

Strasbourg, 5 November 2021

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

CCJE Opinion No. 24 (2021):

Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems

PART A. Introduction and the Opinion No. 10 (2007) of the CCJE

I. Introduction: scope of the present Opinion

1. The judiciary plays an essential role as the third power in a democratic state governed by the rule of law¹. In order to fulfil its role in the modern state and in an increasingly interconnected Europe, the judiciary must be organised in a way that ensures that individual judges are free to decide cases in complete independence, only bound by law. Even the appearance of outside influence and pressure must be avoided so that the public can trust that judicial decisions are made in such independence².
2. In a democratic state governed by the rule of law, an independent judiciary is a necessity. In many, though not all, member States, the institution responsible for defending the independence of the judiciary is a Council for the Judiciary. In 2007, the CCJE adopted its Opinion No. 10 (2007) on the Council for the Judiciary at the service of society. The Magna Carta of Judges³ and international standards developed, for example, by the

¹ See CCJE Opinion No. 18 (2015).

² Court of Justice of the European Union (CJEU), *C-83/19 and others*, 18.5.2021, paras 196-197, 205, 207, 212, 231, 236.

³ CCJE Magna Carta of Judges (2010), para 13.

Venice Commission⁴, have also stressed the importance of such Councils⁵. Since then, some member States have introduced or strengthened Councils for the Judiciary⁶. However, developments in recent years have also challenged the principles and standards expressed in these documents⁷. These developments make it important to reaffirm the principles expressed in Opinion No. 10 and – where necessary – to complement them in the light of recent political events undermining judicial institutions and the case law of the European Courts⁸.

3. However, even detailed rules set out in constitutions and international standards alone will not be enough to make these principles a reality and achieve an independent and impartial judiciary operating according to high professional standards⁹. The judiciary and other branches of government, politicians, the media and civil society must all work together in a long term effort to increase professionalism, transparency and ethics within the judiciary to turn rules on paper into a culture of respect for judicial independence¹⁰ for the benefit of society. Everybody, not only the judiciary, must be involved in protecting these values as a necessary basis for a democratic state governed by the rule of law. Councils for the Judiciary must do their part to earn public trust through excellent work provided in an accountable¹¹ and transparent way in the interest of the public.
4. The CCJE notes from the replies to the questionnaire sent to the member States in preparation for this Opinion that there is great diversity among member States not only in relation to the organisation of the judiciary, but also in relation to organisations referred to as Councils for the Judiciary. Such Councils vary in their organisation, composition and responsibilities. Some Councils are responsible for judges and prosecutors alike, some can exercise powers which through the selection and promotion of judges or the composition of a court can have great influence on court decisions. Other decisions of such Councils only have an indirect effect, such as decisions concerning the organisation

⁴ Venice Commission, Rule Of Law Checklist E. 1 iv-ix; Report on the Independence of the Judicial System, CDL-AD(2010)004 para 32; CDL-AD(2007)028, para 29.

⁵ See for scholarly work the Special Issue on Councils for the Judiciary the German Law Journal published in 2018, Jessica Walsh, Judicial Councils and the Removal of Lower Court Judges in Argentina, 2019; Guiseppe Ferrari, Forthcoming in the International Journal for Court Administration; Sanders/von Danwitz German Law Journal 19(2018) 769.

⁶ EU: Rule of Law Report 2020, COM(2020) 580 final EN, pp. 8-10.

⁷ See about developments in the EU: Rule of Law Report 2020, COM(2020) 580 final EN, pp. 10-12; CCJE Bureau, Report on judicial independence and impartiality in the Council of Europe member States (2019), CCJE-BU(2020)3, paras 20-24.

⁸ See about these events the 2020 Report of the Secretary General of the Council of Europe 2021 Chapter 1; see from the case-law of the European Court of Human Rights (ECtHR), *Ramos Nunes de Carvalho e Sá v. Portugal*, 6. 11. 2018, para 144; *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 12. 2020; *Xero Flor w Polsce v. Poland*, 7.5.2021 – 4907/18, para 243-251; from the case-law of the Court of Justice of the European Union (CJEU), *ASdJP v. Tribunal de Contas* 27.2.2018 – C 64/16, para 42-45; *European Commission v. Poland*, 24.6.2019 – C 619/18, para 71-73; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 120-122. CJEU, *European Commission v. Poland*, 24.6.2019 – C 619/18, para 74, 75; CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 123, 133-134; *VQ v. Land Hessen*, 9.7.2020 – C2727/19, para 54; *Repubblika Il-Prim Ministru v. WY*, 20.4.2021 – C-896/19; C-83/19 and others 18.5.2021.

⁹ Venice Commission, Urgent Interim Opinion on the draft new constitution, 11 December 2020, Bulgaria, CDL-AD(2020)035 para 37.

¹⁰ See Venice Commission, Urgent Interim Opinion on the draft new constitution, 11th of December 2020, Bulgaria, CDL-AD(2020)035 para 37; see also Holmøyvik/Sanders, A Stress Test for Europe's Judiciaries in: European Yearbook of Constitutional Law 2019, 287-310.

¹¹ CCJE Magna Carta of Judges (2010), para 13.

of courts including maintaining court buildings, budget and ICT¹². The CCJE welcomes diversity among member States as this reflects different national constitutions, legal cultures and history and does not wish to recommend a specific council model.

5. This Opinion concerns national institutions of member States which are independent of the executive and legislature, or which are autonomous, and which ensure the final responsibility for the support of the judiciary in the independent delivery of justice. Such institutions are referred to in this Opinion as Councils for the Judiciary¹³. Where it exists, a Council for the Judiciary must be organised and composed in a way that meets the above expectations. Moreover, it must function as a means to protect, support and develop the role of the judiciary and the independence of individual judges in relation to the other powers of state.
6. This Opinion has been prepared on the basis of previous CCJE Opinions, especially Opinion No. 10 (2007), the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities. The CCJE Working Group has greatly benefitted from the contributions of Ms Nuria Diaz Abad (former president of ENCJ, Council for the Judiciary of Spain) and Mr Kees Sterk (former president of ENCJ, former member of the Council for the Judiciary of the Netherlands) in a joint seminar. The Opinion also takes account of the replies of the CCJE members to the questionnaire on evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, of the summary of these replies and the preliminary draft prepared by the CCJE Scientific Expert appointed by the Council of Europe, Prof. Dr. Anne Sanders (University of Bielefeld, Germany/University of Bergen, Norway).

II. The Opinion No. 10 (2007) of the CCJE as the starting point

7. The present Opinion reaffirms and complements Opinion No. 10 (2007). Therefore, the major principles recommended by the Opinion No. 10 (2007) are the starting point for the present Opinion and are therefore cited in full.
8. Thus, in its Opinion No.10 (2007) on the Council for the Judiciary at the service of society, the CCJE recommends that:

A. In general:

a) it is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers;

b) the Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in Article 6 of the ECHR in order to reinforce public confidence in the justice system;

¹² See CCJE Opinion No. 10 (2010), paras 43-47.

¹³ This description is used by the ENCJ: <https://www.encj.eu/index.php/>.

c) the Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislature or the executive through a mention in a constitutional text or equivalent.

B. On the composition of the Council for the Judiciary:

a) in order to avoid the perception of self-interest, self-protection and cronyism and to reflect the different viewpoints within society, the Council for the Judiciary should have a mixed composition with a substantial majority of judges, even if certain specific tasks should be held in reserve to an all-judge panel. The Council for the Judiciary may also be exclusively composed of judges;

b) prospective members, whether judges or not, shall be appointed on the basis of their competence, experience, understanding of judicial life and culture of independence. Also, they should not be active politicians or members of the executive or the legislature;

c) judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary; if direct elections are used for selection, the Council for the Judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system;

d) appointment of non-judge members, with or without a legal experience, should be entrusted to non-political [authorities]; if they are however elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.

C. On the functioning of the Council for the Judiciary:

a) terms of office of members could be full-time but limited in number and in time in order to preserve contact with court practice; members (judges and non-judges) should be granted guarantees for their independence and impartiality;

b) the Council for the Judiciary should manage its own budget and be financed to allow an optimum and independent functioning;

c) some decisions of the Council of the Judiciary shall be reasoned and have binding force, subject to the possibility of a judicial appeal ;

d) as an essential element of the public confidence in the justice system, the Council for the Judiciary should act with transparency and be accountable for its activities, in particular through a periodical report suggesting also measures to be taken in order to improve the functioning of the justice system.

D. On the powers of the Council for the Judiciary:

a) the Council for the Judiciary should have a wide range of tasks aiming at the protection and the promotion of judicial independence and efficiency of justice; it should also ensure that no conflicts of interest arise in the Council for the Judiciary in carrying out its various tasks;

b) the Council of the Judiciary should preferably be competent in the selection, appointment and promotion of judges; this should be carried out in absolute independence from the

legislature or the executive as well as in absolute transparency as to the criteria of selection of judges;

c) the Councils for the Judiciary should be actively involved in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work, but should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges;

d) the Council for the Judiciary may be entrusted with ethical issues; it may furthermore address court users' complaints;

e) the Council for the Judiciary may be entrusted with organising and supervising the training but the conception and the implementation of training programmes remain the responsibility of a training centre, with which it should cooperate to guarantee the quality of initial and in-service training;

f) the Council for the Judiciary may have extended financial competences to negotiate and manage the budget allocated to Justice as well as competences in relation to the administration and management of the various courts for a better quality of justice;

g) the Council for the Judiciary may also be the appropriate agency to play a broad role in the field of the promotion and protection of the image of justice;

h) prior to its deliberation in Parliament, the Council for the Judiciary shall be consulted on all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' guarantee of access to justice;

i) co-operation with the different Councils for the Judiciary at the European and international levels should be encouraged."

Part B. Complementing and reaffirming the Opinion No. 10 (2007) of the CCJE

I. Legitimacy and accountability of the Council for the Judiciary

9. In some member states the legitimacy, functions, composition and accountability of Councils for the Judiciary has been called into question, leading to changes in the law which have affected their powers, composition, competencies and functions. The legitimacy of all Councils is of the utmost importance in upholding the rule of law. Therefore, the CCJE wishes to highlight its sources. The CCJE has explained before that the legitimacy and accountability of judicial power must go hand in hand¹⁴. The CCJE distinguishes two sources of legitimacy for the power of individual judges and the judiciary. *Formal or constitutional legitimacy* is created by the constitution of the respective member state and lawful judicial appointments¹⁵. *Functional legitimacy* is based on the trust of the public created through excellent work, transparency and accountability¹⁶. These two sources of legitimacy are also relevant for Councils for the Judiciary.

¹⁴ See CCJE Opinion No. 18 (2015), paras 12-38.

¹⁵ See CCJE Opinion No. 18 (2015), paras 13-15.

¹⁶ See CCJE Opinion No. 18 (2015), paras 16-19.

1. Legitimacy including legal basis and legal remedies

10. The CCJE reaffirms that the legal basis for a Council and its main elements should be set down in the constitution¹⁷ as a secure legal basis for its responsibilities, independence and legitimacy¹⁸. These should include the composition and functions of the Council; and the security of tenure of its members, together with a guarantee of its independence from the legislature and executive¹⁹. Other details may be set out by law.
11. However, vague pledges for a Council's independence even in a constitution do not suffice. Every Council for the Judiciary should also have effective legal remedies at its disposal to safeguard its autonomy and question the legality of public acts affecting it or the judiciary. A good example would be a right to bring procedures to the Constitutional Court or its equivalent. A Council for the Judiciary also requires standing in national and international courts (including the right to submit – where possible - an *amicus curiae* brief).

2. Accountability

12. While a regulation in the constitution provides a formal source of legitimacy, this is not enough, but must be complemented with functional legitimacy. Every Council for the Judiciary and the judiciary it represents must earn the trust of the public and its support through excellent, transparent work and accountability. In times of conflict with other powers, the support of the public will depend at least to a large extent on this perceived legitimacy of a Council.
13. The CCJE wishes to reaffirm that the Council for the Judiciary should play a role in ensuring that the judiciary works in a transparent and accountable way²⁰. Moreover, the accountability of a Council for the Judiciary is itself an important source of functional legitimacy²¹. The more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers.
14. The CCJE distinguishes between *judicial, punitive, and explanatory accountability* not only in relation to individual judges and the judiciary as a whole²² but also in relation to Councils for the Judiciary.

a. Judicial Accountability

15. Like other bodies of state, no Council for the Judiciary is above the law. Certain decisions of a Council affect rights protected by the ECHR; for example when decisions in relation to judges' careers are made, decisions must be reasoned and judges must have a right to judicial review²³. When the legal merit of a Council's decision is reviewed in an

¹⁷ CCJE Opinion No. 10 (2007), para 11; Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004 para 22.

¹⁸ See for the formal legitimacy of judges through appointment CCJE Opinion No. 18 (2015) para 14, 15.

¹⁹ See the Report of the UN Special Rapporteur on the independence of judges and lawyers Diego García-Sayán (2 May 2018), para 42 – available at https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf.

²⁰ CCJE Opinion No. 10 (2007), paras 91-96.

²¹ In CCJE Opinion No. 18 (2015), para 16, this form of legitimacy was called “functional legitimacy”.

²² CCJE Opinion No. 18 (2015), paras 26-33.

²³ See VC and DG of Human Rights of the Council of Europe, Urgent Opinion in the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of

independent court, the Council is held accountable (*judicial accountability*)²⁴. Special attention should be paid to the independence and impartiality of any court reviewing the merits of the Council's decisions, including independence from the Council itself²⁵.

b. Punitive accountability

16. The members of a Council for the Judiciary must live up to the highest ethical standards and must be held accountable for their actions through appropriate means. They should not be immune from prosecution under the general criminal law. Just as in relation to individual judges, who may be held accountable for their actions, this might be termed *punitive accountability*²⁶. However, the CCJE wishes to underline that such means must be regulated and applied in a way that does not allow their abuse to infringe the independence and functioning of a Council for the Judiciary.
17. Councils for the Judiciary must develop standards of professional and ethical behaviour for their judicial and lay members²⁷ and internal procedures for investigating shortcomings. Members must act according to those standards and the values of independence, impartiality and integrity²⁸. The disciplinary and criminal liability of members is an important aspect of punitive accountability. Fair trial rights of the members including the right to representation must be respected. Decisions taken in this context must be given with reasons and be open to judicial review.

c. Explanatory accountability

18. Every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way²⁹. This may be called *explanatory accountability*. It must also be open to critical feedback and ready to improve constantly. This form of accountability is of special importance in the dialogue with other powers of state and civil society.

II. Tasks, organisation and composition of Councils for the Judiciary

1. The tasks of a Council for the Judiciary

19. The CCJE accepts that there is not one single model for a Council for the Judiciary. However, every Council should have adequate competences to defend the independence of the judiciary and individual judges³⁰, so that individual judges are free

the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) of 5.5.2021 (CDL-PI(2021)004 (Ukraine) para. 62, 75.

²⁴ See CCJE Opinion No. 18 (2015), para 26.

²⁵ See ECtHR Volkov v. Ukraine – 21722/11, para 130; Denisov v. Ukraine –76639/11- para 79.

²⁶ See CCJE Opinion No. 18 (2015), para 33.

²⁷ See for such standards for judges: CCJE Opinion No. 3, paras 8-50.

²⁸ See on the establishment of an Ethics Council: VC and DG of Human Rights of the Council of Europe, Urgent Opinion in the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) of 5.5.2021 (CDL-PI(2021)004 (Ukraine) para.37-40.

²⁹ CCJE Opinion No. 10 (2007), para 95.

³⁰ CCJE Opinion No. 10 (2007), para 14.

to decide cases without undue influence from outside and inside the judiciary³¹. Judicial independence requires special protection in decisions which have an effect on judicial decision making, such as the selection of judges, allocating cases and disciplinary procedures. Where it has such responsibilities, a Council for the Judiciary should ensure that such decisions are made in a way that protects and enhances judicial independence.

20. The ECtHR and the CJEU have decided that the appointment of judges is of great importance for an independent judiciary³². The CCJE has always taken that view³³. Consequently, the selection or recommendation of new judges for appointment and promotion based on merit is a crucial task³⁴. Where this is a responsibility for the Council for the Judiciary, it must be exercised independently and accountably³⁵. Decisions with respect to the career of judges must not be taken because of loyalty to politicians or other judges. Through the selection and promotion of judges or the composition of a court, these decisions have great influence on future court decisions. Therefore, the majority of those who make decisions or recommendations should be judges. However, the CCJE welcomes that lay members are involved in such decisions as a safeguard against cronyism and cloning among judges.
21. Unfortunately, many judges in Europe consider that decisions regarding the selection and promotion of judges are not based on merit alone³⁶. Therefore, it is crucial that Councils work on the basis of ethical rules and, so far as possible, specific objective criteria for appointments and promotions and evaluate each candidate in a transparent procedure concluding with a reasoned decision. Judges who think that their rights have been disregarded must have a right to judicial review³⁷.
22. The CCJE wishes to underline that the vetting of judges is highly problematic because it can be instrumentalised and misused to eliminate politically “undesirable” judges³⁸. If it is undertaken at all in a member state, it must be undertaken by an independent institution. The Councils for the Judiciary should play an important role protecting judicial independence in the process.
23. The CCJE does not exclude the possibility of vetting of the Council itself. But this is a measure of last resort; and where it is done, it should be done by an independent body.
24. The CCJE notes the growing importance of IT for the future of the judiciary and recommends that where they exist, Councils for the Judiciary should have a role in this

³¹ CJEU, *ASdJP v. Tribunal de Contas* 27.2.2018 – C 64/16, paras 42-45; *European Commission v. Poland*, 24.6.2019 – C 619/18, paras 71-73; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, paras 120-122.

³² ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, 6. 11. 2018, para 144; *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 12. 2020; *Xero Flor w Polsce v. Poland*, 7.5.2021 – 4907/18, paras 243-251; CJEU, *European Commission v. Poland*, 24.6.2019 – C 619/18, paras 74, 75; CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, paras 123, 133-134; *VQ v. Land Hessen*, 9.7.2020 – C2727/19, para 54; *Repubblika Il-Prim Ministru v. WY*, 20.4.2021 – C-896/19, paras 53, 57: no regression in the protection of judicial independence: paras 61-64.

³³ CCJE Opinion No. 1 (2001), paras 17-45.

³⁴ CCJE Opinion No. 1 (2001); CCJE Magna Carta of Judges (2010), para 5.

³⁵ CCJE Opinion No. 10 (2007), paras 48-51, Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004, para 32.

³⁶ ENCJ 2019 Survey on the independence of judges, pp. 33-34.

³⁷ See CCJE Opinion No. 17 (2014).

³⁸ ECtHR *Xhoxhaj v. Albania* no. 15227/19; VC Opinion No.868/2016 of 12. December 2016, Albania, amicus curiae brief for the constitutional court in the law on transitional re-evaluation of judges and prosecutors (vetting law); in CCJE Opinion 21 (2018), para 28, the term “lustration” is used.

field to adequately protect judicial independence and secure quality of judges' work in the future³⁹.

25. Opinion No. 10 (2007) of the CCJE and Magna Carta of Judges recommend that Councils for the Judiciary should have broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions⁴⁰. The larger the responsibilities and powers conferred to a Council, the more important it is that its independence is respected by other powers of state, has sufficient resources and is accountable for its activities and decisions⁴¹. While a powerful Council may defend the judiciary and individual judges, many responsibilities make it vulnerable to politicisation from within or outside the judiciary. If the Council has competences on issues of court administration, it should also be committed to increasing the efficiency of the judiciary. If competences or tasks concerning the judiciary are not in the responsibility of the Council for the Judiciary, they should be handled by the judiciary or by an independent body.
26. The CCJE reaffirms its opinion that before deliberation in parliament or legislative action the Council for the Judiciary should be consulted on all policies including proposed or draft legislation likely to have an impact on the judiciary (e.g. the independence of the judiciary) or which might diminish the citizens' guarantee of access to justice⁴².

2. Composition of a Council for the Judiciary

27. Opinion No. 10 (2007) has already made extensive recommendations about the composition of a Council for the Judiciary and the competences and selection of its members and chair⁴³. This Opinion wishes to reaffirm these principles. The members of the Council must be selected in a way that supports the independent and effective functioning of the Council and the judiciary and avoid any perception of political influence, self-interest or cronyism⁴⁴.
28. The CCJE is aware that in some member states, Councils for the Judiciary include ex officio members. Ex officio membership is not acceptable, except in a very small number of cases, for example the president of the supreme court but should not include members or representatives of the legislature or the executive⁴⁵. An ex officio member who is not a judge should not participate in disciplinary decisions.
29. The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers. Other members may be added depending on the functions of the Councils. The CCJE recommends that a Council also have non-judicial members possibly including lay persons who are not legal professionals⁴⁶. While judges should always be in the majority, non-judicial members preferably with voting rights ensure a diverse representation of society, decreasing the risk of corporatism⁴⁷. The

³⁹ CCJE Opinion No. 14 (2011), para 36.

⁴⁰ CCJE Magna Carta of Judges (2010), para 13.

⁴¹ CCJE Magna Carta of Judges (2010), para 13.

⁴² CCJE Opinion No. 10 (2007) para 87.

⁴³ CCJE Opinion No. 10 (2007), paras 15-36.

⁴⁴ CCJE Opinion No. 10 (2007), paras 15, 16; see about the importance of independent bodies selecting judges: CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 137-138. C-619/18

⁴⁵ CCJE Opinion No. 10 (2007), paras 23, 26.

⁴⁶ See CCJE No. 10 (2007), para 22.

⁴⁷ CCJE Opinion No. 10 (2007), para 32.

participation of lay-persons may increase legitimacy and fight the perception of the judiciary as a “lawyers only affair”. The CCJE takes a more nuanced view in this respect than in Opinion No. 10 (2007).

3. Selection of members and chair of a Council for the Judiciary

30. The CCJE wishes to strongly reaffirm that the majority of members should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances⁴⁸, as well as diversity of gender⁴⁹ and regions. Elected judges should be able to participate in the Council’s activities in a way compatible with their workload. Where the Council includes non-judges, they should be able to devote adequate time to participation in the Council’s activities.
31. An election of judge members by parliament or selection by the executive must be avoided⁵⁰. An election by parliament of non-judicial members might, however, be acceptable. As an alternative an election or nomination by institutions such as Bar Associations or nomination by NGOs is a possibility.
32. By whatever means members are selected and appointed⁵¹, this should not be done for political reasons. However, a requirement that a candidate may not have “political affiliations” may be too vague, so that referring to party memberships or official positions in government and the legislature or other concrete examples may be preferable⁵². Members of the Council for the Judiciary should not be under the authority or influence of others.
33. Where members are elected by parliament, a qualified majority should be required in order to involve the opposition and foster cross-party cooperation⁵³. The CCJE realises that such a majority requirement may lead to a deadlock. Therefore, the CCJE recommends that mechanisms are introduced to break such deadlocks⁵⁴. Such mechanisms should avoid lowering the necessary majority as this may reduce any incentive of the majority to reach a compromise. Rather, such a mechanism must ensure an independent selection and might involve the opposition or call for the selection by other institutions from a list of shortlisted candidates. Even though no such model has

⁴⁸ CCJE Opinion No. 10 (2007), paras 18, 25, 26, 27, 30.

⁴⁹ Report of the UN Special Rapporteur on the independence of judges and lawyers Diego García-Sayán (2 May 2018), par. 110 – available at https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf.

⁵⁰ CCJE Opinion No. 10 (2007), para 31.

⁵¹ See: Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20th of March 2020 (CDL-AD(2020)001 para 57-60.

⁵² CCJE Opinion No. 10 (2007) para. 23, See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20th of March 2020 (CDL-AD(2020)001 para 54; see for ineligibility criteria: Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10 May 2021, Montenegro (CDL-PI(2021)008, paras 28-31.

⁵³ Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10. May 2021, Montenegro (CDL-PI(2021)008, para 40.

⁵⁴ See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20th of March 2020 (CDL-AD(2020)001 para 51, 68.; see also Venice Commission, Compilation Venice Commission’s Opinions, Reports and Studies on Constitutional Justice (CDL-PI(2020)004 pp. 20-22.

been brought to the attention of the CCJE yet, judges might be involved in electing candidates to break a deadlock.

34. The selection process including possible campaigns by candidates should be transparent and ensure that the candidates' qualifications, especially their impartiality and integrity⁵⁵ are ascertained. Vacancies should be advertised publicly and equal opportunities guaranteed to support a diverse group of independent candidates. Members of the Council should have access to all information relevant to the exercise of their functions.
35. The CCJE would like to reaffirm that the Chair of the Council for the Judiciary must be an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge⁵⁶.

4. Security of tenure of members of a Council for the Judiciary

36. Members should be selected for a fixed time in office and must enjoy adequate protection for their impartiality and independence⁵⁷. Members must be protected from internal and external pressures. However, except, in cases of death, retirement or removal from office, for example as a result of disciplinary action, a member's term should only end upon the lawful election of a successor to ensure that the Council is able to exercise its duties lawfully even if the appointment of new members has failed, because of a deadlock in parliament⁵⁸. CCJE draws attention to the possible impact of re-election on the independence of the members of a Council for the Judiciary. In principle, re-elections of full-time members should be avoided in favour of longer fixed terms⁵⁹ to ensure independence. In this respect, this Opinion qualifies the view taken in Opinion No. 10 (2007)⁶⁰. Continuity and efficiency can be improved if not all terms of office expire simultaneously.
37. The CCJE wishes to reaffirm the importance of security of tenure of all Council members as such⁶¹ as a crucial precondition for the independence of the Council. Judges appointed to the Council for the Judiciary should be protected with the same guarantees

⁵⁵ See CCJE Opinion No. 10 (2007), para 21.

⁵⁶ CCJE Opinion no. 10 (2007), para 33.

⁵⁷ CCJE Opinion no. 10 (2007), para 36.

⁵⁸ See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on draft amendments to the law on the judiciary and the status of judges and certain laws on the activities of the Supreme Court and judicial authorities (draft law 3711) Ukraine, 9th of October 2020 (CDL-AD(2020)022, para 49.

⁵⁹ According to member States' responses, the longest terms are six years as for example in Slovenia, Romania, North Macedonia, the Netherlands and Hungary.

⁶⁰ CCJE Opinion No. 10 (2007), para 34.

⁶¹ CCJE Opinion No. 10 (2007) rec. E I; see also Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20th of March 2020, Moldova (CDL-AD(2020)001 para 55-56; Opinion of the Venice Commission in the draft amendments to the law on the state prosecution service and the draft law on the prosecutor's office for organised crimes and corruption, 22. March 2021, Montenegro (CDL-AD(2021)012 para 45-48; Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10. May 2021, Montenegro (CDL-PI(2021)008, para 46-49 according to the VC only permissible if new features are introduced which significantly depoliticise the Council.

as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal⁶². Non-judicial members should have equivalent protection. Judges and non-judicial members should enjoy the same immunities as specified in Opinion No. 3 (2002)⁶³.

38. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed. Members may cease to be members in the event of incapacity or loss of the status on the basis of which they were elected or appointed to the Council. If the Council itself or a special body within it are responsible for this decision, the rights of the dismissed member to an appeal must be ensured. The CCJE underlines the importance that procedures which may lead directly or indirectly to termination of office are not misused for political purposes but respect fair trial rights⁶⁴. In this respect, this Opinion amplifies Opinion No. 10 (2007).

5. Resources of a Council for the Judiciary

39. Many member States report a lack of personnel and financial resources of their Councils for the Judiciary. Therefore, the CCJE wishes to reaffirm the responsibility of member States to provide adequate resources for judiciaries including separate financial means and staff for Councils for the Judiciary⁶⁵.

III. Councils for the Judiciary in society

1. Relations with other powers of state

40. Members of parliament and members of the executive must of course respect the law in their dealings with the Council for the Judiciary and not infringe its role and functioning by breaking or circumventing legal rules. Moreover, relations with the Council must be based on a culture of respect for the rule of law and the role of the Council for the Judiciary in their respective member state.
41. Councils for the Judiciary should engage actively in dialogue with other powers of state, especially when they give input about legislative projects. Such dialogue must be conducted in an atmosphere of mutual respect.

2. Relations with Associations of judges and civil society

42. Member States report that they engage with the public through special websites and reports. Some member States even report that some of their plenary meetings are streamed online. The CCJE welcomes such efforts towards greater transparency and accountability. However, it accepts that in many cases, especially including interviews and deliberations concerning judges' careers, there is a legitimate interest in confidential debate.

⁶² See Diego García-Sayán, the United Nations Special Rapporteur on the Independence of Judges and Law, intervention the Case of *Grzęda v. Poland*, Application No. 43572/18, para 45-53.

⁶³ CCJE Opinion No. 3 (2002), paras 51-77.

⁶⁴ CCJE Opinion No. 3 (2002), paras 58-74; CJEU C-83/19 and others 18.5.2021, paras 196-199, 236.

⁶⁵ CCJE Opinion No. 10 (2007), paras 73-75; CCJE Opinion No. 18 (2015), para 51; ENCJ Report 2015/2016 on Funding of the Judiciary.

43. The CCJE recommends that Councils engage in dialogue with Associations of Judges⁶⁶, and also with civil society, including Bar Associations and NGOs. This dialogue provides an important opportunity for accountability. Councils for the Judiciary should be open to external input and criticism and engage in outreach activities including for example satisfaction surveys among court users and complaint procedures. However, a Council must always be aware of its specific independent role and must thus be cautious to avoid lobbying.
44. It is crucial that the public learns about the responsibilities and importance of an independent judiciary⁶⁷. In some legal systems, judicial proceedings are already streamed online, so that hearings may be watched remotely and extensive information is published on the internet. Moreover, individual Courts can engage with the public at the local level. However, the Council for the Judiciary should have a special role in explaining the judicial system and its own role in it.

3. Relations with the media

45. Member States report that they communicate with the media through press offices, press releases and press conferences⁶⁸. For many Councils for the Judiciary in member States, publishing reports and opinions and appealing to the media are important tools to engage with other powers of state. Engaging with the public through the media can be an excellent instrument of accountability and transparency.
46. An important part of any communication with the media, the public and other powers of state must include the explanation that the Council and individual judges must decide cases independently. The Council must counter decisively any attempt to attack or put pressure on individual judges or the judiciary as a whole. To foster adequate relationships between the judiciary and the media, Council for the Judiciary should either serve as mediator between the judiciary and the media or ensure other effective processes are in place to carry out that role.

4. Relations with anti-corruption bodies

47. Fighting corruption is a crucial task, because corruption undermines the trust of the public and thereby the legitimacy of the judiciary as a whole⁶⁹. On the other hand, an effective fight against corruption and respect for judicial independence and the rule of law must go hand-in-hand. There can be no effective fight against corruption without an independent judiciary and respect for the rule of law⁷⁰. Even in circumstances where a special institution has been introduced to fight corruption as well as where fighting corruption remains the responsibility of the Council for the Judiciary, the Council and its members must be fully committed to take and support all appropriate steps in the fight against corruption within the judiciary and the Council. The Council for the Judiciary must also be vigilant that fighting corruption and disciplinary procedures are not used to attack individual judges for political reasons⁷¹.

⁶⁶ See CCJE Opinion No. 23 (2020) paras 25, 29-32 recommendation 6.

⁶⁷ See CCJE Opinion No. 7 (2005), paras 33-54; No. 10 (2007), paras 80-86.

⁶⁸ See the answer to the questionnaire sent out in preparation of this opinion and CCJE Opinion No. 10 (2007), para 95.

⁶⁹ See CCJE Opinion No. 21 (2018).

⁷⁰ See President of the Venice Commission Gianni Buquicchio, in a speech at Democracy in Action: Zero Corruption Conference, 7-8.6. 2021.

⁷¹ See for the danger of a "chilling effect" CJEU C-83/19 and others 18.5.2021, para 236.

IV. Conclusions and recommendations

1. In many member States, Councils for the Judiciary are responsible for defending judicial independence. Political developments make it necessary to reaffirm the principles and recommendations expressed in Opinion No. 10 (2007) on Councils for the Judiciary and – where necessary – complement them (paras 2, 7, 8).
2. Constitutions and international standards advocating the introduction and appropriate regulation of Councils for the Judiciary are not enough to build an independent judiciary. The judiciary and other powers of government, politicians, the media and civil society must work together in a long-term effort to increase professionalism, transparency and ethics within the judiciary to turn rules on paper into a culture of respect for judicial independence and the rule of law (para 3).
3. Council for the Judiciary should have effective legal remedies at its disposal to safeguard its autonomy and question the legality of public acts affecting it or the judiciary. Councils for the judiciary should have standing in national and international courts (para 11).
4. The legitimacy of Councils for the Judiciary rests on their legal basis but must be complemented by the trust of the public earned through transparency, accountability and excellent work in the interest of society (paras 10, 12-14).
5. The larger the responsibilities and powers conferred to a Council, the more important it is that its independence is respected by other powers of state, has sufficient resources and is accountable for its activities and decisions (paras 25, 47).
6. All members of a Council for the Judiciary must live up to the highest ethical and professional standards and must be held accountable for their actions through appropriate means (paras 16, 17).
7. Every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way. In appropriate cases, it must be possible to challenge a Council's decisions in court (paras 12, 15, 18).
8. The CCJE accepts that there is not one single model for a Council for the Judiciary. However, every Council should have adequate competences to defend the independence of the judiciary and individual judges, so that individual judges are free to decide cases without undue influence from outside and inside the judiciary (para 19).
9. Decisions with respect to the career of judges must not be taken because of loyalty to politicians or other judges, but in a transparent procedure using objective criteria as far possible. Such decisions must be reasoned and based on merit alone. Judges who think that their rights have been disregarded must have a right to judicial review (paras 20-21).
10. The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary and avoids any perception of political influence, self-interest or cronyism (paras 27, 29, 31, 34).
11. Ex-officio membership is not acceptable, except in a very small number of cases, and should not include members or representatives of the legislature or the executive (para 28).

12. The Chair of the Council for the Judiciary must be an impartial person. In parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge (para 35).
13. If vetting is undertaken at all in a member state, it must be undertaken by an independent institution. The Councils for the Judiciary should play an important role protecting judicial independence. The vetting of the Council itself is a measure of last resort; and where it is done, it should be done by an independent body (paras 22-23).
14. The majority of members should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of gender and regions (para 29, 30).
15. The CCJE recommends including non-judicial members including lay persons to ensure a diverse representation of society, decreasing the risk of corporatism (para 29).
16. A selection of judge members by parliament or the executive must be avoided. Where non-judge members are elected by parliament, a qualified majority should be required. Appropriate mechanisms should be introduced to break possible deadlocks (paras 31, 33).
17. Members should be appointed for a fixed time in office and must enjoy adequate protection for their impartiality and independence from internal and external pressure. A member's term should in principle only end upon the lawful election of a successor (para 36).
18. The CCJE wishes to reaffirm the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed (paras 36-38).
19. The CCJE wishes to highlight the responsibility of member States to provide adequate personnel and funding for its Councils for the Judiciary (para 39).
20. Relations between the Council and other powers of state must be based on a culture of respect for the rule of law and understanding of their respective roles in a democratic state (paras 40-41).
21. Councils for the Judiciary should actively engage in open, respectful dialogue with other powers of state, Associations of Judges and civil society including Bar Associations and NGOs and the media (paras 40-44).
22. The Council must counter decisively any attempt to attack or put pressure on individual judges or the judiciary as a whole (paras 45-46).
23. The Council and its members must be fully committed to take and support all appropriate steps in the fight against corruption within the judiciary and the Council in a way that respects the rule of law (para 47).