunity was submitted.
11. Arrangements were made to enable this request to be partially satisfied, only for the needs of the investigation.
12. Questions were asked about the procedure that was followed in this case and about its legality. Contrary to certain allegations, the decision was made to support the investigation unequivocally.
13. It was then that the press made the case public, partly on the basis of documents written by [REDACTED] (see below).
14. To prevent any further surprises as a result of political developments relating to the case, the CPCC made an agreement with the prosecutor that he would inform the CPCC of the possible repercussions of political events, without giving any information about the substance of the case. It would be up to the prosecutor to judge what information he could give in order to preserve judicial independence.
15. The prosecutor confirmed that he had not been put under pressure to close the case. He indicated that he had encountered administrative issues which, following the investigation, appeared to have been the usual administrative issues relating to the staff changes and recruitment.
16. In conclusion, an investigation should have been opened at the outset. This would have prevented the issues that later arose in connection with the use of secret and special procedures, which fuelled suspicions of a cover up that fortunately turned out to be unfounded. Communication between Priština and Brussels and within the CPCC was particularly poor. While it was not necessary to pass on details of the case that were subject to investigative secrecy, the knowledge that there in fact was a case would have prevented misunderstandings and allowed for efficient communication when the press made its revelations. I think that standard procedures should have been followed from the outset in this case, which would have prevented the problems described above.



Regarding the treatment of [REDACTED]

1. As an internal whistleblower, [REDACTED] should not have been subject to any internal prejudice, a fact which was confirmed to her by the HoM.
2. All her allegations were the subject of an internal investigation when they were submitted to the administration.
3. The two disciplinary procedures opened against her were based on established facts and were justified. One of them resulted in the least serious punishment possible (a verbal warning), while the other was closed.
4. [REDACTED] complaints stemmed from the fact that she wanted to connect the assessment of her corruption allegations with the disciplinary investigations.
5. No cases were taken away from her and no cases were blocked. The case she mentions (the triple murder case) was a local case, not a EULEX case, and proceedings were coming to an end. There were reasonable grounds for simply letting the case run its course, even if it could be argued otherwise. It is understandable that [REDACTED] convinced of the innocence of one of the accused, wanted to reopen the case. Everyone knows that the outcome of a trial is not the truth but judicial truth, which is a very different thing, and it is to [REDACTED] credit that she did not wish to accept that.
6. The information she presented in order to have the cases reopened had been examined during the procedure by the judges, who did not find it probative. The same applied to the intercepts contained in her report.
7. The existence of a conspiracy against her by a group of colleagues is based on no other evidence other the fact that certain colleagues socialised together, and is the product of rumour, some of which is inaccurate.
8. It is, however, true that she did not have a good relationship with her superior, that all efforts were not made to make her feel comfortable in her job, and that she could reasonably have felt sidelined.
9. Her allegations that incompetent prosecutors had been recruited in the past did not hold up when the files of the people concerned were examined, and were aimed at people who were going to be her direct competitors in the upcoming competition.

10. She was not fired from her job, but did not pass an open recruitment competition following the decision to reduce the number of seconded prosecutors. An appraisal of the composition of the board and the questions asked did not reveal that she had been discriminated against. Even though she was probably not feeling the kind of confidence required to put in an exceptional performance, the simplicity of the questions should have allowed her, given her level of experience, to distinguish herself without difficulty.
11. Her suspension was not, contrary to what she believes, a disciplinary penalty, but a preventative measure which was intended to prevent further leaks in the press and was justified by the fact that, even though she was not responsible for the leaks, the documents used as the basis for the articles had been written by her.
12. Under current EU law, she cannot be considered an external whistleblower.

It is the nature of an executive summary to be succinct and to avoid nuance. All the questions set out above are dealt with in more detail further on in this report.

## RECOMMENDATIONS

### On the functioning of the executive branch

Insofar as an executive branch is maintained, in some form or another, it is advised to:

1. Take care that when recruiting its members it provides for sufficiently long terms of office to ensure the uninterrupted management of cases and to accelerate replacement procedures in order to provide greater continuity.
2. Make a personal handover mandatory at the end of each posting.
3. Produce guidelines clarifying the responsibilities of seconded staff as regards the contributing State and the Mission, respectively.
4. Develop a shared sense of belonging by developing common rules of ethics.
5. Harmonise as far as possible the remuneration levels of contracted and seconded staff members.
6. Strengthen hierarchical control over performance and results by meticulously monitoring statistics at both Mission and CPCC level, in order to ensure the targets are achieved and to introduce new practices to improve results.

7. Delegate control over disciplinary measures to an independent external body composed of high-level judges with the power to investigate and impose penalties.

### **On the functioning of the Mission**

1. The rules on registering documents should be strictly adhered to.
2. In addition to an undertaking to preserve confidentiality, it would be worthwhile to further raise staff's awareness of security issues and to ensure that information is only communicated on a 'need-to-know' basis. That policy is already in place, but it needs to be implemented more effectively.
3. Any allegation of corruption, regardless of any prior judgments that might be made as to its reliability, must be subject to an internal investigation and a reasoned decision.
4. If the alleged facts appear to be serious and the allegations sufficiently substantiated, the person concerned should be suspended on full pay at least until the end of the internal inquiry.
5. In future, ad hoc solutions whose only effect is to make the chosen course of action seem suspect should be avoided.
6. As regards the procedure followed in the case in question and even if there are doubts about the legality of the procedure followed, the only possible course of action is to see it through to the end by providing all possible support and by extending the involvement of the EULEX prosecutor in charge of the case, if he so wishes, until the proceedings are at an end.
7. It would be advisable to establish, along with the Mission, the principles of a communication strategy based on the greatest possible transparency with the media; those principles should be determined in cooperation with Brussels, thereby ensuring a consistent approach and enabling the European Parliament and the Member States – via the working parties concerned – to be informed in a timely manner. This does not mean that all communication should be subject to approval or micro-management but that action should be based on a general set of shared guidelines.
8. The Mission must make an effort to establish relationships of trust with the local press with a view to cooperation, while respecting each individual's specific obligations.

9. When a Head of Mission or high-ranking CPCC staff member leaves, it is vital, and makes good sense, for all important information to be passed on directly and in its entirety by the outgoing to the incoming manager. If that had been the case, the allegations of a cover up would have been avoided.
10. In the future, during selection procedures the rules on professional experience should be more rigorously applied, as directed. In addition, during the selection of board members the appointment of individuals who are too close to the candidates professionally should be avoided. In that way, the boards' independence would be assured and the risk of the kind of criticism experienced in this case would be limited.

#### **On the future of the Mission executive**

1. It is up to the authorities to decide what will become of the Mission, bearing in mind that in its current state Kosovo's judicial system still does not seem capable of meeting the challenges of corruption and the organised crime associated with it.
2. The continued presence of EULEX is only feasible if comprehensive reforms are made to improve its effectiveness and thus its credibility. There is no point staying just to keep doing the same thing.
3. If the executive branch is in fact eliminated, a number of ongoing proceedings are in danger of being lost and forgotten. It is important to set up a mechanism for evaluating and monitoring these cases.
4. In any case, a specific type of greatly reinforced MMA (Monitoring, Mentoring and Advising) should be put in place for local prosecutors and judges.

## I. INTRODUCTION

The aim of this report is to cast a critical eye over the way in which the EULEX Mission and the EEAS authorities have managed the situation which arose from allegations of possible corruption among members of its executive branch (judge and prosecutor), allegations which became public following appearances in the media by another prosecutor, [REDACTED], who believed she had been victimised because she was the one behind these allegations. The report therefore addresses two subjects: on the one hand, the way in which the allegations were followed up; on the other hand, the treatment of the person who made them. The mandate I was given nevertheless has a limit, since the investigation may not include facts relating to ongoing judicial proceedings. The line is a very narrow one. While it is not up to me to assess the veracity of the allegations of corruption, I have occasionally been led to question their plausibility *prima facie*, because if they are not plausible, management cannot be reproached for its possible failure to react to them.

First of all, I would like to make two vital comments. The first relates to the consequences of these allegations for the people concerned. If the allegations are false, considerable damage has been done to the reputation of judges for whom honour is a fundamental quality. They will always carry the stain of corruption in some people's eyes. If proceedings are not initiated, the Union should help to compensate for this damage by affording widespread publicity to their innocence. And even if these people are ordered to appear before a judge, the presumption of innocence will have largely been compromised. On the other hand, if [REDACTED] allegations regarding the treatment she suffered are true, she will have been treated contemptibly. At the institutional level, this case has done considerable harm to the EULEX Mission. Set up to safeguard the rule of law, it has been accused of undermining that rule of law. Its credibility has been damaged to the point that its actions will henceforth often be tainted with suspicion and every decision to convict or not to convict will risk being criticised on the basis of possible corruption. Perhaps this situation has even been knowingly exploited by those who wish it to leave. It is regrettable that respect for the rule of law itself makes it difficult for the Mission to defend itself because the details of a judicial investigation cannot be revealed to the public before a decision is made on indictment, and the independence of the judiciary means that the Mission authorities do not know the details of the investigation in any case. As far as I am concerned, having met the prosecutor in charge of the case on several occasions to discuss the circumstances in which the investigation was opened, no substantive element of the dossier has been made known to me and, within the limits of my assignment, I have never sought to gain such information. Under these conditions, how can the Mission respond to the press except to say that a judicial investigation is under way? A response which I fully understand is not sufficient for investigative journalists or for the public. But that is the price of the rule of law.

In order to successfully complete the investigation, I used as a basis [REDACTED] numerous public declarations, complaints and documents, as well as the comments published in the media. I then examined all of the documents, reports, exchanges of correspondence, and emails exchanged within the Mission and between the Mission and the CPCC. I encountered no obstacles in doing so. All the documents I requested were made available to me and many were provided without my asking for them. I would like to thank all the members of staff at the Mission and in Brussels who offered their valuable assistance. Finally, a number of interviews were carried out both in Brussels and in Priština, to which I made three visits. I also wished to meet some members of the press to better understand their view of the situation. Even if their articles have been critical towards EULEX, the activities of the press are essential and constitute one of the challenges to established authority that are vital to a democratic system. Whatever the conclusions of this report, the vast majority of those belonging to EULEX or the EEAS, regardless of their position in the hierarchy, are aware of the importance of their mission and try to fulfil it to the best of their ability. They are the first to suffer the consequences of cases for which only a handful of them are responsible.

The interviews were conducted in person in the vast majority of cases, but some could only be carried out over Skype because the person concerned was posted on another continent. I met almost all the people involved, or who could or should have been involved, in the case in one capacity or another (more than 30 people). The established rule was that the interviews would remain confidential and that statements would not be attributed to the person who made them without that person's permission. The aim of the interviews was to establish the facts and not to investigate individual behaviour so as to safeguard the rights of the people questioned should they be called to testify in the ongoing criminal investigation. In the report, only those individuals known to the public as a result of their position of authority are referred to by name; the others are mentioned anonymously.

The person who made the allegations, [REDACTED] was only interviewed towards the end of the process because I already had significant material produced by her and it was essential to analyse that in relation to the viewpoint of the other people concerned before coming back to her. Before being interviewed, [REDACTED] wanted to be provided with all the documents I had, which was not possible given that, on the one hand, all of the people involved had been assured of confidentiality and, on the other, some of the documents had come from the EEAS and I could not make them available to third parties. The meeting took place in the presence of two of [REDACTED] lawyers because she had brought legal action regarding the treatment she considered she had received. A day and a half had been set aside, but the meeting was concluded after half a day. I said that I would be available the following day should [REDACTED] consider that a further meeting was necessary. I thank [REDACTED] and her advisers sincerely for their statements as well as for the professionalism they had demonstrated at the meeting.

This report is a synthesis of all of the collected information. I have tried as far as possible to distinguish the facts, insofar as I have been able to establish them in the context of an investigation which was not a judicial process, to provide an assessment and, wherever appropriate, to add applicable recommendations either to the current Mission or to a new mission of this kind if it is decided to establish one.

Finally, I would like to thank [REDACTED], who has assisted me over these four months and without whom it would have been difficult for me to organise all of the investigations that led to this report.

## II. GENERAL CONTEXT

During the investigation, I was able to make a number of practical observations of varying interest. They seemed to me worth recounting, in the hope that some of them may be useful to the authorities in both Priština and Brussels.

### 2.1. The rule of law, the fight against corruption and organised crime

This report is in no way intended to analyse the presence of EULEX in Kosovo in general. An historical overview is provided in Annex 1. Nevertheless, it is not irrelevant to our purpose to examine the Mission's Executive tasks and draw conclusions from what has been observed. The Mission's goal is to bring about "sustainable progress towards a transparent and accountable multi-ethnic justice system, police service and customs service, with clearly defined roles and free from any political interference, operating within a sound legal framework and in close coordination and cooperation with all relevant actors, in accordance with international standards and practices, and with the capacity to constantly deliver an effective service responsive to the needs of society, without international intervention or substitution. Kosovo institutions engaged in broader field of law conform to accepted European standards." (*Strategic Review of EULEX Kosovo mission*, 30 January 2014, EEAS 00115/14).

These objectives are ambitious and, judging by the European Commission's work on the rule of law and corruption, are not always achieved in every aspect by every Member State of the European Union. Based on the above-mentioned goals, EULEX has many long years ahead of it on the ground in Kosovo.

The Executive Division's most delicate tasks have related to fighting corruption and organised crime – putting punishment for war crimes to one side, as we have not been able to make any observations in that area. A common set of observations apply to both corruption and organised crime. In the complete absence of any respect for the rule of law in Kosovo over the years, crimes of this type have abounded. The situation has remained deeply worrying since the Mission began. Corruption is omnipresent. In 2012, Kosovo was ranked 105th of 175 countries in Transparency International's Corruption Perceptions Index (the further down the list, the worse the corruption). In 2014, it fell to joint 110th place with Albania, between Ethiopia and Côte d'Ivoire. The significance of these figures should not be exaggerated since they do not measure corruption itself, but the perception of corruption. The figures therefore indicate that the population's perception on this point, whatever the results achieved by EULEX, has not improved. All the more cause for concern is the fact that when the Mission was set up, unwise statements were made to the effect that corruption would now be brought to an end and the "big fish" arrested. Yet politics moves at a faster pace than judicial work, which insists on proof, adversarial argument and the presumption of innocence. Time is therefore needed to establish and judge a case of corruption, especially



when it has political ramifications. Public opinion is keen to see a swift improvement in the situation. The necessarily protracted nature of the judicial process could not but fuel scepticism in public opinion and the events leading to this report have increased that scepticism dramatically, not least because those seeking the Mission's departure seem to have used them to their own political ends.

With corruption omnipresent, the judicial sector is not excluded. This culture of corruption is an important argument for the defence in criminal trials and, according to several judges it is common practice for the alleged corruption of judges or prosecutors to be mentioned in court. Evidence has also been given that certain lawyers have obtained large sums of money from their clients on the pretext of bribing judges, but have kept this money for themselves. These arguments are repeated over and over again given the number of avenues of appeal that the legislation offers against a conviction, and the repetition helps to maintain the perception of an utterly corrupt justice system in the eyes of the public.

## **2.2 Issues related to the exercise of justice by EULEX**

Although some progress has been made, the Executive Division faces a number of challenges.

- Some problems stem from the very nature of the Mission, which consists in entrusting the execution of justice to prosecutors and judges from outside Kosovo, who come from a variety of Member States. While soldiers and gendarmes are used to foreign missions and often benefit from appropriate training before they leave, this is not the case for members of the legal professions. Moreover, justice cannot be dispensed without taking account of the local culture, and Kosovar society has certain specific features which must be born in mind or the work of the judiciary will not be understood. In the absence of training prior to being posted, they all bring their own traditions and ethics with them. While the purpose is to uphold the highest European standards, those words are meaningless inasmuch as standards differ between Member States, although minimum rules have been established by consensus. While some consider informal working meetings between judges and prosecutors standard practice, others feel they fly in the face of due process. While a prosecutor meeting a defendant without his or her lawyer being present is seen as a possibility by some, it is taboo for others. The only applicable rules are the OPLAN Code of Conduct and Kosovar legislation, which are very general. It might have been useful to draw up ethical guidelines applicable to all those who were to form the basis of a shared culture, but also to prevent the lawyers and their clients from feeling disorientated by different practices. Work had been started on this, but abandoned.

- Another issue is linked to the short duration of postings: between two and three years, and occasionally one year. The average length of a judge's or prosecutor's posting is around three and a half years, given that the term can be extended by several months when it appears vital to the progress of a case. In these conditions, repeated and continuous training is costly. In addition, cases slow down considerably given the time required to understand the local circumstances and become familiar with the dossiers, especially in view of the fact that given the delays involved in finding a replacement it is not always possible for outgoing staff members to hand over dossiers to their successors in person. Several investigators have highlighted the difficulties involved in starting an investigation and then abandoning it partway through because their posting has ended. Added to this is the fact that when an outgoing staff member is replaced there is often a period during which the post is vacant. The short terms of office also mean that they are often attractive to young people starting out in their career rather than to experienced professionals. Several interviewees suggested a longer term of office with a possible probationary period of one year.
- One inevitable source of problems for this type of Mission is the difference between staff contracted by the Mission and staff seconded by Member States. In financial terms, the variation in salaries among countries of origin creates paradoxical situations whereby a member of staff of one nationality may be paid more than his or her superior of another nationality. Politically, seconded staff always feel bound to their country of origin. In the event of a conflict within the Mission, this can lead to their attempting to resort to outside diplomacy to settle matters in their favour. This is exacerbated by the fact that they feel their home country's opinion weighs more heavily than that of the Mission in terms of their career prospects. These staff may experience a conflict between the obligations they have to their country of origin, which is their employer, and their loyalty to EULEX, to which they are officially posted. Seconded staff are organised in national contingents, and contingent leaders – or even the whole contingent – meet regularly with their diplomatic mission. In this case, regardless of the care that is taken to preserve confidentiality with regard to the activities carried out at EULEX, it is inevitable that information will be exchanged on such occasions that could be a source of leaks. It is not my intention to criticise this situation. The State of secondment has a duty of care to these people whose work connects them with it, and it is normal to ensure their well-being and to exchange information with them. The OPLAN attempts to establish a balance between the fact that seconded staff remain under the full command of the contributing State and the fact that they act solely in the interests of the Mission. It would be of some use if guidelines were to be drawn up to explain how this balance can be maintained in carrying out daily tasks.

- Professionally, careers in the judiciary carry a duty of independence. However, this independence does not apply in the same way in all circumstances, particularly in the departments responsible for prosecutions. One gains the impression from the interviews conducted in the Mission that some prosecutors see the cases they are assigned to as their personal property, to the extent that any intervention by a superior is seen as interference in their handling of the case. As a former deputy Head of Mission told us, 'The failure to delimit the limit of this independence was in my view the deep flaw in the whole concept of the Mission. In practice, many of the Justice component interpreted it as a licence to be a "law unto themselves".' Despite attempts to improve the situation, it appears that there is no real team of prosecutors, or prosecution service (what the French would call a 'parquet'), but merely a collection of individuals. The progress made towards fostering genuine team spirit is nowhere near fully achieving the desired outcome as yet, and the case of ██████████, a clear example of a prosecutor who – rightly or wrongly – distrusts the entire hierarchy.
- Oversight is poor. At the beginning, no real statistics were kept on judicial work, which doubtless hindered the development of a working culture rooted in strict standards, akin to that found in many Member States and international courts. It was therefore difficult to assess whether the Mission was achieving its goals. After such statistics became available, revealing low levels of performance, no-one really paid serious attention to them. Here again, this encouraged the judges to behave as if they belonged to an entirely separate entity from the rest of the Mission. As one person well placed to see the system in operation commented: "There was a lack of management oversight or interest by EULEX in judges' activities over and above reaching and publishing verdicts. EULEX senior management showed absolutely no interest in developing any management reporting structures that could quantify and track how effectively the unit was executing its mandated tasks." However, statistics are vital to evaluating the burden placed on the system and particularly the backlog, especially in the framework of Kosovo's National Strategy for Reduction of Backlog. This situation can be compared *mutatis mutandis* with that at the European Court of Human Rights or the Court of Justice of the European Union, where taking serious notice of statistics allowed internal measures to be implemented that considerably improved performance and, in particular, cut the time taken to reach judgments. While it is important that justice be done, it is crucial that it be done promptly, to raise the status of the rule of law in citizens' eyes. While the judicial work in Kosovo is by no means the same as that carried out by the two European Courts, there is no reason why a parallel path should not be followed as far as possible. Primarily, this would not entail measuring the individual activity of judges and prosecutors, rather gaining an overview of the efficiency of the system and seeking ways to improve it.

- As a result of this particular understanding of independence, confidence in the Mission authorities is not particularly high, except when the division senses it is under attack from outside and needs to be defended, as in the present case. The Mission, for its part, feels its hands are tied to some extent and is not equipped to manage problems such as those it faces following [REDACTED] allegations. Torn between pressure from the judiciary and requests for information from the Member States, it has found it hard to strike the right balance. For that reason, some problems related to judges' or prosecutors' conduct should be referred to an independent external body. Many Member States give responsibility for discipline in the judiciary to a specific authority, such as a 'council of the judiciary'. This does not mean that the international judges and prosecutors working for EULEX should be put in charge of managing their own disciplinary matters, but rather that a supreme council of the judiciary should be set up, consisting of judges external to the Mission – for example, two Judges of the Court of Justice and one Judge of the European Court of Human Rights. That authority would be responsible for disciplinary matters involving judges and prosecutors. Having such a body in place would have avoided the current saga and the suspicion that either EULEX or Brussels is involved in a cover-up.

### **Conclusions and recommendations**

**If the Executive Division remains in place, the following measures are proposed:**

- 1. Ensure that, when recruiting staff for the judiciary, their terms of office are long enough to allow for continuity in the management of cases.**
- 2. Make a personal handover mandatory at the end of each posting.**
- 3. Produce guidelines clarifying the responsibilities of seconded staff as regards the contributing State and the Mission, respectively.**
- 4. Harmonise levels of pay between contracted and seconded staff as far as possible.**
- 5. Promote a sense of belonging to a single team, for example by developing shared ethical guidelines.**
- 6. Strengthen oversight via the management hierarchy, focussing both on conduct and on results by detailed tracking of statistics at the level of the Mission and the CPCC, to ensure that the goals are being achieved and to introduce practices designed to improve results.**

7. Give responsibility for discipline to an independent external body with the power to carry out investigations and impose penalties.

### 2.3 Structure of the special prosecution office of the Republic of Kosovo (SPRK)

The period of particular interest for this report is the period up until 2012. According to Article 4.2 of Law No 03/L-352, "The Head of SPRK will direct the activities of SPRK and of its staff under the general supervision of the Chief Public Prosecutor of Kosovo". Pursuant to Article 15.4, the Head of SPRK comes under the general supervision of the Chief EULEX Prosecutor. The Chief EULEX Prosecutor can exercise exclusive prosecutor functions before the Supreme Court and provide managerial supervision for cases prosecuted by EULEX prosecutors. The division of duties between the two parties is far from clear and gave rise to disputes, in particular after the arrival of [REDACTED] who took a broad interpretation of her role, which was not accepted by the Head of SPRK. As a result of those issues, the Mission's Human Rights and Legal Office issued an opinion, which concluded that the Chief EULEX Prosecutor had hierarchical authority, through the chain of command, over prosecutors deployed within SPRK but not in relation to individual cases. In such cases, he or she cannot give instructions, but may issue guidance on how SPRK should deal with any alleged irregularities in the handling of cases. This complex system was established for historical reasons. However, it seems particularly dysfunctional because it positions two people at the head of the prosecution service, who carry out their activities on the basis of a division of tasks which is subject to different interpretations. In these conditions, it is inevitable that the Head of SPRK had a tendency to sidestep the control of the Chief EULEX Prosecutor as far as possible. It seems that the Head of SPRK's monthly reports to the Chief EULEX Prosecutor on prosecution activities had gradually been abandoned on the pretext that they were time-consuming and bureaucratic. These conflicts of jurisdiction probably played a role in the relationship between [REDACTED] who was supported on this point by the Head of SPRK, [REDACTED] and who found it hard to accept any control by the Chief EULEX Prosecutor because she saw it as interference in the way she handled her own cases. The disputes over scope of competence undoubtedly influenced relations between [REDACTED] who was supported on this point by the Head of SPRK [REDACTED] and [REDACTED]. However, in order for the Chief EULEX Prosecutor to remove a prosecutor from a case, serious irregularities would need to have been observed based on a strong justification. [REDACTED] never availed herself of that option.

Nevertheless, [REDACTED] departure made [REDACTED]'s situation less comfortable as she could not rely on the new Head of SPRK, [REDACTED], for support in the same way as she previously had on [REDACTED]. From 1 January 2013 to 15 April 2014, the Chief EULEX Prosecutor could only take over SPRK cases at the request or with the consent of the Head of SPRK. As

of 15 April 2014, the Chief EULEX Prosecutor can no longer assume jurisdiction over any case.

#### 2.4 The future of the Mission Executive

It will be for the competent authorities to decide on the future of the Mission in accordance with the procedures laid down in the Treaty, and it would be presumptuous of me to formulate proposals to that end. I would simply like to make a number of general comments.

The Mission has not yet achieved its main objective as regards the fight against corruption. While total eradication of corruption would have been impossible, it should nevertheless have been possible to gradually lay the foundations of a system capable of fighting corruption. I am not talking about drafting suitable texts, but rather about the means of ensuring the effectiveness of the fight. What is at stake is bringing about a change of culture in politics and society based on an effective police force and judiciary. Corruption is closely linked to organised crime and is an essential obstacle to economic development and investment. Progress has certainly been made thanks to EULEX, and critics of the Mission should ask themselves what things would be like now without the work it has done. The fact that the Mission has been shaken to its very foundations by the situation which is the subject of this report does not mean that we can discount all that it has accomplished on the legislative, policing and judicial front. However, much remains to be done and, in my opinion, a total withdrawal would be premature.

On the other hand, it is clear that, in the long run, if EULEX remains for an indefinite period, this will inevitably be viewed by the local authorities as a 'colonial-type' phenomenon. What matters, therefore, is to implement a strategy of redeployment while continuing to use tools which will make it possible to monitor developments in the situation. Some seem to think that the instruments developed by the Union in the context of the pre-accession strategy are sufficient. Personally I doubt this, given what is happening in the neighbouring states. Moreover, it must be remembered that Kosovo still has a special status.

In these circumstances, the transition must be managed carefully. The local judiciary, to my mind, is still not in a position to have the whole backlog of cases transferred to it, and a total withdrawal could lead to many cases being 'buried'. A judicial presence must be maintained in the form of strengthened MMA (Monitoring, Mentoring and Advising), with the possibility - perhaps - of transferring new cases where it seems that they cannot possibly be dealt with in the local context. It might also be necessary to have an assessment of the judicial backlog of civil cases in Kosovo carried out by an independent body to see, in agreement with the parties, which cases still need to be heard before the Courts and which cases could be dealt with via mediation or conciliation. The presence of a reduced number of EULEX judges and prosecutors would still appear to be necessary in order to assist the local courts.

In other words, a total withdrawal of the executive branch seems inappropriate, and a more limited presence of EULEX in the apparatus of the judiciary seems essential.

#### **Conclusion and recommendation**

In the current scheme of things, Kosovo's judicial system does not yet seem capable of meeting the challenges posed by corruption and the organised crime linked to it.

If the executive branch is in fact eliminated, a number of ongoing proceedings are in danger of being lost and forgotten. It is important to set up a mechanism for evaluating and monitoring these cases.

At all events, a form of strengthened MMA (Monitoring, Mentoring and Advising) should be put in place.

### III. BRIEF PRESENTATION OF EVENTS AS THEY APPEARED BEFORE OUR INVESTIGATION

To simplify matters, reference is made to Annex No 3 for the chronology of events and to Annex No 5 as regards the various legal cases linked to the allegations.

The story in itself is quite simple. In June 2012 a prisoner's tapped telephone conversations provided a prosecutor with information about attempted or actual approaches made via intermediaries to a judge and an international prosecutor to influence the course and outcome of his case. She reported the facts through her line manager [REDACTED]. She submitted her written report and took part in a meeting with the Head of Justice, at which the EULEX Chief Prosecutor was also present. [REDACTED] is also mentioned in the tapped conversations, in a part of her report that was not submitted, but it is clear that this was merely a calculated move on the part of the subject of the tap and entirely lacking in credibility. She is also alleged to have requested money in the past from a defendant in a case she was investigating. When questioned, she provided me with a statement in which she refuted the facts in a credible fashion.

Six months before, at the end of 2011, the Chief State Prosecutor of Kosovo had received a letter containing allegations against the same judge, which he passed on to EULEX. The EULEX Chief Prosecutor replied that she could not launch a case against the judge for various reasons: an appeal was pending in the case, [REDACTED] defence could use this point, there was insufficient evidence and [REDACTED] enjoyed diplomatic immunity.

In March 2013 the Head of Mission [REDACTED] received information from [REDACTED] Intelligence and later from the EULEX Criminal Intelligence Unit regarding an alleged corrupt prosecutor in a case implicating a Kosovar political figure. This information figures in a report which contains also intercepts made by [REDACTED] (see Annex 4). At the time he did not know of the existence of [REDACTED] report. In order to clarify matters, the Head of Mission, by agreement with the CivOpsCdr [REDACTED], decided to open a preliminary investigation under the supervision of the Head of Executive Division [REDACTED].

In May 2013 the investigators discovered, in the office of the previous Deputy HoM in the course of their inquiries a copy of intercepts made by [REDACTED] in the [REDACTED] case, which mentioned contacts between [REDACTED] a judge [REDACTED] and a prosecutor [REDACTED] via intermediaries. In August 2013 [REDACTED] a complaint with the HoM complaining of harassment in connection with a disciplinary procedure involving a parking matter. The complaint contained a copy of the intercepts.

In the light of these new facts, the Head of Mission, by agreement with the CivOpsCdr, [REDACTED] decided to set up a preliminary internal investigation team known as 'Ghost Team'. To guarantee confidentiality and given the fact that possible suspects might belong to EULEX, it



was decided to depart from the usual procedures and conduct the investigation confidentially. Only the Head of Mission, the Head of Executive Division and members of this Preliminary Internal Investigation team were informed. As for the Civilian Planning and Conduct Capability (CPCC), only the CivOpsCdr was notified. ( [REDACTED] confirmed in an interview that he was the only one to be informed of the situation in Brussels. The HoM [REDACTED] gave the same information. The Preliminary Internal Investigation team led the investigation until the autumn of 2013 (the report is undated). It questioned [REDACTED] [REDACTED], who volunteered to be interviewed, opened his bank accounts for inspection and made himself available for various other inquiries. In particular, it also asked a judge to review all the judgments given in the Bill Clinton case (see Annex No 5), proceeding on the assumption that a judge had been corrupted. The conclusion was that the judgments were well-founded and no irregularity could be detected.

The special report submitted by the Preliminary Internal Investigation team contains the following summary findings:

"After conducting a special investigation concerning alleged suspicions of corruption involving at least one EULEX judge and one EULEX prosecutor we find:

- That there are currently no grounds for the suspicions of bribery of EULEX staff. There are therefore no legal reasons for conducting a criminal investigation against the judge or the prosecutor.
- There is grounded suspicion that money was collected by Kosovar lawyers working on cases prosecuted and adjudicated by the two staff members, possibly with the purpose of bribing them. It is not necessary to prove that money actually was offered or paid. The persons collecting the money could be convicted even if no actual payment of the bribe occurred. Therefore, a further criminal investigation on this matter is warranted.
- During the course of the preliminary investigation it was found that an important Mission document was missing from the archive. It is essential for principles of probity and good governance that the circumstances of this document disappearing should be established. Especially since there are allegations that the Mission is covering up for the bribed judge and prosecutor."

The report adds that 'there are no facts indicating that [REDACTED] or [REDACTED] have accepted bribes' and that the fact that lawyers ask their clients to provide them with money for bribes is a well-known *modus operandi* in Kosovo. This should therefore be the subject of a criminal investigation.

Meanwhile, in the light of the revelations made by those convicted in the Triple Murder Case, an investigation was reportedly opened by a Kosovar prosecutor into the locals that had collected money for the bribes. It has not been possible to confirm this information but the case is listed as SEK#24-3-2013. Under these circumstances the HoM and the CivOpsCdr agreed to create a task force based on a joint team consisting of a Kosovar prosecutor and a EULEX prosecutor. Given the potential for corruption within the SPRK, it was decided to recruit a special prosecutor and place him or her alongside that body. The relevant memo signed by the HoM was dated 11 December 2013. [REDACTED] was recruited as special prosecutor. In agreement with the Kosovo Chief State Prosecutor and EULEX, it was decided that the two prosecutors would work together in a joint mixed team.

When CivOpsCdr [REDACTED] left his post, his deputy, [REDACTED], assumed his responsibilities until [REDACTED] took office. During this interim period he was informed that the opinion of the CPCC legal advisor had been sought by the Mission in connection with a draft request for immunity to be lifted. He was assured that the opinion did not relate to any specific case until such time as the CPCC received a request for Judge [REDACTED] immunity to be lifted. This request was drafted on 8 July 2014 by the joint mixed team of prosecutors and forwarded to the HoM on 24 July 2014. The request was examined and passed on to the High Representative on 30 September 2014 and subsequently to the United Nations Secretary-General, whose agreement was requested. The latter's agreement was given on 16 October 2014 and immunity was lifted on 22 October, albeit partially and solely for purposes of investigating and hearing [REDACTED]. If charges were brought against him, a new application would be to be made.

It was at this time that [REDACTED], following her failure to be selected for re-recruitment and then her suspension in connection with her suspected leaks to the media, decided to make a general approach to the media as a whistleblower. These facts are described in section VI of this report.

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#### IV. EXAMINATION OF THE WAY IN WHICH THE SITUATION WAS MANAGED BY EULEX AND THE CPCC

A distinction needs to be made in this regard between three periods that correspond to the tenures of the three HoMs: [REDACTED] Mr [REDACTED] and Mr [REDACTED]. They will be examined one after the other together with the actions undertaken by the CPCC, and each period will be the subject of an assessment.

##### 4.1 The initial facts at the time of [REDACTED]

In May and June 2012, telephone intercepts of [REDACTED], calls showed that he was trying to contact judges and prosecutors in order to speed up favourable consideration of his case, possibly through the appointment of a prosecutor other than [REDACTED]. Certain factors led [REDACTED] to suspect that a ruling on the initiation of investigation (ROI) which was in the sole possession of the Chief EULEX Prosecutor had been forwarded to [REDACTED]. She reported on the situation to the EULEX Head of Justice [REDACTED], on 26 June 2012. In her report, she stated: "I am not making allegations against anyone, neither I am stating that the content of these allegations is true, but they do contain elements which give grave cause for concern". She asked for an internal investigation to be opened.

[REDACTED] organised a meeting between the Head of SPRK [REDACTED] and [REDACTED] to discuss the case. [REDACTED] had also sent the intercepts to the DHoM [REDACTED]. According to the HoM's statements, he also received a copy from [REDACTED], but she does not seem to remember this. According to some reports, the HoM's Special Adviser was present at the meeting.

[REDACTED] forwarded [REDACTED] report to the HoM and the DHoM on 1 August 2012. In his covering e-mail, he stated: "You will see that certain intercepts contain elements of concern. Obviously nobody at this stage is stating that the contents of the intercepts are true. In fact, it's my humble opinion that we were facing what in my country is called "smoke selling". However [REDACTED] are (rightly) concerned about this matter and have asked me to consider the need for an internal investigation. As I do not have this power, I leave the decision to you". The HoM did not see this mail in time as he was away on leave, as shown by his diary. However, the DHoM contacted [REDACTED] to hold a meeting on 2 August 2012 at which the case was mentioned. On 8 August [REDACTED] left the Mission to return to [REDACTED] and had no further involvement in the case.

It appears that the Mission did not start any inquiry at this date. It seems that the content of the intercepts was not felt to be particularly credible. The intercepted persons' knowledge of the exact duties and powers of the persons present in the SPRK was quite vague and their estimate of their chances of being released in the short term was completely wrong. There

was no mention of any monetary payment during the conversations; the question would not arise until much later. What is more, when Judge [REDACTED] sitting alone, extended [REDACTED] detention on remand, [REDACTED] did not seem surprised, as he would certainly have been had the judge been bribed. Given the frequency of attempts to intervene with judges and prosecutors during trials, these conversations seemed to be part of that process and did not yield any result. Moreover, the intercepts examined during the current investigation by various prosecutors with no link to the case appear to support this view. The court hearing [REDACTED] case did not see the intercepts as evidence of an attempt to obstruct the course of justice. However, an internal investigation would have revealed that one of [REDACTED] intermediaries had met Judge [REDACTED] briefly on a number of occasions, on the pretext of university meetings. Except on one occasion, these meetings were held in the presence of a witness (legal officer). During one of these meetings, the intermediary tried to raise the [REDACTED] case with Judge [REDACTED], who asked him to leave and drew up a statement to inform the prosecutor, [REDACTED], of the situation. He also agreed to be questioned by the prosecutor [REDACTED] without any procedural guarantee before the [REDACTED] trial. An in-depth investigation would also have shown that [REDACTED] had also referred in the intercepts to corruption on the part of [REDACTED] although in scarcely credible fashion.

However, no internal investigation was opened. The DHoM [REDACTED] told us that he had informed the CPCC orally through an intermediary during a visit by the contact point between Brussels and the Mission when he was on a visit to Pristina. He said that he had preferred to communicate orally as written communication was not secure. Indeed, no trace of the case has been found in the Mission's monthly reports to Brussels. When asked, the contact point had no recollection of having received such information or of having passed it on. The trail therefore stops here.

#### Assessment

[REDACTED] acted in accordance with her duty under the OPLAN by informing the chain of command of the content of the intercepts. Likewise, the Head of Justice acted correctly by informing the HoM and the DHoM after examining the file. Without disputing the view taken at the time by those in charge of the Mission as to the credibility of the manoeuvres mentioned in the intercepts, it would probably have been better to open an internal investigation. Of course, it is easy to criticise now, when we know how the whole course of the case proceeded, but given how fundamental the fight against corruption was to the Mission, any allegation ought to have been investigated, especially when it concerned judges and prosecutors. If an investigation had been undertaken at this stage, it would have thrown light on the case one way or another, and would have avoided the situation which the Mission is now facing, where it is held in suspicion by public opinion.

[REDACTED] could have opened an official investigation, but chose not to take this route, which would undoubtedly have been the best course of action. According to [REDACTED] thinking, as she explained in connection with the [REDACTED] case, it is a prosecutor's duty to prosecute criminal activities. She could have acted on her convictions in this case. However, from the files found after her departure and the statements by the prosecutor who took over from her it appears that she was conducting a confidential investigation without a Ruling on Initiation of Investigation (Roll) and that she had asked investigators to act accordingly.

The loss of [REDACTED] report was damaging. Was it intentional? The report did not disappear completely since the Head of Justice had kept it in his files and was able to give it us. Likewise, the intercepts, without the report, have been found in the DHoM's office which would not have been the case if the Mission had intended the document to disappear.

One possible explanation is that the document was saved in the recipients' email box without a version being saved to shared files. But this is only one of a number of possible explanations and, in this case, it would appear to have been an administrative error and steps have been taken to ensure that, from now on, every document sent to the Mission is registered. The Head of Mission at the time has told us that his background in intelligence led him to think that the intercepts were unreliable - which was also echoed by both [REDACTED] report and [REDACTED] cover note - and that those being intercepted, knowing that they were being listened to, were simply trying to put up a smokescreen. Whatever the interpretation, there was nothing to prevent the report from being registered in accordance with standard procedure and the facts from being reported. Moreover, following the incidents, the Mission has issued a reminder of the need to register documents. A procedure has been set up for reporting cases of corruption. It is possible to report such cases anonymously, in which case a number is attributed to the case file and the author can be informed of the action taken.

#### **Recommendation:**

- Rules on registering documents must be strictly adhered to.
- Any allegation of corruption, regardless of any prior judgements that might be made as to its reliability, must be subject to an internal investigation and a reasoned decision.

#### **4.2 [REDACTED] handling of the case**

[REDACTED] with the support of the Head of Executive Division, decided first of all, with the agreement of the CivOpsCdr, [REDACTED] to set up a special preliminary internal investigation team. This was to avoid the usual procedures, which were likely to give rise to leaks, by isolating the investigation as far as possible from ordinary investigation work. This meant that some of the investigators from the OCIU (Organised Crime Intelligence Unit) who

had discovered the facts that had prompted the inquiry in the first place were kept out of the investigation. They were under the impression that the Head of Executive was following his own agenda, which only fuelled the - unwarranted - rumours of a cover-up. These investigators, who were working on cases supervised by [REDACTED], therefore preferred to focus on other tasks rather than following the trail of corruption. He then decided, by the same procedure, to agree to the setting up of a Mixed Investigation Team by delegating a specially recruited EULEX prosecutor to a Kosovar prosecutor. This prosecutor was recruited by a special procedure, by derogation from the normal rules, as laid down in the OPLAN. The SPRK subsequently alleged that this procedure did not comply with the rules on derogations laid down in the OPLAN. Prosecutor [REDACTED] was on a shortlist drawn up by the Chief EULEX Prosecutor. He had applied for posts on two other occasions and had been selected, but had not accepted the offer. He therefore fulfilled the requirements perfectly. After considering his file, it was decided to recruit him. He had no personal relations with those in charge of the Mission although he had met some of them on previous assignments. The decision to set up a joint EULEX-Kosovo team is explained by a number of different factors. Given that certain SPRK personnel were involved, it was difficult to follow the normal procedure, especially as it was no longer possible for EULEX to take on new cases (this is disputed at the SPRK). It would have been possible to entrust the case to the Special Investigation Task Force (SITF) which deals with war crimes in Brussels, but apart from the fact that the SITF had refused to take the investigation, it would have been too far removed from local circumstances, as the investigation also involved alleged corruption by local persons. The solution was thus to set up a Mixed Team with the two prosecutors. To avoid any leaks to the SPRK, the chain of command for the EULEX prosecutor went through the Head of Executive and the HoM, which meant that, following [REDACTED] departure, the Head of Executive remained alone in the chain of command.

#### Assessment

The legality of this approach has been called into question, but given the constraints, there was no alternative. Essentially, what has been challenged is the chain of command which resulted in the prosecutor being placed outside the SPRK. Given that there were individuals within the SPRK who were under investigation, the HoM and the Head of Executive Division themselves assumed responsibilities which should have been incumbent on a prosecutor. I do not wish to enter here into a legal debate, which would have to be held if an indictment were to be issued. In addition, the system chosen enabled prosecutors to work with the Kosovar legal authorities with complete trust and transparency. If an investigation had been held according to the usual procedure in 2012, it would have been easier to continue normally, but it would still have been necessary to separate the investigation from the work of the SPRK, as some members of the SPRK were mentioned in the allegations. If there had been a special disciplinary body for judges and prosecutors, it could have supervised the investigations itself through a prosecutor appointed by it, who would have recruited his own

team. The problem with the course that was chosen and the attempts at secrecy using exceptional procedures was that the case made waves when it was made public, whereas if normal procedures had been followed from the outset, with the necessary precautions, all this could have been avoided. The investigation which is the subject of this report is proof of the willingness of those responsible to find out the truth, and the intention is not to criticise this attitude even though they could have followed a different path.

## Recommendations

In future, create a restricted body, outside the Mission, composed of judges who would be responsible for overseeing disciplinary measures for judicial staff and supervising inquiries involving such members of staff.

In future, avoid resorting to ad hoc solutions whose only effect is to make the chosen course of action seem suspect.

Even if there may be doubts about the legality of the procedure followed, the only possible course of action is to see it through to the end, by providing all possible support and by extending the involvement of the EULEX prosecutor in charge of the case, if he or she so wishes, until the proceedings are at an end.

### 4.3 Handling of the case following [REDACTED] departure

#### 4.3.1 Information from the CPCC

At the time of his departure, the dossier was known only to the CivOpsCdr [REDACTED] and to HoM [REDACTED] and to those who were in the preliminary investigation team). That does not mean that there were no rumours. [REDACTED] and Judge [REDACTED] had been heard by the preliminary investigation team. Moreover, the appointment of the new prosecutor and the fact that he did not work in the SPRK premises attracted attention. Some of those rumours even reached Brussels, but certainly did not reach the level of the hierarchical superior or he would have asked the Mission about the situation, after [REDACTED] departure, as soon as the Joint Mixed Team, also called ITF, started its work. However, this was not the case. [REDACTED] confirmed that he had not informed anyone about the situation at the CPCC.

As a result of leaks, on 8 April 2014 the local press and [REDACTED] media reported that Judge [REDACTED] had accepted money to influence the result of the proceedings underway. The CPCC became aware of the situation when on 24 April 2014 the EEAS's legal adviser received a request for advice on drafting a waiver of immunity. To a request for information from [REDACTED] Acting CivOpsCdr, the Mission replied that it was only a theoretical exercise and that no facts had come to light that could lead to criminal proceedings against a judge or

a prosecutor. For that reason, on 13 May, at the request of the [REDACTED] ambassador to the [REDACTED] [REDACTED] replied that no official investigation was underway. The only persons concerned were local lawyers who had collected money from their clients to corrupt influential persons in the framework of the case in progress. On 4 July 2014, the [REDACTED] ambassador in Pristina was called to the Minister of Foreign Affairs in Kosovo to be informed that a request for immunity would be sent to Brussels via the intermediary of the HoM.

Informed about the situation, the CPCC decided to launch an "Internal Support Review" conducted by a Senior Police Officer. The report concluded with a request that EULEX inform CPCC about internal proceedings against members of EULEX staff, to deal with the Motion of Waiver of Immunity as soon as it arrived. Lastly, "EULEX to continue raising awareness with EULEX Prosecutors in relation to possible political and diplomatic implications without interfering in the judicial process". The request to waiver immunity was addressed to the CPCC on 24 July 2014 and examined by the competent authorities before the High Representative was informed. Since the agreement of the Secretary-General of the United Nations was required, a partial waiver acceptance was sent to the Chief State Prosecutor of Kosovo on 22 October 2014. This may seem a long period of time but it is understandable given the need for a detailed legal analysis, the necessary consultations, the holiday period. It is probable that any new requests would be processed more quickly because the procedure and the legal conditions are now known.

Another Internal Support Review was expedited following a request for assistance sent to the [REDACTED] authorities. In that case, it was ascertained that the source of the leak was [REDACTED]

#### 4.3.2 Allegations of a cover-up at the CPCC

It has been maintained that the CPCC tried to push for the dossier to be closed or at least to block it and trying to run matters from Brussels. It should be emphasised that, following [REDACTED] departure, the CPCC was apparently not informed at the level of higher management about the situation. Apart from the fact that CivOpsCdr [REDACTED] claimed to have never forwarded any information on this point to his successor and that he left his duties before his arrival. On the other hand, if he had been informed of the situation, it would have been surprising that [REDACTED] could give assurances to the [REDACTED] authorities.

In these circumstances, it was not surprising that the CPCC tried to obtain information to reply to the national authorities and that he clearly requested that he be informed when anything had possible political consequences, but that he had not asked for details of the judicial proceedings. At the time of the second internal support review on the [REDACTED] leak, on 14 October, CivOpsCdr [REDACTED] wrote to [REDACTED] Head of Executive Division: "I need to understand the legality of such proceedings as well as the reasons why my office was not



kept abreast of such sensitive developments. The substance of 'any case should not be enquired about or discussed". The review dealt with procedural aspects (next steps, possible new requests for a waiver of immunity, time limits, etc.). [REDACTED] interpreted these requests as a desire to have access to the whole dossier. They were, in fact, a desire to have general information to be able to manage the dossier at the political level in relations with Kosovo, the European Parliament and the Member States. [REDACTED] also thought that the CPCC wanted to have background information on the dossier to supply the [REDACTED] authorities which, in turn, would make it available to Judge [REDACTED]. However, Judge [REDACTED] did not need to obtain information through this channel. He had been interviewed by [REDACTED], and then by the Preliminary Investigation team set up by [REDACTED] and he knew about the leaks to the press. He did not need any more information to react. It is true that he was in possession of [REDACTED] investigation report, but here again leaks were such at the Mission that he would have been able to obtain the information in other ways. He also claimed to have received the documents anonymously by post. It was not possible to go further in the investigation.

It is also true that discussions took place between the CPCC and the Mission concerning the legality of the proceedings from the perspective of OPLAN and the Kosovar criminal law. These discussions are not without significance because they determine the legality of the proceedings, but such issues are excluded from the scope of the present report. Fairly early on, and in any event in November 2014 at the latest, the CPCC's opinion was that it was unnecessary to hold a discussion on this point, because this could only complicate the proceedings and increase the public's distrust if an attempt was made to return the case to the SPRK. The best option was to let the appointed prosecutors do their work. It was more difficult to make this opinion acceptable to Pristina. The HoM was caught between the demands of the prosecutors who, as a body, had difficulty accepting that some of their colleagues be subject to an investigation outside the SPRK, and the Kosovar authorities and public, who would have reacted badly to a reversal of the decision.

In addition, attempts to formally integrate the EULEX prosecutor into the SPRK would have been destined to fail and politically counterproductive, although consideration was given to that possibility.

In any case, the independence of the EULEX prosecutor with regard to the Mission and the CPCC has never been called into question and he never had direct contact with the Head of Mission. Any complaints he may have made related to the administrative difficulties he encountered and administrative delays which he felt may have slowed down his investigations. Once the inquiry was complete, there was a delay in taking a decision on the Waiver of Immunity request and other similar requests. As has already been stated, that delay was due to the need, in some cases, to obtain the agreement of the Secretary-General of the United Nations or, in other cases, to consult with the national authorities, who retain responsibility for staff who have been seconded. However, the CPCC has always granted any

requests addressed to it. Similarly, extending the secondment of staff assigned to the prosecutor or recruiting new staff is subject to the usual deadlines for obtaining the financial and administrative authorisation required for such decisions. One can hardly talk of obstruction in this context.

However, it would appear necessary to establish lines of communication between the prosecutor and EULEX to avoid the misunderstandings that occurred when the request for immunity was submitted. To ensure his full independence, it was agreed that the prosecutor would communicate directly with the CPCC through two Senior Police Advisers who were not in office in 2012, in compliance with the principle of investigative secrecy. The prosecutor is the sole judge of the information provided in compliance with the principle of judicial independence and prosecutors' autonomy. The information provided relates to potential consequences for the management of EULEX and the Mission. Consequently it is not information on the progress of the investigation as such; instead, it includes information on events such as requests for the waiver of immunity which must subsequently be managed by the CPCC.

#### 4.3.3 Leaks concerning the case

There have been a series of leaks throughout this case: leaks in the media, leaks involving the Member States, leaks within the Mission. Identifying the source of these leaks would have required investigative resources way beyond the powers of one person. However, it did not take me long to understand how this state of affairs came about. The Mission is a small world in a small town with little to occupy staff outside work. In such circumstances, members of staff talk among themselves and they talk above all about their work. Work email exchanges increase the risk, as an email can easily be forwarded. One only has to read ██████████'s formal complaint and her Court case filed ██████████, which she kindly sent to me, to get an idea of the number of emails she quotes from which were not actually addressed to her. I have been told that the formal complaint she addressed to the HoM about the treatment meted out to her following her allegations was found in the hands of an inmate of ██████████ prison. Even if this is untrue, the fact remains that the complaint was in the public domain when in fact only its author and the administration should have known about it. Similarly, emails in which decisions were suggested to the HoM by one of his advisers were made public, which led to a belief that it was the adviser who had made the decision when in fact he was merely advising his superior. This kind of behaviour weakens the chain of responsibilities in the eyes of staff members.

The HoM made staff members sign a confidentiality agreement, which led ██████████ to conclude that he wanted to ban whistleblowing. This was not the intention: whistleblowing still remains possible and, in the case of internal whistleblowing, is encouraged, in accordance with the general rules, but the majority of the leaks are not justified on the

grounds of whistleblowing. To protect the objectives of the Mission or the privacy of individuals, it is important to ensure that confidential information does not end up in the public domain.

#### **Recommendation**

In addition to confidentiality agreements, it is important to ensure that staff are made more aware of security issues and that information should only be transmitted on a 'need to know' basis. This is already established policy, but it needs to be applied to a greater extent.

#### **4.3.4 Media management of the case**

Media management of this case required a crisis strategy. I do not intend to venture into this domain, not being a communication specialist, but I have drawn a number of conclusions following my meetings with local journalists. Many misunderstandings appear to have arisen from an unsuitable policy approach. The Mission refused to reply to journalists unless it was sent the documents the journalists had in their possession. It was certainly difficult to respond to allegations the content of which was unknown, but the press concluded that this was because of a desire to conceal information and to call into question the secrecy of journalistic sources. A less formal approach would have been more suitable. As far as the journalists were concerned, it would have been simpler to admit that there was a problem and that a judicial investigation was under way, the content of which was covered by investigative secrecy and was not known by the Mission, which was true. But the damage is done and trust needs to be restored through positive, non-aggressive communication on the work of the Mission. It would also be desirable for there to be greater coordination on communication matters between the Head of Mission and the CPCC so that any differences can be avoided.

#### **Recommendation**

It would be advisable to lay down the principles of a communication strategy based on the greatest possible transparency with the media; those principles should be established in cooperation with Brussels, thereby ensuring a consistent approach and enabling the European Parliament and the Member States - via the working parties concerned - to be informed in a timely manner. This does not mean that all communication should be subject to approval or micro-management but that action should be based on a general set of shared guidelines.

## General evaluation

In the course of my investigations, I did not find any indications of the CPCC's involvement in the case, before the questions on immunity were raised in the spring of 2014, other than that of [REDACTED] ([REDACTED]) thinks that such involvement existed and for the sake of truthfulness it is appropriate to reproduce what she wrote on the subject: 'So I know that (...) was informed every step of the way about me and other sensitive cases in which he interfered. You stated there was no email chain well this is just like the lack of any trace of my report. Code red. In fact all sensitive communications with Brussels was sent by encrypted emails and on encrypted phone so it is quite clear there would be no email chain'. However, it has emerged from interviews conducted with a large number of individuals who could or should have been informed of this matter that nobody else than the CivOpsCdr had knowledge of the content of the file. It is entirely possible that rumours within the Mission, sparked off by the secrecy with which operations were conducted in Priština, may have reached Brussels, but they could not have involved any accurate information on the actual substance of the case.

It was only when the CPCC was informed in 2014 following the first leaks and the operations prior to the request for a waiver of immunity that [REDACTED] acting CivOpsCdr, asked for information, which did not concern the substance. Regardless of the differing opinions on how the case had previously been conducted, there was no cover-up attempt. Moreover, this would not have been politically sensitive after the leaks in the media. The suspicion that there had been a cover-up was triggered by the complete secrecy in which the case was conducted before 2014.

The origin of all the problems encountered appears to lie in the initial decision not to open an internal inquiry at the time the revelations were first made. If such a decision had been taken, a criminal investigation could have been opened in a timely manner if the allegations had been substantiated. In that case, there would have been no need to set up, in great secrecy, the special procedures that ensued and there would have been no grounds for suspecting some sort of cover-up. The procedure that was followed led to inevitable leaks. From the moment Judge [REDACTED] was questioned in the preliminary inquiry, it was inevitable that rumours would start to spread among the national authorities and the press. Similarly, the failure to submit timely information to Brussels and the failure to provide clear information to the new CivOpsCdr meant that the latter was unable to inform his hierarchy properly, thereby giving rise to the confusion that followed the revelations in the press.

## Recommendation

**It is crucial and a matter of common sense that, upon the departure of a Head of Mission or a senior official of the CPCC, a handover of all important information should take place**

directly between the outgoing and the incoming head, and that such information should be fully comprehensive. If this had happened, it would have been possible to avoid allegations of a cover-up.

## V. [REDACTED]'s allegations that she was a victim of harassment

(Some of [REDACTED]'s allegations relate to criminal cases. To have a better understanding of how they are related to the present case, please refer to Annex V.)

I would like to make it clear that, in general, [REDACTED]'s professional skills have not been called into question in the interviews I have conducted. Although opinions differ as to her character, all concerned acknowledged, to differing degrees, that she performed her duties as prosecutor satisfactorily. The investigators who worked for her appreciated the way she supervised them by setting clear objectives and keeping a close eye on their investigations.

### 5.1 [REDACTED]'s allegations with regard to some of her colleagues

[REDACTED] claims that, from the moment she reported possible corruption on the part of Judge [REDACTED] and the Chief EULEX Prosecutor, the latter, together with her circle of friends, persecuted [REDACTED] and tried to hamper her investigations. Her complaints focus primarily on three individuals.

#### 5.1.1. Allegations with regard to Judge [REDACTED]

[REDACTED] has not complained about being the victim of any machinations by Judge [REDACTED]. As for the substance of her allegations about corruption, that is a matter for the judicial authorities to decide.

#### 5.1.2 Allegations with regard to the Chief EULEX Prosecutor

Likewise, it is not for me to enter into judgement on the allegations of complicity in corruption, which are a matter for the judicial inquiry. Her complaint about the Chief EULEX Prosecutor is essentially that there was undue interference by the latter in cases which [REDACTED] was conducting. These criticisms are partly related to differing points of view on the powers of the Chief EULEX Prosecutor (see point 2.3 above). Similarly, although [REDACTED] accuses the Chief EULEX Prosecutor of having tried to take a case away from her, this did not actually happen and email exchanges between [REDACTED] line manager and the Chief EULEX Prosecutor show that the latter never interpreted the strong criticisms contained in a letter from a lawyer acting for one of the parties as constituting a request for [REDACTED] to be taken off the case (see below Annex 5) concerning the letter from [REDACTED] lawyer). Over the course of successive proceedings, the Chief EULEX Prosecutor allegedly also recruited a group of prosecutors with whom she socialised and which constituted a 'gang', as [REDACTED] put it, which victimised her. This question is dealt with in the section on the decision not to select [REDACTED] for a new posting, which shows that this

allegation is based on a strange collection of rumours about colleagues' private lives, rumours that were in fact partly untrue. The other allegations that she was prevented from conducting investigations by the Chief EULEX Prosecutor are dealt with in Annex 5, which shows that there was no precise information in support of the allegations and that in any event [REDACTED] had never been taken off a case and that she could, had she wished, have launched an investigation into Judge [REDACTED] which she did not do. The Chief EULEX Prosecutor assessed [REDACTED] performance positively, but it appears that she added a piece of paper to the assessment form stating: '[REDACTED] is no better than other prosecutors'. An inquiry conducted within the human resources department shows that such documents do not exist in the files. However, if they did exist, they would constitute an infringement of the principle that the whole of an assessment must be brought to the attention of and signed by the person being assessed. The Mission must put a stop to such practices, if they ever existed.

### 5.1.3 Allegations against the Head of SPRK [REDACTED]

While [REDACTED] was Head of SPRK, [REDACTED] never submitted any complaints against her boss. [REDACTED] was in charge of the finance section and she was frequently called upon to stand in for her boss when the latter was absent. When [REDACTED] left, [REDACTED], who apparently wanted to succeed her, did not obtain the support of the UK authorities and she was no longer asked to stand in as acting Head of SPRK. Moreover, [REDACTED] wanted [REDACTED] section to move to SPRK premises, which she did reluctantly. Last of all, SPRK's vehicles were no longer allocated to individuals but were available as part of a pool. Internal relations were therefore not excellent. [REDACTED] complains of obstacles being placed in the way of her case against [REDACTED] but [REDACTED] was not yet Head of SPRK at that time. She also mentions a refusal to allow her to investigate in the [REDACTED] cases, in that she was refused access to a protected witness. However, she was not responsible for the case, which had been allocated to another prosecutor [REDACTED]. The witness had been interviewed without hindrance in 2014 by the prosecutor [REDACTED] who succeeded [REDACTED]. [REDACTED] was allegedly also opposed to involvement in the triple murder case (see Annex 5). [REDACTED] is also accused of having negotiated with criminals. This relates to an incident in which three sentenced persons were refusing to leave a hospital where they were being treated and return to their place of detention. As part of a police operation and at the request of the Kosovo police, [REDACTED] talked to the lawyers of the three sentenced persons asking them to convince their clients. The decision on the criminals' place of detention was taken by the competent judge without his being aware of the promise made by [REDACTED]. Last of all, [REDACTED] is alleged to have influenced the recruitment of a prosecutor with whom he shared a flat. It appears that the person in question was a legal officer who worked for [REDACTED] and whose candidacy she, it seemed, supported. He never shared a flat with [REDACTED] but they had lived in the same building on different floors for three months.

In fact, relations between [REDACTED] and [REDACTED] were never excellent. [REDACTED] himself did not make any great effort to endear himself to her and behaved in a purely bureaucratic way towards her. These were unfortunate relationship conflicts that often happen in the working environment, but they do not constitute persecution.

## Assessment

Beyond the accusations of corruption, it has not been possible to confirm the allegations whereby [REDACTED] was really prevented from investigating. Her accusations do not always coincide with the facts. It is true that, from the moment that the Head of SPRK changed, she found herself in a less favourable position than she had previously enjoyed, and her boss does not seem to have greatly appreciated her behaviour, despite giving her excellent assessments. Is this a situation akin to mobbing? Without going that far in relation to the facts, it is certain that the position [REDACTED] found herself in was a step backwards in relation to the past.

### 5.2. [REDACTED] allegations against EULEX

These allegations relate to the two disciplinary procedures involving [REDACTED], her failure to be selected for a new posting, her alleged involvement in the leaking of documents and the fact that she was subsequently suspended.

#### 5.2.1 Illegal parking incident

##### The facts

Article 2 of the Security Directive on EULEX vehicles (of 4 November 2009) stipulates that: "All service vehicles left unattended between the hours of 23.00 and 5.00 must be parked in a private parking place or a EULEX compound. No vehicles are to be left unattended on any public streets between these hours."

On 12 July 2010, [REDACTED] needed a vehicle. Vehicles are assigned to a common pool under the responsibility of the Head of Service [REDACTED]. [REDACTED] had asked that a vehicle be allocated to her several times, but this request was never granted. Since the vehicle she used regularly was not available, she used another vehicle to go home, followed by her security officer. That car remained parked on the pavement on the night of 13 July and its unauthorised presence was noticed by a security officer who took photographs of the vehicle. On the night of 15 to 16 July, the vehicle was once again parked on the pavement, but this time with its doors open. At 2.11 a.m., a security officer telephoned the Head of SPRK [REDACTED] to identify the user of the vehicle. [REDACTED] identified the location as near [REDACTED] residence. The officer tried in vain to contact her on her service telephone. The vehicle was towed to the garage. The next day, [REDACTED] called one of SPRK's assistants to tell that, as she was unwell, she would not be coming to the office that morning and asked him to



send someone to recover the vehicle. During the day she dropped off the keys at the garage without concerning herself any further about what had become of the vehicle.

On 19 July, the Head of Internal Investigation Unit (IIU) requested authorisation from DHoM [REDACTED] to open a preliminary investigation. As [REDACTED] is a prosecutor, the authorisation is subject to the consent of Chief of EULEX Prosecutors, [REDACTED]. In her absence, consent was given by the deputy, [REDACTED]. During the investigation, [REDACTED] was questioned only as a witness. According to IIU, cases such as this are generally dealt with by Security, but IIU was in favour of an investigation in this case as there had been two successive violations (on 13 and 15 July), and also because [REDACTED] was under protection and she might have been negligent as regards her security obligations. Moreover, the matter of vehicle security is important because, in addition to being damaged or stolen, vehicles could also be booby-trapped with explosives when they are returned to EULEX, causing injury not only to the driver but also to persons and property.

During the investigation, [REDACTED] was heard in the presence of her lawyers on 27 August 2013. She explained that on 14 July, she had moved the vehicle in the street, because she wanted to spray pesticide in her garden. During the spraying operation, she was taken ill and went home where she stayed confined to bed. That is why she forgot about her car. She asked that [REDACTED] be questioned to know why the matter had not been dealt with at his level and an investigation had been opened instead. She listed a number of - in her view - similar cases which had not resulted in an investigation and said that she was being discriminated against and was not getting protection as a whistleblower. [REDACTED] lawyers subsequently requested that the investigation be entrusted to a former judge of the General Court of the European Union.

Following [REDACTED] hearing, the IIU investigated the allegation of discriminatory treatment and concluded that: "none of the incidents or persons nominated by [REDACTED] was found and no relevant information contradictory to evidence, or [REDACTED] statement, was offered or discovered". In conclusion, it was suggested that the case be referred to the Disciplinary Board. The decision to convene the Disciplinary Board was taken on 2 September 2013 by the DHoM, [REDACTED]. The Board was composed of a Criminal Judge at the Supreme Appellate Court, a Prosecutor and the Head of Strengthening Division. In light of the evidence, the conclusion was that the allegations were founded and that there had been a minor offence. Possible penalties ranged from a verbal warning and counselling to withdrawal of the right to drive the mission's vehicles. The Board chose the lightest penalty i.e. a verbal warning and counselling.

[REDACTED] lawyers appealed against the penalty on 8 October 2013, invoking discrimination and the protection due to the claimant's status as a whistleblower; on 30 August 2013, the claimant had requested the opening of an investigation in respect of [REDACTED] and Judge [REDACTED] for possible breach of financial and confidentiality rules and expressed

surprise that [REDACTED] signature was on IIU's final report and at the errors and contradictions in the investigation report.

In its report to the DHoM, the IIU states that no reference to the cases on which [REDACTED] founded her accusations of discrimination were found in the files. The final investigation report was signed by [REDACTED] because the applicable rules (Article 4.3 of the Standard Operating Procedures (SOP) on investigating alleged breaches of the Code of Conduct (CoC) stipulated that the Chief EULEX prosecutor must be informed when a prosecutor was involved. The signature merely served as confirmation of receipt of the information by the Chief Prosecutor. Other information in [REDACTED] deposition had been followed up by additional inquiries, which were inconclusive. The appeal was rejected on 31 October 2013.

### Assessment

It seems surprising that an incident like this gave rise to proceedings based on a dossier of over 180 pages and prompted in-depth investigations. However, the scale and duration of the case owe much to [REDACTED], who argued the case with tenacity and with the help of lawyers, over an infringement that could have given rise to a fine of at most a few dozen euros. The actual case is quite simple. It is understandable that IIU wished to pursue the case for security reasons. The situation is not exceptional. According to the Mission's statistics, two other cases led to proceedings the same year, and the penalty imposed on [REDACTED] was the most lenient of all the penalties imposed. Neither [REDACTED] nor [REDACTED] initiated the procedure, and neither was involved in the case. The most lenient penalty was imposed, a verbal warning, which is not recorded in a person's file.

However, it is possible that, for [REDACTED], this case was interpreted as one element in the much wider context of a "fight" against alleged corruption at the mission. Taken in isolation, there is no evidence in this case of specific persecution of [REDACTED]. The legal procedure has been followed and those accused by [REDACTED] did not take part. [REDACTED] met the HoM, [REDACTED] at that time to report her belief that she was the victim of harassment because she was a whistleblower. [REDACTED] reassured her in that regard. According to the statements made to us by [REDACTED] on 11 February 2015: « She contacted me electronically and made reference to a file which she had submitted to IIU and which she had already submitted to my predecessor in 2012. She felt that she was harassed because the mission (field of responsibility of IIU under my deputy) was investigating her for a rather minor disciplinary infraction. She was under close protection but she left her car twice unlocked, overnight, on the street. So I supported that the Mission had to rebut her a little bit. And she felt that this was discrimination and punishment for whistleblowing. I met her and I tried to convince her that this was definitely not the case but that for general disciplinary reasons IIU

had to investigate, follow this up. And she got a verbal warning with counselling through the national contingent leader. You can live with that when you make a mistake».

### 5.2.2 Unauthorised presence of a person on SPRK premises

#### The Facts

In June and July 2013, a young [REDACTED] student visited the SPRK premises on several occasions in the company of [REDACTED]. On certain occasions, she did not return her visitor's badge upon leaving. She was seen photocopying documents. Informed of these facts, the Head of the SPRK informed the DHoM, who authorised the opening of an investigation with the agreement of [REDACTED]. This investigation confirmed the above facts. [REDACTED] explained that the person in question was a young student whom she was helping to learn about legal practices. The student had not been given access to any confidential documents and the photocopies she had made were of legislative texts for the purposes of legal research. [REDACTED] indicated that in the past she had had the implicit authorisation of her previous superior to bring her daughter onto the premises, as well as the person concerned, who was a friend of her daughter, which has been confirmed. It appears that proceedings had already been considered at the time, but had been dropped at the instigation of [REDACTED] superior. [REDACTED] stated that she was not aware of the Internal Administrative Guideline (PoIA No 1 of 22 March 2009) restricting access to the premises to SPRK and EULEX staff. The investigation established that since these rules had not been recorded or published they were unenforceable, and closed the case. The Head of the SPRK could have appealed but chose not to do so.

#### Assessment

Nothing in this case would lead to the conclusion that [REDACTED] was specifically persecuted. The case was closed without damages. If the Head of the SPRK had wanted to appeal, he was free to do so. He could have claimed, on the basis of Annex G to the OPLAN, that the action "will foreseeably bring the mission in disrepute" insofar as he had been obliged to inform the Office of the Public Prosecutor of Kosovo. He chose not to appeal. In addition, it is likely that the issue could have been resolved by a simple conversation between [REDACTED] and [REDACTED] or at the least that he could have informed her on his own initiative. This situation reflects the interpersonal problems between these two people, but does not in itself point to systematic harassment, even in conjunction with the previous case. It is worth noting that in his previous report concerning [REDACTED] work, [REDACTED] referred to it as excellent. In fact, in the first case, neither [REDACTED] nor [REDACTED] was behind the investigation. The two procedures were carried out in complete confidentiality and [REDACTED] was in possession of all the relevant documents.

### 5.2.3 Complaint regarding the failure to respect the status of

[REDACTED] stated that she had filed an official complaint of harassment and non-respect for her status as a whistleblower. According to certain sources, there was no trace of such a complaint to be found in the Mission's files. However, a colleague of the Head of Mission refutes that version of events, indicating that the document was in fact received and was forwarded to the Head of the Human Rights and Legal Office for further action. He in turn confirmed that the complaint had been forwarded to the Head of the Executive Division, who included it in the preliminary internal inquiry being conducted into the corruption allegations. What is certain is that the HoM had met [REDACTED], the presence of co-workers to confirm to her that she would not be disadvantaged on account of her revelations and he called on the Head of the Executive Division to ensure that this was the case.

What is certain is that on 3 July 2014, one of the prosecutors provided the EULEX Head of the Executive Division, [REDACTED] with a set of documents obtained from an unknown source that contained an unsigned, undated formal grievance drafted by [REDACTED] which was publicly available. It also contained copies of the intercepts contained in [REDACTED] original report submitted to [REDACTED] and a record of witness interview from 25 June 2013 on the subject of the corruption allegations concerning Judge [REDACTED]. The origin of the leak is unknown but the documents seem to have come from [REDACTED] office, although it is not possible to determine who made them public. These documents are apparently the same ones that were published in the press (*Koha Ditore*) on 18 October 2014.

### 5.2.4 Non-recruitment of [REDACTED] in autumn 2014

In her allegations, [REDACTED] stated that the selection procedures for prosecutors had infringed the rules in force, in particular because of the nepotism which allegedly governed the recruitment. She accused the Chief EULEX prosecutor, [REDACTED], the Head of the SPRK, [REDACTED], and the Head of the Executive Division, [REDACTED], of breaching the rules in order to hire unqualified people, which could have led to objections to their participation in proceedings. She contested the results of the first competition of 2014 on the basis of which she was successful, and the results of the subsequent competition on the basis of which she was not selected. She believed that she was the victim of the above three persons and of their friends because she had reported the allegations of corruption against [REDACTED] and Judge [REDACTED].

#### 5.2.4.1. The summer 2014 selection procedure

[REDACTED] was selected by the selection panel for this procedure. Nevertheless, she sent emails to the EULEX senior management accusing the panel members of "corruption". She believed that in the past certain candidates had been recruited by the above three persons

in violation of the rules on the length of legal experience and the duties carried out as a full prosecutor required by the rules in force. She gave the names of the candidates. Given the fact that the recruitment followed the reconfiguration of the Mission, the candidates mentioned by [REDACTED] were already working in the service but had to obtain a new mandate. [REDACTED] objected less to the way in which the selection was carried out than to the fact that prosecutors were hired who, at the time of their recruitment, did not meet the required conditions.

The situation is complicated because in England and Wales the duties of a prosecutor can be carried out by members of the Crown Prosecutor's Office, who do so on a full-time basis, or by barristers (for all Courts) or by attorneys (at the level of the lowest criminal Courts) who are assigned to specific cases. The activities of the latter are therefore divided between tasks related to criminal prosecution and tasks relating to defence. Their experience of prosecution should therefore be assessed in order to determine whether they in fact have the required experience of prosecution. In general, the selection panel may take into account experience that is equivalent to that required. On 23 October 2012, the CivOpsCmdr issued the following instructions to the HoM: "I invite you to apply the notion of 'equivalent experience' in the job description with utmost caution. The concept per se is meant to allow a limited measure of flexibility, notably in the field of education requirements. The acceptable kind of equivalent experience should be spelled out as clearly as possible in the job description to avoid problems ...". In addition, the qualifications and experience of the seconded individuals are assessed by the countries that propose them.

In any event, [REDACTED] allegations were the subject of an internal investigation carried out by the Internal Investigation Unit and the CVs of the various candidates were reviewed, with the conclusion that the candidates met the required conditions. They had been recruited in the past by various selection panels comprising different members and it would seem that the three members named by [REDACTED] had not been on these panels together. In one case, [REDACTED], indicated that the husband of the candidate had been part of the selection panel that recruited her, which was utterly incorrect. The Board concluded in its report of 17 October 2014: "IU is of the opinion that [REDACTED] allegation regarding the corrupt selection of three of the contracted staff is not substantiated. Moreover this allegation, along with the allegation against [REDACTED] is to be considered as malicious, frivolous and potentially defamatory". It is worth noting that, having been selected, [REDACTED] was not the subject of any personal prejudice in this case and that the panel members she accused of bearing her ill will had retained her in her post.

#### 5.2.4.2 The second selection procedure in autumn 2014

Since the [REDACTED] had decided to reduce the number of prosecutors seconded to the Mission from seven to four, the first selection procedure described above became obsolete and was cancelled. In addition, in order to make sure there was a fair and transparent choice, the mission decided to open a new procedure in which the 12 previously selected individuals, including [REDACTED], were among the 18 total candidates. In full knowledge of [REDACTED]'s allegations concerning the previous selection, it was decided that the panel should be chaired by an external staff member from Brussels who was not involved in any internal controversy, [REDACTED] from CPCC. The other members of the panel were two EULEX prosecutors, [REDACTED] and [REDACTED]. The make-up of the panel was proposed by [REDACTED] with an alternative option aimed at mitigating the fact that no female members were available. Both prosecutors were chosen by [REDACTED] who took care to ensure that they were persons not mentioned in the allegations. Before the selection, [REDACTED] informed the CiviOpsCdr in Brussels of her concerns. He replied: « please be assured that I fully support the principle that all colleagues should be assessed, irrespective of the purpose, in a totally transparent and objective manner, and that no colleague should ever be the subject of any form of discrimination or prejudice, perceived or otherwise, as a result of bringing matters of irregularity or suspected wrongdoing to the attention of their supervisory colleagues, especially when such notifications/reporting are expected of them by the very organisation that they work for. I have brought this matter to the attention of the Head of Mission and asked that he ensures that the afore-mentioned principles are fully adhered to and respected ».

Before the panel was convened, [REDACTED] sent the HoM a message to report that there were personal connections between certain prosecutors including the two panel members. She criticised a group of people who ate together, went to the opera together or went on trips together. It seems that she made an inventory of all the personal connections that might exist between the international prosecutors in Kosovo to conclude: "It is clear from the above that it is a closely knit group where they favor within their group to the exclusion of better candidates and there is a gang within the team that get preferential treatment as opposed to those who are on the outside" (email to [REDACTED], 25 September 2014). She asked for this email to be sent to [REDACTED] the chair of the selection panel. The list of people drawn up by [REDACTED] included the two prosecutors who were members of the panel and three candidates in the same selection procedure as [REDACTED].

Following the usual telephone interviews, the panel did not select [REDACTED]. She then objected to the composition of the panel, which was composed of members who she claimed had worked closely with the two people she had alleged were corrupt. She renewed her accusations concerning the close links between certain prosecutors who had allegedly formed a group from which she had been excluded, and complained about the nature of the questions that had been asked and the fact that she had had difficulty understanding the

[REDACTED] accent of one of the panel members. She requested a new interview. She also believed that the prosecutors that had been anomalously selected in previous competitions and had applied to this one should not have been accepted. According to the panel members and an observer, Head of Human Resources, the panel's questions had been repeated to the interviewee when necessary and the panel had clearly understood the responses.

[REDACTED] also alleges that at the initial selection in summer 2014, the future reduction in the number of [REDACTED] prosecutors was known. She was allegedly deliberately placed very low in the ranking, below the other [REDACTED] prosecutors, so that when the ranking would be communicated to the [REDACTED] authorities, [REDACTED] would not choose her. It is clear from the correspondence exchanged between the Mission and the [REDACTED] authorities that it was persistently denied access to the ranking. The accusation is therefore unfounded.

#### Assessment

With regard to the objections to the qualifications of prosecutors who had been recruited in the past and had once again applied to a selection procedure, [REDACTED] stated that she was acting in the general interest, but it is impossible not to note that these people were in direct competition with her and that their elimination would have made it easier for her to be selected. Even assuming that in the past some of them had not acquired the necessary length of experience as a prosecutor, they had acquired it since. In addition, given the basic considerations of legal certainty, I consider it extremely dubious in legal terms to challenge a selection carried out several years previously and against which no appeal had been made within a proper timeframe. Any objection should have been made in 2011, 2012, or in one case in 2013.

In any event, after a thorough examination of the files of the prosecutors cited by [REDACTED] it seems that in two past cases the interpretation of the person's experience had been generous, although not outright indulgent. It is true that during the first selection, one candidate who had not originally been on the list was added to it as a result of new deliberations that took place following an email sent to the board. It is not so much the new deliberations that raise questions as the fact that there was written communication between the panel and a candidate after the assessments and before the results were announced, which could constitute a breach of equal treatment among the candidates and an infringement of the SOP (Standard Operating Procedure) on Staff Selection rules in force at the time which forbade contact with panel members during the selection procedure. As regards [REDACTED] she was not the subject of any prejudice during the first selection procedure. Although she was interviewed on 4 August 2014, she did not raise any objections until 31 August when the news that the number of seconded [REDACTED] prosecutors was to be reduced became known and was due to be communicated by email the following day.

During [REDACTED] second - unsuccessful - selection procedure, even if all the candidates she objected to had been removed, she still would not have been high enough on the list to be selected. As regards the allegations of "conspiracy" between panel members [REDACTED] and [REDACTED] (Chief Prosecutor and Head of SRPK respectively), they are based on observations on the private lives of the parties concerned, which allegedly involved social relationships (meals, trips, etc.). In our opinion, none of those elements could lead to the conclusion that one was in the presence of a group whose intention was to eliminate [REDACTED], and some of the information is inaccurate. If that had been their intention, they could have done so during the first selection. Furthermore, there is nothing surprising about a group of people who live abroad, do the same job and in some cases are of the same nationality maintaining social relationships. It is possible that [REDACTED] felt excluded but, according to [REDACTED], she only rarely attended on the regular occasions that prosecutors met up with each other.

To our knowledge there is no element that would appear to confirm [REDACTED] allegations, some of which are factually inaccurate, especially as regards the composition of the successive selection boards or the recruitment of certain people, and others of which have been contested by credible witnesses as regards the facts reported by [REDACTED] concerning the nature of the social relationships between colleagues. Nevertheless, so as to avoid any controversy, it would have been preferable to choose panel members who were less closely linked to [REDACTED] allegations.

[REDACTED] also asserts that [REDACTED] spreading of her allegations regarding the qualifications of the prosecutors proved prejudicial to her. It is difficult to blame this on [REDACTED] as she herself made her allegations known to various persons inside the mission as well as in the Foreign Office.

## Recommendation

During future selection procedures, the rules on professional experience should be applied more rigorously in accordance with the instructions in force. In addition, during the selection of panel members, the appointment of individuals who are professionally too close to the candidates should be avoided. In that way, the independence of the panels would be reinforced and the risk of criticism such as that raised by [REDACTED] would be reduced.

### 5.2.5 Media leaks and the suspension of [REDACTED]

#### 5.2.5.1 Media leaks

On 18 October 2014, the EULEX PPIO (Press and Public Information Office) was contacted by Mr [REDACTED], a journalist for *Koha Ditore*. He indicated that he had in his possession a



series of EULEX internal documents relating to investigations, cases, corruption within EULEX, and threats against prosecutors. He also specified that he had information relating to three cases of corruption respectively involving the former president of the Assembly of EULEX Judges and the EULEX Chief Prosecutor. On 19 October 2014, the Special Advisor to the EULEX Head of Mission and the PPIO held an informal meeting with the journalist. During the meeting it became clear, by the journalist's own admission, that he had inter alia a formal grievance drafted by [REDACTED] copy of the intercepts carried out by [REDACTED] which were contained in the report she drew up in 2012, and a record of a witness interview concerning an alleged meeting between the president of the Assembly of Judges and a facilitator. These documents were the subject of an earlier leak and had been passed on to Prosecutor [REDACTED] on 4 June 2011 by an anonymous source, who was later found to be a witness in a criminal case and whose name could not be revealed at that stage. The journalist was questioned on that point to find out whether the source was [REDACTED]. The content of the reply is not clear, and the persons present at the meeting gave different opinions at different times. According to notes taken by two people during the meeting, it was allegedly indicated that [REDACTED] had indeed been the source of the leaks. Subsequently, after having confirmed that information in writing, one of those people revised his position and gave the following version of events: "he mentioned that [REDACTED] had given him a document and that her allegations were relevant. I wrote that in my notebook. However, he was not direct about it in the sense that he was not asked whether he was given the document to [REDACTED]." The conversation had been translated from Albanian and, some time afterwards, the translator was uncertain as to the content of the reply. What is certain is that the documents originated from [REDACTED] but it is not certain whether that meant that they had been handed over by [REDACTED]. As for the journalist, he now maintains that he did not reveal the name of his source. These documents did not appear to be the only documents the journalist possessed. The journalist indicated that whether or not there was a response from EULEX, he would publish his article on 27 October.

During the conversation, the Special Advisor indicated that she could comment on documents from the mission, but not on documents relating to criminal cases. She cautioned the journalist against divulging the latter since this would be a criminal offence under Kosovar law. The journalist asked if he was being threatened and he was told that he was not. In fact, no charges were subsequently brought against him. On 22 October, the Special Advisor wrote to the journalist saying that if he could at least provide the dates of the documents, she would try to identify them in order to answer his questions. In his response, the journalist thanked her for her cooperation, adding "from your yesterday meeting I understood that you do not have experience with media and that is the reason why you hesitate to show your understanding for the work of exchanges between EULEX officials." The tone of the letter was cordial and showed that if the journalist had felt threatened, he was aware that it was a misunderstanding linked to communication problems. The other

people present at the interview also attest to this. An internal investigation into "Unknown" was opened on 20 October. After a swift assessment of the situation, it became, on 24 October, an investigation into [REDACTED]. In the meantime, [REDACTED] had been suspended by the head of mission on 23 October 2014 (see below).

On 26 October, the newspaper *Koha Ditore* published the first of a series of articles covering the questions asked by the journalist during his meeting at the mission. Later, [REDACTED] gave a series of interviews to the local and international press. She has always denied that she contacted or passed documents to the press before she was suspended and states that after 27 October she acted to preserve her reputation. She demanded her right to protection as a whistleblower. She claimed to be exercising her rights under the law because she had been victimised for reporting corruption and the recruitment of unqualified prosecutors who had been hired as a result of nepotism. She maintained that she had not leaked confidential documents because she had written her formal grievance herself and the intercepts were in the public domain because they had been used during the Tolaj proceedings. She referred to the Dreyfus affair and compared herself both to Dreyfus as a victim and to Emile Zola as the author of "J'accuse".

Among the information made public during the press campaign was the name of a witness in a criminal case that until that point had been kept secret by EULEX, and which was revealed during a television programme. A transcript of the show was published in *Koha Ditore*, which emphasised that the witness was crucial to the [REDACTED] case and that it had not been possible for [REDACTED] to question him because the Head of the SPRK had obstructed the case. Following this disclosure, the prosecutor in charge of the case, [REDACTED] indicated that these revelations compromised the investigations in cases he had recently been assigned. The witness, whose cooperation was still being assessed, had been publicly identified, thereby putting his safety and his life at risk while his inclusion in the witness protection programme was still under examination. [REDACTED] added that he had not encountered any obstacles of any kind when dealing with the case, which he had recently taken over from [REDACTED] and another prosecutor. [REDACTED] replied that she had merely responded to questions she had been asked by the interviewer, who knew the name of the witness. She repeated her allegations that the Head of the SPRK had prevented this witness from being questioned, and refuted the testimony of [REDACTED] on the grounds that he was a friend of [REDACTED] and had only been familiar with the case for a short time.

#### Assessment

To determine what led to [REDACTED] suspension, one has to consider the situation when leaks happened and examine what the authorities knew at the time. Suspension is a provisional measure that maintains the rights of the person suspended, as it is only possible to have full knowledge of the situation when the investigation has been completed. It is

impossible to determine at what point the documents produced by [REDACTED] were made available to the public, since her formal grievance had already been circulating outside the Mission several months before the public revelations. Nor is there any certainty as to who was behind this initial leak which put the documents in the hands of prosecutor [REDACTED]. It is also not at all certain who was responsible for this first leak. Similarly, it is difficult to establish how these documents, along with others, apparently made it into the journalist's hands. The statements by the people present at the interview, including the interpreter, are contradictory. [REDACTED] accuses the Special Adviser of lying, but the Special Adviser's version of events was corroborated at the time by a witness who asked to remain anonymous and who subsequently gave a less clear-cut version of events. The journalist denies later that he revealed his source, but if he did, even inadvertently, he could not admit it publicly. In any case, since the journalist was in possession of documents originating from [REDACTED] would be reasonable to believe that she had been the one to hand over those documents. It is possible to construct the story as [REDACTED] has done, claiming that falsely accusing her of having handed over the documents allowed her to be suspended and therefore discredited, getting rid of her by means of a suspension. However, what interest could the Mission have had in acting in such a way given that [REDACTED] was due to leave the Mission a month later in any case since she had failed to pass the selection procedure? Furthermore, at the time of the revelations, the facts reported in the documents had been the subject of an internal inquiry, an investigation led by Prosecutor [REDACTED] had been opened and Judge [REDACTED] immunity was in the process of being waived. The mission therefore had nothing else to hide.

[REDACTED] states that a part of the documents was public and that the other part, the so-called "formal grievance", belonged to her because she wrote it. This overlooks the fact that in the text she writes at length and in detail about allegations of corruption, impugning prosecutors and judges. At the time of its disclosure this information was being investigated by another prosecutor and did not "belong" to [REDACTED] who would not have been free to reveal it to the public without the consent of the prosecutor in charge. Even if we allow that the requirement of confidentiality incumbent on EULEX members does not apply to prosecutors, who must be able to communicate with the public, this exception does not extend to cases for which a prosecutor is not responsible. [REDACTED] however, believes that this breach of the rules is covered by her status as a whistleblower (of which more later). She accordingly justifies the situation by saying that no investigation had been opened into two of her superiors and that she had a duty to speak out about this. As a prosecutor, she would have been aware that an investigation moves forward in stages and, not having been informed of prosecutor [REDACTED] strategy, she could not at that stage have known his intentions or timing as regards persons other than Judge [REDACTED].

[REDACTED] cannot be unaware of the central role afforded to the presumption of innocence in the protection of fundamental rights (Article 48 of the Charter of Fundamental

Rights of the European Union). As an experienced prosecutor, she must know that as soon as a name is made public along with an expression of belief in that person's guilt, irreparable damage is done regardless of the outcome of the proceedings. In her statements she could perfectly easily have limited herself to stating her convictions without disclosing the identity of the people she was accusing. That was the approach adopted by the prosecutor in charge of the case. It is true that the leaked documents ("formal grievance") written by her made things difficult for her, but she did not show any restraint in expressing her convictions, causing irreparable damage to the honour and reputation of people who are currently presumed innocent. Moreover, even though she did not herself give the name of a protected witness, she confirmed the person's identity, which was all the more dangerous as another protected witness had been found hanged from a tree abroad.

In conclusion, even though the person behind the leak to the press cannot be definitively identified, the leak concerned documents produced by [REDACTED]. In the series of interviews she later gave, she confirmed the content of her accusations. These accusations impugned colleagues of [REDACTED] who were protected by the presumption of innocence. It would have been possible for [REDACTED] to take these factors into account in her statements and to avoid causing such damage to people's reputations and honour by tempering her remarks and emphasising that these facts were the subject of judicial investigations but that the people implicated had not yet been charged.

#### 5.2.5.2 The suspension of [REDACTED]

After the interview with the journalist from *Koha Ditore* [REDACTED] was suspended with pay by the Head of Mission. Such a measure is provided for in point 8.2.3 of the Code of Conduct and Discipline: "The HoM may, at his/her discretion, suspend a staff member under disciplinary procedure, or alternatively temporarily relieve a staff member from duty. The suspension or relief from duty will be without prejudice to any other rights or obligations emanating from the secondment or employment of the suspended staff member unless otherwise decided by the HoM. In the case of judges and prosecutors, the HoM will seek the prior assent of the President of EULEX Judges or the Chief EULEX Prosecutor respectively. The NCL/NPC and line manager will be informed accordingly". Suspension is not a disciplinary measure and does not constitute an assessment of the potential guilt of the person in question. It is not a punishment, but a provisional measure while an investigation is ongoing.

When consulted about the suspension so she could give her consent, the Chief EULEX Prosecutor stressed that she was in a difficult position because she was one of the targets of the allegations. She added, "I may be accused to have an interest in sanctioning [REDACTED] and abusing my powers in order to get rid of her and thus damage the whole procedure". She requested a legal assessment of the situation and indicated that her consent would in any

case be a purely technical matter and should not "be interpreted as an attempt ... to make prejudice to [redacted] rights or position".

[redacted] considers that her suspension was planned far in advance and she supports her argument with an email from the HoM's special adviser indicating that, in view of the provenance of the documents, [redacted] should be prevented from accessing SPRK documents. 'I would think we need to do all we can to maintain document security from here on in. ... welcome the views of others that [redacted] not to be allowed to enter SPRK or other EULEX premises or have access to EULEX webmail/computers'. It was part of the special adviser's role to draw up the measures needed to avoid further leaks and this email was a case of brainstorming with the colleagues concerned and certainly did not relate to a decision that could be taken only by the HoM.

#### Assessment

In criticising the measure taken against her, [redacted] seems to believe that the suspension was a disciplinary sanction and should not have been applied unless there were serious suspicions that she had leaked the documents concerned. That is not the case. It was a "precautionary measure to avoid irreparable harm to ongoing cases and the operational effectiveness of the Mission". The Chief EULEX Prosecutor herself mentioned the risk of a conflict of interest. The suspension is justified because, even though there was uncertainty over whether [redacted] had actually handed over the documents, it was possible, even plausible, that she had done so based on evidence available at the time. Other leaks had to be prevented and for this purpose all potential sources of access to internal documents had to be cut off. [redacted] suspension was one way to do that, since the fact remained that the documents originated from her and it might therefore be supposed that she was responsible for the leak, even though others had had access to those documents in the meantime. It will not be possible to clarify the situation because the Disciplinary Board decided to close the case on the grounds that, as [redacted] had left the mission, it would have been impossible to apply a disciplinary penalty against her should she have been found responsible.

#### Recommendation

In future the OPLAN should provide for appropriate means of dealing with a situation of this kind involving judges and prosecutors, ensuring that in such cases consent to the suspension must be given by an independent body composed of peers.

#### 5.2.6. Alleged ethnic discrimination

[redacted] alleged that she had been discriminated against on ethnic grounds but did not clarify what she meant. Conversely, similar allegations were made against her following an

interview that appeared in EU Observer on 31 October 2014 in which she was reported as making the following remarks: 'This country is corrupt. Everywhere you look in Kosovo there is corruption. If you bring in senior people [to EULEX] from poor countries, or countries which also have endemic corruption, they are more likely to end up colluding with the locals... I'm not saying that all [redacted], all [redacted], or all [redacted] [for instance] are bad, but people [EULEX staff] who come from other parts of Europe ... are maybe not so susceptible'.

#### Assessment

Even if these remarks appear to propagate discriminatory ethnic stereotypes and are likely to be understood as such by nationals of those countries, [redacted] has a history of fighting racial discrimination, and her words, if accurately reported, are linked to her corruption allegations. They must be understood in the context of the time and [redacted] as in any case toned down her remarks.

#### 5.2.7. Allegations regarding [redacted] mental health

[redacted] blames the Head of Mission for having attempted to put the allegations down to mental health problems. An e-mail from the Head of Mission dated 18 October 2014 to his special adviser, the DHoM and Brussels enquiring about cases involving 'burnout of judges or prosecutors involved for a long time in very difficult cases while working in an extremely critical local environment. It is a contractual obligation of the Mission to exercise the duty of care for the well-being and the health of all employed personnel.... This seems to me to be one of those cases.' Clearly, this is a reference to [redacted] and the Head of Mission is seeking to explain the latter's behaviour. Investigations revealed that Brussels never gave credence to the Head of Mission's version of events and advised him against pursuing such a route. [redacted] says that this argument was subsequently used to discredit her, but it constituted an explanation that might have occurred naturally to persons disconcerted by her decision to speak at length to the press, behaviour unprecedented in the history of EULEX.

#### Assessment

The e-mail in question was only circulated internally among a very limited number of people in the Mission, and its contents were never used against [redacted] herself; following a veto by Brussels, however, considering the internal leaks in the Mission, it cannot be ruled out that it was distributed more widely, as [redacted] herself was aware of it. It is true that, in certain messages to senior officials in the Mission, [redacted] said that she was very stressed. [redacted] says that this allegation was sometimes used against her in the media. However, this was not, as she insinuates, a media ploy by the Mission. It appears to be a question of remarks made privately by persons seeking to explain her behaviour.

Furthermore, even if [REDACTED] had been suffering from burnout, that would in no way mean that the information she revealed was inaccurate, although it could have explained the decision to publicise it. On the other hand, burnout is not equivalent to insanity and has no pejorative implications as regards the person concerned. However, the Head of Mission's intervention was clumsily worded. If he had had concerns on the matter, it would have been wiser to contact the relevant medical authorities. As [REDACTED] was convinced that she was being persecuted in the mission, the episode can only have served to strengthen her convictions.

### 5.3 Final conclusions on the allegations

Taken individually, the allegations appear unfounded. Firstly, they amount to two minor disciplinary incidents which did not lead to any real sanctions against the party concerned. The allegations relating to the recruitment of prosecutors largely concern the extent of their professional experience and are only founded in three cases in which an overly liberal assessment was made of said experience. However, it should be noted that the situation in no way influenced [REDACTED] lack of success in the selection procedure. In the latter case, it would undoubtedly have been better had the board consisted of people who were less close to [REDACTED] professionally, but all the investigations carried out confirm that the board's unanimous decision was justified and founded solely on [REDACTED] performance. As regards the other allegations, one – namely ethnic discrimination – is unsubstantiated, and the other – mental health – is the outcome of action which was inarguably ill-considered but which had in no way been intended to bring [REDACTED] into disrepute, as it was supposed to remain within a very small circle of people.

Certain interviewees saw the allegations as a strategy conceived by [REDACTED] to compile a dossier that would enable her to obtain legal damages, as she had previously obtained from the [REDACTED] Government for discrimination on the grounds of ethnicity. It is true that, before the decision was taken not to select her, she had told colleagues that she would go to court and she repeated this in her statements to the press, but nothing arose from my investigation that could confirm or deny this hypothesis.

## VI [REDACTED]'s status as a whistleblower

There are no rules applicable to the status of whistleblower under the CFSP. One has to look at Article 6 of the EU Treaty, which refers to the European Convention on Human Rights (ECHR) as regards the general principles of law, and, by way of possible comparison, at the Staff Regulations for Officials of the European Union, to assess [REDACTED]'s position.

### 6.1 The general status of the European civil service

Article 22a of the Staff Regulations requires any 'official who, in the course of or in connection with the performance of his [or her] duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials' to inform his or her immediate superior, and protects him or her from any prejudicial effects that may result. As regards external disclosure, this is possible only to the presidents of the institutions, OLAF and the Ombudsman, provided that the official is acting in good faith and his or her allegations are well-founded.

The protection thus provided for would therefore not apply to [REDACTED] as regards disclosure to the press. On the other hand, she would have been protected as regards internal disclosure. However, the Staff Regulations prohibit disclosure relating to documents used in court proceedings. [REDACTED] had been an EU official, she would not have been protected under the Staff Regulations.

### 6.2 Case-law of the European Court of Human Rights

According to the Court's case-law in *Guja v. Moldova* (12.2.2008) and *Heinisch v. Germany* (21.7.2011), freedom of information (Article 10 ECHR) protects the disclosure of information regarding an employee's company obtained in the context of the employee's work. However, this disclosure is protected only if certain conditions are met, and above all it must be assessed more restrictively when it concerns public servants serving the general interest and who are unable to make use of the right of disclosure when it conflicts with that public interest. The conditions for disclosure to be considered legitimate are as follows:

- Public disclosure by an employee is only a last resort when internal procedures are ineffective: 'Consequently, in the light of this duty of loyalty and discretion, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public' (Heinisch, paragraph 65).
- The information must be verified and disclosed in good faith: 'Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to



disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable' (Heinisch, paragraph 67).

- Disclosure may occur only when there is a public interest in the information being known.
- Disclosure must not be motivated by personal reasons: 'an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available' (Heinisch, paragraph 69).

### 6.3 Application of these principles to the case of [REDACTED]

Information was disclosed to the public before the internal procedures and subsequent judicial proceedings were complete. According to the former HoM, [REDACTED] was informed on 28 August 2013 of the existence of an internal inquiry into her report. She was interviewed as part of that inquiry. She collaborated with the prosecutor conducting the criminal proceedings. She was an internal whistleblower, but, under these conditions, she cannot in any way be considered an external whistleblower.

She stated that she had chosen this solution on account of her suspension. If that were the case, she would not have been acting in the public interest but in order to pursue her own grievances, which would exclude her from the status of whistleblower.

She cites the persecution to which she had been subjected, but the status of whistleblower does not authorise the breaches of discipline that have been established, and does not allow them to go unpunished.

Last of all, in her statements, she damaged the reputation and infringed the privacy of third persons. It is doubtful whether the public's interest in receiving information could allow such conduct. A proper balance might perhaps have been struck if she had restricted herself to reporting the existence of possible cases of corruption, but she went further and demonised persons largely on the basis of hearsay before the proper proceedings had reached a conclusion.

### Conclusion

The conditions for applying the status of external whistleblower under the European Convention on Human Rights have not been met in this case, particularly as [REDACTED] revelations had been effective and the examination procedure was under way.