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THE UNIVERSITY LA SAPIENZA, ROME and
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International Round Table
**SHAPING JUDICIAL COUNCILS
TO MEET CONTEMPORARY CHALLENGES**

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(Hybrid format)

SPEAKING POINTS
by

Ms Ana GALLEGO TORRES
Director-General for Justice and Consumers, European Commission

ELECTION / APPOINTMENT OF THE MEMBERS OF THE JUDICIAL COUNCIL



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- The European Commission highly appreciates the longstanding cooperation with the Venice Commission.
- Both the European Commission and the Venice Commission share a common objective – to protect and uphold the rule of law in Europe. We have different tools at our disposal, but we all work in the same direction – there is no doubt about it!
- For example, in the European Commission, we have been relying on, using and quoting Venice Commission opinions to develop the European Union Rule of law policy. We have been doing this both within the EU – in the annual Rule of Law Reports, as well as externally, in the accession process and the neighbourhood policy.

[The Council of Europe standards]

- The topic of this panel is one that the European Commission attaches a great importance to - the regime and guarantees regarding the election and appointment of members of Councils for the Judiciary.
- It is up to Member States to organise their justice system, including deciding on whether or not to establish a Council for the Judiciary. However, if a country chooses to establish such a Council, it should be in line with European standards and EU law and be independent.
- We value the standards that the Council of Europe developed in this area: most notably the 2010 Recommendation on judicial independence by the Committee of Ministers.
- This recommendation is particularly interesting as it shows that even if the national justice systems in Europe are very different, it is possible to establish common standards to ensure both the independence and the accountability of justice systems.
- In countries where judicial independence is safeguarding through a Council for the judiciary, the recommendation provides that ‘not less than half of the [Council for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary’. These standards have been built also upon the work of the Venice Commission and remain relevant to this day.
- Another Council of Europe body that has been crucial in developing European standards in this area has been the European Court of Human Rights. One notable example is the Court’s case law as regards judicial appointments in Poland, where it found in three judgments that the national council for the judiciary* did not provide sufficient guarantees of independence from the legislative or executive powers. This fact, amongst others, led the Court to conclude that the appointments of judges were made in a blatant defiance of the rule of law and resulted in a violation of Article 6(1) of the Convention. These judgments are a clear example of how important the composition and independence of Councils for the Judiciary are to ensure that the appointment regime of judges complies with the rule of law.

[EU law requirements]

- Also the Court of Justice of the EU has been developing important case law in this area. In its case-law, the Court has clearly stated that the guarantees of structural independence require rules, particularly on the composition of the court and the appointment, and dismissal of its members, in order to dispel any reasonable doubt regarding the resistance of that court to external factors.
- Furthermore, to prevent such doubts, the Court of Justice stated it is necessary to ensure the appropriate substantive conditions and procedural rules governing the adoption of decisions on appointment of judges. Those conditions and procedural rules

* Chamber judgment in case *Reczkowicz v. Poland* (application no. 43447/19). Chamber judgment in case *Dolińska-Ficek and Ozimek v Poland* (applications Nos. 49868/19 and 57511/19) and Chamber judgment in case *Advance Pharma sp. z o.o v. Poland* (application no. 1469/20).

should preclude not only any direct influence, in the form of instructions, but also types of indirect influence which could have an effect on the decisions of the judges*.

- These standards and EU law requirements show that while there can be different systems of appointment of judges, what is important to ensure in the end is judicial independence.
- And the involvement of independent Councils for the Judiciary in the appointment of judges, if a country decided to establish such a body, is one of the essential guarantees for independence of courts and judges.
- The Court of Justice considers that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective but makes clear that that is only the case provided that *“that body is itself sufficiently independent of the legislature and executive”*.
- Another EU law requirement that has been set by the Court of Justice is the principle of non-regression. In its *Repubblika* judgment of last year, the Court, after having recalled that the rule of law is one of the common value enshrined in Article 2 TEU, stated that a Member State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law. *“The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary”*.
- This is a powerful principle, which could be relied upon to prevent backsliding on fundamental requirements of the rule of law, such as judicial independence. It also shows that we cannot compare a situation which is well established in the legal system of a country to one where a structural reform has been introduced which dismantles a framework which was so far compliant with European standards.

[Other requirements]

- In addition to requirements for ensuring judicial independence, there are other requirements for Councils for the Judiciary, for example regarding the safeguards for the selection of non-judge members in general terms, including pluralism and non-eligibility criteria.
- More pluralism in this regard can for example be achieved by giving a role to the opposition and/or independent external institutions in the selection process of non-judge members. In addition non-eligibility criteria can help to create more distance between party politics and non-judge members in order to reduce the risk of politicisation.
- The European Network of Councils for the Judiciary has made a notable contribution as regards the examination into criteria for selection of non-judge members.

Furthermore, in non-EU countries where there is a low level of governance and a high level of corruption, special measures may be needed to ensure the integrity of Council members. These could include pre-selection procedures in which the integrity of candidates for high judicial institutions is assessed with participation of international experts.

[Importance of the effective functioning on the ground]

- Finally, the Councils for the Judiciary should be functioning in an effective way. In the context of the annual Rule of law of Report, which covers all EU Member States, we have been monitoring how Councils work in practice and we meet with their representatives every year. In this context, we have identified several issues.
- For example, in some Member States, the Council for the Judiciary has notable powers, but not enough human and financial resources to effectively exercise them.

* CJEU, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 55 and 57 and the case-law cited

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We have been highlighting this issue and working with countries to improve the situation, including in the context of the requirements set under the Recovery and Resilience Plan.

- In some other Member States, there is an issue of imbalance in the Council for the Judiciary: between, on the one hand, the judges/prosecutors elected by their peers, and, on the other hand, the Council members appointed by other authorities. This can lead to a problem of representativeness, and can negatively impact the principle of self-governance.
- And in some Member States, we identified issues relating to the independence of the Councils for the Judiciary.
- Let me finally stress that rules and safeguards can always be circumvented. Ultimately, we need therefore to establish a rule of law culture in the Councils, but also in the judiciary and society as a whole.
- To conclude, what is remarkable when discussing about the Councils for the Judiciary in Europe is to see how the EU and the Council of Europe are able to join forces for a common objective of ensuring the rule of law.

Thank you!