

THE ROLE OF THE COUNCILS FOR THE JUDICIARY FOR AN EFFECTIVE JUDICIAL SYSTEM*

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1. INTRODUCTION

One of the conditions for the effective rule of law principle, a cornerstone of every modern democratic state, perhaps even the most important one, is an independent and impartial judiciary. Independence and impartiality need to be ensured for the judiciary to fulfil its role in relation to the parties of courts' proceedings, society and other branches of power. To achieve these two qualities, appointment, responsibility, and dismissal of judges on the one hand, and determination of the scope of their rights and obligations on the other, need to

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Independence of the judicial authority is solemnly declared and protected in the Constitutions of the European Union Member States. In France for instance, the President of the Republic is the guarantor of the independence of the judicial authority and is assisted by the High Council of the Judiciary. See Article 64 of French Constitution of 4th October 1958. Another example is Italy, where the Judiciary is a branch that is autonomous and independent of all other powers. See Article 104 of Italian Constitution.

be provided for in a manner, which is separated from the influence of (daily) politics. It is presumed that this also leads to a higher level of professional competence and quality of judiciary in general. One of the existing paths¹ to achieve this goal, is the creation of a special body named the Council for the Judiciary,² which exists in a number of the European Union (EU) Member States (hereinafter the Member States). While their names in the Member States vary,³ the term Council will be used hereinafter to avoid confusion. It is usually a *sui generis* body with a constitutional foundation⁴ that places it beyond the reach of the ordinary legislator, with the intent to enable it to execute the assigned tasks in complete independence.⁵

The Councils differ significantly in their composition (of judges or also other members who are appointed or elected by various institutions) and their competences, roles and influence. This is due to the peculiarities of legal and political sphere and level of development of a national system, its tradition, and other deeply rooted structural and cultural factors, which make every Council unique.⁶ Its role can be very different and can range from being an auxiliary one, to being a supervisory or even an intermediary one connecting the different branches of power, namely the judicial, legislative, and executive power

¹ In Europe, there are broadly five models of court administration in use. They are the Ministry of Justice model, the Judicial Council model, the courts service model, hybrid models and the socialist model. For more information about each of them see M. Bobek and D. Kosař, 2013, p. 7–9, and D. Kosař, 2016, p. 131–133.

² This wording is already being used by the European Network of Councils for the Judiciary.

³ The High Council of Justice in Belgium, the National Judicial Council in Croatia and Hungary, the Council for administration of Courts in Estonia, the Danish Court Administration in Denmark, the High Council of the Judiciary in France and Italy, the National Council of the Judiciary in Poland, the Supreme Judicial Council in Bulgaria and Portugal, the Supreme Judicial Council of Civil and Criminal Justice in Greece, the Superior Council of Magistracy in Romania, the Judicial Council in Latvia, Lithuania, Scotland, Slovakia, and Slovenia, the General Council of the Judicial Power in Spain, Judges Council in Northern Ireland, England and Wales, and the Commission for the Administration of Justice in Malta.

⁴ The Council is not a constitutionally regulated body in Denmark, England and Wales, Latvia, the Netherlands, Northern Ireland, Scotland, and UK. In some EU Member States there are also two Councils, the other being for administrative courts. This is the case in Greece (Supreme Judicial Council of the Administrative Justice that is constitutionally regulated) and Italy (the Council of Administrative Justice that is not constitutionally regulated). These latter two Councils are not taken into account in this contribution.

⁵ See Report of the ENCJ Working group ‘Mission and vision – developing a strategy for the Council’, 2006, p. 14.

⁶ W. Voermans and P. Albers, 2003, p. 70.

(which can be reflected also in its composition).⁷ The Councils strive to achieve responsibility, quality and efficiency of the judiciary, while at the same time safeguarding the independence of judges and judiciary in its entirety, which can only be achieved if the Council itself enjoys independent status.⁸ In this respect, they significantly influence the functioning of the courts of all levels, including also the Supreme courts of the Member States. Due to the fact that Councils differ greatly among the Member States, the purpose of this contribution is to outline the differences among them while simultaneously attempting to provide arguments to select their better or best practices in relation to the functioning of (Supreme) courts.

2. METHODOLOGY

This research builds on the functional method of comparative law, which allows the discovery of similarities and differences among the Member States concerning the role of the Councils for an effective judicial system. An individual presentation of each Member State's national legislation is avoided given the limited size of the contribution. Nevertheless, national legislation is singled out to illustrate the Member States' practices.

The starting point of this research was the preparation of a questionnaire concerning Supreme Courts and Councils for the Judiciary, which was then sent to national experts. While the respondents were answering the questionnaires, our activities included desk research with which it was attempted to establish the state of the art of the existing research regarding the research topic, specifically the role of the Councils for an effective judicial system. The responses of national respondents were received in November 2016 and subsequently analysed (e.g. empirical research). Where possible, the information provided by the respondents was cross-checked with national legislation and academic literature. In total, questionnaires from 20 Member States were received. Out of these 20 Member States, only in 12⁹ EU Member States a special Council for

⁷ Slovenian Council, for instance, is a *sui generis* body that cannot be included in any of the three branches. It performs a participatory role in the process of appointment of judges and therefore connects the judicial and legislative power. See L. Šturm and others, 2010, p. 923; and M. Končina Peternel, 2015, p. 6.

⁸ Some Member States are taking important steps towards strengthening the independence of the judiciary by establishing the Council as an authoritative independent institution. An example is the legislative proposal for Act on the Judicial Council in Slovenia, available at: <http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/novice/2016/besedilo_zakona.PDF> (last visited March 2017).

⁹ Estonia, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

the Judiciary exists.¹⁰ This is methodologically important as more information about them was received and used for the preparation of this contribution. Basic information regarding the Councils for the Judiciary was also obtained via Constitutional provisions of other EU Member States and the European Network of Councils for the Judiciary.¹¹ Even though it was not possible to obtain relevant detailed information from all the EU Member States, it is argued that a representative sample was compiled that allows relevant conclusions.

The information gathered by the surveys and theoretical framework was afterward compared to validate or falsify the theoretical framework or supplement it. Theoretical and empirical research were thus combined to increase the validity of research findings, which is often referred to as “triangulation” as a research method in the social sciences.

3. THE COMPOSITION OF COUNCILS FOR THE JUDICIARY

3.1. An Overview

When determining the position of the Council towards other State powers and the competences the Council has (or could have), the composition of the Council is fundamentally important. The compositions vary greatly between the Member States, which lead us to believe that the roles of the Councils are therefore different in every Member State.

For instance, differences exist in the total number of members¹² composing Councils. The number can be as low as 4 in the Netherlands¹³ or as high as 44 in Belgium with varying amounts in between in some other EU Member Sta-

¹⁰ The Council for the Judiciary does not exist in Austria, Cyprus, Czech Republic, Finland, Germany, Ireland, Luxembourg, and Sweden.

¹¹ The other Member States with an existing Council are Belgium, Bulgaria, Croatia, Denmark, France, Greece, Malta, and the UK. In the UK, there are three Councils, one for Northern Ireland, one for Scotland, and one for England and Wales.

¹² This observation should be placed a broader context. The number of members is influenced by a variety of factors, such as the size of a Member State and the nature of its pursued goals in the composition of the Council (e.g. professionalism; the principle of checks and balances between different branches of government; public participation for greater transparency and control; representation of citizens from different parts of the Member State; etc.). More important than the total number is the ratio between different groups of members (e.g. judge versus non-judge members) and the required majority for adoption of decisions.

¹³ According to Article 84 of the Dutch Judicial Organisation Act, the Council should consist of between 3 and 5 members. It is up to the Council to choose the actual number. Currently there are 4 members. See ENCJ Factsheet on the Netherlands.

tes. There are 10 members of the Council in Malta, 11 in Croatia,¹⁴ Denmark, Northern Ireland, Slovenia,¹⁵ and Estonia,¹⁶ 15 in Greece, Latvia, and Hungary, 16 in Scotland, 17 in Portugal,¹⁷ 18 in Slovakia,¹⁸ 19 in Romania,¹⁹ 21 in Spain, 22 in France, 23 in Lithuania, 25 in Bulgaria and Poland,²⁰ 27 in Italy and 29 in England and Wales.

The Councils can be composed only of judges (as is the case in Hungary,²¹ Lithuania, Northern Ireland, and Scotland) or of judges and other members. Other members in Slovenia²² and Italy²³ consist of law professors, attorneys or other lawyers elected by the Parliament. Other non-judge members can also be prosecutors, like in Romania, Bulgaria, and France. A unique approach exists in Latvia, where all non-judge members are members by their function.²⁴

¹⁴ See Article 124 of the Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia No. 56/90 with amendments (Croatian Constitution).

¹⁵ See Article 131 of the Constitution of Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I with amendments (Slovenian Constitution).

¹⁶ See Article 40 of Estonian Courts Act from 19 June 2002.

¹⁷ See Article 218 of the Constitution of the Portuguese Republic of 2 April 1976 with amendments (Portuguese Constitution).

¹⁸ See Article 141a of the Constitution of the Slovak Republic of 3 September 1992 with amendments (Constitution of Slovakia).

¹⁹ See Article 133 of the Constitution of Romania, Official Gazette of Romania, Part I, No. 233 of 21 November 1991 with amendments (Romanian Constitution).

²⁰ See Article 187 of the Constitution of the Republic of Poland of 2 April 1997 with amendments (Polish Constitution).

²¹ The President of the Curia is an *ex officio* member, while other 14 judge members are elected in a secret ballot by a majority vote at the meeting of delegated judges. Despite the fact that the National Judicial Council in Hungary is composed only of judges, there are several non-judges who are also entitled to attend the meetings of the Council. It means that meetings (including a closed meeting) of the Council can be attended by the President of the National Office for the Judiciary, the Minister of Justice, the Prosecutor General, the President of the Hungarian Bar Association, the President of the Hungarian Chamber of Notaries Public and any *ad-hoc* experts and the representatives of any civil society organisations and other interest groups invited. The aforementioned persons are given consultation rights at the meetings.

²² Composition of judges, attorneys, law professors or other lawyers should reduce or exclude the influence of politics and other powerful groups of society on the Council. It should also essentially limit the judicial branch of government from its strict self-governance. See Article 131 of the Slovenian Constitution and M. Avbelj et al., 2011, p. 1296.

²³ An interesting fact about Italy is that the President of Italy presides over the Council and is, along with the President of the Supreme Court of Cassation and the Prosecutor General of the Supreme Court of Cassation, member of the Council by the virtue of his office. See Article 87 of the Italian Constitution. The President presides over the proceedings of the Council also in Romania. See Article 133 of the Romanian Constitution.

²⁴ For detailed information see section 3.3.

It is argued that the composition of the Council, where all the members are judges, presents a challenge in that the outside perspectives might be overlooked in the functioning of the Council. Arguments in the direction of lack of democratic legitimacy, self-protection, and self-government of judges are often mentioned as a vice in this respect.²⁵ On the other hand, the mixed composition provides a better balance between the State powers (as other non-judge members are elected or appointed by a non-judicial body), therefore making it more constitutionally appropriate (with respect to checks and balances of State powers). This applies in the cases where other non-judge members are elected or appointed by the legislative or the executive power. In some Member States though, other non-judge members are not elected or appointed by these two powers. For instance, this might apply to prosecution members that could be elected by the prosecutors.²⁶ Nevertheless, in both cases the result of mixed composition is that some members of the Council are not judges, therefore, limiting the judges' power in the Council. Perspective of other members, usually elected on an outstanding merit²⁷ (among legal experts) may be an added value in the functioning of the Council, either by providing a different perspective or perhaps even ensuring better independence of members of the Councils overall – especially in those Member States where the President of the Council is the President of the Supreme Court and other judge members may view them as an authoritative person.²⁸ This influence seems present to a lesser extent on other non-judge members, such as professors, notaries, advocates, etc.

The composition of the Council can also be entirely different than the one described above. In Estonia, other members of the Council also include members of the Parliament, a sworn advocate appointed by the Board of the Bar Association, the Chief Public Prosecutor (or a public prosecutor appointed by them) and the Chancellor of Justice (or a representative appointed by them), while the Minister of Justice is a participant with the right to speak. Mem-

²⁵ Nevertheless, it has to be highlighted that without self-governance, in principle, there is no judicial independence. Self-governance in this sense can also be viewed as a virtue. However, that does not mean that only judges may be members of the Council.

²⁶ In Bulgaria, for instance, where the prosecutors elect four members of the Council among its ranks.

²⁷ Members ought to be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence. See point 21 of Opinion No. 10 of CCJE on the Council for the Judiciary at the service of society.

²⁸ So called “internal” independence (among other colleagues within the judiciary) can be compromised in this respect. For classification of different types of influences on the independence see M. Adams, 2010, p. 245–246.

bers of the Parliament are also members of the Council in Latvia, Poland²⁹ and Croatia,³⁰ while the President of Poland is entitled to appoint one individual to this function and one member seat is reserved for the Minister of Justice.³¹ Participation of politicians (MPs for example) can be viewed as positive due to the argument of democratic legitimacy of the Council. On the other hand, this participation might be a risk to the independence of the Council.³² Whenever political influence would be present in the process of voting, this would (perhaps) be in contrast to the use of the strictly internal professional criteria.³³ The political influence (in the Council) also does not seem to be required when the Council provides opinions or proposals and other State powers (that are politically influenced) actually adopt the more significant decisions (such as election of judges). If that is the case, strictly internal professional criteria are used in one institution (the Council) and the political influence is present in another institution (Parliament for instance) participating in the process of adopting decisions, therefore ensuring a system of checks and balances in this way. When determining the political influence on the functioning of the Council, ratio between judge and non-judge members is important as well as the majority required for the adoption of a decision (usually set by a statute or rules of procedure). Important differences can be observed in this respect between the Member States.

For instance, in the Member States where the composition of the Council includes judges and other members, judges represent the majority of its members. This is the case in Denmark, Estonia and Slovenia (6 out of 11), Croatia

²⁹ Four members from deputies of lower house *Sejm* and 2 amongst the members of the upper house Senate.

³⁰ Two out of eleven members of the Council are members of the Parliament, one of whom is from ranks of the opposition.

³¹ The presence of the Minister of Justice as a member of the Council unavoidably entails the risk of the executive power affecting debates and decisions made by the judicial order and may effectively constrain their sincerity. See ENCJ Project team, Councils for the Judiciary Report 2010-2011, p. 13.

³² Consultative Council of European judges (CCJE) warns that prospective members of the Council should not be active politicians, MPs, the executive or the administration. See Point 23 of Opinion No. 10 of CCJE on the Council for the Judiciary at the service of society.

³³ Functioning of the Council shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive power and be free from any subordination to political party consideration to safeguard the values and fundamental principles of justice. See point 19 of Opinion No. 10 of CCJE on the Council for the Judiciary at the service of society.

(7 out of 11),³⁴ Latvia (9 out of 15),³⁵ Romania (10 out of 19),³⁶ Spain (13 out of 21), Poland (17 out of 25) and England and Wales (28 out of 29). Number of judges and other members of the Council is the same in Belgium (22 out of 44),³⁷ Malta (5 out of 10), the Netherlands (2 out of 4) and Slovakia (9 out of 18), while the judges do not have a majority in the composition of the Council in Bulgaria (8 out of 25), France (7 out of 22),³⁸ Portugal (8 out of 17)³⁹ and Italy (13 out of 27).⁴⁰ To strengthen the independence of the judiciary, it seems appropriate for the Council to be composed of a majority of judges when the composition is mixed.⁴¹

³⁴ Remaining members are two university professors of law and two members of Parliament, one of whom is a member of the opposition.

³⁵ Six judges are elected by the conference and one judge by the plenum of the Supreme Court. Chief Justice of the Supreme Court and President of the Constitutional Court are members *ex officio*. Non-judge *ex officio* members are the Minister of Justice, Chairperson of the Judicial Committee of the Parliament, Prosecutor General, Chairman of the Council of Sworn Advocates, Chairman of the Council of Sworn Notaries and Chairman of the Council of Sworn Bailiffs.

³⁶ Nine judges and the President of the High Court of Cassation and Justice. Other members are the Minister of Justice, the Public Prosecutor General, five prosecutors and two representatives of the civil society (appointed by the Senate) who are specialists in law and enjoy a good professional and moral reputation. See Article 133 of the Romanian Constitution.

³⁷ The High Council of Justice is composed of a Dutch- and French-speaking board. 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 and, on the other hand, of other members appointed by the Senate by a two-thirds majority of the votes cast. See Article 151 of the Belgian Constitution. In total, there are 22 judges and 22 non-judges (8 lawyers, 6 university or board of higher education professors and 8 members of the civil society).

³⁸ The section with jurisdiction over judges comprises of five judges and the Chief President of the Cour de Cassation.

³⁹ Along with the President of the Supreme Court of Justice who is chair by virtue of his or her function, and seven judges, nine other members are elected by the National Assembly or appointed by the President of Portugal. See Article 218 of the Portuguese Constitution.

⁴⁰ Two-thirds of the members should be elected by all the ordinary magistrates amongst themselves and one third should be elected by the Parliament from among university professors of law and lawyers with fifteen years of practice or more. The latter can also be appointed as Cassation councillors for their outstanding merit following a proposal by the Council. See Articles 104 and 106 of the Constitution of Italy, Official Gazette No. 298 of 27 December 1947 with amendments (Italian Constitution). Even though judges do not have a majority in the Italian Council, it is important that judges and prosecutors count as magistrates and these two groups together do have the constitutional two-thirds majority.

⁴¹ See also paragraphs one and four of the Resolution on Self-Governance for the Judiciary: Balancing Independence and Accountability of the General Assembly of the Euro-

The composition of judges in the Council generally consists of judge members elected from courts that differ either by region or hierarchy. This is the case in Hungary, Italy, Latvia, Lithuania,⁴² Poland,⁴³ Portugal,⁴⁴ Slovenia,⁴⁵ and Spain.⁴⁶ This is of utmost importance and a strength considering that representatives of all courts can participate in sessions of the Council and present the issues that arise in the functioning of their court (which can be totally different between the courts themselves).

3.2. Supreme Court Judges as Members of the Council for the Judiciary

The preceding paragraphs clearly outline the fact that the Councils' judge members are representing the courts of different tiers. It seems especially important that judges of the highest courts in the Member States are members of the Council. The connection between the Council as guarantor for the independence of the judiciary and the highest court (generally Supreme Court) is a necessity to achieve a central involvement of the Supreme Court representatives in all matters related to the administration of the judiciary, appointment, promotion, transfer and dismissal of judges, disciplinary proceedings against judges, resolving various disputes and so forth.⁴⁷ They can also convey to the

pean Network of Councils for the Judiciary, met in Budapest in May 2008.

⁴² Three members must be from each of the Supreme Court, the Court of Appeals, the Supreme Administrative Court, one from each regional court, one from all regional administrative courts and one from all district courts located in the territory of each regional court. Members from the Supreme Court are selected by the judges of the Supreme Court, members of the Court of Appeals are elected by the judges of the Court of Appeals, etc. In addition, there are some *ex officio* members (Presidents of the Supreme Court, Court of Appeals and Supreme Administrative Court).

⁴³ Fifteen judges must be chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts. See Article 187 of the Polish Constitution.

⁴⁴ See Article 218 of the Portuguese Constitution.

⁴⁵ A member spot is reserved for elected representative judge of each of the following hierarchical tiers of courts: the Supreme court, Higher courts, District courts and Local courts. Two additional judges are elected by all the judges from aforementioned courts. See Article 22 of Courts Act, Official Gazette of the Republic of Slovenia, No. 94/07 with subsequent changes and modifications.

⁴⁶ Twelve of the twenty elected members by the Parliament must be judges from courts of different levels. See Sec. 122 of the Spanish Constitution.

⁴⁷ See point 51 of Opinion No. 19 of CCJE on the Role of Court Presidents adopted in November 2016.

Council the challenges arising in the functioning of the Supreme Court or courts in general, therefore influencing the Councils' functioning.⁴⁸

As a result, mandatory participation of members of the supreme judicial body or bodies in the Council can be observed in several Member States. By virtue of their position, the President of the Supreme Court (in some Member States also called Chief Justice) is a member of the Council in Bulgaria, England and Wales, Estonia,⁴⁹ Greece, Hungary,⁵⁰ Italy,⁵¹ Latvia, Lithuania, Malta, Northern Ireland, Poland, Portugal,⁵² Romania, Scotland, and Spain, and President of the Supreme Administrative Court is a member of the Council in Lithuania and Poland.

The President of the Supreme Court is not merely a member, but the chair of the Council in England and Wales, Estonia,⁵³ France, Greece, Latvia, Portugal, Scotland, and Spain.⁵⁴ Interestingly, in Lithuania, the President of the Supreme Court used to be the chair of the Council by virtue of their office, but the Constitutional Court declared such a provision as unconstitutional.⁵⁵ A different provision exists in Croatia, where the presidents of the courts may not be

⁴⁸ This was stressed by the Italian respondent. The Latvian respondent clearly outlined that practical experience, competences and involvement in numerous working groups are reasons why Supreme Court judges as members provide strong input in the decision-making process of the Council. Due to the Supreme Court having detailed background information on the functioning of the judiciary in Latvia and other countries, it can contribute to the analytical work and international cooperation of the Council.

⁴⁹ See Article 40 of Estonian Courts Act.

⁵⁰ In Hungary it is called the President of Curia.

⁵¹ President of the Supreme Court of Cassation.

⁵² See Article 218 of Portuguese Constitution.

⁵³ See Article 40 of Estonian Courts Act. The Council sessions are convened by the Chief Justice of the Supreme Court or by the Minister of Justice. The person who convenes a session also determines its agenda.

⁵⁴ See Sec. 122 para. 3 of the Spanish Constitution.

⁵⁵ The Constitutional Court of Lithuania declared on 9 May 2006 (See Judgment in the Case No. 13/04-21/04-43/04) that the Lithuanian Constitution forbids legal regulation that a certain judge could become the head of the Council *ex officio*. The Court found such a rule incompatible with the principle of self-governance of the judiciary as one of the state powers entrenched in the Constitution, as well as with the constitutional principle of a state under the rule of law. The constitutional imperatives (decentralisation of the self-governing judicial power, independence of the judge, the equal status of all judges who administer justice, non-subordination of the judge to any other judge or president of any other court while administering justice, etc. imply a democratic procedure for the formation of the Council. The procedure for the election must be organised and executed so that there would be no preconditions created to doubt the democracy of this election, *inter alia*, the fact whether during an election of the Council some judges were not treated unequally to others (see points 32 and 33 of the judgment). Interestingly, despite this ruling, current president of the Lithuanian Council is nevertheless the President of the Supreme Court, not by *ex officio*, but through the election within the Council.

elected to the Council.⁵⁶ Similarly, Poland banned court presidents from membership of the Council in 2007 and the Slovak Parliament adopted the same incompatibility rule in 2011.⁵⁷ Such a provision formally prevents the accumulation of power in the hands of a handful of persons.⁵⁸ A valid reason for it lies in the fact that judges who should be independent from political control may nevertheless become dependent on other forces, such as court presidents (or senior judges) in a judicial hierarchy, with just as much potential to distort individual decision-making as more conventional political influence.⁵⁹ If the same person is a court president and also a member of the Council (who plays an important role in the career of a judge), the independence of other individual judges, who are members of the Council, is more likely to be threatened.

As to the other justices of Supreme Court being members of the Council in the respective Member States, several different paths are possible.⁶⁰ The Member States can be bound to select a certain number of members of the Council among Supreme Court judges or they retain some flexibility and have a certain extent of freedom in choosing judges as members of the Council. The former applies to Estonia,⁶¹ Italy,⁶² Latvia,⁶³ Lithuania, Poland,⁶⁴ Romania,⁶⁵ and Slovenia.⁶⁶ The latter applies to Slovakia⁶⁷ and Spain. Although there is no legal provision that representatives from the Supreme Court must be members of

⁵⁶ See Article 124 of the Croatian Constitution.

⁵⁷ See D. Kosař, 2016, p. 401.

⁵⁸ See also M. Bobek and D. Kosař, 2013, p. 12. They warn that the Council model in Europe shields the judiciary from external influence, but it pays little attention to the possible improper pressures on individual judges exercised by senior judges and court presidents.

⁵⁹ T. Ginsburg, N. Garoupa, 2009, p. 110.

⁶⁰ An example is Hungary where the President of the Curia is the only judge from the highest court.

⁶¹ Two out of eleven members of the Council are Supreme Court justices, one of the two being the Chief Justice of the Supreme Court.

⁶² Four judges of the Supreme Court are members of the Council, one of them being the Chairperson of the Supreme Court by virtue of his or her office.

⁶³ Along with the President of the Supreme Court, at least one Supreme Court judge is elected among the plenum of the Supreme Court.

⁶⁴ Together with the President of the Supreme Court, two other Supreme Court justices are members of the Council.

⁶⁵ Two representatives of the Supreme Court are members of the Council.

⁶⁶ One of the member judges is elected exclusively by the Supreme Court judges among themselves.

⁶⁷ Respondent of the Slovakia stressed that obligatory membership of the Supreme Court representatives should be enacted, therefore proposing an improvement to the existing system.

the Council, in practice, in the two latter Member States, there are normally several members. If this was any different, it would cause a complicated situation for the Supreme Court.⁶⁸

3.3. Selection Process of the Members of the Council for the Judiciary

One of the more important constitutional questions concerning Councils and their independence regards the influence of the parliament or the government (especially the Ministry of Justice) or any other public body on its composition and functioning.⁶⁹ Influence concerning the composition of Councils can be seen through the selection process of members of the Council. It can be observed that in this respect differences exist between the Member States. While some members of the Council are members by virtue of their function (as explained above), others can become members in a variety of ways.

Judges are elected by the representatives of courts (e.g. by their peers) in Belgium,⁷⁰ Estonia,⁷¹ Hungary,⁷¹ Italy,⁷² Latvia,⁷³ Lithuania,⁷⁴ Poland,⁷⁵ Portugal,⁷⁶

⁶⁸ In Lithuania, for instance, the Constitutional Court held that judges from the highest courts (Supreme, Supreme Administrative and Court of Appeals) must make more than half of the members of the Council. Such a requirement clearly demonstrates that the representation of judges of the highest court(s) in the Council is a necessity.

⁶⁹ It might be relevant in this respect that the CCJE commends a system that entrusts appointments of non-judge members to non-political authorities (so that they are not appointed by the executive branch of government). See point 32 of Opinion No. 10 of CCJE on the Council for the Judiciary at the service of society.

⁷⁰ They are selected by all the judges (*en banc*) of the largest judicial representative body. See Articles 38 and 40 of Estonian Courts Act.

⁷¹ The judge members are elected in a secret ballot by a majority vote at the meeting of delegated judges.

⁷² Two thirds of the members of the Council are elected by all the ordinary judges belonging to the various categories. See Article 104 of the Italian Constitution.

⁷³ Six out of nine judges are elected by the conference of judges where they represent first and second court instances and judges of the land registers (also from regions).

⁷⁴ All candidates are being nominated and elected during the general meeting of judges by the representatives of relevant courts. They are elected for four years and after the term expires, a new general meeting of judges is convened to elect new members of the Council.

⁷⁵ The Supreme Court judges are appointed by the general assembly of judges of the Supreme Court from among the judges of that Court – see Article 11 of the Act on National Council of the Judiciary of 12 May 2011. Other judge members are appointed by the general assembly of judges of the Supreme Administrative Court together with the representatives of assemblies of courts of different tiers – see Articles 12 and 13 of the Act on National Council of the Judiciary.

⁷⁶ The members are elected by their peers in accordance with the principle of proportional representation by a secret ballot.

Romania, Slovakia, and Slovenia. An exception to this can be observed in Spain where judges (along with other members) are elected by the Congress of Deputies and the Senate.⁷⁷

The authority to elect other members lies with the Parliament in Belgium,⁷⁸ Croatia, Estonia, France, Italy, Poland, Portugal, Romania,⁷⁹ Slovenia, and Slovakia.⁸⁰ There are also some Member States where the competence to appoint a member of the Council lies with the executive branch, namely with the President (e.g. in France,⁸¹ Poland,⁸² Portugal,⁸³ and Slovakia), the King (in Spain)⁸⁴ or the Government (in Slovakia).⁸⁵ In Estonia, a special office or association has the right to appoint a member.⁸⁶ A unique approach exists in Latvia, where all non-judge members are members by virtue of their function. *Ex officio* member from the executive power is the Minister of Justice and from the legislative power the Chair of the Legal Affairs Committee of the Parliament. Other non-judge members by virtue of their function are the Prosecutor General and the Chairs of the Council of Sworn Advocates, the Council of Sworn Notaries and of the Council of Sworn Bailiffs.

⁷⁷ Selection requires three fifths of every chamber, so the candidates should not be politically influenced. This has been subject of public debate in Spain for many years though.

⁷⁸ Members other than judges and public prosecution officers are appointed by the Senate by a two-thirds majority of the votes cast.

⁷⁹ Two representatives of the civil society, specialists in law, who enjoy a good professional and moral reputation are elected by the Senate. Senate also validates the members who were elected in the general meetings of magistrates.

⁸⁰ For an overview of all Member States see p. 10 of Member States' responses to the questionnaire on Judicial independence in 2015.

⁸¹ President of the Republic, National Assembly and the Senate each appoint two prominent citizens who are not members of either the Parliament or the Judiciary. See Article 65 of the French Constitution.

⁸² One member is appointed by the President of the Republic of Poland.

⁸³ Seven out of seventeen members are elected by the National Assembly and two are appointed by the President of Portugal.

⁸⁴ Twenty out of twenty-one members of the Council are appointed by the King for a five-year period. Four are 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. See Sec. 122 of the Spanish Constitution.

⁸⁵ Three members are appointed by the President, three by the Government and three by the National Council, while the judges elect nine members of the Council. Each candidate is required to be of impeccable character with a university qualification in law and at least 15 years of professional practice.

⁸⁶ Representatives as members can be appointed also by the Bar association, the Prosecutor's office and the Chancellor of Justice.

4. COMPETENCES OF THE COUNCILS FOR THE JUDICIARY

4.1. Cooperation in the Process of Election or Appointment of Judges

Fundamentally, the Councils are bodies designed to take appointment and promotion of judges away from the political process,⁸⁷ while attempting to ensure some level of their accountability. They lie somewhere in between the diametrical extremes of letting judges appoint their own successors and the alternative of complete political control of judges' appointments, discipline and promotion. The first model of judicial self-selection arguably errs too far on the side of independence, while pure political control may make judges too accountable in the sense that they will consider the preferences of their political principals in the course of deciding specific cases. The Council, as an intermediate body between politically influenced branches of government and judges, therefore provides a potential to enhance both accountability and independence.⁸⁸

This fundamental role of the Council can be best seen through their competences in a specific Member State. While the competences and powers of all members of the Council are reportedly equal⁸⁹ (for instance) in Hungary, Latvia, Lithuania, Poland, and Romania, the competences of the Council itself differ significantly among the Member States.

The most widely recognised competence of the Councils is their involvement in the process of election or appointment of judges.⁹⁰ This can be achieved

⁸⁷ The underlying rationale for the creation of Councils was the need to insulate the judiciary from the executive power. See Autheman V., Elena S., 2004, p. 2.

⁸⁸ N. Garoupa, T. Ginsburg, 2008, p. 7.

⁸⁹ This does not refer to duties or operational powers of the Chair, such as convening sessions, determining agenda, etc. This also does not refer to specific functions that an individual member has as a member of the Council, for instance being a member of a disciplinary or a standing committee. Such internal commissions in the Council are present in many Member States. Equal status of judicial and non-judicial members of the Council is also recommended in the ENCJ Report 2015-2016, Standards VI: Non-judicial Members in Judicial Governance, p. 12.

⁹⁰ According to Article 9 of the Universal Charter of the Judge, adopted on 17 November 1999, the selection of judges should be carried out by an independent body that includes substantial judicial representation. See also Venice Commission Opinion No. 403/2006 of 22nd June 2007, p. 5.

either by assessing and proposing candidates (Belgium,⁹¹ Croatia,⁹² Poland,⁹³ Romania,⁹⁴ Slovenia,⁹⁵ and Slovakia⁹⁶), providing opinion on the candidates (France,⁹⁷ Lithuania,⁹⁸ Malta,⁹⁹ and Estonia¹⁰⁰) or even consenting in the asses-

⁹¹ See Article 151 of the Belgian Constitution.

⁹² The Council autonomously decides, in conformity with the Constitution and the law, on the appointment, promotion, transfer, dismissal and disciplinary accountability of judges and presiding judges, except in the case of the Chief Justice of the Supreme Court. These decisions are made in an impartial manner on the basis of the criteria set forth by law. See Article 124 of the Croatian Constitution.

⁹³ For competences see Article 3 of Act on National Council of the Judiciary of 12 May 2011 with amendments.

⁹⁴ See Article 134 of the Romanian Constitution.

⁹⁵ For competences see Article 28 of Slovenian Courts Act, Official Gazette of the Republic of Slovenia No. 94/07 with amendments.

⁹⁶ In relation to the administration of the Supreme Court, the Council is authorized to submit to the President of Slovakia the proposal for appointment and dismissal of the President and the Vice-President of the Supreme Court. See Sec. 27a of Act on the Judicial Council of the Slovakia No. 185/2002 Coll. of 11 April 2002.

⁹⁷ The Council makes recommendations for the appointment of judges to the Cour de Cassation, the Chief presidents of Courts of Appeal and the Presidents of the Tribunaux de grande instance. Other judges are appointed with the consultation of the Council. See Article 65 of the French Constitution.

⁹⁸ In Lithuania, the opinion of the Council is not an opinion in its common sense. Without a consent (positive opinion) of the Council, judge (including a Supreme Court judge and even its President) cannot be appointed, promoted, transferred or dismissed from office. This opinion is given to the President of the Republic. The same applies for the appointment and removal from office of Chairpersons and Deputy Chairpersons of courts or their divisions. The Council's consent is not necessary only if a judge from an ordinary court is appointed as a judge of the Constitutional Court or as a Minister of the Government or is dismissed from office by the Parliament in an impeachment procedure. The latter is applicable for dismissal from office of judge of the Supreme Court and the Court of Appeals if they grossly violate the Constitution or breach judge's oath, or when they are found to have committed a crime. The Council's approval is not necessary in the impeachment procedure, because the Constitutional Court plays a significant role in this procedure and, therefore, acts as a counterbalance to political powers. The Council also forms the Examination Commission of candidates to judicial office and approves the regulations concerning its procedure.

⁹⁹ Advice on appointment is delivered upon the request of the Prime Minister. See ENCJ Factsheet on Malta.

¹⁰⁰ The Council and all the judges of the Supreme Court provide an opinion to the Chief Justice of the Supreme Court on the candidates for a vacant position of a justice of the Supreme Court. A justice of the Supreme Court can then be appointed to office by the Parliament on the proposal by the Chief Justice. See Article 55 of the Estonian Courts Act.

sment of applications for a position of a judge (Hungary).¹⁰¹ There are no competences in the selection and appointment of judges in England and Wales,¹⁰² Northern Ireland,¹⁰³ and Scotland.¹⁰⁴ These three UK Councils also lack any competence regarding the assessment, promotion, transfer and dismissal of judges or court presidents.

Interestingly, the Spanish Council also has an influence on the composition of the Constitutional Court. It nominates two out of the twelve Constitutional Court Justices, which are appointed by the King.¹⁰⁵ In a broader sense, the influence of the Council extends also to the sphere of the prosecution in

¹⁰¹ The Council has the right to exercise consent in the assessment of applications for a judge's position where the President of the National Office for the Judiciary or the President of the Curia wishes to award a position to the applicant in the second or third position in the rankings. It also determines the principles to be applied when assessing applications and then annually publishes its opinion on the relevant practice regarding the assessment of the applications for a judge's position and court leader's positions.

¹⁰² The Council does have a specific statutory responsibility for appointment of three members of the Judicial Appointments Commission under the Constitutional Reform Act 2005. Apart from this role, the Judges' Council is not concerned in the selection, appointment or promotion of judges or in the assessment of judicial activities. Its primary function is to be a body broadly representative of the judiciary as a whole which will inform and advise the Lord Chief Justice on matters occasionally requested. See ENCJ Factsheet on England and Wales.

¹⁰³ The Council also does not have any competences regarding the promotion of judges. Its competences are to represent the judiciary in Northern Ireland on a wide range of issues and to advise the Lord Chief Justice as Head of the Judiciary. In essence, the Council serves the judiciary. See ENCJ Factsheet on Northern Ireland.

¹⁰⁴ The objectives of the Council are to preserve the independence of the judiciary, to protect and promote the due administration of justice, to promote the professional and pastoral interests of the judiciary, to provide guidance to the judiciary on questions of ethics and other matters of relevance for the administration of justice, to facilitate communication between the various branches of the judiciary and, where appropriate, collect and collate their views, to provide information and advice to the Lord President so that they may be aware of the views of the judiciary and to deal with all the matters of concern to the judiciary. See ENCJ Factsheet on Scotland.

¹⁰⁵ See Sec. 159 of the Spanish Constitution.

Belgium,¹⁰⁶ France,¹⁰⁷ Italy,¹⁰⁸ Latvia,¹⁰⁹ Romania,¹¹⁰ and Spain.¹¹¹ This correlates to the Councils' composition where members are also prosecutors (in Belgium, France, Italy, and Romania).¹¹²

The cooperation of the Council in the process of the appointment of judges strengthens the principle of division of powers, as judges are, as a last step, elected or appointed by the legislative (through the national Parliaments)¹¹³ or the executive authority (by the President).¹¹⁴ If the competence to elect a judge was in the absolute domain of the Council, this would necessarily mean that its composition would need to be different, likely one where judges would not hold the majority, so that the element of democratic legitimacy¹¹⁵ would be ensured and that critique of self-appointment of judges would be avoided.¹¹⁶ Since the path towards the election of a judge should present a fundamental

¹⁰⁶ Main competences of the Council in Belgium include admission to the profession of a prosecutor, presentation of candidates to be nominated as a prosecutor or as chief prosecutor. It also draws up the general profile of chief prosecutors. See ENCJ Factsheet on Belgium.

¹⁰⁷ The formation of the Council with jurisdiction over public prosecutors has the task to issue a simple "favourable" or "unfavourable" opinion on the proposed appointments by the Minister of Justice who is not bound by this opinion. See ENCJ Factsheet on France.

¹⁰⁸ According to the Italian Constitution, the Council is responsible for recruitment, assignment, transfer, promotion and disciplinary measures concerning magistrates (e.g. judges and public prosecutors). See Article 105 of the Italian Constitution.

¹⁰⁹ The Council issues a recommendation to the Parliament on appointment to the post of the Prosecutor General every 5 years.

¹¹⁰ The Council ensures the observance of the competence criteria in the magistrate's career and offers consultative advice on the proposal of the Minister of Justice for the appointment into and release from the leading positions within the Prosecutor's Office by the High Court of Cassation and Justice. See ENCJ Factsheet on Romania.

¹¹¹ The State's Public Prosecutor is appointed by the King on the Government's proposal after consultation with the Council. See Sec. 124 of the Spanish Constitution.

¹¹² See p. 10 of the Member States' responses to the questionnaire on Judicial independence in 2015.

¹¹³ An example of this option exists in Slovenia. See Article 130 of the Slovenian Constitution.

¹¹⁴ Judges are appointed by the President of the Republic on the proposal of the Council in Lithuania (see Article 112 of the Lithuanian Constitution), Poland (see Article 179 of the Polish Constitution), Romania (see Article 134 of the Romanian Constitution) and Slovakia (see Article 145 of the Slovak Constitution).

¹¹⁵ The argument of democratic legitimacy that results in representative judiciary can lead to negative outcomes. Such an outcome historically occurred in Belgium at the end of the 20th century where the end result was highly politicised judiciary with judges who were not necessarily appointed on the basis of their expertise. See M. Adams, 2010, p. 240.

¹¹⁶ I. Kaučič, 2002, p. 1255. This is the case even when the election of judges would be done by the majority of judges by using strictly internal professional criteria.

guarantee for the independence of the judiciary, it is therefore logical that constant tensions and search for a proper balance¹¹⁷ with the political (legislative and executive) powers might exist.¹¹⁸

4.2. Cooperation in the Process of Appointing Court Presidents

Not only that the Council participates in the process of appointment of judges, but it can also have the competence to elect court presidents. This is the case in Estonia,¹¹⁹ Italy, Romania,¹²⁰ and Slovenia.¹²¹ The Council proposes nominees for the position of a court president in Belgium,¹²² Romania,¹²³ Slovakia,¹²⁴

¹¹⁷ The tensions between the judiciary and the other two powers of the State should not necessarily be seen as a threat to the judiciary or its independence, but as a sign that the judiciary is fulfilling its constitutional duty of holding other powers to account on behalf of the society as a whole. See point 9 of Opinion No. 18 of CCJE on the position of the judiciary and its relation with the other powers of state in a modern democracy.

¹¹⁸ I. Kaučič, 2002, p. 1255. An example of this is observed in Slovenia where a judge is elected by the Parliament and its vote is required also for the appointment as a Supreme Court justice. The necessity of such a vote for appointment as a Supreme Court justice is now being questioned, since it is not the constitutional requirement, but has been established by the legislator. See. Article 21 of Judicial Service Act, Official Gazette of the Republic of Slovenia No. 94/07 with amendments.

¹¹⁹ This applies to Chairpersons of circuit, administrative and county courts – see Articles 12, 20 and 24 of Estonian Court Act.

¹²⁰ This applies to court presidents of courts of first and second instance.

¹²¹ This does not apply to the President of the Supreme Court. See Article 28 of Slovenian Courts Act.

¹²² It nominates the candidates to the King for the positions of the first president of the Supreme Court, the first presidents of the appeal courts and the presidents of the lower courts.

¹²³ The assignment of the President of the High Court of Cassation and Justice is done by the Romanian President at the proposal of the Council (judges section). The assignment of President and Vice-president positions in Courts of Appeal, second jurisdiction and specialized jurisdiction and first instance court is made only through open competition or organized exam, held anytime necessary by the Superior Council of Magistrates through the National Institute of Magistrates. See points 1.2 and 4.1 of Romanian response to the questionnaire for the preparation of the CCJE Opinion No. 19 on the role of court presidents.

¹²⁴ See Article 141a of the Slovak Constitution.

and Spain,¹²⁵ while in Hungary,¹²⁶ Latvia,¹²⁷ Lithuania,¹²⁸ the Netherlands,¹²⁹ and Poland¹³⁰ it expresses its opinion on their appointment and dismissal.

Appointment of presidents of courts is more of an internal matter of the judiciary (for instance in Italy¹³¹ and Portugal)¹³² and it seems plausible that other State powers are not necessarily involved in this process.¹³³ However, to ensure the proper checks and balances, their involvement might be required if

¹²⁵ The President of the Supreme Court is appointed by the King on the proposal of the Council. See Sec. 123 of the Spanish Constitution.

¹²⁶ A preliminary opinion can be expressed regarding nominees for the President of the National Office for Judiciary and the President of the Curia on the basis of a personal interview. The Council can also initiate the deprivation of office of the President of the National Office for the Judiciary.

¹²⁷ The Council hears the candidates and provides its opinion on them for the position of the judge of the Constitutional Court to the Parliament and for the position of the Chief Justice of the Supreme Court to its plenary session. The Council also coordinates the appointment and pre-term removal of the Chair of a district or regional court (with the Minister of Justice who decides on it). The Council also submits proposal to the Parliament for the dismissal of the Chief Justice of the Supreme Court from their office due to their will or an appointment in another office.

¹²⁸ In Lithuania, an opinion of the Council is not an opinion in its common sense. Without a consent (positive opinion) of the Council a judge, as a general rule, cannot be appointed, promoted, transferred or dismissed from office. This opinion is therefore mandatory.

¹²⁹ The Council gives a recommendation for the appointment of the presidents of the courts of first instance and courts of appeal to the Minister of Justice. The presidents of the courts are appointed by Royal Decree, upon recommendation of the Minister of Justice. See point 1.2 of Answers from the Netherlands to the questionnaire for the preparation of the CCJE Opinion No. 19 on the role of court presidents.

¹³⁰ Opinion can be expressed regarding appointment and dismissal of presidents and deputy presidents of common and military courts. See Article 3 of Act on the National Council of the Judiciary.

¹³¹ The Council decides on the appointment of all judges and court presidents.

¹³² In Portugal, the Council decides on appointment of judges and court presidents of all instances. This does not apply to the president of the Supreme Court who is chosen by the Supreme Court.

¹³³ This does not apply for Latvia where the selection procedure for the presidents of courts is very much in control of the executive power. A selection committee consists of Ministry of Justice and Court Administration (which is under the Ministry of Justice) officials. The committee chooses the best candidate and submits a proposal to the Minister of Justice. If the Minister agrees to nominate the judge as a president of the court, the relevant documents are sent to the Council for approval. If it is not received, new selection procedure occurs. See point 1.4 of Latvian response to the questionnaire for the preparation of the CCJE Opinion No. 19 on the role of court presidents.

the concerned president is the president of the Supreme Court.¹³⁴ The election of Supreme Court presidents is usually different from the election of presidents of courts of first and second instances. As the head of the judicial branch, they might be elected by the legislative power on the proposal of the executive power, e.g. by the Head of State (in Croatia and Hungary).¹³⁵ In Slovenia, for instance, the president of the Supreme Court is elected by the Parliament on the proposal of the Minister of Justice and after obtaining opinions of the Supreme Court and the Council.¹³⁶ In Estonia, the Chief Justice of the Supreme Court is appointed by the Parliament on the proposal of the President of the Republic.¹³⁷ A different situation exists in Latvia where the Parliament confirms the President of the Supreme Court on the proposal of the plenary session of the Supreme Court, while the Council hears the candidates for the office and provides an opinion to the plenary session of the Supreme Court. The proposal similarly comes from the Supreme Court to the Head of State that adopts the final decision in Poland¹³⁸ or to the Minister of Justice who makes a formal appointment in Denmark.¹³⁹

4.3. Assessment, Promotion, Transfer of Judges and the Standards of Professional Ethics

The Councils have many competences affecting the career of a judge. Along with their role in the process of judges' appointment, they can, in some Member States, assess the judges' work (as in Italy, Portugal, Romania,¹⁴⁰ Slovenia,¹⁴¹

¹³⁴ There are also doubts whether such a solution (e.g. that Parliament elects the President of the Supreme Court) within the system of checks and balances is adequate. It is possible to find a different solution, where the Council proposes a nominee and they are approved by the President of the Republic. Recently, on several occasions this has been the subject of a debate in Slovenia.

¹³⁵ The Parliament decides with the consultative opinion of the Council. See response of Hungary to the questionnaire on Judicial independence 2015.

¹³⁶ See Articles 28 and 62a of Slovenian Judicial Service Act.

¹³⁷ See Article 27 of Estonian Courts Act.

¹³⁸ See Poland's response to the questionnaire on Judicial independence in 2015.

¹³⁹ See point 4.1 of Denmark's response to the questionnaire for the preparation of the CCJE Opinion No. 19 on the role of court presidents.

¹⁴⁰ For Italy and Romania, see responses to the questionnaire on Judicial independence in 2015.

¹⁴¹ The Council itself does not evaluate the work of judges in Slovenia, however, it can request from the personnel council to prepare an evaluation of the judge. The Council cannot change the evaluation of the personnel council and it (mostly) serves as grounds for determination of a promotion. See Articles 31, 33, 34, 34.a, and 52 of Judicial Service Act and Article 28 of Courts Act.

and Spain) or approve the description of assessment of the judges' activities (in Lithuania)¹⁴² and even adopt criteria (in Slovenia) or procedure (in Latvia)¹⁴³ for the assessment of quality of work of judges.

Connected to these is the competence to advise (in Lithuania) or decide on the promotion (in Croatia, Estonia, France, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain)¹⁴⁴ and the transfer of judges (in Croatia,¹⁴⁵ Estonia,¹⁴⁶ France,¹⁴⁷ Hungary, Italy, Latvia,¹⁴⁸ Lithuania,¹⁴⁹ Portugal,¹⁵⁰ Romania,¹⁵¹ Slovakia, Slovenia,¹⁵² and Spain).¹⁵³ The Council in Latvia¹⁵⁴ may also determine the court where a judge will serve following the appointment by the competent body or determine which judge will fill a vacant post or substitute for a judge that is temporarily absent.

¹⁴² In Lithuania, the Council approves the description of assessment of the judges' activities. This document sets criteria and procedure for the assessment. The Council also appoints four out of seven members of Permanent Assessment Commission, elects its Chair and can hear judges' complaints regarding the results of assessment.

¹⁴³ The Council can determine the content and procedure for assessing judges' professional knowledge and sample the documents necessary for assessment.

¹⁴⁴ See responses of the Member States to the questionnaire on Judicial independence in 2015.

¹⁴⁵ Transfer of a judge is possible due to organisational reasons.

¹⁴⁶ For Estonia see Figure 50 of the 2016 EU Justice Scoreboard.

¹⁴⁷ This is possible due to disciplinary reasons.

¹⁴⁸ This can be done for transfers of judges within the same court instance on the basis of recommendation of the Minister of Justice and a positive statement of the Judicial Qualification Committee. For transfers of judges to a court of a lower or a higher tier, the Council submits its proposal to the Parliament.

¹⁴⁹ This is possible due to organisational reasons for a temporary period when there is an urgent need to ensure the proper functioning of the court, when judge is ill or on maternity leave or when there is an increased workload. Permanent transfer is possible when the Council identifies the essential difference of workload in courts and there is no judge who wishes to be transferred.

¹⁵⁰ The transfer is possible due to organisational or disciplinary reasons.

¹⁵¹ It is possible for disciplinary reasons.

¹⁵² This is possible due to disciplinary or organisational reasons if the court where the judge performs judicial service closes, if the volume of work at the court (where the judge performs judicial service) decreases significantly for an extended period, if the organisation of the courts is changed or if it is so required to eliminate backlogs in the court's work. See Slovenian response to the questionnaire on Judicial independence in 2015.

¹⁵³ The transfer is possible due to disciplinary reasons.

¹⁵⁴ This is true for all the court levels. The Council may instruct a judge of the same or lower tier or a judge *Emeritus* to fill a vacant post or substitute a temporary absent judge for up to two years.

In some Member States, the Councils also have powers concerning professional ethics of judges. For instance, the Scottish¹⁵⁵ and Polish Councils can adopt the principles of professional ethics of judges and these are approved by the Council in Slovakia. In Spain, the Council can reportedly adopt standards of professional ethics, and in Slovenia even a code of professional ethics of judges. The Council has adopted a code of conduct also in Malta, Belgium (in 2012)¹⁵⁶ and in Hungary (in 2014).¹⁵⁷ Such a code is not adopted by the Council, but it is approved by it in Romania.¹⁵⁸ The Council in France formulates and publishes a repository of ethical obligations for magistrates.¹⁵⁹

Moreover, the Councils in Hungary, Poland and Romania ensure observance of judicial ethics, while in Slovenia¹⁶⁰ and Lithuania¹⁶¹ the Council can appoint members of a special commission for ethics and integrity. The Councils in Bulgaria, the Netherlands¹⁶² and Portugal have a role to promote judicial ethics. In England and Wales, the Council hears reports of a special committee on any points of principle that may need to be dealt with in an ethics guide.¹⁶³ It follows from the 2016 EU Justice Scoreboard that adoption of ethical standards is also a competence of the Council in Estonia.¹⁶⁴ There is no specific role of the Council in the field of judicial ethics in Greece, Italy¹⁶⁵ and Northern Ireland.

¹⁵⁵ The Statement of Principles of Judicial Ethics for the Scottish Judiciary is kept under review by the Council and its Judicial Conduct Committee. The last revisions were implemented in May 2013. See ENCJ Factsheet on Scotland.

¹⁵⁶ It is called Guide for the Magistrates, Principles, Values and Qualities. This guide was inspired by the guidelines issued by the ENCJ. The Council promotes judicial ethics through its legal competences in training, advices and proposals and through the external control on the judiciary. See ENCJ Factsheet on Belgium.

¹⁵⁷ See ENCJ Factsheet on Hungary.

¹⁵⁸ The Council approves the Code of judicial ethics and deontology. See ENCJ Factsheet on Romania.

¹⁵⁹ See ENCJ Factsheet on France.

¹⁶⁰ In Slovenia, one member of the Council for the Judiciary is also a member of the Commission for ethics and integrity.

¹⁶¹ Members of the Judicial Ethics and Discipline Commission are elected and appointed by a secret ballot within the Council, which also adopts regulations concerning the commission, hears its reports and may withdraw commission's members on the grounds laid down by the law.

¹⁶² Strengthening awareness of integrity is a key objective of the Council. A special working group of the judiciary and policy advisors of the Council is currently working on integrity issues, such as a handbook, amendment of the Code of conduct for the judiciary and opening the debate on accessory functions. See ENCJ Factsheet on the Netherlands.

¹⁶³ See ENCJ Factsheet on England and Wales.

¹⁶⁴ See Figure 50 of the 2016 EU Justice Scoreboard.

¹⁶⁵ See ENCJ Factsheet on Italy.

4.4. Investigative and Disciplinary Competences

In some Member States, the Councils have certain investigative and disciplinary competences. The Council in Portugal has the competence to order investigations, inquiries and inspection to court's services and it adopts an annual inspection plan. In Poland, the Council can visit the court or its organizational unit, make inspections at the court or the inspections of the career of a judge or a trainee judge, whose individual matter is to be addressed by the Council.¹⁶⁶ In Hungary, the Council can perform checks related to the property declarations of judges. The Lithuanian Council has a right to receive information required for performing its functions from state institutions and can investigate administrative activities of all courts of Lithuania, including the Supreme Court. The Hungarian Council has a right of access to documents related to the operation of the National Office for the Judiciary and it can request data and information from its President. The Council can require a report of the national courts administration on its activities in Estonia¹⁶⁷ and Lithuania¹⁶⁸ or on exercising the court's administrative tasks from court presidents in Slovenia. In Slovenia, it can also give the court presidents binding instructions about the implementation of proposals, given by the Ministry of Justice after the inspection, and order a court president to carry out an official oversight of the work of an individual judge.¹⁶⁹

The Councils may not only investigate administrative matters, but may also be involved in disciplinary measures against judges. Disciplinary power over judges by the Council is established in Bulgaria, Croatia,¹⁷⁰ Estonia, France,¹⁷¹ Italy,¹⁷² Malta, Portugal,¹⁷³ Romania,¹⁷⁴ and Spain. The Council is the body that

¹⁶⁶ Such inspections shall not interfere with areas in which judges and trainee judges are independent. See Article 5 of Polish Act on the National Council of the Judiciary.

¹⁶⁷ The Council deliberates in advance the review to be presented to the Parliament by the Chief Justice of the Supreme Court concerning courts administration, administration of justice and the uniform application of law.

¹⁶⁸ The Council can also adopt the regulations on administration in courts and resolve other issues of administration.

¹⁶⁹ See Article 79.b of Slovenian Judicial Service Act.

¹⁷⁰ See Article 123 of the Croatian Constitution. The Council conducts disciplinary proceedings and decides on the disciplinary liability of judges. It can also decide on the dismissal of judges. See ENCJ Factsheet on Croatia.

¹⁷¹ It is the disciplinary tribunal for judges that is presided over by the Chief President of the Cour de cassation. See Article 65 of the French Constitution.

¹⁷² The Minister of Justice has the power to originate disciplinary action. See Articles 105 and 107 of the Italian Constitution.

¹⁷³ For Bulgaria, Estonia and Portugal see Figure 50 of the 2016 EU Justice Scoreboard. See also the ENCJ Factsheet on Romania.

¹⁷⁴ See Article 134 of the Romanian Constitution.

appoints members of the disciplinary bodies in Lithuania,¹⁷⁵ Poland¹⁷⁶ and Slovakia¹⁷⁷ The Council is the body that proposes a disciplinary action against a judge to the competent body in Lithuania.¹⁷⁸ The Councils in Belgium, England and Wales, Greece, Hungary, Latvia,¹⁷⁹ the Netherlands, Northern Ireland, Slovenia, and Scotland do not have disciplinary competences. It is valuable to mention that it is necessary to ensure an independent appeal in the cases where Councils take part in disciplinary matters.¹⁸⁰

Disciplinary proceedings may lead to a judge being dismissed from his or her office. The Council plays a role in this process, where it is its competence to decide on the dismissal of a judge from office (in Bulgaria, Croatia¹⁸¹ and Italy¹⁸²), propose that to the competent body (to the Parliament in Slovenia¹⁸³ or the President in Slovakia)¹⁸⁴ or to give consent for dismissal (in Lithuania). However, in Slovenia, for instance, the Parliament may only dismiss a judge if he or she violates the Constitution or seriously violates the law.¹⁸⁵ These cases are extremely rare. It is more common that the Staff Council establishes a judge

¹⁷⁵ The Council participates in the formation of the Judicial Ethics and Discipline Commission, where it appoints four out of its seven members. See ENCJ Factsheet on Lithuania.

¹⁷⁶ The Council appoints the disciplinary commissioner for matters regarding judges and trainee judges.

¹⁷⁷ The Council elects or recalls members of the disciplinary panel and chairpersons of disciplinary senates.

¹⁷⁸ It is not only the Council that has a right to propose disciplinary action in Lithuania. This can also be done by the President of the Court where the judge works and the President of every higher court. Moreover, in principle every citizen can ask for a disciplinary action against a judge.

¹⁷⁹ In Latvia, it is the competence of the Judicial Disciplinary Committee and Disciplinary Court. See ENCJ Factsheet on Latvia.

¹⁸⁰ See for instance the case of *Mr Ramos Nunes de Carvalho e Sá v. Portugal*, ECLI:C:ECHR:2016:0621JUD005539113, decided on 21 June 2016 where the European Court of Human Rights decided that domestic authorities had failed to secure the guarantees of a public hearing, thus hindering the applicant's ability to defend his case and call a witness and failing to ensure the safeguards of a fair hearing.

¹⁸¹ If the Council so decides due to the perpetration of grave infringement of discipline. See Article 123 of the Croatian Constitution.

¹⁸² Judges may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the Council, 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. See Article 107 of the Italian Constitution.

¹⁸³ See Article 28 of Slovenian Courts Act.

¹⁸⁴ See Article 147 of the Slovak Constitution.

¹⁸⁵ Article 132 of the Slovenian Constitution.

as incompetent to perform judicial service and his or her service ceases when such an assessment is confirmed by the Council.¹⁸⁶ In Estonia, the Council merely provides an opinion regarding the dismissal of a judge. Interestingly, in Hungary, the Council plays a role also in cases of resignation of judges.¹⁸⁷

4.5. Competences in Training of Judges or Their Qualification

Additional competence of the Councils in some Member States relates to the quality of judicial service, which can be improved through organizing the training of judges. This is not very common as many of the Councils (e.g. in Bulgaria,¹⁸⁸ England and Wales, Estonia, Greece, Italy,¹⁸⁹ Latvia, Lithuania, Malta, Northern Ireland, Portugal, Scotland, Slovakia,¹⁹⁰ and Slovenia) do not have a direct¹⁹¹ role in judicial educational or training activities.

The opposite can be said about Spain and some other Member States. In Spain, there is a judicial training service within the Council. This department organizes seminars with the participation of judges of the Supreme Court and of lower courts to share knowledge, in particular when new legislation is passed.

¹⁸⁶ Article 33 of Slovenian Judicial Service Act.

¹⁸⁷ It can approve a notice period shorter than three months and relieve the judge from their work related duties for the notice period in full or in part. In the case of a judge retiring or reaching the upper age limit, it makes a decision concerning the relief of the judge of his or her duties during the notice period (in line with Hungarian Act on the Legal Status and Remuneration of Judges).

¹⁸⁸ The responsibility for the organization of the judicial training goes to the National Institute of Justice. It is headed by a management board that includes five representatives of the Council. The Council also coordinates the curriculums of the National Institute of Justice.

¹⁸⁹ The training was organized until 2013, when a special body (e.g. School of the judiciary) started to operate. At this stage, the Council can merely give guidelines and they are being considered when the School of the judiciary draws up its annual program of training courses.

¹⁹⁰ Nevertheless, the Council determines the subject matter to be included in the judges' education in agreement with the Minister of Justice. Moreover, it elects five members of the Board of the Academy and proposes members of the pedagogical staff of the Academy, as well as the members of the examination committees for the professional judicial exam and the prosecutor exam. See ENCJ Factsheet on Slovakia.

¹⁹¹ The Council may have an indirect role though. For instance, one member of the Slovenian Council is a member of a special Council that provides professional assistance for the implementation of tasks of Slovenian Centre for Judicial Training (*Center za izobraževanje v pravosodju*), which enables them to influence the content of training. Moreover, the Commission for Ethics and Integrity (a special commission of the Council for the Judiciary in Slovenia) has, as an umbrella body, the duty of care (in collaboration with Centre for Judicial Training) for the training of judges in the field of ethics. See Articles 74a and 28d of Slovenian Courts Act.

In Denmark, the Council (e.g. Danish Court Administration) is responsible for the training of all court staff, including the judges and deputy judges. Each year, an extensive training catalogue is published, and a large number of training activities are organised.¹⁹² In the Netherlands, the Council coordinates the training activities of the lower courts only and is a part owner of the body in charge of developing and organizing the judicial training.¹⁹³ Moreover, the competence of the Council for training of judges and prosecution officers exist in Belgium.¹⁹⁴ The Council has the role to participate in the training and personal development of judges and other judicial personnel also in Croatia.¹⁹⁵ In Romania, the Council coordinates the activity of the National Institute of Magistracy and approves annually the Programme of Professional training for judges and prosecutors.¹⁹⁶

An educational or a training role in a broader sense exists in Poland, Lithuania and Hungary. In Poland, the Council can express its opinion on the program of training as part of the judges' training period, the scope and manner of conducting the judges' training period entry contests and judges' exams, it can express opinion on annual schedules of training and professional education of judges, trainee judges and court officers, and it names or expresses opinions on the appointment of members of an educational or training body.¹⁹⁷ In Lithuania, the Council adopts rules on judges' training organization, approves training program, annual training plans and requirements for lecturers. The Council in Lithuania also has a say on the training budget and has a training committee, which consists of certain number of the Council members. Moreover, the Council in Lithuania can adopt regulations on organising the training of judges, the training programmes, the annual plans for improving the qualifications and qualification requirements to the lecturers. In Hungary, the Council can form an opinion on the rules pertaining to the training system of judges and to the performance of the training obligation.¹⁹⁸

¹⁹² See ENCJ Factsheet on Denmark.

¹⁹³ Judicial training is developed and organized by the SSR (National Judicial Training Centre). The Council is a part owner of SSR (2/3 Council and 1/3 Prosecutor General's Office) and therefore responsible for the organization and supervision of SSR. See ENCJ Factsheet on the Netherlands.

¹⁹⁴ See Article 151 of the Belgian Constitution.

¹⁹⁵ See Article 123 of the Croatian Constitution.

¹⁹⁶ See ENCJ Factsheet on Romania.

¹⁹⁷ The Council can name three members of the Board and express opinion on the appointment of Director of the National School of Judiciary and Public Prosecution. See Article 3 of the Polish Act on the National Council of the Judiciary.

¹⁹⁸ The training of judges and judicial employees is organised by the President of the National Office for the Judiciary.

Competences of the Council concerning the training of judges can be seen as an opportunity towards an independent and professionally competent judiciary. This is supported by the fact that it has already been established that the body responsible for supervising the quality of the training programme should be independent from the executive and legislative power and with at least half of its members being judges.¹⁹⁹

4.6. Protection of Independence of Judges

To safeguard the independence of the judiciary and the judges individually, the Council is one of the bodies that could have the task of their protection. This can be achieved in various ways. For instance, if a judge is adjudicating in a significant legal case that is also covered thoroughly by the media, they can find themselves under pressure from the general public, political parties or other actors. It is a fact that individual judges, who have been under scrutiny, often hesitate to defend themselves (particularly in the case of a pending trial) to preserve their independence and to demonstrate that they remain impartial.²⁰⁰ In such a case, the Council could protect an individual judge by issuing public statement(s) in their support or inform the public with truthful facts that are often lopsided in the media and put additional stress on a judge and their independence when adjudicating a case. If the judiciaries do not provide information and answers, others members of the society (who could be less informed) might do it for them instead.²⁰¹

The protective role of the Council may as well be very different. For instance, in Croatia, a judge may not be remanded in custody or detention without the prior consent of the Council for an initiated criminal prosecution for a criminal offence perpetrated in the performance of his or her judicial duty.²⁰² In Latvia, there is a system of administrative immunities for judges that is under scrutiny.²⁰³ In Slovenia, the judges can appeal to the Council when they consider their independence is being under attack from within the judiciary.²⁰⁴

¹⁹⁹ See paragraph 3 of point 2 of the European Charter on the Statute for judges.

²⁰⁰ See point 53 of Opinion No. 18 of CCJE on the position of the judiciary and its relation with other powers of state in a modern democracy.

²⁰¹ J. Thomas, 2008, p. 8.

²⁰² See Article 122 of the Croatian Constitution.

²⁰³ See points 41 to 45 of Interim Compliance Report on Latvia, adopted by GRECO in 2016, available at: <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6d6e>> (last visited March 2017).

²⁰⁴ See Article 12 of Slovenian Courts Act.

4.7. The Functioning of the Courts

The Councils indisputably play a significant role in the functioning of the courts by having numerous competences related to the judges' careers. But they also play a role in the functioning of the courts in a broader sense. The Council in Italy can establish criteria that each court – in defining its own organizational plan – must follow in the assignment of the judges to the chambers and the distribution of cases.

The Council can also (for instance) influence the number of judges in courts by giving advice (to the President of the Republic in Lithuania) or proposal (to the Parliament in Latvia)²⁰⁵ or even by determining or changing the number of judges in courts in Estonia. Furthermore, it can approve model structures of courts, a model list of positions and job descriptions in Lithuania and approve the regulations for forming the chambers of judges and the distribution of cases to judges in Lithuania, Portugal,²⁰⁶ and Spain for instance.

The Council can also have various other competences related to the functioning of the courts. For instance, in Estonia, it can grant approval for the determination of the territorial jurisdiction of courts, approve the determination of the number of lay judges, the amount of remuneration paid to them in county courts²⁰⁷ and consent to the increase of the maximum age of a judge.²⁰⁸ In Poland, the Council can consider applications for the retirement of judges or their return to judicial post from retirement.

4.8. Competences Regarding the Financing of the Courts

Majority of the Councils do not have any competences with respect to the financing of the courts. This is the case in Belgium, Croatia, France, Italy, Por-

²⁰⁵ The Council submits proposal to the Parliament on the total number of judges in district and regional regular and administrative courts and on the number of the Supreme Court judges. The determination of the number of judges in district and regional courts is done on the basis of recommendation of the Minister of Justice, and for the determination of the total number of judges of the Supreme Court the Council decides on the basis of recommendation of the Chief Justice of the Supreme Court.

²⁰⁶ The Council can suspend or reduce case allocation of judges tasked with other functions of recognised interest for courts' jurisdiction or involved in other situations where the adoption of such measures is justified. On an annual basis and with the support of the Ministry of Justice, it can also establish the maximum number of cases to be allocated to each judge, as well as the maximum term for the respective procedural acts, whose time limit is not fixed by the law.

²⁰⁷ See Article 14 of Estonian Courts Act.

²⁰⁸ Ibidem. See Article 99.

tugal, Romania, and Spain. The Councils in some other Member States do, however, have some competences related to the financing of courts. This seems reasonable considering that the Council is an intermediary body between the judicial and the executive or legislative power of a Member State (that adopt the State budget). It follows from this that the Council participates in the process of determination of the financing of courts for a fiscal year in one way or another. For instance, it can form an opinion on the proposed budget of the courts (in Latvia,²⁰⁹ the Netherlands,²¹⁰ Poland, Slovenia,²¹¹ and Slovakia) and on the report regarding the implementation of the budget (in Hungary). In Lithuania, it can consider and approve proposal on draft investment programmes for courts and proposal for budgets of courts and submit them to the Government. In Estonia, it can provide a preliminary opinion on the principle of the formation and amendment of annual budgets of courts.²¹² Involvement of the Council in the preparation of the budget allocated to courts exists also in Denmark.²¹³ This coordinative role in preparing requests for court funding is desirable and considered as a strength if an independent body – like the Council – represents all the courts in a Member State.²¹⁴ The ENCJ Report 2015–2016²¹⁵ similarly recommends that to ensure and strengthen the separation of powers, the Council (or a body on which the judiciary is represented) should be closely involved and fully informed at all stages in the budgetary process and should have an opportunity to express its views about the proposed budget to the Parliament.

²⁰⁹ This advice of the Council to the Supreme Court on formal proposal on the budget allocated to courts is mandatory. See Latvian response to the questionnaire on Judicial independence in 2015.

²¹⁰ The Council provides a mandatory opinion to the formal proposal on the annual budget for the whole judiciary to the Ministry of Security and Justice which proposes it to Parliament.

²¹¹ See Article 28 of Slovenian Courts Act.

²¹² The Minister of Justice approves the budget of courts of the first instance or courts of appeal within two months after the state budget is passed as an Act, considering the opinion formulated by the Council. See Article 43 of Estonian Courts Act.

²¹³ The Danish Court Administration 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.

²¹⁴ See also point 11 of Opinion No. 2 of CCJE on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights.

²¹⁵ See ENCJ Report 2015-2016, Funding of the Judiciary, p. 3.

The Councils in the Netherlands²¹⁶ and Denmark²¹⁷ also allocate the respective budgets to the courts.

4.9. Competences Concerning Legislative Acts Regarding the Judiciary

The Councils, as the institutional bodies ensuring the independence of the judiciaries and the judges, often have a say in numerous areas that affect the courts or judges. One of such areas is the legislation that concerns the judiciary. To this end the Council can form opinions on draft legislations concerning the judiciary (in Belgium,²¹⁸ Bulgaria, Croatia,²¹⁹ Denmark,²²⁰ France,²²¹ Italy, Latvia,²²² Lithuania,²²³ the Netherlands,²²⁴ Poland, Portugal, Romania,

²¹⁶ The Council is fully accountable to the Minister with regard to the way this budget is spent. The budget covers all costs and activities of the Council, the courts under its responsibility and also the salaries of judges. The Council allocates the budget to the courts and supervises their financial administration. The courts are accountable to the Council pertaining to the way their budgets are spent. See ENCJ Factsheet on the Netherlands and the response of the Netherlands to the questionnaire on Judicial independence in 2015.

²¹⁷ The total budget for the judiciary is part of the annual Finance Act. The Ministry of Justice delegates the budget (appropriations) to the Danish Court Administration, which in turn allocates the budget to the courts. Ultimately, the economic responsibility for the judiciary lies with the board of governors of the Danish Court Administration. The board has the possibility to address the Parliament directly with a budget proposal should they find that the appropriations are insufficient. See ENCJ Factsheet on Denmark.

²¹⁸ The Council delivers recommendations, opinions and advice on proposed legislation regarding the general functioning and organization of the judiciary. See ENCJ Factsheet on Belgium.

²¹⁹ This is done at the request of the Ministry of Justice. See ENCJ Factsheet on Croatia.

²²⁰ The Danish Court Administration regularly takes part in legislative preparatory work and hearings. It also provides advice on legal matters and policy proposals that affect (directly or indirectly) the judiciary. See ENCJ Factsheet on Denmark.

²²¹ Requests for an opinion are formulated by the President of the Republic. See ENCJ Factsheet on France.

²²² The Council has the possibility to express an opinion to the legislator on issues which affect the functioning of the courts.

²²³ In Lithuania, the Ministry of Justice, the Government or the Parliament as a general rule asks the opinion of the Council on every piece of draft legislation related to the work of courts (e.g. proposed amendments to procedural code) or status of the judiciary (e.g. proposed amendments to Law on Courts).

²²⁴ One of the Council's main duties is providing advice to the Government and to the Parliament on bills and policy proposals that affect the judiciary. This only involves proposals that have a direct impact on the organisation of the judiciary, as well as on the introduction or amendment of (new) legal proceedings. The Council's advice is ratified following consultation with the courts. The Council can provide legislative advice both on request and on a non-solicited basis.

Scotland,²²⁵ Slovakia,²²⁶ Slovenia, and Spain) and present proposals in this regard (e.g. in Hungary,²²⁷ Poland, and Portugal).²²⁸ The Councils in Greece, Northern Ireland and England and Wales do not comment on the merits of the proposed government policy.

Moreover, the Council may make an application to the Constitutional Tribunal regarding the constitutional conformity of normative acts to the extent that they relate to the independence of courts and judges in Latvia,²²⁹ Poland²³⁰ and Slovakia.²³¹

Consultation with the Council on all draft legislation, likely to have an impact on the judiciary before its deliberation in Parliament, is an opportunity that professional and representative voice during the legislative procedure is heard from amongst the judges themselves.

It is important to note that the Council may not only react when the current position of the functioning of the judiciary is concerned, but may express its opinion on the regulation of the judiciary in the future (*de lege ferenda*).²³²

²²⁵ The Lord President has a statutory responsibility for representing the views of the Scottish Judiciary to the Scottish Parliament and the Ministers and may consult and be advised in that regard by the Council.

²²⁶ The Council can express an opinion on proposals of generally binding legal regulations setting out the organization of the judiciary, proceedings before courts and the status of judges. See ENCJ Factsheet on Slovakia.

²²⁷ The Council can make a proposal to the President of the National Office for the Judiciary on initiating legislation affecting the courts or form an opinion on the regulations and recommendations issued by the President of the National Office for the Judiciary.

²²⁸ The Portuguese Council can issue an opinion on legal acts related to the judiciary and, in general, study and proposes to the Ministry of Justice the legislative measures to improve the efficiency of the judiciary. See ENCJ Factsheet on Portugal.

²²⁹ This has actually happened recently in Latvia where the Council instituted proceedings before the Constitutional Court concerning judges' and public prosecutors' salaries. More information is available at: <<http://at.gov.lv/en/news/about-the-council-for-judiciary/2016/8051-the-constitutional-court-based-on-application-by-the-council-for-the-judiciary-institutes-proceedings-in-case-of-the-remuneration-system-of-judges/>> (last visited March 2017).

²³⁰ See Article 186 of the Polish Constitution.

²³¹ See Article 141a of the Slovak Constitution.

²³² Slovenian Council can adopt a principled position on the situation in the judiciary (see Article 28a of Slovenian Courts Act). Such a document can, for instance, serve also as grounds for an initiation of a legislative change.

As a concluding note of this section, it needs to be stressed that the Councils in some Member States have certain additional specific competences to the ones mentioned above.²³³

5. INFLUENCE ON THE ADMINISTRATION OF THE COUNCIL FOR THE JUDICIARY AND THE SUPREME COURT

5.1. Influence of the Council for the Judiciary on the Administration of the Supreme Court

One of the aims of our research was to determine how the Supreme Court and the Council influence each other in their mutual relations. A specific area of our focus was the influence of the Council on the administration of the Supreme Court and vice versa (for this see the following subsection). Through our research and the information provided by the respondents it has been established that generally, the Council influences the administration of the Supreme Court in the sense that it has the competence to participate in the process of appointment or release of Supreme Court justices, their promotion and transfer, evaluation of judges, and disciplinary proceedings against them. These possibilities of its participation have already been discussed above. What might be interesting in this respect, is that the competences of the Councils in relation to Supreme Courts may be much narrower than in the relation to other courts. For instance, the competence of the Council in Poland in disciplinary proceedings concerning judges of the Supreme Court is considerably limited.²³⁴

²³³ For instance, Lithuanian Council (and this is assumed for other Councils as well) can cooperate with other national, international and foreign institutions and organisations concerning the issues of court autonomy, administration and other issues relevant to the activities of the courts. The Council can (for instance) also convene meetings of the judges, like General Meetings of Judges in Lithuania or convocation of Judges' conference in Latvia (while setting issues to be included in the agenda). The Council can award honorary titles in Hungary or propose them in Latvia. In Latvia, it has the competence to approve procedure for using judges' robe and insignia and it approves a sample of judge's identification card. The Councils also have various other specific competences and there are too many to mention all of them. Additionally, the members of the Council can also discuss other issues at the initiative of the competent person or a body or decide on other issues or powers prescribed by law.

²³⁴ The Council is not entitled to request that disciplinary proceedings be initiated against a Supreme Court judge. It does also not participate in the election of the Supreme Court disciplinary commissioner and their deputy (who are elected by the Board of the Supreme Court for a four-year term).

Apart from these participative roles, the Councils reportedly do not directly affect the administration of the Supreme Court in Latvia, Portugal and Romania,²³⁵ for instance. In Slovenia, the Council is responsible for the matters concerning judges and the Supreme Court²³⁶ is responsible for the administration (operational procedures and management) in courts. Therefore, their functions are generally separated.²³⁷ A slightly different situation exists in Hungary where the Council does not have the task of the central administration of courts, but it does supervise the competent body for it.²³⁸ The reason for such a state is of a historical nature. In many EU Member States, including those where the Councils originated (e.g. France, Italy, Spain, and Portugal), the improvement of administrative management was not the rationale for their creation. Therefore, in these countries, there have been no significant demands for transfer of these powers to the Council.²³⁹

5.2. Involvement of the Supreme Courts in Administering the Work of the Councils for the Judiciary

In our research, the reverse influence was also examined, e.g. the influence or involvement of the Supreme Courts in administering the work of the Councils. It was established that, as a rule, the Supreme Court is not directly involved, apart from having Supreme Court justices as members or chairs, in

²³⁵ This is because the Council has been primarily formed to deal with the court administration of first and second instance courts (but not the Supreme Court as this is an independent constitutional institution).

²³⁶ The concrete administrative decisions are in the power of the President of the Supreme Court and its Secretary General. For other courts, this is the responsibility of court presidents which may delegate some matters to court directors.

²³⁷ Nevertheless, the Slovenian Council does have some competences related to the administration of the Supreme Court. It gives consent to the policy of detection and control of risks of corruption and exposure of the courts to them, that is adopted by the President of the Supreme Court who monitors its implementation and may propose amendments (Articles 28 and 60č of Courts Act); it hears annual reports and analyses the effectiveness and efficiency of the work of judges (Articles 60a and 60b of Courts Act); it discusses the annual programs of the courts and their realization with the President of the Supreme Court, other court presidents and the Minister of Justice (Article 71a of Courts Act); and it participates in the judicial budgetary committee dedicated to the coordination of proposed financial plans of the courts and the human resources plans of the courts (Article 75 of Courts Act).

²³⁸ The competent body is the President of the National Office for the Judiciary.

²³⁹ V. Autheman, S. Elena, 2004, p. 3.

administering the work of the Council. This applies to Estonia,²⁴⁰ Hungary,²⁴¹ Italy,²⁴² Lithuania,²⁴³ Poland, Romania, Slovakia,²⁴⁴ Spain, and Slovenia. Interestingly, in the latter, the budget for the functioning of the Council is given to the Supreme Court, which may in this way exercise substantial influence on the functioning of the Slovenian Council.²⁴⁵ However, a new legislative Act on the Judicial Council of Slovenia was proposed and the Council should become an independent budgetary user in the near future.

An exception to the rule that the Supreme Court is not directly involved in administering the work of the Council (that applies to other Member States) exists in Latvia. The work of their Council is ensured by the administration of the Supreme Court (in the beginning of 2017, a Secretariat was established, which is a new division at the Supreme Court).²⁴⁶

6. COUNCIL FOR THE JUDICIARY AS PROVIDER OF THE INFORMATION TO THE SOCIETY

In light of the required transparency of State bodies and the courts of law, one might wonder how more transparency could be achieved regarding the functioning of the Council.²⁴⁷ Transparency is above all a precondition for the confidence of the citizens in the functioning of the justice system and the guarantee

²⁴⁰ The Ministry of Justice officials are responsible for administrating the work of the Council as the Council does not have its own officials. See Article 40 of Estonian Courts Act.

²⁴¹ Administrative and operational support regarding the filing system, the organization of meetings and the general operation of the Council is provided by the permanent office of the Council. The Curia is not involved.

²⁴² Equipment and administrative staff of the Council is provided by the Ministry of Justice.

²⁴³ The responsible body for providing services to the Council is the National Courts' Administration.

²⁴⁴ Currently it is not, but the Supreme Court closely cooperates with the Council.

²⁴⁵ The current situation in Slovenia is that the Supreme Court provides full information technology support to the Council (e.g. e-register, computer support) which (in addition to the financial aspect) further binds the Council and its work to the Supreme Court. This is far from trivial and the Supreme Court can have a very strong impact on the Council's work in this manner.

²⁴⁶ More information is available on the website of the Latvian Supreme Court: <<http://at.gov.lv/en/news/about-the-council-for-judiciary/2017/8114-for-ensuring-the-operation-of-the-council-for-the-judiciary-the-secretariat-is-established/>> (last visited on March 2017).

²⁴⁷ Transparency and reasoning of the decision of the Council is stressed in the fourth chapter of the Recommendation CM/Rec (2010)12 and explanatory memorandum.

from the danger of political influence. In some Member States, the Councils may publish summaries of their meetings (in Hungary and Slovakia), their audio recordings or press releases (in Slovakia). This may include the Council's decisions (in Slovenia)²⁴⁸ or opinions on the selection of judges or candidates for judges (in Slovakia). In Lithuania and Latvia, one can find agenda of the Council meetings (which are usually open), minutes of them and decisions of the Council on a general website of the courts (with supporting material). A press release is also issued and (sometimes) a press conference organized as a follow-up to the adoption of major decisions or events of the Council. To provide greater transparency, the Council meetings may be open to all judges as well (in Hungary).

The Council does not always have a role in providing information to the society. This can be left to the Ministry of Justice, the respective courts of law or their special press units (like in Estonia).²⁴⁹ Nevertheless, the Council might also have a press or a communication office. This is the case in Spain²⁵⁰ and the Netherlands.²⁵¹ Another way of providing information to the society by the Council is through publication of a review of the previous court activities. This is done for the previous year in Lithuania²⁵² and Hungary, while in Poland it is done for each quarter of the year.²⁵³ Furthermore, the Council in Hungary also holds press conferences about its duties and operations.²⁵⁴

²⁴⁸ Slovenian Council publishes decisions for each term of office, decisions connected to ethics and integrity, and to the provision concerning incompatibility with the function of a judge. It also issues explanations regarding the promotion of judges and warnings, opinions and explanations of the Council in other matters.

²⁴⁹ The Council has, however, adopted Recommendations for the Courts' Media Relations.

²⁵⁰ Their members are active on the social networks and they provide wide information through their website, available at: <www.poderjudicial.es> (last visited March 2017).

²⁵¹ It is responsible for liaising with the media and for setting national policies on behalf of the Judiciary. The department is also responsible for press communications and for providing information to the public. The Judiciary maintains a series of press guidelines, which indicate what journalists, district courts and courts of appeal can expect and how the courts should provide information to the media before, during and after court cases. The media, for their part, are expected to comply with internal rules regarding court sessions.

²⁵² It is published before 31 March on the website of the National Courts Administration.

²⁵³ National Council of the Judiciary Quarterly, published since 2008, where current problems of the judiciary are also discussed.

²⁵⁴ Press conference can be organised by the President of the Council, vice-president or the delegated spokesperson and its members have the right to give information to the society about its operation.

The Council can also provide information to the society concerning the judiciary by issuing opinions on draft legislation concerning the judiciary and judges or by issuing statements on current events and developments concerning judiciary (e.g. in Poland). In Lithuania and Portugal,²⁵⁵ it can also publish statements and comments on topical issues, while in Romania it publishes info-letters and guides concerning judiciary. A substantial part of communication with the public can also be based on the inquiries from press or individuals as is the case in Slovenia.²⁵⁶

The Council in Latvia can even approve guidelines on communication of the court system, therefore determining the manner in which the information is communicated to the media. Interestingly, in Italy, the Council follows a specific communication strategy with press releases, interviews given to the press and other media, by allowing the presence of journalists in public sessions of the general assembly, through visits to schools and universities or through meetings organized with other institutions with a strong communicative impact.

It is important to stress that when providing information to the society, a proper balance between the secrecy of judicial inquiries on the one hand and freedom of expression (regarding the right to inform and to be informed) on the other hand needs to be maintained. Therefore, in some cases, information cannot be provided due to judicial secrecy.

7. FUNCTIONING OF THE COUNCILS FOR THE JUDICIARY

Some paragraphs ought to be devoted also to the functioning of the Council. The starting point of functioning (in a broader sense) is the term of the office that members are elected or appointed for. It can be observed that it is different among the Member States. It lasts one year in Greece, three years in Northern Ireland, England and Wales, four years in Belgium, Croatia,²⁵⁷ Denmark, France, Italy,²⁵⁸ Latvia,²⁵⁹ Lithuania, Malta and Poland,²⁶⁰ and five

²⁵⁵ The Council, whenever necessary, exercises its right to reply to the media whenever they transmit untruthful news or need additional information or clarification.

²⁵⁶ The statutory basis for these inquiries are Public Information Access Act (Official Gazette of the Republic of Slovenia No. 51/06 with amendments) and Media Act (Official Gazette of the Republic of Slovenia Nno. 110/06 with amendments).

²⁵⁷ See Article 124 of the Croatian Constitution.

²⁵⁸ See Article 104 of the Italian Constitution.

²⁵⁹ See Article 89 of Law on Judicial Power.

²⁶⁰ See Article 187 of the Polish Constitution.

years in Slovakia²⁶¹ and Spain.²⁶² The term of office in Hungary, the Netherlands and Romania²⁶³ is six years. In Slovenia, the term is also six years, but it is unequally distributed, so that half of the Council members is replaced every three years.²⁶⁴ Such a provision ensures the preservation of the continuity of the Council's activities.²⁶⁵

The other point regarding terms of the office is whether a member can be elected for several terms, perhaps even consecutively. It is important to note that the same person cannot hold the office of being a member of the Council for two consecutive terms in Belgium, Bulgaria, France, Hungary, Italy,²⁶⁶ Romania, Slovenia,²⁶⁷ and Spain²⁶⁸ or for more than two terms in Croatia,²⁶⁹ Latvia, Poland, and Slovakia.²⁷⁰

A different approach exists in Bulgaria²⁷¹ and Portugal²⁷² where the term of office is different for different groups of members. The same applies also for the possibility of its renewal in Portugal.²⁷³

Once the members of the Council are elected, there is a need for the determination of its chair or president. In several member States, for instance in Estonia, Latvia, Portugal, and Spain, the chair is the President of the Supreme Court. More often though, it is selected internally among its members. This is

²⁶¹ See Article 141a of the Slovak Constitution.

²⁶² See Sec. 122 of the Spanish Constitution.

²⁶³ See Article 133 of the Romanian Constitution.

²⁶⁴ See Article 18 of the Slovenian Courts Act.

²⁶⁵ According to point 35 of Opinion No. 10 on the Council for the Judiciary at the service of society, not all Members of the Council should be replaced at the same time.

²⁶⁶ They cannot be immediately re-elected. See Article 104 of the Italian Constitution.

²⁶⁷ See Article 18 of Slovenian Courts Act.

²⁶⁸ This does not apply for the Council's President in Spain.

²⁶⁹ See Article 124 of the Croatian Constitution.

²⁷⁰ The same person may be elected or appointed as the Chair or as a member of the Council for a maximum of two consecutive terms. See Article 141a of the Slovak Constitution.

²⁷¹ Elected members have a term of office of five years and the *ex officio* members (e.g. the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General) have a term of seven years. See ENCJ Factsheet on Bulgaria.

²⁷² Term of office for members appointed by the President of the Republic is five years, for those appointed by the Parliament four years and for the elected judicial members three years. See ENCJ Factsheet on Portugal.

²⁷³ *Ibidem*. There are limits only for judicial members who cannot be members for more than two terms of office.

done in Croatia,²⁷⁴ Lithuania,²⁷⁵ Poland,²⁷⁶ Romania,²⁷⁷ Slovenia,²⁷⁸ and Slovakia.²⁷⁹ An interesting solution exists in Belgium²⁸⁰ and Hungary,²⁸¹ where the presidential position is filled by Council's members on rotational basis.

An important element of the functioning of the Council concerns the type of function that the members are elected or appointed for. They can be elected or appointed for performing an honorary function (in England and Wales, France, Greece, Hungary, Latvia, Lithuania, Malta, Northern Ireland, Poland,²⁸² Slovenia,²⁸³ and Slovakia),²⁸⁴ part- (in Croatia²⁸⁵ and Scotland)²⁸⁶ or even full-time function (in Bulgaria, Italy, the Netherlands, and Romania).²⁸⁷ In Portugal, it is up to the respective member to decide, but it possible to have a full-ti-

²⁷⁴ See Article 124 of the Croatian Constitution.

²⁷⁵ The President of the Council is elected for two years.

²⁷⁶ A chair and two deputy chairpersons are chosen from amongst the members of the Council. See Article 187 of the Polish Constitution.

²⁷⁷ The President of the Council is elected among the judge members for one years' term of office which cannot be renewed. See Article 133 of the Romanian Constitution.

²⁷⁸ See Article 131 of the Slovenian Constitution.

²⁷⁹ The Chair is elected and recalled among and by the members of the Council.

²⁸⁰ The Presidency is exercised in turn by each member of the Bureau for one year. See ENCJ Factsheet on Belgium.

²⁸¹ The members rotate every six months in the following manner: the first to fill the position is the judge with the longest judicial service, followed by the other members in descending order of the length of their judicial service.

²⁸² The members of the Council usually meet once a month for a whole week, so the judges remain full-time judges.

²⁸³ The members gather in meetings every 2-3 weeks.

²⁸⁴ See ENCJ Factsheets on France, Hungary, Latvia, Lithuania, Poland, Slovenia, and Slovakia.

²⁸⁵ E.g. in Croatia. Judges that are members of the Council have their work obligations as judges reduced by half. The president of the Council has their working obligations reduced by three quarters. The members gather in meetings one or two weeks apart.

²⁸⁶ The Council meets twice each year and on-going work is realized via a committee structure with members performing these duties on a part-time basis. All the members are serving judges. See ENCJ Factsheet on Scotland.

²⁸⁷ See ENCJ Factsheet on Italy, the Netherlands and Romania.

me function.²⁸⁸ In other Member States, only some members have a full-time position. This applies to Belgium,²⁸⁹ Denmark,²⁹⁰ Slovakia,²⁹¹ and Spain.²⁹²

This element has an enormous influence on the Council's functioning. If the function of a member is honorary, the members of the Council (may) only discuss and adopt decisions, while office staff prepares the majority of agenda and its documents.²⁹³ If the function is part- or full-time, then members of the Council have sufficient time to prepare themselves for the sessions, and they can prepare or at the very least review the documents related to the agenda of each session. It is plausible that a part- or even full-time function presents an opportunity towards a more effective work, but poses a threat on the other hand concerning the continuity of the work of the members. It seems that a balance between the two could be achieved by a part-time function as a member of the Council, while simultaneously preserving court practice or other non-judicial function (of non-judges).²⁹⁴ The type of function is of significant importance also to the members of the Council who are court presidents. In this case, they combine three functions – being a judge, president of a court and a member of the Council.

While the opening section of this article discussed the composition of the Council, a reference to it needs to be made here. The regulation of the functioning and the competences of the Council essentially depends on its composition. Nevertheless, another point of significant influence has to be highlighted here. The functioning of the Council also largely depends on the provisions concerning the quorum for adopting decisions and the majority required for it. For

²⁸⁸ Only judge members were in a full-time position in 2015. See ENCJ Factsheet on Portugal.

²⁸⁹ Only four members of the bureau are in a full-time position. See ENCJ Factsheet on Belgium.

²⁹⁰ The only person with a full-time position is the Director General appointed by the board of governors and responsible for the day-to-day management of the Danish Court Administration. See ENCJ Factsheet on Denmark.

²⁹¹ Only the President of the Council is a full-time member. Other members of the Council fully keep their original functions and are not entitled to remuneration as members of the Council. See ENCJ Factsheet on Slovakia.

²⁹² Only six members (president and five other members) have a full-time position according to the last amendment introduced by the Organic Law on the Judiciary of June 2013. These members are the ones who make up the Standing Committee. See ENCJ Factsheet on Spain.

²⁹³ Interestingly, in Romania, the works for sessions are prepared with the support of an administrative staff of 260 persons. See Report of ENCJ Working Group Mission and Vision III, 2006-2007, p. 31.

²⁹⁴ See also point 34 of Opinion No. 10 of CCJE on the Council for the Judiciary at the service of society.

instance, Estonian and Lithuanian Councils have a quorum if more than half of its members are present, while the Hungarian Council requires at least two-thirds of its members present. In Estonia, the Council adopts decisions by a majority vote of the members present, while in Slovenia, the Council adopts decisions with the majority of all of its members, unless an Act or Rules of Procedure of the Council determines otherwise.²⁹⁵ This is the case, for instance, when more significant decisions are adopted.²⁹⁶ The Council in Slovenia then decides with a qualified two-thirds majority of all members of the Council. Such a majority is required in order not to give the judges in the Council the possibility to make a decision by themselves. Despite the fact that judges have a majority in the Council, such a condition means that significant decisions are not adopted unless there are (with the intent to reach consensus) sufficient votes among the judge and non-judge members.

Additional reference needs to be made towards having adequate human and financial resources for the functioning of the Council. It seems necessary to emphasize the importance of a quality administrative and technical support for the work of the Council. Its constitutional foundation and nature of its tasks require an in-depth and responsible approach to work. Professional and strong administrative support system of the Council is, therefore, one of the key conditions for the effective fulfilment of the mission that these bodies have in modern democratic societies. If this is not guaranteed, the Council will clearly have difficulty in effectively performing its function.²⁹⁷ Because the Council is an independent body, it is of utmost importance that it is also financed in a way that enables it to function properly.²⁹⁸ Therefore, it should have the appropriate means to operate as well as the power and the capacity to nego-

²⁹⁵ See Article 23 of Rules of procedure of the Council in Slovenia, available at: <http://www.sodni-svet.si/images/stories/Poslovnik/Neuradni_cistopis_Poslovnika_Sodnega_sveta_5_11_2015.pdf> (last visited March 2017).

²⁹⁶ See Article 28 of Slovenian Courts Act. Such cases are proposals for election of judges, their appointments or promotions, etc.

²⁹⁷ J. P. Gilligan, Address to the Working Group of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Sarajevo, 2 November 2010, p. 11.

²⁹⁸ In Poland and Portugal, the Council has its budget as a separate part of the State budget, making it financially independent body.

tiate²⁹⁹ and organise its budget effectively.³⁰⁰ When the Council has budgetary powers, it is only logical that it should then be accountable for the use of the funds to the Parliament (which adopts the budget)³⁰¹ or another supervisory body, such as the Court of Audit (e.g. in Slovenia).

8. CONCLUDING THOUGHTS

The Council for the Judiciary is an intermediary institution between the judicial and other (political) State powers. Its role is to safeguard the independence of the judiciary and judges. This is achieved by participating in the process of election or appointment and dismissal of judges and court presidents, assessment of their work, their promotion, transferral, training and in the case of disciplinary proceedings against them.

The Councils in the EU Member States have additional other various competences concerning the adoption of standards of professional ethics of judges, protection of judges and (in a broader sense) also competences regarding the functioning of the courts, their financing, participating in the process of adopting legislative acts regarding the judiciary and perhaps even having the function of providing the information concerning judiciary to the society.

The Councils' roles in the Member States differ for each of these competences, which is the result of the application of the three constitutional principles of democracy, separation of powers and independence of the judiciary. The Member States tended to find different solutions when attempting to find the optimal balance between these principles. The Council itself as an institution was originally created to ensure the principle of separation of powers. This principle is flexible, and its content and mechanisms are of different types. This applies especially to the relations between the legislative and the executive power. The idea that is nevertheless common to all Member States is one where the judicial power should be functionally separated from the other two powers. This applies fundamentally to the performance of the judicial function, but not so absolutely to the election or appointment of judges. In the latter

²⁹⁹ An example can be seen in Slovenian legislative proposal of Act on Judicial Council where one of the goals is to determine the Council as a directly financed budgetary body that proposes its budget itself. Currently, Slovenian Council is financed through a joint budget for courts where coordination and distribution of funds is in the competence of the Supreme Court. See Proposal of Act on Judicial Council (*predlog Zakona o sodnem svetu*), first discussion, EVA 2015-2030-0019, p. 7–8.

³⁰⁰ See also point 37 of Opinion No. 10 of the CCJE on the Council for the Judiciary at the service of society.

³⁰¹ *Ibidem*, point 94.

process, the principle of separation of powers needs to be understood in a way that the judicial power cannot be entirely excluded (e.g. some form of their participation needs to be ensured).³⁰² Here lies the reason that the Councils' powers in the process of election or appointment of judges are more restricted than when adopting decisions on judges' careers.

The restriction can be seen in the fact that the legislative or the executive authority appoints a judge (and has the final say) or that one of the democratic institutions (e.g. the President) or its members (e.g. MPs) are members of the Council. It could even be both. What is evaluated as the best solution though, is that the Council operates by strictly internal professional criteria, selects the candidates and proposes them to the democratically elected institution that elects or appoints them. If the Parliament has the final say, then the powers might be balanced if the President of a Member State is a member of the Council. The opposite is also possible, however, since the Parliament is a collegial body, it is better if it elects the non-judge members among the ranks of outstanding jurists and not among MPs (since this would cause several members of the parliament to be members of the Council and endanger its independent role). This also necessarily requires that the composition of the Council does not include only judges to avoid the self-government of judges. In the case the composition is mixed, safeguarding mechanisms need to be established to prevent potential abuses by a handful of members. It is important to determine which group has the majority in the Council, the quorum and the (qualified) majority of votes required for adopting decisions.

On the other hand, these various mechanisms for the election or appointment of a judge might not be necessary once a judge is already performing his or her function and decisions are taken concerning his or her career (e.g. assessment, promotion, transfer). The principle of independence of the judiciary might then prevail over the principle of democracy, and the Council could have the final say on these issues. Nevertheless, the element of democracy can still be respected if the legislative or the executive power elects or appoints members of the Council (or has their members in the Council which would likely be overly democratic and insufficiently independent). These various discussed competences of the Council in the Member States are mere reflections of the differently perceived and executed constitutional principles. It follows from this that these differing solutions will likely persist for as long as the optimal balance between these perceived principles will remain different.

Since one of the areas of our interest was to determine whether the Councils have a direct influence on the administration of the Supreme Courts, it is

³⁰² See S. Nerad, 2016, p. 393.

concluded that in many Member States they do not. The reason can be found in the fact that the first Councils were not created for this purpose and these powers have subsequently not been transferred onto them. Nevertheless, in many EU Member States, the Councils are still developing³⁰³ and only time will tell if changes will occur in the future.

Lastly, if the Council is to perform its functions effectively, it needs to have adequate financial and human resources. The latter include having sufficient office staff, but also the answer to the question whether the members have honorary or professional (part- or full-time) function. If the function is honorary, one can find themselves overwhelmed with performing their work and preparing, attending and voting as a member of an important constitutionally founded body of a significant importance for the independence and impartiality of the judiciary. Therefore, it is beneficial (or even necessary) that the members of the Council perform their function professionally.

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³⁰³ Especially in the Member States in Eastern Europe, the Councils are still embryonic institutions, which need to be reformed and strengthened to become more accountable. See V. Autheman, S. Elena, 2004, p. 3.

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VLOGA SODNIH SVETOV ZA ZAGOTOVITEV UČINKOVITEGA SODNEGA SISTEMA*

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Prispevek temelji na funkcionalni metodi primerjalnega prava, ki omogoča ugotovitev razlik in podobnosti pravne ureditve vlog sodnega sveta v državah članicah EU za učinkovit sistem sodstva. Izhodišče raziskave je bila priprava vprašalnika o vrhovnih sodiščih in sodnih svetih, ki je bil nato poslan nacionalnim strokovnjakom. Poleg rezultatov vprašalnikov, ki so bili prejeti od 20 držav članic EU (pri čemer sodni svet obstaja le v dvanajstih), prispevek temelji tudi na znanstveni literaturi in pravnih virih, ki so služili za pridobitev sodobnih pravnih pogledov in potrditev prejetih rezultatov. Osnovne informacije o sodnih svetih so bile pridobljene tudi iz ustav preostalih držav članic in evropske mreže sodnih svetov, zaradi česar je mogoče trditi, da je nastal reprezentativen vzorec, ki omogoča relevantne zaključke.

Prvo pomembno obravnavano vprašanje pri delovanju sodnega sveta je njegova sestava. Ta je v ureditvah držav članic različna. Razlike so razvidne v številu članov in poklicu, ki ga člani opravljajo. Najnižje število članov (štiri) je na Nizozemskem, najvišje pa v Belgiji (44), z vmesnimi rešitvami pri drugih državah članicah. Sodni svet je v Litvi, Združenem kraljestvu (v Severni Irski in na Škotskem) ter na Madžarskem sestavljen samo iz sodniških vrst, v dru-

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Podatki in pogledi v tem prispevku so zgolj pogledi avtorjev in ne odražajo nujno pogledov Evropske unije.

gih državah članicah pa so prisotni tudi drugi člani. Ti so v Sloveniji in Italiji lahko profesorji prava, odvetniki ali drugi pravniki. V nekaterih državah (na primer v Estoniji) so člani tudi iz vrst poslancev, tožilstva, ministrstva za pravosodja in odvetniškega združenja. Prednost mešane sestave je, da lahko svoje (širše) poglede predstavijo tudi posamezniki, ki niso sodniki, hkrati pa so ti z institucionalne ravni tudi bistveno bolj neodvisni od članov sodnikov. V tuji literaturi se namreč pogosto opozarja na notranjo odvisnost sodnikov v razmerju do predsednikov sodišč ali starejših kolegov. To velja še bolj tedaj, ko je predsednik (zlasti vrhovnega sodišča) eden od članov sodnega sveta. Mešana sestava sodnega sveta tudi preprečuje samoupravljanje sodnikov in zagotavlja boljše ravnotežje moči med sodno, zakonodajno in izvršilno oblastjo (zlasti če so člani sodnega sveta tudi poslanci). To pa je mogoče (in morda celo bolje) doseči tako, da je sodni svet sestavljen brez neposrednega političnega vpliva, ta pa je prisoten v drugih institucijah (na primer parlamentu), ki imajo pomembno vlogo v postopku odločanja o izvolitvah sodnikov in drugih pristojnostih, pomembnih na področju sodstva. Hkrati je s tem mogoče lažje doseči, da sodni svet deluje strogo po strokovnih merilih.

Člani iz sodniških vrst so praviloma predstavniki vseh stopenj sodniškega odločanja in predstavljajo v večini držav članic večino članov sodnega sveta. Zanimivo je, da je član sodnega sveta v nekaterih državah članicah oseba zgolj na podlagi opravljanja določene funkcije. Ena od teh je položaj predsednika vrhovnega sodišča, ki je po funkciji član sodnega sveta v kar 14 državah članicah. Poleg tega je predsednik vrhovnega sodišča celo predsednik sodnega sveta po funkciji v šestih državah članicah. Drugačna rešitev je prisotna na Hrvaškem, Poljskem in Slovaškem, kjer predsedniki sodišč ne morejo biti člani sodnega sveta. Te države so sprevidele, da obsežnega kroga pooblastil ni primerno zaupati le ozkemu krogu oseb. Preostale člane, ki ne prihajajo iz sodniških vrst, izvoli zakonodajna ali izvršilna veja oblasti, izjemoma (v Estoniji) pa odvetniško združenje in tožilstvo. Edinstven primer je Latvija, kjer so preostali člani sodnega sveta osebe na podlagi položaja, ki ga zasedajo.

Poleg sestave sodnega sveta se ti v državah članicah EU razlikujejo tudi po pristojnostih, ki jih imajo. Njihova najbolj prepoznana pristojnost je njihova vpetost v postopku izvolitve oziroma imenovanja kandidatov na sodniško funkcijo. Ta se lahko odraža v obliki ocenjevanja in predlaganja kandidatov (na primer v Belgiji, Romuniji, Sloveniji, na Slovaškem, Poljskem in na Hrvaškem), predložitve mnenja o kandidatih (na primer v Franciji, Litvi in Estoniji) ali celo s soglašanjem o predlaganih kandidatih za funkcijo sodnika (na primer na Madžarskem). Poleg tega imajo sodni sveti v nekaterih državah članicah pristojnost predlagati kandidate za položaj predsednika sodišča (na primer v Belgiji, Španiji in na Slovaškem), podati mnenje (na primer v Latviji, Litvi, na

Madžarskem in na Poljskem) ali celo izvoliti predsednike sodišč (na primer v Estoniji, Italiji in Sloveniji). V Sloveniji to sicer ne velja za predsednika Vrhovnega sodišča.

Sodni sveti imajo tudi nekatere druge pristojnosti, ki so povezane s sodniško službo. V nekaterih državah članicah lahko ocenjujejo delo sodnikov (na primer v Sloveniji, Španiji in na Portugalskem) ali ocene potrjujejo (na primer v Litvi), ponekod pa lahko celo določijo merila za ocenjevanje kakovosti dela sodnika (na primer v Sloveniji). S tem povezana pristojnost sodnih svetov se nanaša na svetovanje ali odločanje o napredovanju sodnikov, ponekod pa tudi na odločanje o njihovi premestitvi (na primer v Italiji, Latviji, na Portugalskem, Hrvaškem in na Slovaškem). Sodni sveti imajo lahko pristojnosti tudi glede sodniške poklicne etike, pri čemer lahko sprejmejo njena načela (na primer na Poljskem in Slovaškem), njene standarde (na primer v Španiji) ali celo kodeks poklicne sodniške etike (na primer v Sloveniji). S tem povezana je tudi pristojnost imenovanja članov posebnih komisij za etiko in integriteto (na primer v Sloveniji in Litvi).

V nekaterih državah članicah imajo sodni sveti tudi nekatere preiskovalne in disciplinske pristojnosti, ki jim lahko sledi razrešitev s sodniškega položaja. Ponekod o tem odloča sodni svet (na primer v Italiji in na Hrvaškem), drugje pa je ta le predlagatelj pristojnemu organu (na primer v Latviji, Sloveniji in na Slovaškem) ali organ, ki o tem poda mnenje (na primer v Estoniji). Zanimivo je, da je v manjšem številu držav članic sodni svet neposredno pristojen tudi za izobraževanje sodnikov (na primer v Španiji, Litvi, na Madžarskem in na Poljskem), kar vodi v kakovostnejše opravljanje sodniške službe. Upošteva dejstvo, da je sodni svet organ, ki ima nalogo varovanja neodvisnosti in nepristranskosti sodstva, je lahko eden od načinov za doseg tega tudi javna podpora sodnikom, ki odločajo v medijsko odmevnih primerih. Tako lahko sodni svet zaščiti in odvrne pritisk od posameznega sodnika z javnimi nastopi svojih članov oziroma odgovorne osebe za stike z javnostjo. Sodniki se praviloma lastnega branjenja izogibajo, da ne bi vzbudili dvomov v svojo nepristranskost, hkrati pa se dogaja, da ob odsotnosti odgovorov te rade priskrbijo manj obveščene osebe. Varovalna vloga je lahko tudi drugačna in se predhodno soglasje sodnega sveta zahteva za pripor sodnika v primeru začetka pregona za kaznivo dejanje, ki je storjeno ob opravljanju sodniške službe (na primer na Hrvaškem).

Sodni sveti nekaterih držav članic pa imajo še širše pristojnosti. Te se lahko nanašajo na sodelovanje (s podajo mnenj ali pripravo predlogov) pri pripravi predlogov zakonodaje, ki se nanaša na pravice in obveznosti sodnikov oziroma na sodstvo. Še več, na Poljskem in Slovaškem lahko sodni svet ustavnemu sodišču predlaga presojo skladnosti normativnih pravnih aktov z ustavo, če se ti nanašajo na neodvisnost sodnikov in sodišč. Poleg tega lahko sodni sveti

vplivajo na organizacijo sodišč prek svetovanja (na primer v Litvi), predlaganja (na primer v Latviji) ali določanja oziroma spreminjanja števila sodnikov nekaterih sodišč (na primer v Estoniji). V Litvi lahko sodni svet odobri strukturno zasnovo sodišč, seznam položajev in opis služb. Za delovanje sodstva v najširšem pomenu ima sodni svet lahko tudi pristojnosti v postopku določanja financiranja sodišč. Tako lahko na primer oblikuje mnenje o predlaganem proračunu sodišč v Latviji, Sloveniji in na Slovaškem. Na Nizozemskem in Danskem pa sodni svet celo prejme proračunska sredstva za celotno sodstvo, ki jih potem nadalje razdeli posameznim sodiščem. Sodni sveti posameznih držav članic pa imajo še številne druge posebne pristojnosti, ki so preštevne za omembo. Razlog za različne pristojnosti sodnih svetov v posameznih državah članicah je mogoče najti v izpeljavi treh ustavnih načel demokratičnosti, delitve oblasti in neodvisnosti sodstva. Države članice so očitno našle ustrezno ravnotežje med njimi na drugačne načine, kar se odraža tudi v sestavi, delovanju in pristojnostih sodnega sveta.

Eden od ciljev raziskave je bilo tudi ugotoviti, kakšna sta vpliva sodnega sveta in vrhovnega sodišča v njunih medsebojnih razmerjih. Posebna pozornost je bila namenjena vplivu ene institucije na drugo z vidika administrativnega delovanja. Ugotovljeno je bilo, da poleg sodelovanja v postopku izvolitve sodnikov, njihovega napredovanja itn., sodni svet praviloma nima neposrednega vpliva na administrativno delovanje vrhovnega sodišča. Razlog je zgodovinski, in sicer v dejstvu, da izvirno prvi sodni sveti (v Franciji, Španiji, Italiji in na Portugalskem) niso bili ustanovljeni za izboljšanje administrativnega delovanja sodišč, te pristojnosti pa pozneje na njih niso bile prenesene.

V obratnem razmerju pa tudi vrhovno sodišče praviloma neposredno ne vpliva na administrativno delovanje sodnega sveta. Izjema obstaja v Latviji, kjer strokovne službe vrhovnega sodišča opravljajo administrativno delo sodnega sveta.

Pozornost je v prispevku namenjena tudi posredovanju informacij javnosti s strani sodnega sveta zaradi zahtev po njegovem transparentnem delovanju. Ta je prvi pogoj za vzpostavitev zaupanja državljanov v delovanje sodnega sistema in omejuje nevarnost političnega vpliva. V nekaterih državah članicah tako sodni svet objavlja povzetke srečanj svojih članov, zvočne posnetke ali izjave za javnost (na primer na Slovaškem). Ponekod so objavljene tudi odločitve (na primer v Sloveniji) oziroma njegova mnenja. Zanimivo je na primer, da sodna sveta v Litvi in na Madžarskem objavita povzetek aktivnosti sodišč za prejšnje leto, sodni svet na Poljskem pa za vsako tromesečje.

Sklepno je pozornost namenjena tudi delovanju sodnega sveta. Primerjana so obdobja, za katera so člani izvoljeni, možnosti njihove ponovne izvolitve, izvolitev predsednika sodnega sveta, kvorum in potrebna večina za sprejemanje

odločitev. Zlasti zadnja elementa sta povezana tudi s sestavo sodnega sveta. Kljub morebitni večinski zastopanosti članov iz sodniških vrst lahko zahteva po kvalificirani absolutni večini pri sprejemu pomembnejših odločitev pomeni, da bodo morali člani aktivno opravljati svojo funkcijo in se bo (z namenom dosega soglasja) zahtevala odobritev tudi (nekaterih) članov zunaj sodniških vrst. Z delovanjem sodnega sveta je povezana tudi določitev, ali je funkcija člana častna ali pa jo ta opravlja poklicno (s krajšim ali polnim delovnim časom). Če je funkcija častna, je lahko član kmalu – poleg opravljanja lastnega poklica – preobremenjen še s pripravo, udeležbo in glasovanjem na sejah sodnega sveta. Lažje je opravljati funkcijo člana, če je ta poklicna, pri čemer se zdi najboljša vmesna rešitev s krajšim delovnim časom. Tako lahko člani iz sodniških vrst še naprej ostanejo vpeti v sodnih postopkih, preostali člani pa lahko ostanejo v stiku s poklicem, ki ga opravljajo. Nedvomno pa je opredelitev funkcije člana pomembno soodvisna od administrativnega osebja, ki ga ima sodni svet. Če je tega osebja manj in je funkcija članov sodnega sveta častna, je dvomljivo, da bo lahko sodni svet kot ustavno regulirana institucija velikega pomena za neodvisnost in nepristranskost sodstva učinkovito opravljal predvidene naloge.