



Doc. 14282 Add.
24 April 2017

The functioning of democratic institutions in Turkey

Addendum to the report¹

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

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1. Introduction

1. At its meeting on 8 March 2017, the Monitoring Committee approved a report and adopted a draft resolution on the functioning of democratic institutions in Turkey² with a view to its presentation at the April 2017 part-session. At that meeting, we announced that we would prepare an addendum to our report, in order to take account of the latest developments in the country, the opinions of the European Commission for Democracy through Law (Venice Commission) adopted on 10 and 11 March 2017,³ the resolution and recommendation of the Congress of Local and Regional Authorities of the Council of Europe adopted on 29 March 2017 and the first findings of the ad hoc committee of the Parliamentary Assembly, chaired by Mr Cezar Florin Preda (Romania, EPP/CD), which observed the referendum of 16 April 2017 on the constitutional amendments.

2. Since the publication of our report, a package of 18 constitutional amendments was adopted by a majority of voters (51.4%) in favour of an executive presidency (with a turnout of 85,32%), after a speedy parliamentary procedure. While the purges continue,⁴ the state of emergency was extended for the third time, and for another three months, on 18 April 2017. Following the arrest of HDP MP Çelik Özkan on 19 April 2017 and the release of HDP MPs Nursel Aydoğan and Meral Daniş Beştaş on 21 April, there are still 12 members of parliament in detention.

1. Addendum approved by the committee on 24 April 2017.

2. See [Doc 14282](#).

3. This addendum focuses on two of the three opinions adopted by the Venice Commission at its meeting of 10-11 March 2017, i.e. the opinions relating to the constitutional amendments and the impact of the emergency decree laws on media freedom. The third opinion adopted by the Venice Commission, at the request of the Monitoring Committee, relates to the duties, competencies and functioning of the criminal peace judgeships established in June 2014. The Venice Commission reviewed this judicial mechanism and, in the light of the issues identified (i.e. specialisation of these judges on "preventive measures", horizontal appeal system, detention orders based on insufficiently reasoned decisions by peace judges, prosecution, etc), advised the authorities to reform it, in particular to set up a vertical system of appeals and to remove the competence of the criminal judgeships of peace on protective measures during the investigation phase. See [CDL-AD\(2017\)004](#): Turkey – Opinion on the duties, competences and functioning of the criminal peace judgeships, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

4. According to the figures issued by Interior Minister Süleyman Soylu, 47 155 people accused of having links to the Gülen Movement have been arrested and 113 260 people had been detained as of 2 April 2016.



2. Constitutional referendum of 16 April 2017: preliminary findings of the Assembly's ad hoc observation committee

3. As co-rapporteurs, we participated in the observation of the 16 April 2017 referendum in Turkey with a 20-member ad hoc committee. While the technical aspects during election day were generally well administrated, the findings of the joint observation mission of the Parliamentary Assembly and the Office for Democratic Institutions and Human Rights (ODHIR)⁵ confirmed the concerns expressed by the Monitoring Committee since January 2017 about the context in which this referendum took place (under a state of emergency, with members of parliament and journalists in detention, fundamental freedoms restricted and populations displaced in south-east Turkey). We also identified a number of shortcomings during the referendum campaign, such as unbalanced media coverage, misuse of administrative resources, restricted fundamental freedoms, an inadequate legal framework to hold a genuinely democratic process, etc.

4. In addition, the Supreme Board of Elections (SBE) issued instructions late on voting day that “significantly changed the ballot validity criteria”, thus removing “an important safeguard” and contradicting the electoral law as amended in 2010, as noted by the Parliamentary Assembly/ODIHR observation mission.⁶ The appeals made by the opposition parties CHP and HDP, as well as by hundreds of individual citizens, to the SBE requesting the annulment of the referendum in view of the alleged irregularities were rejected by the SBE on 19 April 2017. *Pro memoria*, decisions of the SBE are final and cannot be appealed – an issue which has been repeatedly criticised by previous Assembly election observation missions.

5. Our ad hoc committee concluded that “the referendum did not live up to Council of Europe standards”. The report of the ad hoc committee will be presented to the Standing Committee in May 2017. In the light of the uneven campaign and the decision of the SBE during voting day, serious questions can be raised about the legitimacy of the outcome of the referendum.

6. In view of the “close result of the referendum”, the Secretary General of the Council of Europe Mr Thorbjørn Jagland invited the Turkish leadership to “consider the next steps carefully”, adding that “it is of utmost importance to secure the independence of the judiciary in line with the principle of rule of law enshrined in the European Convention on Human Rights”.⁷

7. For our part, we take note of the outcome of the referendum. At the same time, we reiterate our position that the newly adopted constitutional changes raise a number of issues, which have been substantiated by the constitutional experts of the Venice Commission, as detailed in section 3 of this addendum with respect to the constitutional amendments and media freedom under the state of emergency.

8. Three constitutional provisions will be implemented immediately: the right of the President of the Republic to be a member of a political party; the restructuring of the High Council of Judges and Prosecutors (all 13 members being now appointed by the parliament and the President) and its replacement by a “Council of Judges and Prosecutors”, as well as the abolishment of military courts – which was welcomed by the Venice Commission (see below).

9. We remain committed to working with the Turkish authorities, including its parliament, and with our Council of Europe partners, in particular the Venice Commission, through the preparation of constitutional amendments if need be, to ensure that the constitutional framework and its implementation comply with Council of Europe standards. In the light of the electoral deficiencies identified during the observation of recent elections, due attention should also be paid to the election framework. The monitoring procedure should provide us with the necessary framework to follow up the expected co-operation on constitutional and electoral matters.

5. See the [joint PACE / ODIHR statement](#) of 17 April 2017 and the [preliminary conclusions](#) of the international referendum observation mission.

6. The SBE allowed the validation of unsealed ballot papers “unless it [could] be proved that they were brought from outside the voting room”. Media reported that “according to Article 98 of the Law on Basic Provisions on Elections and Electoral Registers, ‘envelopes’ which are not in the form and colour which is given by the Ballot Box Committees (BBCs) and on which there is no seal from the Provincial Election Boards (PEBs) and BBCs are deemed invalid. According to Article 101 of the law, the ‘ballot papers – split ticket’ which do not have the seal of the BBCs are invalid”. www.hurriyetdailynews.com/turkish-election-board-rejects-all-referendum-appeals.aspx?pageID=238&nID=112177&NewsCatID=338.

7. [Statement](#) by the Secretary General Thorbjørn Jagland on the outcome of the Turkish constitutional referendum, 17 April 2017.

3. Constitutional amendments for a presidential system submitted to referendum on 16 April 2017

3.1. Opinion by the Venice Commission on the constitutional amendments

10. The opinion by the Venice Commission⁸ on the amendments to the Constitution relates to the establishment of what the Turkish authorities have described as a “Turkish-style presidential system”. This opinion confirms the concerns we expressed at the end of our visit to Turkey (9-13 January 2017), and which were later shared by the Monitoring Committee in its declaration of 26 January 2017 and the report adopted on 8 March 2017. These findings concern:

10.1. *The procedure of adoption of the constitutional amendments:* the Venice Commission stresses that “the breach of the secrecy of vote cast a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies’ vote. Regrettably, the parliamentary procedure did not provide a genuine opportunity of open discussions with all the political forces present in parliament” (paragraph 131).

10.2. *The advisability of holding a referendum under a state of emergency:* the Venice Commission considers that “whether permanent constitutional change should occur during a state of emergency is dependent on whether the circumstances are such that democratic principles will prevail” (paragraph 36). Recalling that “constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome”,⁹ it considers that it is “highly doubtful that the constitutional referendum scheduled for 16 April 2017 could and would meet the democratic principles of the European democratic tradition. In addition, even if these standards were respected, the credibility of the results of a referendum held during a state of emergency that has been declared to consolidate government power would be compromised” (paragraph 41).

10.3. The Venice Commission underlined that this whole process was taking place during the state of emergency, “when very substantive limitations on freedom of expression and freedom of assembly are in force. In particular the extremely unfavourable environment for journalism and the increasingly impoverished and one-sided public debate that prevail in Turkey at this point question the very possibility of holding a meaningful, inclusive democratic referendum campaign about the desirability of the amendments” (paragraph 132). In another opinion, the Venice Commission recalled the essential role of a free media environment to openly discuss political matters when a major constitutional reform is launched.¹⁰

10.4. *The compliance of the constitutional amendments, in substance, with European standards with respect to:*

10.4.1. *The separation of powers and checks and balances:* The Venice Commission noted that “a presidential regime requires very strong checks and balances, and especially a strong, independent judiciary” as controversies between the executive and the legislative branches “often end up in courts” in presidential systems (paragraph 44). Under the new Constitution, the President of the Republic would be at the same time the head of State and the head of the government. The Venice Commission showed that the proposed amendments made to the Constitution would not guarantee, in practice, the separation of powers in view of:

10.4.1.1. the “invasive influence” of the President of the Republic – who would have ties with his/her political party – over the parliament in a system when presidential and parliamentary elections are held at the same time, with the phenomenon of attraction of presidential elections over parliamentary elections. “The President will have the power to appoint and dismiss ministers, choosing some of them from among members of the legislature. This will give him or her effective source of patronage over the legislature” (paragraph 62). “This creates a danger of the President taking control of the legislative agenda” (paragraph 52). The President would also be able to issue presidential

8. [CDL-AD\(2017\)005](#): Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

9. Venice Commission report on the constitutional amendments, [CDL-AD\(2010\)001](#), paragraph 245.

10. [CDL-AD\(2017\)007](#): Turkey – Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), paragraph 91.

decrees (except, if the country is not under a state of emergency, on certain issues related to human rights); even though the law should in theory prevail over presidential decrees when there are conflicting areas;

10.4.1.2. the President's power to nominate and dismiss high-level State officials according to procedures defined by himself/herself as well as ministers and vice-ministers (with the parliament exercising no control over these nominations) (paragraph 68). Despite not being elected, vice-presidents and ministers would enjoy parliamentary immunity (paragraph 63) and, in case the President would not be in a position to exercise his/her mandate, a Vice-president would be able to rule the country without democratic legitimacy, and for unlimited time (except for the length of the mandate itself) (paragraph 66).

10.4.2. *The weakening of the independence of the judiciary:* the Venice Commission pointed out that the composition of the "Council of Judges and Prosecutors" – which would replace the "High Council of Judges and Prosecutors" – would be problematic, as all 13 members would be appointed by either the President (4+2 *ex officio* members, i.e. the Minister of Justice and the Undersecretary of Justice, appointed by the President) or the parliament (7), which contradicts both the positions of the Venice Commission and Committee of Ministers Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.¹¹ In addition, because the President would be engaged in party politics, his/her choice of the members of the Council of Judges and Prosecutors "will not have to be politically neutral" (paragraph 119). In addition, the appointment procedure of the members of the Supreme Court of Cassation and the Council of State by the Council of Judges and Prosecutors also influences the composition of the Constitutional Court.¹²

11. The Venice Commission also explained at length the system of "bilateral" renewal of the elections: the President can dissolve the parliament on any grounds whatsoever – and the parliament can also dissolve itself on any ground (and with a three-fifths majority). In either of these two cases, the presidential and parliamentary elections would be held simultaneously. The President is limited to two mandates, unless the parliament dissolves itself during the second mandate of the President, which would then pave the way for his/her third mandate. The Venice Commission also considered that holding elections simultaneously "means in practice that usually the President controls the parliamentary majority ... It makes it unlikely that there will be meaningful separation of powers ... It rather follows a concept of unity of power which is characteristic for not so democratic a system".¹³

12. The Venice Commission concluded that the constitutional amendments would lead to "an excessive concentration of executive power in the hands of the President and the weakening of parliamentary control of that power. ... The democratic accountability of the President is virtually absent during the mandate; it only comes into play if the President runs for a second mandate. ... The [Turkish Grand National Assembly] may not hold a vote of confidence in the President. There is no possibility of interpellations. Only written questions are allowed and must be addressed to Vice-presidents and ministers (amended Article 98(5)). In addition, the President will benefit from a general immunity for any criminal act besides those committed in the exercise of the presidential functions, for which he or she may be subject to a very complex procedure of impeachment with the final judgment being made by the Constitutional Court, whose members are appointed directly or indirectly by the President" (paragraph 47). In addition, the constitutional amendments will reinforce the veto power of the President, who can decline to promulgate a law and send it back to the parliament, which could override this veto provided that the absolute majority of the members of parliament vote in favour.

13. While welcoming the abolition of the military courts and the provision that the presidential emergency decrees automatically lose their validity if they are not approved by the Grand National Assembly within three months, the Venice Commission assessed that the proposed constitutional amendments would introduce in Turkey a presidential regime "which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one" (paragraph 130). It concluded that "the substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition

11. CM/Rec(2010)12 stated that: "Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."

12. "The Court of Cassation and the Council of State are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. The influence of the Executive over the Constitutional Court is therefore increased" (paragraph 121).

13. CDL-AD(2017)007, paragraph 98.

of Turkey”, stressing “the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum”.

3.2. Opinion of the Venice Commission on measures provided in the recent emergency decree laws with respect to freedom of the media

14. At the request of the Committee on Political Affairs and Democracy, the Venice Commission also analysed the measures provided in the recent emergency decree laws with respect to freedom of the media, in particular the liquidation of medias, the confiscation of property, the use of criminal justice against journalists in the light of European standards and the case law of the European Court of Human Rights.¹⁴

15. The Venice Commission concludes that the media cannot exercise its public watchdog role in a context marked by “severe interference with freedom of expression and the media caused by the emergency decree laws”¹⁵, while “the ability to openly discuss political matters in the media becomes even more crucial when the state of emergency had been prolonged”.¹⁶

16. The Venice Commission also emphasises, in line with previous findings of Council of Europe monitoring mechanisms, that pretrial detention of journalists under the [vague] heading of “membership” of terrorist organisations (and alike) are problematic, it should be necessary to produce “relevant and sufficient” reasons for the detention of journalists in case they are prosecuted because of their writings, while detention “should remain an exception”.¹⁷

17. We fully share the concerns expressed by the Venice Commission, and we would like to suggest one amendment to emphasise our expectations towards the “Inquiry Commission on State of Emergency Measures” with respect to freedom of the media, which is a cornerstone of democracy and should urgently be restored in Turkey (see proposed amendment 3).

4. Regarding the reintroduction of the death penalty

18. We noted, with great dismay, that the issue of the reintroduction of the death penalty was once again raised during the campaign by Mr Erdoğan, who reiterated his readiness to promulgate any such law passed by the parliament. As already noted in our report and stressed by the Assembly in its Resolution 2149 (2017),¹⁸ the introduction of the death penalty is not compatible with membership of the Council of Europe.

19. The day after the referendum, President Erdoğan again signalled that he would approve a parliamentary bill reintroducing the death penalty, or organise a referendum on this subject if opposition MPs would not support such a bill.¹⁹

20. We recall that Turkey abolished the death penalty in 2004 as part of its reform process. It ratified Protocol No. 6 (ETS No.114 concerning the abolition of the death penalty) in 2003 and Protocol No. 13 to the European Convention on Human Rights (ETS No.187 concerning the abolition of the death penalty in all circumstances) in 2006. The reintroduction of the death penalty would require Turkey to denounce these two protocols, and thus also the European Convention on Human Rights (ETS No. 5) as such. As noted by Yves Cruchten (Luxembourg, SOC), Parliamentary Assembly General Rapporteur on the abolition of the death penalty, the reintroduction the death penalty “would be simply incompatible with Turkey’s continued membership of the Council of Europe” and that the Assembly would “not accept any backsliding on turning Europe into a death penalty-free continent”.²⁰

14. [CDL-AD\(2017\)007](#).

15. [CDL-AD\(2017\)005](#), paragraph 37.

16. [CDL-AD\(2017\)007](#), paragraphs 91-92.

17. *Ibid.*, paragraph 93.

18. [Resolution 2149 \(2017\)](#) on the progress of the Assembly’s monitoring procedure (September 2015-December 2016) and the periodic review of the honouring of obligations by Austria, the Czech Republic, Denmark, Finland, France and Germany.

19. www.hurriyetdailynews.com/president-erdogans-death-penalty-remarks-start-debate-with-europe.aspx?pageID=238&nID=112127&NewsCatID=338.

20. [Statement](#) by Mr Yves Cruchten, 19 April 2017.

21. We deem it necessary to stress, once again, the position of the Assembly on this matter, and propose to reaffirm our commitment to this Council of Europe *acquis* by means of an amendment and to highlight the parliament's specific responsibility to refrain from any move that could jeopardise Turkey's membership of the Council of Europe (see proposed amendment 1). The Assembly remains at the full disposal of the Turkish National Grand Assembly to exchange with parliamentarians and the Turkish authorities on this issue.

5. Functioning of democratic institutions at local level: position of the Congress of Local and Regional authorities of the Council of Europe

22. Both in the Assembly's June 2016 [Resolution 2121 \(2016\)](#) and in our report of 8 March 2017, we pointed to the serious problems faced in southeast Turkey in the wake of the security operations which have been conducted there since August 2015.

23. In his report of 10 March 2017,²¹ the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, highlighted human rights violations and documented "numerous cases of excessive use of force; killings; enforced disappearances; torture; destruction of housing and cultural heritage; incitement to hatred; prevention of access to emergency medical care, food, water and livelihoods; violence against women; and severe curtailment of the right to freedom of opinion and expression as well as political participation".

24. This report also depicted the impact of the state of emergency measures that "appear to have largely targeted dissent in general and political parties of the opposition in particular, disproportionately affecting citizens of Kurdish origin. Of particular concern is the massive scale of dismissals of public officials, especially of school teachers; the mass arrests of members of parliament belonging to the People's Democratic Party (HDP) and of municipal mayors in majority Kurdish areas; and the closure of almost all Kurdish language local and national media outlets and the arrests of their journalists".²²

25. On 29 March 2017, the Congress of Local and Regional Authorities debated the report "Fact-finding mission on the situation of local elected representatives in Turkey"²³ submitted by Anders Knape, Sweden (L, EPP/CCE) and Leendert Verbeek, Netherlands (R, SOC). The Congress deplored that one member of the Turkish delegation, Nurhayat Altun, Co-Mayor (HDP) of Tunceli, has been detained in the Kocaeli F-type prison since 17 November 2016, while another member, Serra Bucak (DBP) was also prevented from attending the 2017 spring session of the Congress in Strasbourg.

26. The Congress adopted [Resolution 416 \(2017\)](#), as well as [Recommendation 397 \(2017\)](#) which notably asked the Committee of Ministers to invite the Turkish authorities to:

- "rescind the legislative measures on 'mayors appointed by the central authorities' and restore the capacity of municipal councils to choose a replacement mayor, if the mayor is removed from office;
- ensure that the arrest of a local elected representative is a decision duly substantiated in domestic law, taken in conformity with the standards of the Council of Europe;
- examine, with a view to their release, the situation of local elected representatives currently in pretrial detention in order to ensure that it is in conformity with the European Convention on Human Rights and, where appropriate, proceed with their immediate release;
- revise the ministerial instructions of 11 November 2016 with a view to decriminalising the appointment of co-mayors;
- revise the Turkish legislation to align its definition of terrorism with European standards, notably the case law of the European Court of Human Rights".²⁴

27. The Congress also requested an opinion of the Venice Commission on the constitutionality of the measures in Decree Law No. 674 which concern the exercise of local democracy in Turkey.

28. Together with the Congress, we encourage the monitoring mechanisms of the Council of Europe, in particular the Council of Europe Commissioner for Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as well as the Group of Experts on

21. Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in South-East Turkey, July 2015 to December 2016, February 2017. See [press release](#) of 10 March 2017.

22. *Ibid.*

23. [CG32\(2017\)13](#).

24. [Recommendation 397 \(2017\)](#) on the fact-finding mission on the situation of local elected representatives in Turkey, adopted by the Congress on 29 March 2017, paragraphs 8.

Action against Violence against Women and Domestic Violence (GREVIO), to continue to pay close attention to democratic developments at local level. We would like to echo the recommendations made by the Congress, which are fully relevant in respect to the functioning of democratic institutions in Turkey, in our upcoming resolution (see proposed amendment 2).

6. Conclusions

29. On the basis of the information provided in this addendum, the Monitoring Committee could decide to table the following amendments to the draft resolution on the functioning of democratic institutions in Turkey:

29.1. **Amendment A:** After paragraph 7, insert the following paragraph: “In this context, the Assembly recalls that the reintroduction of the death penalty would be incompatible with membership of the Council of Europe and urges the Turkish Grand National Assembly to refrain from any move that could lead to the reintroduction of capital punishment and thus jeopardise Turkey’s membership of the Council of Europe”;

29.2. **Amendment B:** At the end of paragraph 11, add the following: “The Assembly deplores that these detentions have suspended the practical exercise of local democracy in that region, led to a disproportionate supervision of local administrations through the appointment of trustees and reduced local public services, in contravention of the European Charter of Local Self-Government (ETS No. 122). The Assembly urges the Turkish authorities to release, where appropriate, the mayors currently in pretrial detention and fully restore local democracy in south-east Turkey, in line with Resolution 416 (2017) and Recommendation 397 (2017) of the Congress of Local and Regional Authorities.”

29.3. **Amendment C:** After paragraph 26.4, insert the following paragraph: “ensure that the Inquiry Commission on State of Emergency Measures will be fully operational without further delay and with the power to restore the *status quo ante* and/or, where appropriate, provide adequate compensation, grant priority treatment to the most urgent applications, including those introduced by the media outlets, and issue reasoned individualised decisions in line with the recent opinions of the Venice Commission”;

29.4. **Amendment D:** replace paragraph 28 with the following paragraph: “The Assembly takes note of the adoption of a package of 18 constitutional amendments by the parliament on 21 January 2017 and by 51.4% of the voters during the constitutional referendum on 16 April 2017, which will result in a profound change and a shift from a parliamentary to a presidential system, granting the President of the Republic extensive powers while drastically reducing the supervisory role of the parliament. The Assembly emphasises that it is the sole right of the Turkish citizens to decide on the democratic political system they wish to have, provided that sufficient information is given to the voters and that enough time is left for public debate.

29.5. **Amendment E:** after paragraph 30, insert the following paragraph: “In the light of the preliminary findings of the international referendum observation mission of the Parliamentary Assembly/Office for Democratic Institutions and Human Rights (ODIHR), the Assembly deeply regrets that the referendum was contested on an uneven playing field, thus preventing the two sides in the campaign from having equal opportunities. Furthermore, the decision of the Supreme Board of Elections in the course of the voting day – allowing the validation of unsealed ballot papers in contradiction with the 2010 election law – has raised serious questions about the legitimacy of the outcome of the referendum. The Assembly also expects the Supreme Board of Elections to thoroughly investigate all alleged election irregularities.”

29.6. **Amendment F:** after paragraph 31, insert the following paragraph: “In the light of the March 2017 recommendations of the Venice Commission on the constitutional amendments, the Assembly resolves to follow the institutional developments and to work with the Turkish authorities, possibly through the preparation of constitutional amendments, to ensure that the constitutional framework and its implementation comply with Council of Europe standards.”

29.7. **Amendment G:** delete paragraph 34.8 [about the organisation of the constitutional referendum].