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### **Independence of the judiciary in Turkey: new composition of the Constitutional Court and of the High Council of Judges and Prosecutors (HSYK)**

Ladies and gentlemen,

The Union of European Turkish Democrats – Brussels (UETD Brussels) is a European Parliament accredited organization based in Brussels which supports the democratization process in Turkey.

On September, 12, 2010, a referendum was held in Turkey about a 26 articles constitutional amendment package. Two of those articles focus on the judiciary lato sensu. Indeed, they modify the rules for the composition of the Constitutional Court and for the High Council of Judges and Prosecutors (HSYK).

Those articles led to a large controversy during which the groups opposed to the constitutional amendment package argued that the revision of the aforementioned institutions' composition would put the independence of the judiciary in danger and lead to a control of the judiciary by the ruling party, AKP (Party for Justice and Development).

In order to verify the legitimacy of this allegation, one must compare the way of composing both institutions before and after the constitutional amendment package.

#### *Constitutional Court before the constitutional amendment package*

The Constitutional Court has the power to abrogate any law that violates the Constitution. In a democratic State, its composition must therefore have a democratic basis. This is why in EU member States, members of the Constitutional Courts are nominated by the Parliament and/or by the President. In Turkey, before the constitutional amendment package, it was composed by 11 effective members, 8 being nominated by the President of the Republic on lists presented by several institutions (mainly higher courts), and 3 being nominated directly by the President of the Republic. There is thus a lack of democratic legitimacy and the citizen's remedy is not possible.

#### *Constitutional Court after the constitutional amendment package*

The number of members has changed from 11 to 17. Several chambers have been created to professionalize the Court. From now on, 3 of the 17 effective members will be nominated by the Turkish National Assembly, but indirectly: 2 of them will be selected upon 3 candidates presented by the Revenue Court and 1 of them will be selected upon 3 candidates presented by the national bar association. This new system is very similar to the one implemented between 1961 and the coup of 1980. Moreover, the citizen's remedy

has become a reality, which means that every citizen who believes a new law violates his fundamental rights will have the legal possibility to seize the Court after using all other legal remedies.

*The HSYK before the constitutional amendment package*

The HSYK is a public institution which mission is to make sure that justice is properly made by the judges and the prosecutors. It was composed by 7 effective members: the minister of Justice who is the chairman of the institution (the same system exists for example in Germany), the deputy minister of Justice and 5 other members elected inside the Court of Cassation and the Council of State. It means that none of the more than 10 000 judges of the country is represented in this institution which must nevertheless control them. On the other hand, there are no remedies for the decisions made by the HSYK. This institution has thus absolutely no democratic legitimacy.

*The HSYK after the constitutional amendment package*

The composition of the HSYK has been completely revised. The number of its effective members has changed from 7 to 22. Several chambers have been created as well. The powers of the minister of Justice, who remains chairman of the institution, are reduced. The higher courts still elect some members, but the enormous innovation is that the judges of the lower courts finally receive the right to send a certain number of members as well. Another positive change is that decisions made by the HSYK will be open to remedies, which will prevent abusive decisions.

All these factors lead us to the following conclusion:

- 1) The previous composition of the Constitutional Court and the HSYK did not respect the European standards about independence and impartiality of the judiciary at all.
- 2) The composition of those two institutions rectifies this structural problem and will make the acceleration of future steps to strengthen democracy in Turkey possible.

Each of the 26 articles of the constitutional amendment package contributes to the reinforcement of democracy in Turkey. Of course, one might think it is not enough. It is not. It is legitimate to say that Turkey needs an entirely civil constitution and not a “democratized” military constitution. That is why there is a growing number of civil society movements that launched a campaign to support the constitutional amendment package called “Yetmez! ama EVET!” (“Not enough, but YES!”) which summarized perfectly the importance of voting in favor of this package despite its limited ambition.

The Union of European Turkish Democrats – Brussels supported this campaign by creating a website called [www.notenoughbutyes.eu](http://www.notenoughbutyes.eu), a sort of database containing various pedagogical documents explaining the content of the package approved by a large majority of Turkish citizens.

We now encourage the Turkish government to accelerate its works for a civil constitution and to include the civil society in this process. Finally, we invite the OSCE to support all efforts in this regard.

Mehmet A. SAYGIN  
Secretary-General

Warsaw, October, 4, 2010.