

## 9<sup>th</sup> Assembly of the EULEX Judges

Peje/Pec, 11<sup>th</sup> March 2010

### PROPOSAL FOR DISCUSSION

During the Civil Judges, Legal Officers and Legal Advisors meeting held in Pristhine/Pristina on 27 October 2009 and 17<sup>th</sup> February 2010 the below issues were discussed without a decision being taken. The first meeting referred the discussion to the 8<sup>th</sup> Assembly of EULEX Judges. The 8<sup>th</sup> Assembly postponed the discussion.

**1. Should civil law complaints be followed up only if they refer to KTA/KPA or (other) "property related" cases in the sense of Art. 5.1 of the LoJ ?**

All EULEX Judges, Legal Officers and Legal Advisors have a heavy workload which requires to concentrate their activities on specific issues. With regard to civil law, the OPLAN stresses the need to focus on "property related civil cases" (Justice Executive Approach, p. 47) / "conflict related property cases" / "conflict related compensation cases" (Tasks to Justice Component, p. 60, 61). So far, the EULEX Judges, Legal Officers and Legal Advisors working in the area of civil law have followed up complaints and have undertaken MMA activities regardless of whether they were property related. Since the MMA Guidelines as approved by the 2<sup>nd</sup> Assembly of EULEX Judges do not confine the "areas of special attention" (s. p. 6 and 9 subs.) to a particular material subject-matter, the cases which are monitored are picked arbitrarily.

The legal mandate for MMA activities authorizes EULEX to deal with any matter in “all areas related to the rule of law” (Art. 143 of the Constitution of the Republic of Kosovo i.c.w. Art. 13.3 of the Comprehensive Proposal, Art. 1.1 of Annex X and Art. 2.3 lit.g. of Annex IX thereto. – Art. 2.4 of the LoJ is unclear: Either it restricts MMA activities to “the respect of the principle of independence of the judiciary”, i.e. judicial independence, or – if read “in respecting the principle of independence of the judiciary” it does not contain any restriction whatsoever.).

There is a need not to confine civil law MMA activities to “property related” cases, cf. e.g. the working groups on domestic violence. Yet, in view of the (ordinary) legal remedies available to Kosovo citizens it is questionable whether a similar need exists when it comes to complaints.

Hence, the question arises whether the law – at least – allows for a distinction between complaints and MMA activities.

MMA activities consist of: observing, assessing and reporting; coaching or showing how a task could be carried out; providing professional counseling (OPLAN, Strategic Objectives of the Mission, p. 32). In contrast thereto, complaints are - by legal nature - extraordinary legal remedies which are directly addressed to and answered by EULEX. All complainants ask EULEX either explicitly or tacitly to “take over the case”, i.e. to take responsibility pursuant to Art. 5.1 of the LoJ. This might legally justify to investigate only those complaints that refer to KTA/KPA or “property related” cases in the sense of Art. 5.1 of the LoJ. Failing this, the complaint would not fall within EULEX’ mandate.

In case this distinction between complaints and MMA activities is made, it is not strictly necessary to amend the MMA Guidelines as approved by the 2<sup>nd</sup> Assembly of the EULEX Judges. Yet it might be advisable to incorporate a clarification. If the Assembly recommends a definition of the term “property

related" in the sense of Art. 5.1 of the LoJ (see the *proposal* to the Agenda) this definition should be incorporated in the MMA Guidelines.

**2. Should there be a stronger focus of civil law MMA activities on "property related" cases in the sense of Art. 5.1 of the LoJ ?**

The above-mentioned reasons (approach/tasks as defined in the OPLAN, workload and lack of a common practice) suggest to put a stronger focus on "property related" cases in the sense of Art. 5.1 of the LoJ.

If so, the MMA Guidelines would have to be amended. One option is to enumerate the material subject-matters to be dealt with in the Guidelines. In addition, it might be useful to subject non-property related MMA activities to the consent of the President of the Assembly of EULEX Judges in order to maintain a general line and to ensure harmonization with the MMA activities of other units within the Justice Component. If the Assembly recommends a definition of the term "property related" in the sense of Art. 5.1 of the LoJ (see the *proposal* to the Agenda) this definition should be incorporated in the MMA Guidelines.