Consolidation of Justice Sector Policy Development in Ukraine

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COMPARATIVE STUDY ON THE ROLE OF THE COUNCILS FOR THE JUDICIARY IN THE LEGISLATIVE PROCESS IN SELECTED COUNCIL OF EUROPE MEMBER STATES

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About the author of this report

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Her international judicial experience includes serving (from 2008 to 2011) as the President of the Assembly of EULEX Judges in Kosovo (the body responsible for ensuring the independence of EULEX Judges) and Supreme Court criminal judge (where she presided over a number of serious cases of war crimes, organised crime and terrorism).

Ms Civinini assisted the Consultative Council of European Judges (CCJE), in her capacity of a scientific expert, in preparing Opinions on the quality of judicial decisions (2008) and on the specialisation of judges (2012). She is also a member of the Board of Editors of the Italian legal journal "Questione Giustizia" and author of numerous publications on the modernisation of the Italian judiciary, the status of magistrates in Italy and the role of the CSM, the training of magistrates and many others.

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EXECUTIVE SUMMARY

The report is focused on the advisory power of the Councils for the Judiciary in the legislative process. Independent bodies – such as the Consultative Council of European Judges (CCJE) and the European Network of Councils of Justice (ENCJ)[1] – share the view that the judiciary should be involved in judicial reforms and should issue an opinion on draft laws before parliamentary deliberations. The report examines the different systems in place in the Council of Europe member states, and acknowledges that in almost all countries the judiciary plays an advisory role in the legislative process.

In common law countries the views of the judiciary are conveyed through an entity that holds a hierarchically higher position or through a political body; it consists of a purely *technical* contribution to the process of drafting the law, and it cannot exercise a function of guiding the policy. In civil law countries, the advisory power of the judiciary in the legislative process is lacking in states where the Minister of Justice administers the judiciary.

In the majority of member states that have a Council for the Judiciary[2] the competence to express opinions in the law-making process is foreseen by the law and in some case by the Constitution; it is considered an expression of the principle of separation of powers and independence of the judiciary; it can be exercised *ex officio* or upon request, in respect of any law having an impact on the status of judges and on the quality and organisation of the judiciary; the opinion of the Council does not bind the legislature, but the latter has an obligation to consult the Council and to take its advice into consideration. The Constitutional Court – depending on its responsibilities and powers – may be called upon to adjudicate conflicts arising from the distribution of competencies between the powers of the State, or decide whether the rules adopted without proper consultation are in compliance with the Constitution.

[1] Includes 22 Councils from EU member states (strictly speaking, 16 Councils for the Judiciary and 6 Court Administration Services) as members of ENCJ; 7 Ministers of Justice of EU member states, 6 Councils of third countries and the Court of Justice of the European Union are observers.

[2] Different Council of Europe member states use different terms when referring to their national bodies entrusted with the protection of the independence of judges. This report therefore uses a generic term of "Council for the Judiciary" where it refers to such bodies in general. This wording is also used by the ENCJ and by the CCJE.

1. Introduction

The Joint EU/CoE project "Consolidation of Justice Sector Policy Development in Ukraine" implemented by the Council of Europe requests a report on "the role that councils for the judiciary in other Council of Europe member states play in the national legislative process, in particular where they are called upon to give an opinion on draft legislation concerning judges".

The Consultative Council of European Judges recommends that "all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' (including judges' own) guarantee of access to justice, should require the opinion of the Council for the Judiciary before deliberation by Parliament".[3]

As a general remark, it can be observed that in almost all Council of Europe member states the judiciary commonly plays an advisory role in the law-making process related to the status and guarantees of the members of the judiciary, courts' organisation and management, legal reforms. The configuration, contents, importance and effectiveness of this role differs depending on the forms of government of the state, the relationship between the state powers, the system for appointment and selection of judges, their level of "effective" independence and the forms of government of the judiciary. The more the judiciary is independent (its individual members and the organisation as a whole), the more weight is given to the opinions of the Councils for the Judiciary in the legislative procedure. Where the structure for the management of the justice system is under the overall responsibility of the Minister of Justice, there is no space for autonomous advising by the judiciary but the courts, especially the Supreme Court, are consulted on their "expert" opinion. The difference is obvious; in the first case we are faced with an opinion which is not binding on the government or on the Parliament in the exercise of their constitutional functions, but the advice should be taken into account; whereas in the second case the opinions of courts are equivalent to the opinions of professors and experts in various capacities consulted during the preparation of the text of the law. The judicial systems in the member states of the Council of Europe are very different and there are many nuances and intermediate situations between the two extremes described above.

[3] CCJE Opinion no. 10(2007).

2. An overview of different solutions in Council of Europe member states

2.1. Common law countries

In common law countries a range of structures and organisations execute some of the responsibilities that in other countries are vested in the Council for the Judiciary (i.e. in England and Wales the Courts and Tribunals Service is responsible for determining the number of judges, the Judicial Appointments Commission for the appointment of judges, the Lord Chief Justice for the deployment of judges, the Office for Judicial Complaints for dealing with complaints). Generally the judicial bodies do not have consultative functions in the legislative process; sometimes they have an advisory role to the Government or to the Chief of the Judiciary. This depends on the understanding and practice of the principle of separation of powers in those countries. It also depends on the different roles of the courts of common law in the production of the law (judge-made law principle), through binding precedent, regarding civil law. Hence, we can ascertain that the Judges' Council and the Judicial Executive Board of *England* and *Wales* do not comment on the merits of proposed government policies. It is within the key responsibilities of the Lord Chief Justice to represent the views of the judiciary of England and Wales before Parliament and the Government. The Council advises the Lord Chief Justice on policy and other matters as requested from time to time by him/her. The Judges' Council for *Northern Ireland* does not provide opinions on proposed legislation to the Government. In *Scotland* the Lord President represents the views of the Scottish Judiciary to the Parliament and the Minister, and may consult and/or be advised in that regard by the Judicial Council. The Commission for the Administration of Justice of *Malta* may make recommendations to the Minister responsible for justice as to the remedies, which seems to result in a more efficient functioning of the courts, and may advise him or her on any matter relating to the organisation of the administration of justice[4]. The Supreme Council of Judicatura of *Cyprus* – composed exclusively of the judges of the High Court who are appointed by the President of the Republic[5] – has no advisory role. There is a custom whereby the High Court is invariably asked to give its opinion in all matters related to new legislation on evidence and court administration but it does not partake in the law-drafting process.

[4] Article 101 of the Constitution of Malta.
[5] Article 157 of the Constitution of Cyprus.

The view of the judiciary is conveyed through an entity that holds a hierarchically higher position or by the political authority. It consists of a purely *technical* contribution to the process of drafting the law; it cannot exercise a function of guiding the policy; it is a simple source of *information*, although prestigious, among the many available to the legislative power.

2.2. Civil law countries

Most civil law countries have a Council for the Judiciary, meaning a body elected by or appointed from the judiciary with extensive powers in relation to career, training, judicial discipline and in some cases, administration of the courts.[6] Some of the states lacking a Council have autonomous bodies to manage the courts (Court Service, Court Administration or Judicial Board).[7] In another small group of states, it is the Minister of Justice, who provides for court administration.[8] While the Councils for the Judiciary, with few exceptions,[9] have an advisory power and a role in the legislative process, this is absent in states where the Minister of Justice administers the judiciary. Courts may be requested to give expert opinions.[10] In some countries court administration services take part in legislative preparatory works and provide advice on legal matters, policy proposals etc., on texts that affect (directly or indirectly) the judiciary,[11] taking into consideration their relationship with

[6] Namely, Albania, Armenia, Azerbaijan, Belgium, Bosnia i Herzegovina, Bulgaria, Croatia, Estonia, France, Georgia, Greece, Hungary, Italy, Moldova, Montenegro, Netherland, Poland, Portugal, Romania, Spain, Slovenia, Slovakia, Serbia, Turkey, FYROM, Ukraine. Three Council of Europe member states – San Marino, Andorra and Monaco – do not have an autonomous justice system: they rely respectively on the Italian, Spanish and French ones. Latvia has a Council for the Judiciary which, based on Article 89 of the Law on Judicial Power, "is a collegial authority which participates in the development of the policies and strategies of the judicial system, as well as the improvement of the organisation of the work of the judicial system". It does not have direct administrative tasks – these are carried out by other bodies, such as the Chief Justice of the Supreme Court, the Senate of the Supreme Court, the Disciplinary Court, the Court Administration, the Minister of Justice.

[7] Czech Republic, Denmark, Sweden, Norway and Switzerland (with peculiarities resulting from the Cantonal organisation) belong to this group. Due to the specific structure and functions of the Councils of the Netherlands and Hungary, some researchers regard them as structures of court administration rather than Councils following the model of southern Europe (see Lord Justice Thomas, *Councils for the Judiciary. States without a High Council. Preliminary report* prepared for the working group of the CCJE available at https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)4&Language=lanEnglish&Ver=original&Site=DGHL-Judges-CCJE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3

[8] Austria, Finland, Germany, Liechtenstein, Luxembourg.

[9] Armenia, Azerbaijan, Montenegro, Moldova. In Albania, the HCJ does not participate in the law-drafting process, which is performed by the National Judicial Conference through its relevant committee. It is the Minister of Justice who reports to the parliament/government about problems in the court system.

[10] Germany; Finland, where the Supreme Court and the Supreme Administrative Court have the right to submit proposals to the Council of State to initiate legislative action.

[11] Denmark, Norway, Sweden.

the Minister of Justice (court administration is usually an autonomous branch or agency of the Minister of Justice). Participation in the legislative process does not have the character of a dialogue between institutions/powers of the state; rather it is seen as an "internal" consultation.

2.2.1. Countries having a Council of the Judiciary

Mapping the situation in those states where a Council exists we can make a distinction based on: (a) the source of their power, (b) the exercise of the right to give opinions *ex officio* or on request, (c) the object of the opinion and (d) its direct recipient.

(a) The source of advisory power. Only in two states is the provision establishing the role of the Council in the legislative process set down in the **Constitution**. These are: *Belgium*, where Article 151 § 3 point 6 of the Constitution states that the High Council of Justice has responsibility for issuing opinions and proposals concerning the general functioning and organisation of the judiciary; and *France*, where Article 64 § 6 states: "The High Council of the Judiciary meets in plenary session to respond to requests for opinions made by the President of the Republic under Article 64. It shall approve, within the same composition, issues related to the ethics of judges and any matter related to the administration of justice referred to it by the Minister of Justice".[12]

In two other states – *Croatia* and *Hungary* – there is a (similar) **practice** in place, without an explicit legal basis.

In other countries the advisory power is based on the **ordinary law**. Some examples:

- In *Bulgaria*, Article 6 of the Regulation on the Organisation of Work of the Supreme Judicial Council and its Administration states: "(1) The Supreme Judicial Council shall: <…> 34. give opinion to the Council of Ministers and the National Assembly on draft laws related to the judiciary".
- In *Italy*, Article 10 of law No. 195 - 1958 entitles the High Council for the Judiciary to make proposals and give opinions to the Ministry of Justice in the field of regulation regarding matters related to the judiciary and administration of justice.

[12] A special provision on requests of the President of the Republic is laid down in Article 64 of the French Constitution: "The President of the Republic is the guarantor of the independence of the judiciary. He is assisted by the High Council of the Judiciary". Articles 64 and 65 of the French Constitution read in conjunction with each other clearly indicate that the authority to manage the justice system is vested in the President of the Republic, and is implemented by the High Council (without prejudice to the powers of the Ministry of Justice).

- In *Poland,* based on Article 3 of the Act on the National Council of the Judiciary of Poland of 12 May 2011, competencies of the National Council of the Judiciary include "<…> (4) expressing a stance on the status of the judicial staff; (5) expressing a stance on matters concerning the judiciary and judges, put on the agenda by the President of the Republic of Poland, other public authorities or judiciary self-government; (6) expressing an opinion on draft normative acts concerning the judiciary and the judges and presenting applications in this regard". Article 186 § 2 of the Constitution gives to the National Council of the Judiciary also the power to "make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges".
- The *Portuguese* High Council for the Judiciary is competent to issue opinions on legal acts related to the judiciary and the status of judges and, in general, to propose to the Ministry of Justice legislative measures to improve the professionalism and the efficiency of the judiciary.
- The *Romanian* Law No. 317/2004 on the Superior Council of Magistracy in Article 33 stipulates: "(1) Where the law provides for the certified opinion, the approval or consent of the Superior Council of Magistracy, the point of view issued [by it] shall be mandatory. If the law foresees a consultation or opinion of the Superior Council of Magistracy, the point of view issued by the Council shall not be binding. (2) Unless the law stipulates a deadline for the Superior Council of Magistracy to issue such opinions, these shall be issued within thirty days from the notification date. The exceeding, by the Superior Council of Magistracy, of the deadline for issuing the opinion shall not affect the validity of the document".
- Based on Act No. 185/2002 Coll. on the Judicial Council of *Slovakia*, the competence of this institution includes: (a) expressing an opinion on proposals of generally binding legal regulations setting out the organisation of the judiciary, proceedings before courts and the status of judges; (b) expressing an opinion on proposals of conceptual documents concerning the judiciary presented for discussion to the National Council and to the Government (§4 points f and g). The President of the Judicial Council can request the Constitutional Court to check the compliance of legal regulations regarding the administration of justice with the Constitution, Constitutional acts, International Treaties.
- The *Turkish* High Council of Judges and the Prosecutor in plenary session delivers

opinions on draft laws, regulations and by-laws concerning the Council's own jurisdiction (Article 7, point K).

- In *Georgia*, in order to exercise the authority granted by the law, the High Council of Justice: (a) examines draft laws related to the activity of the court and develops relevant opinions/conclusions; (b) within its competence is authorised to prepare the draft of Presidential Order or instruction, or adopt a decision of the High Council of Justice of Georgia.
- The *Spanish* law is very detailed: Article 108 of the Organic Law 6/1985 of 1 July on the Judiciary states: "(1) The General Council of the Judiciary shall inform and notify in respect of draft bills and general State and Autonomous Community provisions which affect, either totally or partially, any of the following matters: (a) Determination and modification of judicial boundaries and their capitals pursuant to the terms of Article 35 of this Law; (b) Establishment and modification of organic staff of Judges, Senior Judges, Secretaries and personnel in the service of the Administration of Justice; (c) Organic statute of Judges and Senior Judges; (d) Organic statute of Secretaries and the remaining personnel in the service of the administration of Justice; (e) Procedural regulations or those affecting legal or constitutional aspects of tutelage before the ordinary courts or the exercise of fundamental rights and any others which affect the composition, organisation, operation and governance of the Courts and Tribunals; (f) Criminal laws and regulations on the penitentiary regime; (g) Others as stipulated in the law. (2) The General Council of the Judiciary shall issue the report within a term of thirty days. When the urgency of the report is stated in the service order the term shall be fifteen days. (3) The Government shall submit the said report to the General Parliament in the case of draft bills".
- Article 7 point 28 of the Law on High Judicial and Prosecutorial Council of *Bosnia and Herzegovina* (Official Gazette No. 25/04) states that the Council shall have the competence of "providing opinions on draft laws, regulations, or issues of importance that may affect the judiciary, initiate the adoption of relevant legislation and other regulations and to provide guidance to courts and prosecutors' offices on matters falling under the Council's competence".
- While in the past it was for the Supreme Court to make recommendations, it is now the *Serbian* High Judicial Council that gives its opinion on changes in existing laws or in new draft laws. Article 13 of the Law on High Judicial Council published in the

Official Gazette of the Republic of Serbia No. 116/08 (as subsequently amended) stipulates that the Council "provide[s] opinions on amendments to the existing laws or on the passing of new laws which set out the status of judges, organisation and functioning of the courts, as well as other systemic laws applied by courts or of importance for exercising the office of judge". It should be emphasised that in Bosnia and Herzegovina, like in Serbia, the advisory mechanism works effectively. Based on testimony from the Councils of those Countries which I have personally (but informally) gathered, the advice of the Council is regularly requested and its observations and proposals are taken into consideration. We may affirm that the presence of international advisors and international organisation (OSCE, EU, Venice Commission etc.) facilitates this cooperative approach to the law making process. We hope that good practices will remain in place, when the international presence comes to an end.

- Finally, it is worth mentioning the case of *Latvia*. It is **the Constitutional Court** of the country that affirmed the duty of the Council for the Judiciary to intervene in the legislative process and the duty of the Parliament to hear and take into consideration the opinion of the judiciary, and to reason when adopting different solutions. Reference is made to the judgments of 18 January 2010 and 22 June 2010 (both related to the compliance with Articles 1, 83 and 107 of the Constitution of the Law of 14 November 2008 "Amendments to the Law On Judicial Power", on judges' remuneration, determining a less favourable economic treatment in comparison with the procedures for the calculation of the basic salary of judges previously in effect). After having described the role of the Constitutional Court and the position of the judiciary in a democratic country, and after having examined in depth the meaning of the principle of independence of the judiciary and separation of powers, the Constitutional Court states: "The legislator, prior to taking decisions regarding judicial operations (in matters related to the implementation of both the budget and other judicial functions), should give the opportunity to the judicial power or independent institution, representing the judicial power, if such institution has been established, to express its opinion regarding matters which affect judicial operations. <…> In a democratic state, the principle of the separation of power not only separates the branches of power, but also contains the requirement for mutual co-operation thereof, as the common objective of all branches of the judicial power is the strengthening of democracy in the interests of the nation. If, due to objective reasons,

the legislator cannot agree with the opinion of the judicial power, then he shall justify his decision" (judgment of 18 January 2010). In a judgment of 22 June 2010, the Court specifies that: (a) "in case this opinion is not taken into account or is only partially taken into account, the legislator has a duty to provide justification for his action to such an extent that, if the court had to evaluate the compliance of the action of the legislator (the decision taken) with the Constitution, this justification would provide all the information necessary for the inspection of commensurability"; (b) direct negotiations between the legislator and individual representatives of judicial power regarding these matters are not the most suitable way for mutual communication of the branches of power, as during such negotiations the legislator has a possibility even seemingly to affect the judicial power and the adjudications accepted thereby, but even such seeming possibility is not permissible"; (c) the Constitutional Court is competent to evaluate "whether the opinion of the judicial power has been heard and taken into account and whether justification has been provided in cases where this opinion has not been taken into account or has only been taken into account partially".

These judgments are of crucial importance: they define and provide a theoretical framework for the responsibility of the Councils, and underline why the advisory power is an attribute of the representative body of the judiciary and not of individual judges or single courts.

(b) Advisory powers *ex officio* or upon request. In general the law does not specify whether the Council exercises its power *ex officio* or upon request of the Government or of the Parliament. Only in Croatia and France are the opinions delivered exclusively upon request of the Minister of Justice for the first country, and the President of the Republic or the Minister of Justice for the second. In Italy and the Netherlands the law provides that opinions may be sent both on the initiative of the Council and upon request. In all other cases, where nothing is specified, the dual possibility must be considered. In consequence, the power of the Council can be exercised independently without any request or consultation.

(c) Subject of the opinion. The Councils can generally give opinions (and even make proposals) on draft laws and regulations concerning the specific field of their competence: the status of judges, functioning, organisation and efficiency of the judiciary and the administration of justice. In some cases reference is made to laws on "proceeding before

courts" (Slovakia), to "other systemic laws applied by courts or of importance for exercising the office of judge" (Serbia), "judicial operations" (Latvia), "criminal laws and regulations on the penitentiary regime" (Spain).

Looking at the concrete exercise of the power under examination, we can conclude that the "older" Councils with consolidated experience of giving opinions in the law-making process have the tendency to express their advice not only with reference to law affecting status, organisation and functioning of the judiciary but also with reference to a large part of legal reform. The foundation of this trend is the assumption that legal reforms (related to the fight against corruption or organised crime, juvenile justice, criminal or civil procedural law etc.) can (and normally do) have a serious impact on the organisation of work in courts, on the length of proceedings, on the protection of fundamental rights that is the main function of the judiciary. There is also the idea that the Councils are authorised to formulate policy guidance on litigation-related matters.

On the web-site of some of the Councils it is possible to find the texts of all advice and opinions delivered during, or in view of, a legislative process. Namely, on the web-sites of the Belgian and Italian Councils (both of which have, from a formal point of view, a consultative role limited to the issues of the status and career of judges and organisation and management of the judiciary) we find opinions on draft laws (*avant-projets de loi*) on the evaluation of Heads of Courts, on modifying the criminal law and the criminal procedural law, on civil procedural law, on patrimonial penalty and judicial fees, on the reform of judicial districts (Belgium); and opinions on draft laws on measures to fight international terrorism, measures to fight organised crime and on measures regarding unlawfully acquired assets (Italy). As far as Italy is concerned, in the past the Government was very critical of the choice of the Council to deliver opinions without a request from the Minister and on topics not directly related to the competence of the Council. Today, the contribution of the Council to the law-making process is generally considered an important part of the legislative process in a democratic society.

(d) Recipient of the opinion. In the majority of cases the law does not specify the recipient of the advice. In many cases it is the Minister of Justice who has a role of intermediary to the legislative power: having the power of legislative initiative and the power of proposing amendments to the draft law, the Minister may make an initial screening of the proposals and make them his own, in whole or in part. In some cases the proposal may be addressed also to the Parliament (Bulgaria, Latvia), to the President of the Republic (France, Poland,

Lithuania), to the Council of Ministers (Bulgaria), depending on the relations between different institutions and on the role of the Minister of Justice, if any, in the legislative process.

When the recipient is not specified, the opinion is sent to the relevant Minister and to the Parliament.

3. European Union good practices

The ENCJ shares the views of the CCJE. In 2011, the ENCJ adopted the Vilnius Declaration,[13] which lists a set of recommendations for the EU judiciaries. Considering the impact of the economic crisis and of the budgetary constraints affecting the court system, the ENCJ calls for a long-term policy including necessary reforms of the judiciary with the aim of improving efficiency and reinforcing public confidence in justice. It recommends *inter alia* that judiciaries and judges be involved in the necessary reforms (Recommendation No. 5) and that Councils for the Judiciary or autonomous courts' administrations assume a significant role, always taking into account and respecting the competences of the other powers of State (Recommendation No. 6).

The Network elaborated this concept in two Reports on Judicial Reforms in 2012 and 2013. In Report 2012,[14] five major areas for reform are identified, and for each area general directions are outlined:

(1) Rationalisation and (re)organisation of courts and public prosecutors' offices;

(2) Reduction in the volume of court cases;

(3) Simplification of judicial proceedings, improvement in case management and introduction of new technologies;

(4) Financing of the judicial system (courts and public prosecution offices);

(5) Court management and allocation of cases within and between courts and within and between public prosecution offices.

The Report underlines that "[i]t is essential that the judiciary, judicial councils and in particular judges and prosecutors be involved at each stage of development and implementation of reform plans. This is to ensure the independence of the judiciary, that reforms are effective and instil confidence" (Recommendation No. 17); it is further stated

[13] http://www.encj.eu/images/stories/pdf/GA/Vilnius/encj_vilnius_declaration.pdf
[14] http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_judicial_reform_def.pdf

that "[t]he judiciary, under the lead of Judiciary councils, where these exist, should develop sensible proposals for effective reform. The goal of reform should be improvement of the overall excellence of justice" (Recommendation No. 18).

The Report 2013[15] identifies the role that the Judiciary and Judicial Councils can play in the reform process and gives the following guidelines:

- The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation.
- The Judiciary should be engaged with the creation of success criteria and Key Performance Indicators to evaluate effectiveness of the reform.
- The Judiciary and Judicial Councils have a vital pro-active role to play in the whole reform process.

The Guidelines are developed also as far as contents of the main reforms are concerned.

4. Conclusions

Based on the elements thus far enumerated we can make the following concluding remarks:

a) Judicial reform must be carried out in compliance with the principle of judicial independence; it must ensure the implementation of fundamental rights and keep access to justice, as guaranteed by Article 6 of the ECHR, intact. The discretion of the legislature is limited and it must preserve the essential role of justice in a democratic society.

b) The involvement of the Councils for the Judiciary in the law-making process is an expression of the principle of separation of powers and independence of the judiciary. The principle of loyal cooperation between state powers, on the one hand, obliges the legislature to consult the judiciary and, on the other hand, obliges the judiciary to give its opinion and make proposals.

c) It should be within the power of the Council (or another independent body in charge of administration of the judiciary) to deliver advisory opinions and/or proposals.

d) The Constitution or the law should foresee among the tasks of the Council the power to give opinions during the legislative process.

e) While it would be inappropriate for the Parliament (or the Government) to consult single judges who cannot speak on behalf of the judiciary as a whole, on the contrary,

[15] http://www.encj.eu/images/stories/pdf/workinggroups/encj_report_judicial_reform_ii_approved.pdf

courts, associations of judges, scholars, associations of lawyers (including the Bar) may/can be requested to express their views in their capacity as experts or union representatives. This is part of the preparatory work of acquiring relevant knowledge that is an element of every law-making process. This is clearly distinct from the institutional consultation with the Council.

f) The Council should have the power to express opinions and proposals with reference to any law that can have an impact on the status of judges and on the quality and organisation of the judiciary. The concept of quality is based on European good practices. Reference can be made to opinions and reports of the CCJE, CCPE[16] (where prosecutors are part of the judiciary), CEPEJ,[17] ENCJ and other independent bodies. The ENCJ Reports on judicial reform 2012 and 2013 and the main areas for judicial reforms specified therein are an accurate reference.

g) The Council should have a pro-active role; it should intervene at the early stage of the legislative process, or at least as soon as a first draft is ready.

h) The Council should be able to proceed both *ex officio* and upon request. Depending on the legislative procedure (initiative of the Parliament or of the Government, permanent or *ad hoc* committees in charge, preparatory study commissions in place), the request for consultation is issued by the Parliament, directly or through the relevant Minister, or the Government (the Council of Ministers or the relevant Minister). In case of the establishment of study committees at the Ministry of Justice level, the Council should be invited to participate.

i) If the Parliament or the Government does not initiate the consultation, the Council should be entitled to take the initiative.

j) Once the advisory opinion is elaborated, the Council, through its President and/or Secretary General, sends it to the institution that requested it. Depending on the institutional relationships the Council will address it to the Parliament directly or through the relevant Minister.

k) The Laws on the Council of Spain and Romania set a deadline for issuing the opinion (thirty days; fifteen in case of urgency). Specifying a time frame can be useful for the rapidity of the process. Nevertheless, it seems more reasonable to leave the Council free to determine the timing; it may not be appropriate to prepare in a few days a reasoned opinion on complex topics, especially taking into consideration the

[16] Consultative Council of European Prosecutors.
[17] European Commission for the Efficiency of Justice.

composition of the Councils (judges and representative of civil society or other institutions) and the need to develop a common view. It will be up to the Council, for the sake of its role and credibility, to deliver its opinion in due time.

l) The opinions of the Councils given as part of the legislative process should be published on their web-site, on a dedicated page. The website of the Belgian Council can be taken as an example. A translation in one or two of the most spoken languages of the European Union or the Council of Europe member states should be made available to foster exchanges with other Councils.

m) As a rule, the opinion of the Council is generally not binding, except where the law provides otherwise.

n) If the legislature does not consult the Council or does not take into consideration its opinion or disregards it without giving reasons, the Constitutional Court – depending on its responsibilities and powers – may be called upon: (1) to judge on conflicts arising from violations of the principle of separation of powers of the State: if one branch takes action that infringes considerably on the competence of another branch of government, the courts may declare this action unconstitutional because it violates the constitutional separation of powers. In this regard, the Italian Constitution[18] may serve as an example; (2) to judge the compliance with the Constitution of the rules affecting the quality of justice and adopted in spite of a negative opinion or without hearing the opinion of the Council, because of violation of the principle of separation of powers. In this regard, the judgments of the Latvian Constitutional Court may constitute a leading case.

[18] Article 134 of the Italian Constitution stipulates that the Constitutional Court shall pass judgements on:
– controversies in the constitutional legitimacy of laws and enactments having force of law issued by the State and the Regions;
– conflicts arising from distribution of the powers of the State and those powers allocated to the State and the Regions, and between the Regions;
– charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.
For further information see https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.