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Comparative analysis on the High Councils for Judiciary in the EU member states and judicial immunity

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I. Introduction

International and regional human rights treaties recognize the right to an independent and impartial judiciary as part of the broad guarantee of the right to a fair trial. It is today well recognized, that judicial independence extends to the institutional autonomy of the courts. The full-fledgedness and independence of the judiciary pre-supposes its self-regulation and self-governance, which includes, *inter alia*, the organization of the work of courts and the activities of the professional corps of judges.

Concerns about the independence of the judiciary led to the creation of Judicial Councils (Councils for the Judiciary), starting in France and Southwestern Europe and spreading worldwide as part of reform efforts to improve judicial independence and court operations. In various European countries Councils for the Judiciary act as intermediaries between the Government and the judiciary in order to guarantee the independence of the judiciary¹. As set out in the Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary (ENCJ) of 23rd May, 2008, in most European States there now exists a Council for the Judiciary or a similar institution which is an independent or autonomous institution distinct from the legislative and executive powers of the State, and responsible for the independent delivery of justice².

This study sets out to examine the arrangements of Judicial Councils in various EU member states, with particular emphasis on legal status, composition and main functions of the mentioned institutions in the light of relevant European standards. Following the request of the beneficiary, questions of judicial immunity are also dealt with.

¹ V. Autheman, S. Elena. Global best practices: Judicial Councils. Lessons learned from Europe and Latin America. April, 2004.

² <http://www.encj.eu/images/stories/pdf/resolutionbudapestfinal.pdf>

II. Judicial Councils

1. Relevant European standards

Each Council for the Judiciary has its origin in the development of its own legal systems which is deeply rooted in a historical, cultural and social context but nevertheless all Councils for the Judiciary share common challenges and are governed by the same general principles.³ At the European level, the most comprehensive efforts to draft minimum standards regarding the creation, membership and role of Judicial Councils have been undertaken under the direct or indirect supervision of the Council of Europe (CoE). Already in the Recommendation (94) 12 of the Committee of Ministers to Member States on the Independence, efficiency and role of judges, the CoE has recommended to entrust responsibility for the selection and career of judges to an authority independent from the government and the administration and whose members are selected by the judiciary⁴. However, as at that period a diversity of court administration models across Europe was still acknowledged, the CoE refrained from proposing to change the alternative systems of court administration that in practice worked well⁵. Efforts to design regional judicial independence guidelines culminated with the adoption of the European Charter on the Status for Judges in 1998, which provides that in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent from the executive and legislative powers **within which at least one half of those who sit are judges elected by their peers** following methods guaranteeing the widest representation of the judiciary.⁶ Following the Explanatory memorandum of the Charter, the intervention of a body independent from the executive and the legislature where a decision is required on the selection, recruitment or appointment of judges is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body. As some countries might find it difficult to accept an independent body replacing the political body responsible for judicial appointments, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body means that the political or administrative authority which does not follow such recommendation or opinion should at the

³ http://www.csm1909.ro/csm/linkuri/15_06_2011__41800_ro.pdf

⁴ http://www.judicialcouncil.gov.az/Law/eAS_NK_12sayli.pdf

⁵ <http://www.coe.int/t/dghl/standardsetting/cdcj/CJSJUD/recR%2894%2912e%20exp%20memorandum.pdf>

⁶ https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

very least be obliged to make known its reasons for its refusal so to do. The provision that at least one half of the body's members should be judges elected by their peers, means that the Charter wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principles prevailing in different national systems⁷.

Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, reflects further movement in the recognition of the role of Judicial Councils, as it already contains the whole chapter on the Councils for the Judiciary, including the main role, composition and principles of activities of those institutions. It defines Judicial Councils as independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system. **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. Councils for the Judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions. In exercising their functions, Councils for the Judiciary should not interfere with the independence of individual judges.

Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, has highlighted the importance of Judicial Councils in many of its opinions, the most relevant being Opinion No. 10 (2007) on "Council for the Judiciary in the service of society".⁸ The aim of this opinion was to identify the core elements in relation to the general mission, composition and functions of Judicial Councils with a view to strengthening democracy and to protecting the independence of the judiciary. The opinion does not present a detailed description of principles for the composition or the functions of the Judicial Council, neither does it create a single model for the Judicial Council in Europe, however, it sets the main principles that the democratic states

⁷ https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

⁸ <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282007%29OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>

are expected to follow. Those principles will be dealt with in more detail in the subsequent chapters of this report.

Summarizing the main principles and ideas, expressed in the mentioned and other relevant documents, Judicial Councils should be independent bodies that seek to safeguard the independence of the judiciary and of individual judges; they must operate in a transparent and accountable manner; the structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence; Judicial Councils must be granted adequate human and financial resources. Judicial Councils should be composed of a majority of judges; judicial members of the Judicial Council should be elected by their peers rather than appointed by the legislature or executive; the selection process should be transparent and provide for civil society participation and oversight. Judicial Councils should be responsible for the judicial selection process and contribute to the promotion, discipline and/or training of judges; the decision-making process of the Judicial Council should be transparent.⁹

2. Models for Judicial Councils in Europe

Within the Judicial Councils existing in Europe, a distinction is often made between the **Southern European model**, in which the body is constitutionally rooted and fulfills primary functions in safeguarding judicial independence – such as giving advice on the appointment of members of the judiciary or exercising disciplinary powers with regard to these members – and the **Northern European model**, in which the Councils have far-reaching powers in the area of administration (supervision of judicial registry offices, caseloads and case stocks, flow rates, promotion of legal uniformity, quality care etc.) and court management (for example, housing, automation, recruitment, training, etc.) and, in addition to that, play an important part in the budgeting of courts (involvement in setting the budget, distribution and allocation, supervision and control of expenditure, etc.)¹⁰. The underlying reason for the mentioned differences is the history and rationale of creation of Judicial Councils in different regions of Europe.

The motivating concern for creation of Judicial Councils in Southern Europe was ensuring independence of the judiciary after periods of undemocratic rule. To entrench judicial independence, most of these countries enshrined the Judicial Council in their constitution. In

⁹ IFES Rule of Law Tool: Seven International Best Practices for Judicial Councils, A Tool to Strengthen Judicial Independence and Integrity.

¹⁰ See e.g. Councils for the Judiciary in EU Countries. CEPEJ, 2003

France the first High Council of the Judiciary (*Conseil Supérieur de la Magistrature*) was established in 1946, in the aftermath of the Vichy regime and World War II. This Council, which has been maintained under Article 64 of the 1958 French Constitution, was in charge of managing judicial personnel, but only a minority of members were themselves magistrates elected directly by fellow judges. In 1958, Italy became the first country to create a Judicial Council (*Consiglio Superiore della Magistratura*) designed to completely remove the entire judiciary from political control, a model that served subsequently for other judiciaries. Spain and Portugal have slightly different models, introduced after the fall of their dictatorships in the mid-1970s¹¹. In Southern European model Judicial Councils are given significant powers primarily in appointing and promoting judges and/or in exercising disciplinary powers vis-à-vis judges. Although Judicial Councils may also play a role in the areas of administration, court management and budgeting of the courts, these powers are secondary to their competences relating to judges and personnel generally.

By contrast, Judicial Councils in Northern Europe, especially in Denmark or Sweden, were created exclusively to meet the objectives of improved administrative management and control over the judicial budget and personnel. Sweden was the first country to adopt a Council for the Judiciary according to the Northern European Model, for the Swedish *Dolmstolsverket* has been in existence since 1975. It is to be noted that Sweden has a unique system of public administration, which is characterised by a constitutional tradition of functional decentralisation and devolution of responsibilities from government ministries to independent administrative agencies. Importantly, the agencies' independence is protected by the constitution against any interference by the ministries in their operations. Against this background, it should come as no surprise to learn that Sweden was the first Northern European country that decided to entrust the organization of court administration to an independent institution (agency).¹² Ireland and Denmark are usually pointed out as other examples of countries that have adopted a Council for the Judiciary according to the Northern European Model¹³. The Northern European model is also sometimes described as “the courts service model” of courts administration, where the primary

¹¹ N. Garoupa, T. Ginsburg. The Comparative Law and Economics of Judicial Councils. Berkeley Journal of International Law. Volume 27, Issue 1, 2009

¹² T. Bunjevack. Court governance in context: beyond independence. International Journal for Court Administration. December, 2011

¹³ V. Autheman, S. Elena. Global best practices: Judicial Councils. Lessons learned from Europe and Latin America. April, 2004.

function of independent intermediary organizations (agencies) is in the area of administration, court management and the budgeting the courts, limited role in the appointment and promotion of judges and no disciplinary powers vis-à-vis judges, the latter powers being vested in independent institutions such as judicial appointment commissions¹⁴. Diverse representation on the governing board of an independent judicial agency is an important feature in practically all of the Northern European countries, because it serves to promote the “public accountability” of those institutions¹⁵.

Starting from the year 1990, Judicial Councils were established in most EU countries. In Poland Judicial Council was established in 1990, in Slovenia, Romania and Bulgaria – in 1991, in Croatia – in 1993, in Lithuania and Malta – in 1994, in Belgium – in 1998, in Ireland – in 1999, in the Netherlands, Slovakia and Estonia – in 2002, in Latvia and Northern Ireland – in 2010, in Hungary – in 2012.¹⁶ Many of those countries have tended to borrow aspects from both models in designing/reforming their own Judicial Councils in order to reach twofold aims: to protect judges from any interference in their independence by the way of appointment, promotion or dismissal, and to meet the growing requirements of modern court management. Relevant international and European standards described above have served as an important guideline in this process. Therefore, the mentioned models can be named as **mixed**, although there is also an opinion that namely Italian model had the greatest influence over the design of newly created Judicial Councils around Europe¹⁷.

In a few EU member states Judicial Councils have not yet been created. In Germany and Austria the Ministry of Justice still plays a key role in both the appointment and promotion of judges and in the administration of courts and court management. This is also said to be true about Finland. The mentioned countries are well known for *de facto* respect of judicial independence by the executive, and that could be the main reason for abstention from creation of Judicial Councils here. Although an effort to establish the Judicial Council in the Czech Republic

¹⁴ E.g. Judicial Appointments Council in Denmark is composed of a Supreme Court judge (chairman), a high court judge (vice-chairman), a district court judge, a lawyer and two representatives of the public.

¹⁵ T. Bunjevac. Court governance in context: beyond independence. *International Journal for Court Administration*. December, 2011

¹⁶ Data taken from the website of the Network of Councils for the Judiciary, <http://www.encj.eu/>

¹⁷ See e.g. C. E. Parou. Explaining judiciary governance in Central and Eastern Europe: external incentives, transnational elites and Parliament inaction; N. Garoupa, T. Ginsburg. *The Comparative Law and Economics of Judicial Councils*. *Berkeley Journal of International Law*. Volume 27, Issue 1, 2009

has been taken in 2000, this was, unfortunately, not supported by the political consensus.¹⁸ In Cyprus the functions of Judicial Council are vested on the Supreme Court.¹⁹

3. Legal status of Judicial Councils

In its Opinion No. 10 CCJE recommended the Council for the Judiciary to be positioned at the constitutional level in those countries having a written constitution, or in the equivalent basic law or constitutional instrument for other countries. Provisions should be made for the setting up of such body, for the definition of its functions and of the sectors from which members may be drawn and for the establishment of criteria for membership and selection methods.²⁰ Although the legitimacy of Judicial Councils is not necessarily at risk when they are created by statute, in countries that are in the process of consolidating democratic institutions, the constitutional creation of Judicial Councils may help strengthen their legitimacy within the legal and judicial framework. A constitutional provision will grant the newly-created institution the legitimacy of constitutional recognition and may help insulate it from interferences from the executive, legislative or judiciary through legislation, decrees or rulings. Establishing the Council through a constitutional provision may help emphasize its importance as a guarantor of judicial independence²¹.

In the majority of EU member states (Belgium, Bulgaria, Croatia, France, Italy, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Hungary, Greece) Judicial Councils are constitutional bodies. In Sweden, Denmark, Latvia, Estonia, the Netherlands and Ireland Judicial Councils have no constitutional basis. In England and Wales Judicial Council has no constitutional status but is protected by legislation in the form of the Judicature Act 1873 and the Constitutional Reform Act 2005²².

In some countries where Judicial Councils enjoy the constitutional status, the Constitution only points out to the existence and main role of such authority, without listing its precise composition or functions, the latter being regulated by law.²³ However, more countries tend to regulate the composition and sometimes the main functions of the Judicial Council in the

¹⁸S. Spac. Judiciary development after the breakdown of communism in the Czech Republic and Slovakia. 2013.

¹⁹ Article 157 of the Constitution of Cyprus

²⁰ CCJE Opinion No. 10, Para 11

²¹ V. Autheman, S. Elena. Global best practices: Judicial Councils. Lessons learned from Europe and Latin America. April, 2004.

²² http://www.encj.eu/images/stories/pdf/factsheets/judges_council_uk_england_and_wales.pdf

²³ E.g. Article 25 of the Constitution of Hungary, Article of the Constitution of Lithuania.

constitution itself.²⁴ This solution seems to be wise in order to prevent possible tries to narrow the competence of Judicial Councils by the way of changing the relevant laws.

Judicial Councils are designed as the main bodies of the autonomy of courts - authorities which are independent from the legislative and/or executive authorities, intended to safeguard both the independence of the judicial system and the independence of individual judges²⁵. Councils for the Judiciary should embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary. On the other hand, Councils for the Judiciary do not belong to the hierarchy of the court system and cannot as such decide on the merits of the cases. In exercising their functions, Councils for the Judiciary should not interfere with the independence of individual judges.²⁶

4. Membership of Judicial Councils

Membership of Judicial Councils varies from country to country. There is however an undisputed consensus that Judicial Councils should include a majority of judges. International and regional instruments refer to the membership of Judicial Councils as including “substantial judicial representation”²⁷, “substantial majority of judges elected by their peers”²⁸, “not less than half [...] judges elected by their peers”²⁹. Membership of non-judges is by no way excluded, however, members of the Judicial Council, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and

²⁴ E.g. Article 151 of the Constitution of Belgium, Article 129 of the Constitution of Bulgaria, Article 124 of the Constitution of Croatia, Articles 186-187 of the Constitution of Poland, Part VI Article 122 of the Constitution of Spain, Articles 133-134 of the Constitution of Romania, Article 141a of the Constitution of Slovakia, Article 131 of the Constitution of Slovenia, Articles 104-105 of the Constitution of Italy, Article 218 of the Constitution of Portugal. **See Annex I for some examples.**

²⁵ E.g. Council is defined as a sovereign and independent body which ensures the sovereignty and independence of judicial power (Article 124 of the Constitution of the Republic of Croatia and article 2 of the State Judicial Council Act); as an institution intended to safeguard the independence of courts and judges (Article 186 of the Constitution of Poland), permanent acting body, which represents the judicial power and secures its independence, determines its personnel and the work organization of the judicial system, and manages its activities without interfering with the independence of its bodies (Judiciary System Act of Bulgaria).

²⁶ CCJE Opinion No. 10, Para 12; Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities, Article 29

²⁷ European Charter on the Status for Judges

²⁸ The Magna Carta, adopted by the CCJE on 17 November 2010

²⁹ CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

culture of independence,³⁰ avoiding any undue political influence over the activities of the Council. Prospective members of the Council for the Judiciary should not be active politicians, members of parliament, the executive or the administration³¹. The CCJE considers that the membership of the Council for the Judiciary should reflect the size of the judiciary and, consequently, the volume of tasks to be fulfilled³².

The number of members of Judicial Councils around Europe now ranges from 3 to 5 in the Netherlands to 44 in Belgium. Other examples are 10 members in Malta and Sweden, 11 in Denmark, Croatia Slovenia and Estonia, 15 in Latvia and Hungary, 17 in Ireland and Portugal, 18 in Slovakia, 19 in Romania, 21 in Spain, 22 in France, 23 in Lithuania, 25 in Poland and Bulgaria, 27 in Italy.

Judges constitute the majority of Judicial Councils in Bulgaria (14 out of 25 members), Croatia (7 out of 11), Ireland (9 out of 17), Latvia (9 out of 15), Estonia (6 out of 11), Poland (15 out of 25), England and Wales (28 out of 29), Romania (10 out of 19), Slovenia (6 out of 11), Spain (12 out of 21), Italy. In Lithuania, Hungary, Scotland and Northern Ireland Judicial Councils are composed solely of judges. In Belgium ratio of judges and non-judges members is equal (22 out of 44). The same applies to Slovakia, where by law, at least 50% of members of Judicial Council should be judges. It is noted however that in practice very often there is a significant majority of judges³³. In those countries where judges are still in the minority of the Council, the ratio of judges to non-judges is nearly equal: for example – 5 out of 11 in Denmark and 8 out of 17 in Portugal³⁴.

Following the recommendations of the CCJE, in order to guarantee the independence of Judicial Councils, there should be rules ensuring that the judge members are selected by the judiciary. Without imposing a specific election method, it is recommended that judges sitting on the Council for the Judiciary were elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels. The selection can be done through election or, for a limited number of members (such as the presidents of Supreme Court or Courts of Appeal), by virtue of their office. Factual situation around Europe reflects the mentioned recommendation

³⁰ CCJE Opinion No. 10, Para 21

³¹ CCJE Opinion No. 10, Para 23

³² CCJE Opinion No. 10, Para 34

³³ It happens because from among 3 members elected by the Parliament, 3 members appointed by the President and 3 members appointed by the Government many are also judges. See: www.encj.eu

³⁴ Data taken from the website of the European Network of Councils for the Judiciary, <http://www.encj.eu/>

– in most EU member states some – mainly the highest – judges are members of a Council for the Judiciary by virtue of their office³⁵, while other judge members are elected by judges³⁶. In some countries there are provisions ensuring the distribution of elected judge members among the various levels of jurisdiction.³⁷ However, in any case judicial members of the Council must act as the representatives of the entire judiciary.

The CCJE disproves systems that involve political authorities at any stage of the selection process of judicial members of the Council as well as all forms of appointment by authorities internal or external to the judiciary. There are, however, some EU member states where such situation remains. For example, in Spain judicial members of the Council are appointed by the Parliament and in Romania elected members of the Council are validated by the Romanian Senate. In Bulgaria, 11 members of Judicial Council, which are elected by the National Assembly, can also be elected from among judges. The same applies to Slovakia, where members of the Council, elected respectively by the Parliament, the President and the Government, can (and often in practice do) come from the judiciary. Although the latter situation by itself does not intervene with the requirement of “majority of judges, elected by their peers”, it could cause unnecessary concerns as to independence and impartiality of judges so appointed.

As regards the non—judge members of Judicial Councils, according to the recommendations of the CCJE those may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status. Legal experience gained from practicing as a lawyer or involvement in other legal position is desirable in order to guarantee that such members have the requisite skills and experience in areas of Councils competence as well as sufficient understanding of judicial life. Modern

³⁵ E.g. the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court in Bulgaria, the Chief Justice of Ireland in Ireland, the First Chief Judge of the Supreme Court in Italy, Chief Justice of the Supreme Court and President of the Constitutional Court in Latvia, the First President of the Supreme Court and the President of the High Administrative Court in Poland, President of the Supreme Court in Portugal, President of the Supreme Court, President of the Court of Appeal, President of the Supreme Administrative Court in Lithuania.

³⁶ E.g. 22 members in Belgium, 16 members in Italy, 7 members in Latvia, 20 members in Lithuania, 15 members in Poland, 7 members in Portugal, 9 members in Romania, 9 members in Slovakia, 6 members in Slovenia, 5 members in Estonia, 14 members in Hungary.

³⁷ E.g. In Lithuania elected members of the Council (20) are three judges from the Supreme Court, the Court of Appeal, the Supreme Administrative Court each, one from each regional court (5), one from all regional administrative courts and one from all district courts located in the territory of each regional courts activities. The candidates are nominated and elected during the General Meeting of Judges by the representatives of the relevant courts. In Hungary 14 members of the Council are elected in a secret ballot by majority vote at the meeting of the delegated judges - one judge of a regional court of appeal, 5 judges of courts of appeal, 7 judges of local courts and one judge of an administrative and labor court.

management of the judiciary might also require wider contributions from members experienced in areas outside the legal field (e.g. in management, finances, IT, social sciences)³⁸.

Prospective members of the Council for the Judiciary should not be active politicians. In particular, the presence of the Minister for Justice as a member of the Council for the Judiciary is not considered appropriate, as it clearly entails the risk of the executive power affecting the debates and choices made by the judicial order and may effectively constrain the frankness of debate and discussions. This risk of having the Minister for Justice as a member of the Council outweighs the possible theoretical advantage of having the Minister present to carry out a joint evaluation of problems arising from the functioning of the judicial system, and matters of common interest³⁹.

Analyzing the actual composition of Judicial Councils in EU member states, non-judge members of Judicial Councils are mainly members of other legal professions: attorneys at law (Belgium, Bulgaria, Denmark, France, Malta, Ireland, Slovenia, Spain, Sweden), investigating magistrates (Bulgaria), prosecutors, especially Prosecutor General (Bulgaria, France, Romania, Spain, Italy, Latvia, Malta, Estonia), notaries (Latvia), bailiffs (Latvia), chief executives of the Judicial office (UK, Ireland), as well as university professors at law (Belgium, Bulgaria, Croatia, Slovenia, Spain) or other professionals and/or citizens of acknowledged status (e.g. in Belgium 4 non-judge members of the Council must hold an university or equivalent degree and have 10 years of relevant professional experience; in Denmark 2 members of the Council are representatives with special management and social insights, in France the Council must include 6 “prominent figures” nominated by the President of the State and the parliament). In Sweden Council includes two representatives from trade unions. Some of non-judge members are elected, while others (Prosecutor General, Chief executive of judicial office) might be members of the Councils *ex officio*.

Politicians remain members of Judicial Councils in Croatia (2 members of parliament), Sweden (2 members of parliament), France (the president of the National Assembly and the president of the Senate), Latvia (Minister of Justice and Chairperson of the Judicial Committee of the parliament), Poland (6 members of the parliament, Minister of Justice and representative of the President of the State), Romania (Minister of Justice). In Italy and Malta the President of

³⁸ CCJE Opinion No. 10, Para 22

³⁹ ENJCJ Project Team. Councils for the Judiciary. Report 2010-2011.

the State is a chairperson of the Council *ex officio*, however, this position seems to be ceremonial. For example, in Malta the president only has a casting vote⁴⁰. In Estonia and Bulgaria the Minister of Justice has a right to participate in the Council with no voting rights.

As regards appointment of non-judge members, following the Opinion of the CCJE those should not be appointed by the executive. The CCJE commends a system that entrusts appointments of non-judges to non-political authorities. If in any state any non-judge members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society⁴¹. In practice, this is true for some non-judges members in Croatia (university professors that are members of the Council are elected by law faculties on the proposal of law faculty councils), France (lawyer member is nominated by the president of the national Council of bars), Ireland. In most EU member states appointment of non-judges members of the Councils is carried out by the parliament (Belgium, Bulgaria, Croatia (for the members of parliament only), Italy, Romania, Slovakia, Slovenia, Spain) or the president and the parliament (France, Portugal, Slovakia, Slovenia).

5. Selection of the Chair

Following the Opinion of the CCJE, it is necessary to ensure that the Chair of the Council for the Judiciary is held by an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge⁴².

Chairperson of the Judicial Council is elected by the Council itself in Croatia, Denmark (it is pointed out that so far it was always a member from the Supreme Court),⁴³ Lithuania, Romania, Slovakia, Slovenia, Poland. In Hungary presidency is based on rotation on seniority basis. In Belgium presidency of the Council is exercised in turn by each member of the Bureau for 1 year, while the Bureau itself is elected by the general assembly of the Council.

⁴⁰ <http://judiciarymalta.gov.mt/commission-for-the>

⁴¹ CCJE Opinion No. 10, Para 32

⁴² CCJE Opinion No. 10, Para 33

⁴³ http://www.encj.eu/images/stories/pdf/factsheets/domstolsstyrelsen_denmark.pdf

In other EU member states the presidency of Judicial Council is carried out by the president of the Supreme Court (Chief justice) *ex officio*. This is the case for the UK, Ireland, France, Latvia, Portugal and Spain.

As it was already mentioned, in Italy and Malta the President of the State is an *ex officio* chairperson of the Council. Vice – president of the Council in Malta is the Chief Justice *ex officio*.

6. Term of office

The term of office of Councils members varies from 3 years (Portugal (elected members), Ireland and UK) to 6 years (Hungary, the Netherlands, Romania and Slovenia). In Belgium, Croatia, Denmark, France, Italy, Latvia, Lithuania, Malta and Poland the term of office of Councils members is 4 years and in in Bulgaria, Slovakia and Spain – 5 years.

Following the Opinion of the CCJE, although it is for the states to decide whether the members of the Council for the Judiciary should sit as full-time or part time members, full-time attendance means a more effective work and a better safeguard of independence. However, there is a need to ensure that judges sitting on the Council for the Judiciary are not absent for too long from their judicial work, so that, whenever possible, contact with court practice should be preserved. Terms of office which entail exclusive sitting on the Council for the Judiciary should be limited in number and time.⁴⁴

In practice, only in a few EU member states (Bulgaria, France, Italy, the Netherlands and Romania) membership of the Council is on a full – time basis. In some states full-time membership is limited to the executive bodies of the Council, e.g. director general in Denmark, president of the Council in Slovakia, members of the Bureau in Belgium, members of the Standing Committee in Spain (from June 2013). In Portugal, decision whether to serve as a full – time member can be taken by the member of the Council himself.

In vast majority of EU member states (Belgium, Bulgaria, Croatia, Denmark, UK, France, Italy, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia, Poland) the term of office of Council members can be renewed once; in some countries (e.g. Italy) such renewal cannot be consecutive. In Hungary, Romania and Spain no renewal is possible.

⁴⁴ CCJE Opinion No. 10, Para 34

7. Functions of Judicial Councils

In its Opinion No. 10 the CCJE encourages attributing both traditional (related to safeguarding judicial independence via participation in judicial appointment, promotion, and disciplinary responsibility) and new (administrative and management) functions to the Council. The following tasks are recommended to be performed preferably by the Council itself, or in cooperation with other bodies: the selection and appointment of judges; the promotion of judges; the evaluation of judges; disciplinary and ethical matters; the training of judges; the control and management of a separate budget; the administration and management of courts; the protection of the image of judges; the provision of opinions to other powers of the State; the co-operation with other relevant bodies on national, European and international level; the responsibility towards the public: transparency, accountability, reporting⁴⁵. This recommendation is followed in practice, irrespective of the already mentioned fact that in some EU member states Judicial Councils have stronger “traditional” powers, when in the others – administrative and management powers.

As Judicial Councils are entrusted with a wide scope of functions, sometimes there might be a conflict between different functions of the Council for the Judiciary, such as between appointing and training of judges, or between training and disciplinary matters, as well as between training and evaluation of judges. One way of avoiding such conflict is to separate the different tasks between various branches of the Council for the Judiciary.⁴⁶ For example, in Belgium two committees are established within each language board of Judicial Council: a Nominations and Appointments Committee, composed of 14 members, responsible for presentation of candidates for a nomination or appointment, judiciary entrance examinations, directives on the training of judges and judicial interns, and an Advisory and Investigation Committee, which has 8 members and is responsible for opinions and recommendations to policy-makers, handing complaints, audits and special inquiries, monitoring internal control mechanisms.⁴⁷ In Lithuania for the purpose of preparing, reviewing in advance or solving certain issues the Council may form standing or ad hoc commissions, working groups, standing committees⁴⁸. In Poland Judicial Council has separate standing committees for general matters

⁴⁵ CCJE Opinion No. 10, Para 42

⁴⁶ CCJE Opinion No. 10, Para 42-43.

⁴⁷ <https://www.csj.be/en/content/committees>

⁴⁸ Regulation of work of the Judicial Council, approved by Resolution of Judicial Council of 28 June 2013.

and training, disciplinary responsibility of judges, budgetary, for visitation and inspection of the court, for professional ethics of judges, library as well as issue – specific committees dealing with complaints, international contacts and mass media.⁴⁹ In Spain, Judicial Council includes the Permanent Committee, the Disciplinary Committee, the Economic Affairs Committee and the Equality Committee.⁵⁰

7.1 Judicial appointments and promotion

The most widely recognized power of a Judicial Council is its role in the appointment and promotion of judges. While it is widely accepted that appointment or promotion can be made by an official act of the Head of State, yet given the importance of judges in society and in order to emphasize the fundamental nature of their function, Heads of States must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the judge's image of independence, irrespective of the personal qualities of the candidate proposed⁵¹. It means that involvement of any political power in the selection and career of judges, if such exists, must be clearly ceremonial.

If the selection procedure is separate from the appointment procedure, it is also important to specify the particular safeguards that apply to the selection procedure. Candidates for judicial office must be selected and recruited by an independent body or panel. Examination or selection panels can be used for this purpose provided they are sufficiently independent⁵². Example of such a panel can be Selection Commission of Candidates to Judicial Office in Lithuania.⁵³

CCJE advocates for judicial appointments made by the Council for the Judiciary itself (as it is for example in Italy, Spain or Portugal), however, in most EU member states judicial appointments are made by the act of the Head of the State or (in some cases) – the parliament. Judicial Councils, on the other hand, play a prominent role in judicial appointments in almost all

⁴⁹ <http://www.krs.pl/en/about-us/composition-of-the-council>

⁵⁰ <http://www.poderjudicial.es/cgpj/en/Judiciary/General-Council-of-the-Judiciary/Institutional-information/How-the-CGPJ-works>

⁵¹ CCJE Opinion No. 10, Para 49, CM/Rec (2010) 12, Article 47

⁵² European Charter on the Statute for Judges, Article 2.1

⁵³ Composed of seven members and formed for a period of three years by the President of the Republic. Three members of the Selection Commission are judges and four members are the representatives of the society. Members of the Judicial Council may not be appointed members of the Selection Commission.

EU member states. This role mainly includes binding advice to the appointment authority (Belgium, Lithuania, France, Malta, the Netherlands, Slovakia), and can also extend to organization of entrance examination (Belgium), selection and nomination of judicial candidates (Estonia, Slovakia, Slovenia, Belgium, France), appointments of members of the Judicial Appointments Commission or similar body (UK), employment of deputy judges (Denmark). Judicial Councils may also be given powers to approve rules and selection criteria for candidates seeking judicial office and persons seeking judicial promotion (Lithuania).

7.2 Disciplinary powers

The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Principle VI of Recommendation No. R (94) 12, stated that disciplinary measures against judges should be dealt with by “a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself” and that judges should in this connection benefit, at the least, by protections equivalent to those afforded under Article 6.1 of the Convention on Human Rights. Recommendation CM/Rec (2010) 12 further states that such proceedings should be conducted by the independent authority or court with all the guarantees of a fair trial and provide the judge to challenge the decision and sanction⁵⁴.

In its Opinion No. 10, the CCJE recommended that disciplinary procedures in first instance, when not addressed within the jurisdiction of a disciplinary court, should preferably be dealt with by a disciplinary commission composed of a substantial representation of judges elected by their peers, different from the members of the Council for the Judiciary, with provision of an appeal before a superior court⁵⁵. A Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body⁵⁶.

Judicial Councils themselves function as disciplinary bodies (mainly first instance) vis-à-vis judges in Bulgaria, Croatia, Italy, France, Portugal, Romania and Spain. In case if the Council itself acts as a disciplinary body, this function is usually entrusted to specific division

⁵⁴ Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities, Article 69

⁵⁵ CCJE Opinion No. 10, Para 64

⁵⁶ CCJE Opinion No. 10, Para 63

(composition) of the Council. For example, in Italy Disciplinary division of the Council, which acts as disciplinary authority of first instance, is composed of six members: the Vice President, who is a member *ex officio* and chairs the court, and five members elected by the Council from among its members, one of whom is a „laymen“, one is a judge/prosecutor with the rank and functions of a Court of Cassation judge/prosecutor, two are judges and one is a prosecutor. In his capacity as President of the Council, the Head of State may avail himself of the right to chair the Disciplinary Division and in that case, the Vice President is excluded from the panel. In Spain Disciplinary Committee of the Council comprise seven members: four appointed on the basis of judicial rotation, and three on the basis of the rotation of jurists of recognized competence. The Plenary Session of the Council elects the members who will comprise the Disciplinary Committee. In France Disciplinary composition of the Council for Judges acts as first instance disciplinary court and in Romania it is done by particular section of the Council. In Bulgaria disciplinary proceedings are allocated for hearing to a disciplinary panel of three elected members of the Supreme Judicial Council singled out from its membership by drawing lots. After the submission of the proposal by the disciplinary panel of judges for imposing a disciplinary sanction, the Supreme Judicial Council shall pass a decision with a majority of the votes of over half of its members (13 votes), whereby it can impose a disciplinary sanction following the proposal of the disciplinary panel of judges⁵⁷. Decision of the first instance disciplinary authority can be then appealed against to the court (e.g. Constitutional Court in Croatia, Combined Civil Divisions of the Court of Cassation in Italy, Council of State in France). In Romania, Plenum of the Judicial Council acts as second instance disciplinary court.

In other EU member states disciplinary powers are vested in independent institutions different from Judicial Councils (e.g. Disciplinary Committee in Latvia⁵⁸, Judicial Court of Honour in Lithuania⁵⁹) or courts (Disciplinary chamber of the Supreme Court in Estonia, Special Court of Indictment and Revision in Denmark, disciplinary courts in Poland, Supreme court in the Netherlands). Disciplinary powers of Judicial Councils in those countries may extend to appointment of members of independent disciplinary bodies (Lithuania, Slovakia, Poland,

⁵⁷ http://vss.justice.bg/en/root/f/upload/5/The-Rules-EN_TRA.pdf

⁵⁸ A body of judicial self-governance the members of which have been elected by secret ballot in the conference of judges for the term of four years. The Judicial Disciplinary Committee reports on its activities to the judicial conference.

⁵⁹ Autonomic authority of courts to hear judicial disciplinary cases and petitions of judges for defense of honor of the judge, constituted from ten members for the period of commission of the Judicial Council.

Hungary), or/and the right of motion for instituting a disciplinary case against a judge (Lithuania, Belgium, Slovenia). UK, Estonia, Denmark, Sweden, Ireland, Latvia, and the Netherlands have reported that Judicial Councils have no competence in the area of disciplinary proceedings against judges in their respective countries⁶⁰.

7.3 Training

Following the recommendations of the CCJE, the responsibility for organizing and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the Judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programs and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions should be encouraged between the Council for the Judiciary and the training academy, when it exists. If the Council for the Judiciary has competence in training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks and ties should be avoided either with the ministry of justice (appointment of the trainers, budget allocation etc.), or with the ministry of education (accreditation, recognition of diplomas etc.)⁶¹.

In the vast majority of EU member states training of judges is carried out by independent public institutions, such as Judicial Academy in Croatia, Judicial Training Centre in Lithuania, Judicial Studies Committee in Malta, National Institute of Magistracy in Romania or Centre for Judicial Studies in Portugal. The role of Judicial Councils includes determination of the general guidelines for the training of members of the judiciary (Belgium, Hungary, Italy, Poland), development and approval of the programs for initial and continuous training (Latvia, Lithuania, Romania). In Portugal and Spain respective judicial training institutions are under the umbrella of Judicial Councils and in Denmark Judicial Council itself is responsible for the training of all court staff, including the judges and deputy judges. In Bulgaria 5 representatives of the Supreme Judicial Council are members of the management board of National Institute of Justice, responsible for judicial training. In the Netherlands Judicial training is developed and organized

⁶⁰ http://www.encj.eu/index.php?option=com_content&view=article&id=51&Itemid=97&lang=en

⁶¹ CCJE Opinion No. 10, Para 66

by the National Judicial Training Centre. The Council is part owner of National Judicial Training Centre (2/3 Council and 1/3 Procurator-General's office) and therefore responsible for both the organization and supervision of the National Judicial Training Centre. In Slovakia the Judicial Council in agreement with the Minister of Justice determines the subject matters to be included in judges' education, elects 5 members of the Board of the Academy and propose members of the pedagogical staff of the Academy.

7.4 Judicial Ethics

In some EU member states (Belgium, Malta, Romania, Hungary, Slovakia, Poland, France) it is within the competence of Judicial Councils to adopt judicial codes of conduct. In Belgium "*Guide for the magistrates, principles, values and qualities*" has been issued by the Council in June 2012. This guide was inspired by the guidelines issued by the ENCJ. In Hungary the Judicial Council enforced the Code of Judicial Conduct on the 10th of November, 2014. In Poland Judicial Council adopted the Code of Ethics on 19 February 2003. In the Netherlands a special working group of members of the Judiciary and policy advisors of the Council are currently working on integrity issues, such as a handbook, amendment of the Code of conduct for the Judiciary and opening debate on accessory functions.

In EU member states where judicial codes of conduct are not adopted, or adopted by different institutions than Judicial Council (e.g. Lithuania, Slovenia, Denmark) Judicial Councils promote judicial ethics as part of the organised judicial training activities. In some states Judicial Council has a right to give opinion of issues of judicial ethics (e.g. Slovenia) or hear complains concerning the violations of judicial ethics (Croatia).

7.5 Budget of the judiciary

Independence and self-governance of the judiciary do not come without certain requirements surrounding the budget of the judiciary and of the self-governing body (Judicial Council) itself. It is of crucial importance that the judiciary is able to influence its own budget at least by direct negotiations with the various stakeholders and representatives of other branches of government power.⁶² Although the funding of courts is part of the State budget as presented to Parliament by the Ministry of Finances, such funding should not be subject to fluctuations for

⁶² http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/judic_reform/Project_report_0911.pdf

political reasons. Although the level of funding a country allocates to its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.⁶³ The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary.⁶⁴

European standards do not advocate different budget-drafting procedures or the allocation of financial resources depending on the relative level of a court within the judicial hierarchy. It would be advisable, and in the interests of the judiciary as one of the branches of state power, for judicial self-governing bodies to be involved in the procedure of drafting of budgets for all courts of all levels, without exception. This would enable discussions to be had and the relevant state authorities to be presented with a common approach for the whole judicial system. In order to ensure that the needs of the judiciary are met, the involvement of self-governing judicial bodies in (1) the process of drafting budgets for the judiciary and its institutions, and (2) the process of negotiation with government and parliament is a pre-requisite to ensuring judicial institutional independence.⁶⁵

As it was already mentioned, in countries with Northern European model of Judicial Councils Judicial Councils are traditionally very strong in budgetary issues of the judiciary. For example, in Denmark the *Domstolsstyrelsen* plays an active role in the negotiations of the budget to be allocated to the judiciary. This happens through the channels of the Ministry of Justice. The Ministry of Justice delegates the budget (appropriations) to the *Domstolsstyrelsen*, which in turn allocates the budget to the courts. Ultimately, the economic responsibility for the judiciary lies with the board of governors of the *Domstolsstyrelsen*. The board has the possibility to address Parliament directly with a budget proposal should they find that the appropriations are insufficient. Allocation of resources to the 24 district courts is done using a budget model that is based on the number of received cases at the various district courts (the workload). As far as the rest of the courts are concerned, the allocation of resources is based on the budgets allocated the

⁶³ CCJE Opinion No. 2 on the funding and management of courts, Para 10

⁶⁴ CCJE Opinion No. 10, Para 73

⁶⁵ http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/judic_reform/Project_report_0911.pdf

previous years⁶⁶. In Sweden the budgeting of the judiciary takes place at several levels. First of all, there is – based on the budget approved by Parliament – an allocation of the Government budget to the *Domstolsverket*, which, subsequently, apportions the money and passes it on to the different courts. For determining the budgets earmarked for the judiciary, a three-year budgetary cycle applies. During the first year, on 1 March, the *Domstolsverket* presents a budget proposal to the Government, which submits it in a budget proposal to Parliament on 20 September. Between 1 March and 20 September, the Government negotiates with the *Domstolsverket* about the policy for the coming budgetary year: the policy objectives and target figures are determined during this period and translated into instructions that the Government gives to the *Domstolsverket* when the budget is approved. The budget proposal goes out on 20 September, after which the Government and Parliament debate the budget proposals. The management information from the annual reports of the *Domstolsverket* for previous budgetary years plays an important role here. Subsequently, Parliament usually adopts the budget in December. Once the budget is approved, the *Domstolsverket* implements an apportionment and thus determines the budgets for the individual courts⁶⁷.

In contrast, in some EU member states with traditional South European model, Judicial Councils have limited or no powers in the budgetary process. E.g. in Italy, the budget for the operation of the courts and, in general, for the organization of the judiciary, is administered by the Ministry of Justice⁶⁸. Same situation is in France.⁶⁹

Countries with newly created Judicial Councils tend to include budgetary powers into the competence of their Judicial Councils. For example, in Hungary the Judicial Council makes its budgetary proposal and hands it in to the Parliament (the President of the Council and the Minister of Finance negotiate in several rounds.) The Council also makes decision on the distribution of the budget between the courts⁷⁰. In Lithuania budgets and investment programs are drawn up by the appropriations managers - the courts. The courts submit their proposals for their draft budgets to the Council of Judges for consideration. The Council of Judges considers

⁶⁶ http://www.encj.eu/images/stories/pdf/factsheets/domstolsstyrelsen_denmark.pdf

⁶⁷ Prof. Wim Voermans and Dr Pim Albers. Councils for the Judiciary in EU Countries. CEPEJ, 2003

⁶⁸ http://www.encj.eu/images/stories/pdf/factsheets/italy_csm.pdf

⁶⁹ Prof. Wim Voermans and Dr Pim Albers. Councils for the Judiciary in EU Countries. CEPEJ, 2003

⁷⁰

<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282010%2912&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

and approves proposals for draft investment programs for courts and proposals for the budgets of district, regional and regional administrative courts and submits them to the Government. The Supreme Court, the Court of Appeal and the Supreme Administrative Court, after preparing their draft budgets, put them directly before the Government.⁷¹ According to the Article 11 of the Law on Courts of the Republic of Lithuania, material and technical facilities of courts must be in line with the advances of science and technology, taking into account the economic potential of the State. It is prohibited to worsen the financial, material and technical conditions for the functioning of courts provided by law. When the economic and financial situation of the country deteriorates considerably, the Seimas (parliament) may review the material and financial conditions for the functioning of courts. In Poland the drafts of financial plans and financial plans for courts within the area of appellate jurisdiction are drawn up by directors of courts of appeal based on drafts drawn up by directors of regional courts, presidents of district courts or financial managers of district courts, if appointed. Directors of courts of appeal submit the drafts to the National Council of the Judiciary and to the Minister of Justice. The National Council of the Judiciary within a month from the date of receiving the draft, lodges a request to the Minister of Justice for drafting the common courts incomes and expenses together with its comments and reservations.⁷²

7.6. Provision of opinions to other powers of the State

It is well recognized that Judicial Councils should have the power to put forward proposals or to render opinions on any judicial policies or legislative proposals which impact on the delivery of justice or the functions of the judiciary. All draft texts relating to the status of judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' (including judges' own) guarantee of access to justice, should require the opinion of the Council for the Judiciary before deliberation by Parliament. This consultative function should be recognized by all States.⁷³ The mentioned recommendation is followed in practice, as Judicial Councils have advisory powers on legislation concerning the judiciary and procedural laws in almost all EU member states (Belgium, Bulgaria, Croatia (on the request of

⁷¹ Prof. Wim Voermans and Dr Pim Albers. Councils for the Judiciary in EU Countries. CEPEJ, 2003

⁷² <http://www.legislationline.org/topics/country/10/topic/9>

⁷³ CCJE Opinion No. 10, Para 83

the Minister of Justice), Denmark, France (on the request of the President of the State), Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain). Exception to this rule seems to be UK, Northern Ireland (no advisory function at all) and Ireland (limited to the questions concerning the functioning of the Council itself).

For example, in Italy, it is compulsory under the law to consult the Judicial Council in the law drafting process of all laws that may concern administration of justice. In Spain, there is a list of issues when consultation with Judicial Council is compulsory (e.g. modifications to the Law on the Judiciary, determination and modification of judicial boundaries, procedural regulations or regulations that affect juridical and constitutional aspects of legal protection before the courts that relate to the exercising of fundamental rights), however, the Judicial Council may also be consulted on any other matter that the Government, Parliament or, where appropriate, the Legislative Assemblies of the Autonomous Regions deem relevant⁷⁴. In Latvia, following the ruling of the Constitutional Court of 18 January 2010 No. 2009-11-01, the legislator has a right to disagree with the opinion of the judiciary, but must listen to it and treat it with due respect and understanding.⁷⁵

In Slovakia, in addition to advisory functions of the Council, the President of the Judicial Council can institute proceedings before the Constitutional Court regarding the conformity of legislation, regarding the administration of justice, with Constitution.⁷⁶ The same right is vested to the Judicial Council of Poland, concerning normative acts to the extent to which they relate to the independence of courts and judges⁷⁷.

III. Judicial immunity

The notion of judicial immunity is part of the wider concept of judicial independence. Two types of judicial immunity can be distinguished: “non-liability” immunity, which refers to non-liability for judgements handed out by judges, and “inviolability” or “procedural” immunity, which protects a judge from prosecution, i.e. only following a special procedure can procedural immunity be lifted.⁷⁸

⁷⁴ <http://www.poderjudicial.es/cgpj/en/Judiciary/General-Council-of-the-Judiciary/Institutional-information/What-is-the-CGPJ-/Functions/Advisory-Function/Advisory-Function>

⁷⁵ http://www.ency.eu/images/stories/pdf/factsheets/tp_latvia.pdf

⁷⁶ http://www.ency.eu/images/stories/pdf/factsheets/sudna_rada_slovakia_march_2015.pdf

⁷⁷ Constitution of Poland, Article 186

⁷⁸ <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29008-e>

As regards “non-liability” immunity, it is generally accepted as being prerequisite for judicial independence. Following the Recommendation CM/Rec(2010)12, the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. Neither should it give rise to criminal liability, except in cases of malice⁷⁹. This principle is followed by all the EU member states. However, judges should enjoy “non-liability” immunity only for lawful acts performed in carrying out their functions, but not for ordinary crimes committed out of the exercise of their functions.

As regards “procedural” immunity, opinions are more controversial. On the one hand, judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process⁸⁰. On the other hand – procedural immunity is important when it is a danger that false accusations might be brought against judges who represent a weakest state power. Some countries provide for procedural immunity of judges probably because they fear that unjustified charges could be brought against them. Thus, weak situation of the judiciary in some Eastern European countries must be taken into account.⁸¹

As it is rightly noted by Venice Commission, there are no rigid European standards for judicial immunity and it leaves large margin of appreciation to the states concerned⁸². Below, some examples are provided how certain EU member states deal with procedural immunity issue.

Under the Article 122 of the Constitution of **Croatia**, judges and lay magistrates who participate in court proceedings may not be held liable for an opinion or vote given in the process of judicial decision-making, unless the exist violation of law on a part of a judge which constitutes a criminal offence. A judge may not be remanded in custody or investigative detention with any criminal prosecution without a prior consent of a National Judicial Council. The Constitution of **Czech Republic** (Article 86) grants immunity from criminal prosecution to Constitutional Court judges – they cannot be subjected to criminal prosecution without the consent of the Senate. A justice of the Constitutional Court may be detained only if he is

⁷⁹ Articles 66, 68

⁸⁰ CCJE Opinion No. 3, Para 52

⁸¹ <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29008-e>

⁸² <http://www.juridice.ro/wp-content/uploads/2015/06/default.pdf>

apprehended while committing a criminal act or immediately thereafter. The competent agency shall report the detention without delay to the Chairman of the Senate. If the Chairman of the Senate does not consent within twenty-four hours of the detention to delivery of the detainee to a court, the competent agency shall release the latter. At its first subsequent meeting the Senate shall decide on admissibility of the criminal prosecution with final validity.. Under the Article 153 of the Constitution of **Estonia**, criminal charges may be brought against a judge during his or her term of office only on the proposal of the Supreme Court, and with the consent of the President of the Republic. Criminal charges may be brought against the Chief Justice and justices of the Supreme Court only on the proposal of the Chancellor of Justice, and with the consent of the majority of the membership of the Riigikogu (parliament). In **Lithuania**, justices of the Constitutional Court have the same rights concerning the inviolability of their person as shall Members of the Seimas (parliament) (Article 104 of the Constitution). A judge of any court may not be held criminally liable, arrested or have his freedom restricted otherwise without the consent of the Seimas, or, in the period between the sessions of the Seimas, without the consent of the President of the Republic of Lithuania (Article 114 of the Constitution). In **Poland** under the Constitution (Article 181) a judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained. A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained (Article 196). In **Slovenia**, if a judge is suspected of a criminal offence in the performance of judicial office, he may not be detained nor may criminal proceedings be initiated against him without the consent of the National Assembly (Article 134 of the Constitution). In **Slovak Republic** a judge may be prosecuted due to the crimes committed

during his/her judge service of in relation with the judge service only with the consent of the body which appointed him/her.

As it might be seen from the examples above, procedures for lifting judicial immunity differ from country to country. Procedural immunity of judges is not a common phenomenon around Europe; therefore no strict recommendations on this respect are given at the European level. However, taking into account the role of Judicial Councils as main guarantors of judicial independence, as well as the main purpose of procedural immunity of judges where such exists, participation of Judicial Councils in the procedure of lifting judicial immunity might be advisable.

Goda Ambrasaitė – Balynienė

Anex I. Excerpts from the constitutions of some EU member states

Belgium

Article 151

§ 1. Judges are independent in the exercise of their jurisdictional competences. The public prosecutor is independent in conducting individual investigations and prosecutions, without prejudice to the right of the competent minister to order prosecutions and to prescribe binding directives on criminal policy, including policy on investigations and prosecutions.

§ 2. There is one High Council of Justice for all Belgium. In the exercise of its competences, the High Council of Justice respects the independence referred to in § 1.

The High Council of Justice is composed of a Dutch-speaking college and of a French-speaking college. Each college comprises an equal number of members and is constituted with equal representation, on the one hand, of judges and officers of the public prosecutor's office elected directly by their peers under the conditions and in the manner determined by the law and, on the other hand, of other members appointed by the Senate by a two-thirds majority of the votes cast, under conditions established by the law.

Within each college, there is a nomination and appointment committee, as well as an advisory and investigatory committee, which are constituted with equal representation in accordance with the provision laid down in the preceding paragraph.

The law specifies the composition of the High Council of Justice, of its colleges and of their committees, as well as the conditions under which and the manner in which they exercise their competences.

§ 3. The High Council of Justice exercises its competences in the following areas:

1° the nomination of candidates for appointment as judge, as referred to in § 4, first paragraph or for appointment as officer of the public prosecutor's office;

2° the nomination of candidates for an appointment to the positions referred to in §5, first paragraph and to the position of head of the public prosecutor's office;

3° access to the position of judge or of officer of the public prosecutor's office;

4° training of judges and of officers of the public prosecutor's office;

5° drafting of general profiles for the positions referred to in 2°;

6° voicing of advice and of proposals concerning the general operation and organisation of the judiciary;

7° general surveillance on and the promoting of the use of means of internal control;

8° to the exclusion of all disciplinary and criminal competences:

– the receiving and the following-up of complaints relating to the operation of the judiciary;

– the conducting of an enquiry on the operation of the judiciary.

Under the conditions and in the manner determined by the law, the competences referred to in 1° to 4° are assigned to the relevant nomination and appointment committee, and the competences referred to in 5° to 8° are assigned to the relevant advisory and investigatory committee. The law determines the cases in which and the manner in which the nomination and appointment committees and the advisory and investigatory committees exercise their competences jointly.

A law to be adopted by a majority as described in Article 4, last paragraph determines the other competences of this Council.

Taken from: <http://confinder.richmond.edu/admin/docs/Belgium2007English.pdf>

Slovakia

Article 141a

The Judiciary Council of the Slovak Republic

(1) The Chairman of the Judiciary Council of the Slovak Republic is the Chief Justice of the Slovak Republic. Its other members are a) eight judges, who are elected and recalled by judges of the Slovak Republic, b) three members who are appointed and recalled by the National Council of the Slovak Republic, c) three members who are appointed and recalled by the President of the Slovak Republic, d) three members who are appointed and recalled by the Government of the Slovak Republic

(2) As a member of the Judiciary Council of the Slovak Republic according to paragraph 1, letters b) to d) may be appointed person who is of impeccable character and has university education in law and at least 15 years of Professional practice.

(3) The term of office of members of the Judicial Council of the Slovak Republic shall be five years. The same person may be elected or appointed as a member of the Judiciary Council for a maximum of two consecutive terms.

(4) Under the authority of the Judiciary Council falls:

a) to present to the President of the Slovak Republic proposals for candidates for appointment as judges, and proposals for recall of judges,

b) to decide on the assignment or transfer of judges,

c) to present to the President of the Slovak Republic proposals for appointment of the Chief Justice of the Slovak Republic and the Deputy Chief Justice of the Slovak Republic, and proposals for their recall,

d) to present to the Government of the Slovak Republic proposals of candidates for judges who should act for the Slovak Republic in international judicial bodies, e) to elect and recall members of disciplinary senates and elect and recall chairmen of disciplinary senates,

f) to comment on a proposal for the budget of courts of the Slovak Republic during the preparation of the proposal for the state budget,

g) other activities if laid down by a law.

(5) The adoption of a resolution of the Judicial Council of the Slovak Republic requires consent of an absolute majority of all its members.

(6) Details on the means of establishing members of the Judicial Council of the Slovak Republic, on its scope of powers, on organisation and on relations to bodies of judicial administration and to bodies of judicial self-administration shall be laid down by a law.

Taken from: <https://www.prezident.sk/upload-files/46422.pdf>

Spain

Section 122

1. The Organic Act of the Judicial Power shall make provision for the setting up, operation and internal administration of courts and tribunals as well as for the legal status of professional judges and magistrates, who shall form a single body, and of the staff serving in the administration of justice.
2. The General Council of the Judicial Power is its governing body. An organic act shall lay down its status and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system.
3. The General Council of the Judicial Power shall consist of the President of the Supreme Court, who shall preside it, and of twenty members appointed by the King for a five-year period, of which twelve shall be judges and magistrates of all judicial categories, under the terms provided for by the organic act; four nominated by the Congress and four by the Senate, elected in both cases by three-fifths of their members amongst lawyers and other jurists of acknowledged competence with more than fifteen years of professional practice.

Taken from:

http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo_sexto.aspx

Poland

Article 186

1. The National Council of the Judiciary shall safeguard the independence of courts and judges.
2. The National Council of the Judiciary may make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.

Article 187

1. The National Council of the Judiciary shall be composed as follows:
 - 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
 - 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
 - 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.

2. The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.
3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.
4. The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

Taken from: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

Italy

Article 104

The Judiciary is a branch that is autonomous and independent of all other powers.

The High Council of the Judiciary is presided over by the President of the Republic. The first president and the general prosecutor of the Court of Cassation are members by right.

Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice.

The Council elects a vice-president from among those members designated by Parliament.

Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, nor serve in Parliament or on a Regional Council.

Article 105

The High Council of the Judiciary, in accordance with the regulations of the Judiciary, has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges.

Article 107

Judges may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High Council of the Judiciary, taken either for the reasons and with the guarantees of defence established by the provisions concerning the organisation of Judiciary or with the consent of the judges themselves.

Taken from: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf