



European Commission for the Efficiency of Justice (CEPEJ)

Councils for the Judiciary in EU Countries

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Preface

This report reflects an explorative comparative study conducted in the Netherlands in 1998 and 1999, which had been commissioned by the Ministry of Justice in preparation for the establishment of a council for the judiciary in the Netherlands. In January 1999, the TAIEX Bureau of the European Commission asked whether the report could be used as basic material for a project in support of the Czech Republic's entry into the European Union. As a result of this request, the report was translated into English and a chapter about the Czech Republic and the plans for a council for the judiciary developed in that country was added.

The research reported on was completed in January 1999 (and – as far as the Czech part is concerned – in May 1999). After that, it was sent to contact persons in the countries that had been the subject of the research, who were requested to make comments. Various contacts sent in comments in the course of 1999 and 2000, and these were incorporated into the report.

This means that the report is out of date in some respects, but we thought the material interesting enough to present in book form. This report could be a first step in the process leading to a broader evaluation and characterization of councils for the judiciary in Europe and in the world.

In 2001, information was gathered about the Croatian Council for the Judiciary within the framework of a EU project concerning the administration of justice in Croatia. This material was used to add a chapter about this Council to the report.

We – and the translators who have produced this English edition – welcome any comments and we hope that in the future this study will be supplemented with other reports about the Councils for the Judiciary.

Leiden/The Hague, February 2003

Wim Voermans
Pim Albers

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Chapter 1. Research into Councils for the Judiciary in EU Countries.

1.1. Reason for the research: a Council for the Judiciary in the Czech Republic

In various European countries councils for the judiciary – called ‘Councils for the Judiciary’ or ‘Councils for the Magistrature’ – act as intermediaries between the Government and the judiciary in order to guarantee the independence of the judiciary in some way or in some respect. These court administration authorities have different powers in different EU countries. Some of them act as boards charged with the appointment of judges and disciplinary action against judges (e.g. France and Italy), while other authorities play an active role in the budgeting and general financial and administrative management of courts, as well as housing, education, automation etc. (e.g. Sweden and Denmark).

At present there is a European trend to establish court administration authorities in countries that have hitherto relied on ministerial management and budgeting of the courts and the judiciary. This shift has led to the establishment of court administration authorities in Ireland (1998) and Denmark (1999). The Netherlands is also contemplating the establishment of such an authority, just as the Czech Republic is. This contribution reports on some of the characteristics of several court administration authorities, especially on the issues of public or constitutional responsibility for the management of the judiciary by Councils for the Judiciary. In most EU countries, public responsibility for the management of the judiciary was, until recently, mainly expressed through and governed by the ministerial responsibility of a Minister of Justice (or of the Government) to Parliament. The establishment of a court administration authority changes the former pattern of responsibility arrangements.

The research reported on was originally undertaken for the benefit of the Dutch Government and their plans to establish a Judicial Council. They wanted some comparative research in order to support them in their discussions on the constitutional position and shape of their Authority. The Dutch plans constituted the background for the comparison in the original research. For the sake of clarity, they are set out in some detail in this report. However, this report aims to serve as a means for reflection, by way of comparison, for the plans of the Czech Republic, which is also considering the establishment of

a court administration authority as part of an operation to reform the Czech judiciary.

1.2. The principles of the reform of the Czech judiciary and their implementation

On 14 April 1999, the Government of the Czech Republic discussed the draft of *the Principles of the Reform of the Judiciary*. These principles are reflections on and reactions to the findings of the mission of EU experts in the area of the judiciary and Interior Affairs in the Czech Republic of November 1997 and the report about the progress in the pre-association period of the Czech Republic.

The Government of the Czech Republic ordered the Ministry of Justice to submit a draft of the Reform Concept that will be based on the approved Principles before 15 June 1999. This concept should include both the proposals for necessary legal arrangements and proposals for technical and organisational measures relating to their implementation in practice.

The key aspects of the judiciary reforms to be prepared should be the following:

- the establishment of a Council for the Judiciary which will be independent of the Government. The Council will have the power to solve issues concerning the organisation of the judicial decision-making process in the courts, judges' personal affairs, including disciplinary proceedings, training of judges etc.;
- the new solution concerning the agenda, so far executed by presiding judges of courts in the area of the administration of the national property and state executive administration, and the related new definition of the position of presiding judges and their relationship to judicial self-administration;
- the simplification of the four-level court system and its change to a *functional* three-level system;
- organisational arrangements concerning the fast settlement of cases on the one hand and guaranteeing the constitutional rights and liberties on the other hand.

The implementation of judiciary reforms is left to the Ministry of Justice (as the supplement to the principles approved by the Government). The expected deadline for the submission of specific drafts for statute laws is the end of 1999. The corresponding statutory instruments should be prepared during the first half of

2000, and the large-scale implementation of reforms is expected at the turn of 2000/2001.

These policy plans require an elaborate legislative programme at relatively short notice. This research aims at giving comparative insights into the legislative arrangements of EU countries that have established authorities such as the State Administration of Judges of the Czech Republic. The research results may serve as inspiration or merely as food for thought for the Czech plans. Concluding remarks are made and recommendations are given at the end of the report.

1.3. Central research question

The central question in this research project can be phrased as follows: how has the national legislation from the EU countries shaped the legislative relationship between independent Councils for the Judiciary (if any) – or comparable agencies – and the Minister of Justice (or Government) on the one hand, and between the Council for the Judiciary and the courts/judiciary, on the other?

1.4. Research approach

The EU countries involved in the research

This comparative study sets out to examine the constitutional position of court administration bodies or Council for the Judiciary arrangements in various EU countries. On this basis, it will present an overview of the different ways in which national legislation organizes the relationship between the Council for the Judiciary and the Minister of Justice on the one hand, and the courts/judiciary on the other. Special attention will be focused on the way in which an independent Council for the Judiciary and the legislative arrangement governing it contribute to the quality of the administration of justice and judicial self-government.

The following countries will be included: Sweden, Denmark, the Netherlands, France, Italy and the Czech Republic. In choosing these countries, we took into account the variation in models existing in Europe as regards the constitutional configuration concerning public supervision of the relationship between the judiciary and those politically responsible (the Minister of Justice or the Council of Ministers as a whole).

This choice from among the various countries will also facilitate the comparison between the models used to administer the courts and the judiciary in the different countries. In fact, three basic models

regarding the relationship between the judiciary, Councils for the Judiciary or similar agencies, and the politically responsible authorities exist in Europe, *viz.* the *Northern European model* (with far-reaching powers for independent Councils for the Judiciary, also in the fields of budgeting, logistics, control, supervision, appointments, disciplinary measures, recruitment, etc. with regard to the judiciary), the *Southern European model* (with only *advisory* powers to appoint members of the magistrature/judiciary and to take disciplinary measures against magistrates), and the *Undivided Model*, in which there is no intermediary institution such as a Judicial Council, but in which the management of the judiciary is vested in the politically responsible Government authorities. Examples of the Northern European Model are to be found in Sweden and – within a year – in Denmark and Ireland. Italy, France and Sweden are examples of the Southern European model and the Federal Republic of Germany and the Netherlands – at the time of writing – represent the Undivided Model. The situation in the Netherlands is interesting because a transition from the Undivided Model to the Northern European model is currently under consideration. Ireland and Denmark underwent this transition only recently.

Aspects to be compared

The comparative study of the constitutional and legislative configuration of the relationship between the independent Councils for the Judiciary, or similar institutions, the judiciary and the politically responsible authorities will focus on a number of issues, *viz.:*

1. The background of the constitutional system (system of government, position of the judiciary, history of the relationship between the judiciary and the Government/status of the independence of the judiciary);
2. Constitutional and legislative form of the relationship between the judiciary, politically responsible officials, and (if there is an institution of this kind) the Judicial Council;
3. The powers of the Council for the Judiciary in the field of *policy*, such as the following:
 - public relations
 - public service
 - judicial co-operation
 - personnel policy
 - appointment policy
 - research policy

advice to the Ministry of Justice
quality monitoring

4. The powers of the Council for the Judiciary in the field of *management*, such as

housing and security
automation
administrative organisation
public information

5. The powers of the Council for the Judiciary in the field of *budgeting and budgeting procedures*, such as

budgeting policy
allocation of resources
spending policy

The data for each of the countries studied will be analysed and compared on the basis of this scheme (where relevant). Where possible, the analysis will take experiences with the actual performance of Councils for the Judiciary into account.

Chapter 2. Models of Councils for the Judiciary in the European Union

2.1. Northern and Southern European Model of Councils for the Judiciary

We have already pointed out that several member states of the European Union – in order to safeguard the independence of the judiciary or for the purposes of efficient management and administration of judicial organisations – have established independent intermediary organisations positioned between the judiciary and the politically responsible administrators in the Government or Parliament itself. Within these Councils existing in Europe, a distinction can be made between the Southern European model, in which the body is constitutionally rooted and only fulfils primary functions in safeguarding judicial independence – such as giving advice on the appointment of members of the judiciary or exercising disciplinary powers with regard to these members – and the Northern European model, in which the Councils, in addition to primary functions such as advice on appointments and disciplinary judicial procedures, have rather far-reaching powers in the area of administration (supervision of judicial registry offices, case loads and case stocks, flow rates, promotion of legal uniformity, quality care etc.) and court management (for example, housing, automation, recruitment, training, etc.) and, in addition to that, play an important part in the budgeting of courts (involvement in setting the budget, distribution and allocation, supervision and control of expenditure, etc.).

2.2. Countries with a Council for the Judiciary according to the Southern European Model

The Southern European model of Councils for the Judiciary is to be found in France, Italy, Spain and Portugal.

In *France* a High Council for the Magistrature (*Conseil supérieur de la magistrature: CSM*) has existed since 1946. The President of the Republic chairs this Council. In addition, the *Conseil* consists of the Minister of Justice (Vice-Chairman), 12 members who are appointed for a four-year term by and from the ranks of the judicial organisations themselves and the Public Prosecutor's Office. In addition, one member of the CSM is elected by the *Conseil d'Etat*

(Council of State), one is appointed by the President of the Republic and one is appointed by the President of the *Assemblée nationale* (the French Parliament). The CSM has powers in the domain of the appointment of members of the judiciary – members of the judiciary are appointed by or on the recommendation of the *Conseil* by the Head of State – disciplinary judicial procedures and the promotion of members of the judiciary.

Italy also has a High Council for the Magistrature (*Consiglio Superiore della Magistratura*). This Council is closely related to the French *Conseil Supérieur de la Magistrature* and is also chaired by the Head of State. It consists of the First Chairman of the Supreme Court of Appeal, the Attorney General with this Court, 20 members appointed by and from the ranks of the judicial organisation and 10 qualified jurists chosen by Parliament. The powers of the Council embrace appointment, transfer and promotion of the members of the judiciary, the appointment of other persons who are serving on the courts of the ordinary judiciary, and disciplinary judicial procedure with regard to the members of the judiciary.

In *Spain* there is a General Council for the Judiciary (*El Consejo General del Poder Judicial*), which consists of the president of the ‘*Tribunal Supremo*’ (chairman) and of 20 members appointed, on the recommendation of Parliament, for a period of five years by the Head of State. Twelve of them come from the ranks of the judiciary and eight from that of barristers, solicitors and other lawyers. The powers of the *Consejo* concern appointments, promotion and supervision through inspection and disciplinary procedures.

The final example of a High Council for the Magistrature according to the Southern European model is to be found in *Portugal*. There the president of the Supreme Court chairs the *Conselho Superior da Magistratura*. In addition, it consists of 16 ordinary members, two of whom are appointed by the Head of State, seven by Parliament and seven by and from the judicial profession. As in Spain, the Public Prosecution Service is not part of the Portuguese Council. The powers of the Council include appointments, posting/transferring and promotion of judges.

2.3. Countries with a Council for the Judiciary according to the Northern European Model

At present, Sweden, Ireland and (before long) Denmark are examples of countries that have adopted a Council for the Judiciary according to the Northern European Model.

Sweden was the first country to adopt a Council for the Judiciary according to the Northern European Model, for the Swedish

Domstolsverket has been in existence since 1975. This Council for the Judiciary was set up as an independent administrative body led by a director-general. The executive board of the Council is under his chairmanship and further consists of four judges (two district court presidents and two presidents of appeal courts), two Members of Parliament, a lawyer and two union representatives. The powers of the Swedish Council for the Judiciary include administrative tasks with regard to the drafting of the budget and the apportionment of the national budget for the judiciary among the courts, as well as managerial powers such as supporting the courts in, *inter alia*, the area of personnel and training management, housing, automation and computerisation (business administration systems, case law databases, and suchlike), administrative organisation and bearing the responsibility for accounting information concerning the spending of funds. In addition, the Council basically fulfils a facilitating role in the recruitment and appointment¹ of judges.

A short time ago (16 April 1998)² Ireland also adopted a council for the judiciary (Courts Service), which is provisional for the time being.³ The Council is under the chairmanship of a Chief Executive Officer (appointed on 1 January 1999) and is further made up of nine judicial members from the different ranks of the Irish courts, the Attorney General, two lawyers, members from the echelons of the administrative and legal staff of the judiciary (clerks office, registrar, etc.), a public prosecutor/district attorney, a member representing the interests of the clientele of the courts, a member designated by united unions and a legal expert. The Council has a number of tasks and powers in the area of court administration and management, including budget allocation, inspection on and justification of spending of the budget funds by the courts, general administrative assistance to courts, supporting departments for judges (including auxiliary personnel), external relations (*inter alia* public information), responsibility for housing, taking care of facilities for litigants, training programmes, information supply and responsibility concerning data relating to the working process of the courts, providing annual reports and strategic policy plans and – in general – advising the Minister of Justice on judicial procedure issues.

¹ The office support bureau for the Appointments Review Committee for the Judiciary, which is independent of the Domstolsverket. See Appointment of permanent judges and the position of the Appointments Review Committee for the Judiciary and its working method, published by Domstolsverket, Jönköping 1997.

² Date of Entry into Force of the Courts Service Act, 1998.

³ In Gaelic the Council is called '*An tSeirbhís Chúirteanna*'. Expectations are that the Council will formally acquire a permanent status before the end of 1999.

On 26 June 1998, Denmark passed the Act on the Council for the Judiciary (*Lov om Domstolsstyrelsen*), which established an independent Council for the Judiciary that was inspired by the Swedish example. The Council for the Judiciary, which will start operating from the entry into force on 1 July 1999 in Denmark, is under the chairmanship of a director and a Board of five – independent – committee members from the different courts (Supreme Court, courts of appeal and district courts), two committee members from the ranks of the judicial staff of the courts, and two from the supporting departments. Furthermore, a lawyer and two committee members with management expertise will have a seat on the Council. The director and the Executive Board do not possess any powers they may exercise independently of the General Board of the Council. The Council, in addition to supporting tasks for the Judicial Appointments Council (a separate body), has powers in the domain of the budget (*inter alia* presenting budget proposals to the Minister of Justice) and the right, should the occasion arise, to address Parliament directly if the Council considers the allocated means to be insufficient). In addition, the Council has the power to draw up strategic policy plans for judicial procedures, the power to allocate the budget funds among the courts, to inspect spending, the responsibility of drawing up annual reports and annual statements of accounts, and a general competence in the area of managing courts (ranging from housing to training programmes). In addition, the Council will play a supporting role in providing information and in automation.

2.4. Case studies into examples of the different models: experiences

As was already stated in chapter 1, this study does not deal with all EU countries that have adopted a Council for the Judiciary. A thorough case study has been made of the experiences in Sweden, France and Italy only. Denmark and Ireland have also been examined more closely, but, as the Councils for the Judiciary have been set up quite recently in these countries, a study trip in search of experiences would provide little additional value. Literature studies into the Councils in Denmark and Ireland have been started.

Chapter 3. Sweden (*Domstolsverket*)

3.1. The constitutional position of the judiciary in Sweden

The independence of the Swedish judiciary is regulated in chapter 11 of the Swedish Constitution (*Regeringsform 1975*). The independence of judges is – indirectly – guaranteed at the level of the individual judge, viewed from the legal position perspective⁴, and, functionally, at the level of the ‘judicial function’ (organisation and independent administration of justice⁵). Judges in Sweden are independent in that they can be dismissed only in the cases cited by the Constitution and receive a permanent appointment from the Government.⁶ An appointment as a judge is incompatible with the membership of Parliament.⁷ Article 2 of chapter 11 of the Swedish Constitution forbids Government organs and Parliament to determine in any way how a court should interpret the law or administer justice in an individual case. In addition, article 11:3 of the Swedish Constitution assigns settlement of disputes between citizens exclusively to the courts. A further indirect guarantee for independence is to be found in the way the Constitution lays down the basic structure of the judicial organisation and reserves the details of the judicial organisation and of procedural law for the legislator.

The constitutional position of the judiciary in Sweden has, at first sight, an affinity with the independent position of the judiciary in the Dutch Constitution. Yet, on closer consideration, the position of the

⁴ See articles 11:5 (employment protection), 11:7 (incompatibilities), 11:9 (appointment and selection requirements) and 11:10 (legal position of judges by law) of the Swedish Constitution.

⁵ See, *inter alia*, articles 1:9 (requirement of objective and impartial administration of justice), 11:1 (main features of judicial organisation), 11:2 (independent guarantee of administration of justice for courts), 11:4 (judicial organisation and procedural law by law) and 11:11 (cassation possibilities with a leave system).

⁶ See, *inter alia*, articles 11:5 and 11:9 *Regeringsform 1975*. This guarantee, however, is only applicable to judges who are permanently appointed. Temporary judges can also be dismissed for other reasons. This gave rise to some unrest when, at the start of the 1990s, many temporary judges were dismissed as a result of a retrenchment programme.

⁷ Article 11:8 *Regeringsform 1975*.

Swedish judiciary is quite different from that of the Dutch judiciary on a number of points. This is chiefly due to Sweden's very distinct constitutional and administrative tradition, which is characterised by a substantial degree of territorial decentralisation but also – and to a much greater extent than is the case in the Netherlands – by functional decentralisation. Particularly, the frequent and far-reaching assignment of administrative powers to independent administrative organs (*ämbetsverk*) at central government level are characteristic of the Swedish system.⁸ Just like the Councils for the Judiciary, local authorities and – certainly – distinct administrative organs operate independently of the central Government. In the Swedish system, the executive and the judiciary have so much in common that it is often difficult to make a strict distinction between the executive and judiciary function.⁹ This is reflected in the Swedish Constitution in various ways: for example, the judiciary and the executive (except for the central Government itself) are dealt with collectively in chapter 11, and in many respects, the independence of the decentralised administrative bodies is dealt with in the same way as that of the members of the judiciary.¹⁰

Basic organisation of the judiciary in Sweden

In Sweden, the administration of justice in civil and criminal matters is assigned to the ordinary courts; the administration of justice in administrative matters is assigned to the separately organised, administrative courts. Both the ordinary and the administrative judiciary have two instances, *i.e.* both have the possibility of appeal to appeal courts and subsequent appeal to the Supreme Court (in the latter case, being an appeal to an administrative appeal Court and subsequent appeal to the Supreme Court in administrative matters). Civil or criminal matters are dealt with in the first instance by a district court (*Tingsrätten*). Sweden has 96 district courts that vary in size from small district courts with only one or two judges to large

⁸ Please refer to J.L. Boxum, J. De Ridder and M. Scheltema, *Zelfstandige bestuursorganen in soorten* [Independent Administrative Organs in Sorts], Deventer 1989, p. 186 *et seq.* As a result of its different administrative organisation, Sweden has, compared to other Western European countries, small ministries (average size about 120-130 people) and many independent administrative organs, to which the greater part of the administrative implementation tasks have been entrusted.

⁹ See also J.M. de Meij, *Het Koninkrijk Sweden* [‘The Kingdom of Sweden’], in: L. Prakke, C.A.J.M. Kortmann (ed.), *The constitutional law of the countries of the European Union*, 5th impression, Deventer 1998, p. 908.

¹⁰ See, for example, article 11:2 and article 11:7, which both, in comparable ways, forbade interference from other Government bodies with exercising jurisdiction functions, exercising, respectively, administrative competences in individual cases.

district courts with dozens of judges and hundreds of employees (for example Stockholm). Appeal from decisions by district courts lies to six courts of appeal (*Hovrätter*). After a judgment rendered by one of the appeal courts, it is possible to refer a case to the Supreme Court (*Högsta domstolen*). Sweden, however, has a leave system under which the Supreme Court hears only matters that the Court itself deems important to the development of case law.

The administrative system – which has had its own court organization since 1979 – has the same structure for administrative cases. In the first instance, matters are dealt with by an administrative district court (one of the 23 *Länsrätter*), while appeal lies to the administrative courts of appeal (4 *Kammarrätter*), and a final appeal to the administrative Supreme Court (*Regeringsrätten*), the latter appeal being subject to the leave requirement.

3.2. Ministerial responsibility and public control in Sweden

Due to the different structure of the Swedish system, which is founded on its own – non-revolutionary – tradition, the way in which public control over the administration is shaped also differs fundamentally from, *inter alia*, the Dutch or Czech systems. And this has important consequences for the constitutional position of the Swedish judiciary.

Where, for example, the Dutch constitutional system uses the political concept of ministerial responsibility as the pivoting point for public control over the administration and, as a result thereof, over components of the judicial system, this is less obvious in Sweden. Sweden also uses the concept of political ministerial responsibility and there too, it has developed into a general ministerial responsibility, in the sense that Ministers can also be held responsible for matters on the basis of the assignment of responsibility. However, the scope of ministerial responsibility in Sweden is fundamentally different from what we have, for example, in the Netherlands. Thus, the collective responsibility of the Government is the rule and individual responsibility the exception. The reason for this is simple: in Sweden, Ministers cannot exercise powers independently, but can act and be held liable only collectively as the Government. In addition, there is a tradition that Ministers are not responsible for activities of independent administrative organs (hereinafter called 'IAOs'), if such activities are beyond their actual power of intervention. If there are problems with independent administrative organs, the Minister's responsibility is restricted to information about the IAO, appointment or dismissal of the administration or of a director of an IAO, or the funding of and

financial accountability by an IAO. In Sweden, public control over the performance of IAOs' duties is not achieved for the most part by the instrument of ministerial responsibility. First of all, there is inspection by the courts, which can exercise supervision over the IAOs by offering legal protection, so that their activities remain within the limits of the law. Furthermore, according to the Swedish Constitution, the IAOs are obliged to follow the general instructions and policy directives which Parliament, on the proposal of the Government, issues together with the budget.¹¹ The non-compliance with these general instructions issued with the budget can have different, namely financial, consequences. In addition, supervision over the performance of the IAOs' duties may be exercised by means of the composition and appointment of the executive boards of IAOs. Sitting members of parliament and unions as well as representatives of interest groups are often on the IAO boards appointed by the Government and headed by directors-general. An additional form of supervision is through the regulations concerning public access of government decisions. In Sweden these regulations are far-reaching, certainly compared to the Netherlands, and make it possible for the public – and, as it happens, also the press – to monitor the performance of the duties of IAOs in detail. Another instrument of supervision regarding the activities of IAOs lies in the existence of the Parliamentary Ombudsmen, who exercise supervision over the decent treatment of citizens by the Government. A final public form of control consists in the 'auditing' instrument. In Sweden nearly all IAOs are subject to an annual report and/or accounting report obligation. The law also provides that these reports must be audited either by the national Auditor General's Office or by special, Parliament-appointed accounts committees or auditors. Both the report and the audit report are available for inspection by the public.

Against this background, it is not surprising that Sweden has chosen to assign the management and a large part of the funding responsibility to an independent administrative organ, the *Domstolsverket*, i.e. the Swedish Judicial Council. The Council acts as an intermediary between the Government and the Swedish courts and has important policy and managerial tasks. In the Swedish system, it is unusual to call the Government to account for the performance of tasks which are the responsibility of the Council for the Judiciary. The Council for the Judiciary itself is called to account as a general rule. The supervision Parliament – together with the Government – exercises over the way the judiciary is managed is in the form of general instructions, which accompany the budget. In general, these instructions relate to the way budget targets should be

¹¹ See article 9:7 *Regeringsform* 1975.

achieved, such as the policy to be pursued in the field of case stock reduction and certain target figures.

3.3. The Swedish Council for the Judiciary (*Domstolsverket*): composition and powers

For the budgeting and administrative and policy support of the judiciary, a special-purpose independent administrative body (*Domstolsverket*) has existed since 1975. It is in charge, *inter alia*, of apportioning the national budget for the judiciary among the courts, and has powers in the area of judicial management and support. This *Domstolsverket*'s administration consists of judges (6), Members of Parliament (2), union representatives (2) and a director-general.¹² Each year, the administration of the *Domstolsverket* decides on the allocation of the budget made available by the legislator under the budget law. In addition, the administration is mainly in charge of approving the annual statement of accounts that the *Domstolsverket* has to produce for inspection by the Government, in which the spending of the money is accounted for, and rendering advice in matters submitted to the administration by the director-general. The director-general is responsible for the decision-making in all other matters assigned to the *Domstolsverket* for decision. Thus the director-general, supported therein by his division directors, is in charge of taking budgeting decisions in concrete cases and implementing training and support policy for the courts. The support that the *Domstolsverket* offers to the different courts is exceptionally extensive. For example, the *Domstolsverket* provides various financial services¹³ for courts, such as auditing support with the financial accounts that courts must draw up periodically,¹⁴ but also support for courts' salary records, expense account systems, automation support and the delivery and provision of central data files (also central legal databases) and business administration systems. The *Domstolsverket* also assists in the recruitment of personnel, personnel records and personnel management.¹⁵ During

¹² At present, Mr Bertil Hubinette is the Director General of the *Domstolsverket*. Hubinette himself has also been a judge, first in a court, later in a tribunal.

¹³ A remarkable element in the financial management of the *Domstolsverket* is that the *Domstolsverket* itself enters into loans with private institutions in order to get the budget balanced. In fact, this lending takes place on the Government's instructions.

¹⁴ For example by making a central financial management system available, called *Agresso*.

¹⁵ In this way the *Domstolsverket* also acts as a supporting service for the Advisory Committee for the Judiciary. This otherwise independent committee,

the last few years, the *Domstolsverket* has also become more active in the area of training. In addition to legal courses and training programmes, proficiency courses are also being developed nowadays. For example, in 1998 a management course for executive judges attached to courts of appeal and district courts started for the first time. In addition, the *Domstolsverket*, *inter alia*, takes care of the housing and office design and furnishing of the courts¹⁶ and it grants financial loans to courts facing budget deficits. The *Domstolsverket* plays a mainly general and technical role with regard to courts. The Council has actually quite limited powers vis-à-vis individual courts. The courts, through the system of integrated management, are largely autonomous in their own management affairs and budgetary matters. However, as a result of the size of certain courts, this autonomy produces a heavy burden. In order to be able to judge the role that the *Domstolsverket* plays, it is important to examine how the management and the budgeting of Swedish courts are organised.

The judicial management and the administrative support

The Swedish district courts and courts of appeal (but also the Supreme Court and other courts in charge of the administration of justice) have a system of integrated management; this is a system under which the individual courts themselves are for the most part responsible for the funding and management of their own organisation. The management structure for the courts is regulated by means of separate instructions for (administrative) district courts, (administrative) courts of appeal and the (administrative) Supreme Court. The basic organisation of every court, however, is set up according to the same model. For most courts, this is a 'collegium plenary assembly', which means that the judicial meeting is the pivot of the organisation. This collegiate body has actually only one power, being the annual election of the presidium of the court. This presidium, of which the president of the court is also a member, functions as an executive board and is mainly responsible for two matters, namely to determine the basic allocation of funds internally, to determine the criteria for the distribution of the workload and to adopt the annual report. Further management affairs are assigned to the chairman/president of a court, who usually operates as *primus inter pares* among his judges, but with regard to the supporting staff,

which consists mainly of judges, advises the Government on the candidates to be appointed. The Government, on the recommendation of this Advisory Committee, appoints judges in Sweden.

¹⁶ Many of the court centres are in rented office buildings, the rent of which is negotiated by the *Domstolsverket*. However, the *Domstolsverket*, if it is expedient, also buys premises.

he also has the power to issue instructions, even the power to appoint and to dismiss.

This system of integrated management – which, according to the judge interviewed, works satisfactorily and in particular promotes self-responsibility for the primary process – was adopted more recently than the establishment of the *Domstolsverket*. Sweden changed over to this system around 1990.

Allocation of the budget funds for the judiciary

In Sweden the budgeting of the judiciary takes place at several levels. First of all, there is – based on the budget approved by Parliament – an allocation of the Government budget to the *Domstolsverket*, which, subsequently, apportions the money and passes it on to the different courts. For determining the budgets earmarked for the judiciary, a three-year budgetary cycle applies. During the first year, on 1 March, the *Domstolsverket* presents a budget proposal to the Government, which submits it in a budget proposal to Parliament on 20 September. Between 1 March and 20 September, the Government negotiates with the *Domstolsverket* about the policy for the coming budgetary year: the policy objectives and target figures are determined during this period and translated into instructions that the Government gives to the *Domstolsverket* when the budget is approved. The budget proposal goes out on 20 September, after which the Government and Parliament debate the budget proposals. Naturally, the management information from the annual reports of the *Domstolsverket* for previous budgetary years plays an important role here. Subsequently, Parliament usually adopts the budget in December. Once the budget is approved, the *Domstolsverket* implements an apportionment and thus determines the budgets for the individual courts. This always takes place on 1 January. For the calculation of the budgets, the *Domstolsverket* uses a four-step procedure. First of all, there is a distribution based on the type of court; next, there is a distribution based on the size of the court; subsequently, the case load is taken into consideration¹⁷ and finally, special circumstances are taken into account, to see if a further budget supplement may be required. This supplement system, which favours mainly the smaller courts, has become so detailed that there is a risk of many courts losing their grip on the criteria used for the distribution. The courts are very critical about this aspect. At present the Swedish Auditor General's Office is considering the possibility of a simpler and more manageable system.

¹⁷ This takes place by means of a calculation of averages: the average intake of the previous two years is used as the criterion.

The budget, made available by the legislator to the *Domstolsverket* in December, is a lump sum, which means that before being placed at the disposal of the *Domstolsverket*, the money still has no predestined purpose. The system used before 1989, which used certain kinds of earmarked funds, has been abandoned by now.

The management and spending of the funds

The use of the funds through the agency of the *Domstolsverket* has already been mentioned above. At the level of the courts, the executive board, usually represented by the president/chairman (*lagman*) of a court, decides on the appropriation of the budget. The executive board usually decides on the budget and the annual account, the chairman/president of the court decides on the daily appropriation, spending and justification of the credits within the framework of the budget. Most of the money is spent on the salaries. Because the Government appoints the judges, who are then assigned to a particular court, the president/chairman is not free to use his budgets at his own discretion. Yet, it sometimes happens that extra support from trainee judges is called in to remove backlogs. This flexibility in the budget management is usually possible. In the event of contingencies, courts can also conclude loans with the *Domstolsverket* amounting to 3-5% of the total budget.

Many courts pursue the policy of maintaining reserves. In principle, they do not have to be repaid. These reserves, which can be spent freely, are increasing at many courts at present, while the case stock and the backlog in the settlement of cases are increasing too. The *Domstolsverket* is carefully considering the possibility of applying these reserves usefully. In 1997 there was some commotion over a letter from the *Domstolsverket* in which it was announced that the *Domstolsverket* would take back half of the reserves if the courts could not use them adequately.

Financial accountability

The financial accountability of the courts is effected mainly through the agency of the *Domstolsverket*, which gives the official accounts. This takes place in a semi-automated way. The courts keep accounts of their receipts and expenditure using a system managed by the *Domstolsverket* (*Agresso*). This system administers receipts and expenditure and every three months printouts are generated. In addition to the accounting report, the courts must also provide the *Domstolsverket* with information concerning their case stock and case settlement rates. This used to take place only occasionally. Once a year a summary of received and processed matters was given to the *Domstolsverket*. Nowadays, *Agresso* makes it possible to include and generate management information, too. As a result of the greater

extent of detail of the information and reporting wanted by the Government, *Agresso* includes more information than mere accounting data in the records.

The exceptional aspect about the Swedish accountability system is that there are almost no sanctions. There are no actual sanctions on exceeding or improperly using the budget: criminal proceedings are applicable only in case of fraud. In addition, the 'golden strings' of the budget do their work and there is a great emphasis on consultations. However, the budget discipline is strong. Interim overspending of the annual budget adopted by the *Domstolsverket* gives no ground for compensation: the budget must be adequate, making up for the difference occurs only very occasionally. According to the courts, the budgeting system does, however, increase the management's own responsibility and flexibility.

Supervision of the management

A system of supervision over the management of individual courts hardly exists in the legal sense. Consultation and enhancing the proper responsibility and support are the *Domstolsverket*'s principal steering instruments as regards the courts. If things get out of hand, the *Domstolsverket* may withdraw the delegation of the budgetary powers from an individual court. In fact, such a withdrawal boils down to a court of justice being under supervision. Although the *Domstolsverket* has already threatened to do this several times, it has never materialized.

The disciplinary effect that results from the reports and statistics from courts merits mentioning. Swedish courts – as became evident during a visit – do not like to perform worse than other courts. The comparison between courts with good figures and those with bad figures in the annual report or during meetings has a very powerful effect, according to the *Domstolsverket*.

3.4. Intermediate conclusion, Sweden

The Swedes – this was the impression during a study visit in 1997¹⁸ - are satisfied with the performance of *Domstolsverket*, the method of budgeting and the system of integrated management at the level of the courts. The promotion of the self-responsibility of courts and the flexibility of the system were mentioned as important advantages of

¹⁸ See the report by D. Kersten and W. Voermans, 'The decentralised budgeting of the judiciary and the management of Courts in Sweden', Tilburg/The Hague 1997.

the system. The satisfaction with how the *Domstolsverket* performs has mainly to do with the way in which the Council interprets its competence. As an independent administrative organ, which is well informed about the courts, the Council is successful – according to representatives from the different levels of the Swedish court system – in solving many of the problems with which courts have to contend. Also in the budget distribution area, there is satisfaction (compared with the alternative that previously existed in Sweden, of direct ratification and budgeting by the Ministry of Justice), although a number of the interviewed court representatives consider the apportioning criteria and the basis for the distribution of the budget – used by the *Domstolsverket* – to be obscure. The system of equity bonuses, which courts can receive in exceptional circumstances, is subject to much criticism by courts, certainly the courts which hardly have any exceptional circumstances.¹⁹ In addition, some court administrators appear to take the view that the *Domstolsverket* is pursuing a cautious policy: the *Domstolsverket* is not easily inclined to take measures or action against courts that do not perform well. There is deep respect for the autonomy of courts. ‘Management by dialogue’ is the be-all and end-all for the *Domstolsverket*.

The Swedes’ satisfaction with the *Domstolsverket* already became apparent in another matter at an earlier stage. The 1993 plans of the Liberal-Conservative Government to abolish the *Domstolsverket* met with strong opposition among the judges in Sweden, who felt that their independence would be infringed to a substantial degree. The abolition plan was withdrawn on account of widespread resistance to it.

3.5. Comparative overview of the tasks and powers of the Swedish *Domstolsverket*

I. Policy-making powers:

- ✓ external affairs
- ✓ provision of public financial services
- judicial collaboration
- ✓ personnel management

¹⁹ At present, within the framework of a research project into the possibilities to reorganise the judiciary, an investigation is being conducted by the Swedish Auditor’s Office into the budget distribution of the *Domstolsverket* and the distribution criteria used.

- selection policy
- ✓ research policy
- ✓ advising the Ministry of Justice
- quality policy
- II. Managerial powers:*
- ✓ housing & security
- ✓ automation
- ✓ administrative organisation
- ✓ provision of administrative information
- III. Budget procedure*
- ✓ budget policy
- ✓ distribution means
- ✓ spending accountability
- IV. Other powers*
- corrective powers/discipline
- (power to propose candidates for) judicial appointments
- promotion of and posting judges

Chapter 4. Ireland (Courts Service)

4.1. The constitutional position of the judiciary in Ireland

The position of the judiciary in Ireland is greatly affected by the British way of setting up the judicial procedure and judicial organisation, such as the organisation which existed well before the existence of the independent Irish Republic and the Irish Constitution of 1922. Through the Judicial Courts Act of 1924, the basis of the British judicial organisation, as it had existed before 1922, was adopted, the difference being that the Irish Minister of Justice rather than the British Lord Chancellor was given the highest responsibility for the management of the judicial system. This judicial organisation was not so much based on a meticulous analysis of the brand-new situation, but rather on a longing for continuity in the judicial procedure. According to the Denham group, a committee that has been giving advice on a phased revision of the judicial organisation in Ireland since 1995, this has resulted in a basic flaw in the system – of, in particular, the management – of the judicial organisation.²⁰ According to the Denham group, this was inadequately thought out right from the start in 1922. From the mid-1970s, this flaw has led to increasing judicial procedure problems, as the system had – certainly with a constantly growing number of cases – become too expensive, too complex and too slow.²¹ Also, the independent position of the judiciary did not benefit from the only partially new structure of the judicial organisation in 1924. Where the Lord Chancellor, being the ultimate person responsible for the management and the funding of courts in the British system, is a judge himself, and as such plays a role in the Government's policy-making and in the legislation process, the Minister of Justice is not involved as a judge but politically and in accordance with the Government's administration and legislation. For the Denham group, this is not only a loss for the independent position of the judiciary, but it also decreases the possibilities of allowing the judiciary more individual responsibility regarding its own

²⁰ See Working Group on a Courts Commission (further: Denham Group), *First Report: Management and Financing of the Courts*, Dublin 1996.

²¹ See Denham Group, *op cit* 1996, p. 18 and p. 9.

management, enabling it to work more efficiently and cheaply as a result.

In Article²² 35 (2) of the Irish Constitution, the independence of the judiciary is guaranteed, both from the perspective of the legal position as well as functionally, at the level of individual judges. Irish judges are appointed for an indefinite period by the President of the Republic and a dismissal policy with strict guarantees applies to judges – particularly those of the Supreme Court and the High Court. The legal position is also governed by the provision of section five of Article 35 of the Constitution, which states that a judge's salary may not be reduced during his appointment. Article 35 (2) of the Irish Constitution provides for a functional guarantee of independence by prescribing that judges are independent in the execution of their judicial functions and that, in addition, they are only subordinate to the Constitution and the law. The Irish Constitution contains no guarantees as such for the independent performance of courts or of the judicial organisation as a whole, although Article 6, section two, of the Irish Constitution provides that the legislative, executive and judiciary powers may be exercised only by the organs the Constitution has authorised for this purpose.

The judicial organisation in Ireland

The 'ordinary' courts in the Irish Republic – *i.e.* the courts responsible for the administration of civil and criminal justice – has two levels: the first level consists of the *Courts of First Instance*, and the second level consists of the *Court of Final Appeal*. The level of the courts of first instance consists of the *High Court* and the *Courts with local or limited jurisdiction* (successively the *Circuit Court* and the *District Court*). The District Court is *one* Court that consists of a president and 39 judges. The District Court is empowered to try smaller criminal offences and civil cases (up to £25,000). The District Court administers justice without a jury. In some matters a District Court also tries cases in which the right to a jury actually exists. This is possible if the defendant or the Director of Public Prosecutions do not object to it. Circuit Courts are empowered to try criminal offences for which trial by jury exists. Hence, it concerns mostly 'ordinary' – which is to say not serious – crimes, the 'indictable offences'. The Circuit Court consists of a president and 15 judges. The Circuit Court deals with criminal cases from the District Court on appeal, and in the last instance. Further, the District Court is competent – in civil cases – as a court of first instance for cases

²² In Irish legislation, the term 'sections' rather than 'articles' is used.

that the law has designated as such and is empowered to review the civil decisions of the District Court as a Court of appeal.

The High Court has a general competence in criminal and civil cases. The High Court consists of a president and 15 ordinary judges. By virtue of their office, the Chief Justice and the President of the Circuit Court partake in the High Court. In civil cases the High Court is empowered as a Court of appeal for judgments of the Circuit Court. In criminal cases, the High Court is commonly referred to as the Central Criminal Court. The Central Criminal Court is empowered to pass judgment on legal questions which – pending a procedure – are referred to it by the District Court. In addition, the Central Criminal Court can try serious crimes in respect of which the right to a jury also applies. For certain exceptional criminal cases – offences against the State – a special criminal judge is empowered, the Special Criminal Court.²³ Three judges have a seat on this special court, and there is no possibility of jury trial.

Appeals against criminal judgments of the District, Circuit or High Courts lie to the Court of Criminal Appeal. In the last resort, there is an appeal to the Court of Cassation, *i.e.* the Supreme Court, against decisions of the High Court and the decisions of other courts which the law has designated. This highest judicial authority in Ireland consists of the Chief Justice, at least four judges and the President of the High Court.

In Ireland, the administrative judiciary has for the most part developed within the system of ordinary criminal and civil courts. There are no special administrative courts, but the possibility of special actions within legal proceedings, in which the Government is a party, exists, or in which a citizen seeks legal protection against government action. Certainly, for the purpose of disputes with the Government, there are special *tribunals*, which, in the first instance, review objections to Government action. Thus, it concerns courts such as the Appeal Commissioners of Income Tax, the Appeals Officers in the Department of Social Affairs, the Planning Board (for appeal cases in the area of the environmental planning) etc.²⁴

4.2. Ministerial responsibility and public control of the judicial procedure in Ireland

Until recently, the responsibility for the management and funding of the judicial procedure in the Irish system was assigned to the

²³ By virtue of the Offences against the State Act of 1939.

²⁴ For a further insight, see A.K. Koekkoek, *op cit* 1998, pp. 394-395.

Minister of Justice. In Ireland Ministers are collectively and individually accountable to the Irish Parliament (*Dáil Éireann*) for the affairs of their department.²⁵ In Ireland a system of general ministerial responsibility is in force, in the sense that a Minister can be called to account for matters which, in the general sense, fall under his political responsibility. However, the Irish Constitution does not mention the ministerial responsibility before the Irish Senate (*Seanad Éireann*): in practice the members of the Government are also individually and collectively accountable to the Senate.²⁶

In 1996 the Denham group concluded that the way in which the management and funding of the judiciary are interpreted caused a number of fundamental problems. The Denham group found the existing system of management – in which the Minister of Justice was entirely responsible for the management of the judiciary – ineffective and inefficient. According to the group, a clear structure of management and accountability was absent in particular. The existing system was a fragmented, uncoordinated management and financing system and appeared to offer hardly any room for the courts' own responsibility with regard to their own operational management. In addition, according to the Denham group, there were hardly any quality standards for assessing the achievements of judges and courts, and bad use was made of new information technology; there was little interest in instructing and training judges and auxiliary personnel, and little concern about the poor accommodation, and the judicial organisation had insufficient grip on its own information supply and its own production data which are necessary, for example, to be able to report on flow, work volumes and new cases. In the group's eyes – and not last on the list – the courts had far too little thought for litigants (information, complaints, etc.)²⁷ What is clearly noticeable in this problem analysis is that the points on which the problems are identified run largely parallel to the managerial tasks and powers that the Swedish *Domstolsverket* exercises with regard to the Swedish courts. In any case, it is not surprising that in 1996 the Denham group advised the setting up of a Courts Service in Ireland based on the Swedish model. In 1998 this Council – after three more consultations and studies by

²⁵ See article 24.4.1 *et seq.* of the Irish Constitution.

²⁶ See also A.K. Koekkoek, Ireland, in [In Ireland]: L. Prakke and C.A.J.M. Kortmann (editor), *Het staatsrecht van de landen van the Europese Unie*, [The constitutional law of the countries of the European Union] 5th impression, Deventer 1998, p. 383.

²⁷ The Denham group identified no less than 17 groups of fundamental problems in the Irish administrative system. See the report of the Denham group, *op cit* 1996, pp. 35-36.

the Denham group – was actually established. A substantial number of managerial and financing powers that used to be under the control of the Minister of Justice have been transferred to the Irish Courts Service.²⁸ This primarily means the Minister is no longer responsible for the ‘day-to-day’ and operational management of Irish courts. However, with respect to the main aspects of management and funding – in the sense of creating adequate conditions and means for making effective management of courts possible – the Minister of Justice remains accountable to the Irish Parliament. This responsibility is applicable in particular to the budget, budgetary justification and information supply. To make this ministerial responsibility concrete, the new Irish system provides for reporting and information obligations of the Courts Service to the Minister of Justice.²⁹ On behalf of the Court Service, the chairman (the Chief Executive) takes care of this information. In addition, at the request of parliamentary committees, the chairman of the Courts Service must give information about court management matters, although he does not have to examine the way in which justice is administered in the courts. The justification relating to the expenditure of the budgetary funds before the General Auditor’s office and Parliament takes place, in the first instance, in a room of the Courts Service itself, although this responsibility is necessarily shared with the Minister of Justice, who is the main person responsible for the budgetary policy.³⁰ How the sharing of responsibilities will develop in practice is still unclear at present, as the Courts Service has only been in existence for a short time. Indeed, it is remarkable that, for the Denham group, the Courts Service is itself politically responsible for the financial management and the administration of courts.³¹ Whether this line will be retained is doubtful, certainly if politically sensitive incidents which relate to the financial management of the administration of courts occur. The line of a Minister’s political responsibility to Parliament has different dynamics than that of the much slower and less direct line of responsibility that the Courts Service has with Parliament.

With the budgetary cycle, the Government can, through the Minister of Justice, set policy objectives and implement policy with regard to the judiciary and the administration of justice. To this end, the policy

²⁸ Article 29 of the Courts Service Act of 1998 gives a comparative overview of the tasks and powers which previously rested with the Minister of Justice and as from 1998 have been executed by the Courts Service.

²⁹ See, *inter alia*, article 8, Courts Service Act 1998.

³⁰ See Working Group on a Courts Commission, *Fourth Report: The Chief Executive of the Courts Service*, Dublin 1997, p. 29 and further.

³¹ See Denham group, *op cit* 1996, and p. 49.

plans of the Government, as well as the strategic three-year plans which the Courts Service must draw up in accordance with the law shall have to be geared to one another.³² In the meantime, the Government or a Minister has the possibility of formulating policies in administration of justice matters and of taking this up with the administration of the Courts Service. In accordance with the Courts Service Act of 1998, the executive of the Council, when performing tasks and exercising powers, is obliged to take the policy of the Government or of one of the Ministers into consideration.³³

4.3. The Irish Council for the Judiciary (Courts Service): composition and powers

The Courts Service in Ireland – for the time being – consists of an administration (Board), a chairman (Chief Executive Officer)³⁴ and judicial staff. The Courts Service has no further division into five sections, pursuant to the law, yet five office divisions exist within the service.³⁵ The powers of the Courts Service, for all intents and purposes, remain with the board. The Chief Executive acts as implementing organ of the board, of which he is officially a member, but he also has some independent powers in the area of reporting, budgetary justification and information supply (especially in the area of the external justification and the external information supply). Thus, it is the Chief Executive who can be called to account by a Parliamentary committee in order to give a decisive answer about the efficiency figures of the judicial organisation or the policy of the Courts Service itself. Furthermore, the Chief Executive is responsible for the day-to-day management of the Courts Service and is, as such, responsible for the financial management of the board and the personnel.

The Courts Service has an extensive board of directors and is made up of nine members coming from the different ranks of the courts in Ireland, the Attorney General – officially the Chief Executive – two lawyers, a member representing the judicial support staff, a public prosecutor/district attorney, a member who represents the interests of the courts' clientele, a member designated by united unions and a legal expert. High on the Denham group's list is the proposal that the

³² Article 7 of the Courts Service Act 1998.

³³ Article 13, subsection 2, under b.

³⁴ This Chief Executive Officer is as from 1 January 1999 Mr. P.J. Fitzpatrick.

³⁵ Article 22 Courts Service Act 1998. The administration can establish committees. See article 15, Courts Services Act 1998.

majority of the board should be composed of judges. Through a detailed arrangement for the filling of vacancies, the law ensures that this judicial majority is also maintained in the event of board members no longer being able to function as such in the executive of the Council.³⁶ Moreover, on setting up the board, the concept of judicial representation was all-important. The Denham group proposals concerning the composition have been fully incorporated into the law. This is rather surprising because the Denham reports do not contain any intrinsic detailed motivation about the scope of the board.

The board is responsible for the general policy of the Courts Service and the supervision of the implementation of that policy by the Chief Executive.³⁷ The board of directors must ensure that the Courts Service achieves its essential tasks. These tasks lie in the area of the administration and management of the courts, establishing or making available facilities and services for judges (providing information, training, etc.), providing information to the general public about how the administration of justice functions in Ireland, to care for and manage the accommodation of the judicial organisation and taking care of facilities for the clients of the judiciary.³⁸ In order to be able to accomplish these powers, the board is empowered to acquire real estate, to enter into contracts and arrangements, to arrange staff training and education, establish arrangements for consultations with users of the courts, to recommend appropriate scales of court fees and charges to the Minister, to make proposals to the Minister about the allocation of jurisdiction and business among the courts, and matters of procedure, to provide service to other bodies subject to such conditions, including the payment of fees, as it deems fit, to hire (with the consent of the Minister) consultants and advisers in connection with the performance of the courts and designate court venues. In addition, the Courts Service has some financial powers (including a bank account).³⁹

Besides these tasks and powers, the board has a role in the planning, budget and financial accountability. Accordingly, the board must submit an annual report containing a policy and financial justification. That annual report with, in addition, an annual account, is submitted through the Minister of Justice to Parliament.⁴⁰ Every

³⁶ See article 12 Courts Service Act 1998.

³⁷ See article 13 of the Courts Service Act 1998.

³⁸ Article 5 of the Courts Service Act 1998.

³⁹ See article 6 of the Courts Service Act 1998.

⁴⁰ Article 8 of the Courts Service Act 1998.

three years the board has the duty of making a strategic three-year plan. In that plan the central policy objectives with its policy approach for the administration of justice must be set out. The report must pay attention to the Minister of Justice's policy wishes.⁴¹ Besides target figures in accordance with the intention that the Denham group had with it, such a plan shows the views on the quality of the administration of justice for the coming years.

When performing the managerial powers, the Courts Service works in close collaboration with the registrars of the various Irish courts.

The Irish system of judicial organisation stems from the organisational uniformity of the various types of court. For example, the Circuit Court is in fact one organisation. This has led to the Courts Service implementing a somewhat central management course on the financial and general administration of the courts. Now that the officials of the Ministry of Justice who had previously taken care of the judicial management (the Courts Bench) within the department have all gone to the Courts Service, as from 1999, computerisation is entirely regulated through the Department (the financial administration as well as lawsuit registration), and the financial control of the courts is directly in the hands of accountants working for the Courts Service, while the 'Human Resource Management' is used for all the courts within the service itself, and recruitment, and the organization and maintenance of the buildings is executed entirely by the service. The Ministry of Justice, as was the case just before 1998, pays the salaries, which is applicable to all sections of the judicial organisations. The courts' auxiliary services⁴² themselves retain for the most part the more substantive managerial powers (judicial business)⁴³, such as the intake of cases, control of court fees, instruction, assigning tasks, keeping the cause list up to date, monitoring processing time, serving decisions and sentences, etc. In performing these powers, these public servants are

⁴¹ Article 7 of the Courts Service Act 1998.

⁴² Circuit Courts employ County Registrars for the day-to-day management and secretarial tasks. Their job is comparable to that of a senior secretary of a magistrates' court in England (article 35 Courts Officers Act, 1926). District courts employ Senior Clerks, also comparable to a registrar at the head of a court's registry department in the Netherlands. The High Court has a Master of the High Court, who combines the functions of a court clerk and a staff lawyer. The Master of the High Court is the functional head registry clerk in a more intrinsic area, while the Tax Master, also employed at the High Court, takes care of the financial and administrative management of the High Court. This structure also remained unchanged after 1990, although it is questionable whether the position of County Registrar will continue to exist. See Denham group, *op cit* 1996 (III), and pp. 30-31.

⁴³ Regulated in the Courts (Supplemental Provisions) Act, 1961.

under the authority of the president of the Court to which they belong.

The Courts Service has no powers in the appointment of judges or court personnel,⁴⁴; nor is the service involved with disciplinary jurisdiction. However – through the support of the Human Resource Management of the Courts Service, attention is paid to the career development of judges and court personnel.

The Irish Courts Service has many powers which, as a result of the centralised way in which they are exercised, can easily affect the judicial work. For example, if the way in which matters are to be recorded is changed centrally, the court registrars probably also have to work differently, need to plan and assign court cases differently etc. Consequently, management and substantive judicial powers quickly get in each other's way. Section 9 of the Courts Service Act of 1998 checks the progress of such practices: the tasks and powers of the Courts Service may not prevent or interfere with the independent performance of judicial powers by the courts.

Objectives of the Courts Service

With the establishment of the new Courts Service in 1998, a number of policy objectives were formulated, which are also to be found in the Netherlands. According to the Denham group, the Courts Service could improve access to the courts and the effectiveness and efficiency of the judicial process, prevent unnecessary delays in case management, streamline the organization of the courts, and ensure a smoother financial, administrative and human resource management. Besides, working with a Courts Service makes it easier to formulate and pursue clear co-ordinated objectives for judicial organisations and more clarity exists about sharing responsibilities and powers.⁴⁵ It is remarkable that, compared to the Dutch plans, these objectives are focussed in particular on the financial and administrative side of the judicial business. There are no or hardly any expectations about any contribution to the improvement in the quality of the administration of justice through better management and a better organisation – apart from reducing delays in and improving access to the courts. Also, the promotion of judicial

⁴⁴ On this issue, too, fundamental changes are imminent in Ireland. Recently a study group specially set up for this purpose reported as the first step in that process about appointments and appointment requirements for judges in high courts and the Supreme Court. See *Report of the Working Group on qualifications on the appointment as judges of the High and Supreme Court*, Dublin 1999.

⁴⁵ See Denham group, *op cit* 1996 (I), and p. 45.

independence by the establishment of a Courts Service is notably missing on the list of policy objectives of the operation.

4.4. Intermediate conclusion, Ireland

One of the most striking features of the Irish Courts Service is the detailed rules governing its organization. The tasks and powers of the Courts Service in the Courts Service Act are set out quite precisely, and, in view of the responsibility that the Minister of Justice still bears for the administration of justice, this could be considered an advantage. After all, the Minister can no longer be held accountable for the performance of the tasks and powers of the Courts Service. The question is, however, if this clarity is not a smokescreen, certainly considering the permanent responsibility that the Minister of Justice continues to have for the supply of the means necessary for the administration of justice. In addition, although the political responsibility for the financial management and administration of the courts is now vested in the Courts Service, this still does not mean that the Minister of Justice can no longer be called to account in this area. When incidents happen, the general political responsibility of the Minister of Justice will continue to play a role. The dynamics of the accountability relationship between Parliament and the Courts Service differs from that between the Minister and Parliament. It is true that the Irish solution constitutes a selective and quite faithful imitation of the Swedish arrangement through the *Domstolsverket*, but the way in which ministerial responsibility in Sweden is defined in relation to the responsibility of the *Domstolsverket* (justification is also due to the Swedish Parliament for the financial management and administration of courts) does differ in reality. The context of the public control in Sweden is completely different from that in Ireland. First of all, based on the Swedish tradition to leave implementation and management largely in the hands of independent administrative organs, a system has developed in which the control of this handling of tasks and powers is not mainly organized through the control of politically responsible administrators, but in another way, *viz.* through an Ombudsman, the composition of the board, publicity of management, external forms of responsibility through reports, etc. On the basis thereof a system has developed in which it is relatively easy to call administrators within an independent administrative body to account. This occasionally leads to the departure of administrators. There is no such background in a country like Ireland, as the public control over many forms of management was in fact organised to a great extent – in any case until recently – through politically responsible administrators. This means that the adoption of the

Swedish system does not yet guarantee that the favourable effects of the Swedish system are automatically imported.

In Ireland – just as in the Netherlands – the establishment of the Courts Service is part of a combined operation whereby a number of aspects of the performance of the judicial organisation are reconsidered. In Ireland, moreover, focus is primarily on the organisation of the financial and administrative management of the courts. It was precisely in this area that serious problems arose and a direct solution for them is being devised. Much less effort is being put into the more indirect objectives such as increasing the independence of the judiciary, or improving the quality of courts. A possible reason for this is that the independence of judges and the quality of the court system is much less a subject for debate in a country with a ‘common-law’ tradition, as Ireland is, than in continental legal systems.

The Irish Courts Service has a very broad representative composition at management level. The reason for this does not appear directly from the documents, but the idea of representing the board’s most important target groups seems to have been paramount. Such a broad management makes it almost necessary to have a general manager who observes daily routine and represents the service. Thus, a manager (the Chief Executive) taking care of the day-to-day management also chairs the Courts Service in Ireland, just as in Sweden.

4.5. Comparative overview of the tasks and powers of the Irish Courts Service

I. Policy-making powers:

- ✓ external affairs
- ✓ public services
- judicial collaboration
- ✓ personnel management
- selection policy
- ✓ research policy
- ✓ advice to the Ministry of Justice
- policy on quality

II. Management-related powers:

- ✓ accommodation & safety
- ✓ automation
- ✓ administrative organisation
- ✓ administrative information supply

III. Budget procedure

- ✓ budgetary policy
- ✓ distribution means
- ✓ spending accountability

IV. Other powers

- corrective powers/disciplining
- (appointment powers with) appointing judges
- promotion and posting of judges
- ✓ education and training

Chapter 5. Denmark (*Domstolsstyrelsen*)⁴⁶

5.1. The constitutional position of the judiciary in Denmark

Article 64⁴⁷ of the Danish Constitution guarantees the functional independence of the ordinary judiciary by providing that in performing their judicial powers, judges are bound only by the law. That same Article 64 also guarantees independence in terms of their legal position through a security in office system under which judges can be discharged from their office only by a judicial decision, and can be transferred against their will only by means of a judicial reorganisation. Further, the term of office ends when judges reach the retirement age (70).

This protection does not apply to the '*konstituerede dommere*', a judge in temporary service who also fulfils another duty.⁴⁸ A guarantee of independence at the level of the judicial organisation itself is found in Article 3 in conjunction with art. 61 of the Danish Constitution. It provides that the power to administer justice rests with the courts and that the judiciary and the executive must remain separated. It does not give a real guarantee in the sense of a claim: it rather is, as Gilhuis observes, a general political principle.⁴⁹ The constitutional provisions concerning the separation between the executive and the judiciary have not prevented the development of special courts alongside the ordinary judicial court system. In addition, it even happens that judiciary powers are assigned to

⁴⁶ We will deal only very briefly with the Danish Council for the Judiciary here. Initially, a study visit to Denmark was planned, but at the request of the Danes, this visit was postponed. The Council has not yet gained any experience, and much preparatory work was not yet completed at the time of contact. The discussion on the establishment of the Council is still continuing. Hence, we considered it wiser (for the time being) not to give any impression rather than a wrong one.

⁴⁷ The Danish Constitution (*Grundlov*) and other Danish legislation make use of section (indicated with §) as the smallest regulation unit. We shall, however, refer to them below as 'article'.

⁴⁸ See also J.G. Steenbeek and P.C. Gilhuis, *Het Koninkrijk Denemarken*, in [In the Kingdom of Denmark]: L. Prakke and C.A.J.M. Kortmann (editor), *Het staatsrecht van de landen van de Europese Unie*, [The constitutional law of the countries of the European Union] 5th impression, Deventer 1998, p. 78.

⁴⁹ See P.C. Gilhuis, *op cit* 1998, p. 78.

administrative organs, even in the highest instance, in which cases, the *Højesteret* (Supreme Court) is not competent. This practice is not considered unconstitutional.⁵⁰

Judicial organisation in Denmark

The ordinary judicial court system in Denmark includes 84 '*byretter*' (courts of first instance, comparable to the Dutch cantonal courts, or magistrates' courts or county courts in other countries), two appeal courts, the '*landsretter*' (comparable to the Dutch courts of appeal), and one Court of Cassation, the '*Højesteret*' (Supreme Court). The largest *byretter* is the court in Copenhagen (a president and 421 judges); the other *byretter* (48) always consist of one judge only.

The competence to try criminal and civil cases is vested in the ordinary judiciary. Article 65 of the Danish Constitution provides that, in criminal cases, members of a jury take part in the deliberations of the Court.

In addition, the Danish judicial organisation has yet another set of special courts, consisting of the *sø- og handelsret* (maritime and commercial law), the *søretter* (maritime courts), the *handelsretter* (commercial courts), the special *Særlinge Klageret* (court of complaint, having the competence to try disciplinary cases with regard to judges), the *forvaltingsdomstole* (administrative courts), the *boligretter* (courts specialised in rent and leasing disputes), courts specialised in real estate expropriation, special courts for issues of deprivation of liberty and clerical courts. Not all these special courts are permanent bodies. Most are, in fact, not permanent, but can be convened on an ad hoc basis. Jurisdiction conflicts are in most cases resolved by the special courts themselves in the first instance. If necessary, the *Højesteret* (Supreme Court) decides conflicts. The regulations for the organisation of judiciary and the regulations for criminal proceedings are laid down in *Retsplejelov* of 1916 (Act on the Administration of Justice).

5.2. Ministerial responsibility and public control in Denmark

In Denmark, the Ministers are individually and collectively responsible to Parliament (*folketing*). The Prime Minister (*Statsminister*), however, assumes a central position in the relationship based on mutual trust existing between Government and Parliament. If Parliament withdraws its trust in the Government with

⁵⁰ See P.C. Gilhuis, *op cit* 1998, p. 79.

a vote of no confidence, the entire Government must resign by virtue of a constitutional obligation (Article 15,-second paragraph, Danish Constitution). In Denmark, the ministerial responsibility has developed into a *full* ministerial responsibility.

Until recently, the Minister of Justice was fully responsible for the management of the judicial organization. In his advice of April 1996 concerning the judiciary, the Commission for the Judiciary (the Pontoppidan Commission) came to the conclusion that this form of judicial management is at odds with the principle of judicial independence.⁵¹ According to the commission, this is a matter of principle, rather than that actual practice would have proved that the executive power used its managerial powers to curb the independence of the judiciary. In any case, the Commission advised that courts should be given more tasks and powers of their own in the area of judicial management, for the purpose of establishing a Council for the Judiciary and, by doing so, to contribute to the reinforcement of judicial independence.

In the new Danish system, the general budgetary responsibility remains mostly with the Minister and the budgetary legislator. They have chosen to ensure that parliamentary control over the main aspects of the budgeting of the judiciary continues to be guaranteed.⁵² For the allocation of funds and financial accountability, as well as administrative and financial management, the Danish Council for the Judiciary will be responsible from now on. In order to ensure that the Minister is able to fulfil his general budgetary responsibility, without being in conflict with judicial independence, the new Danish system, on the proposal of the Pontoppidan Commission, contains the possibility that the Minister of Justice dismisses the entire board of the *Domstolsstyrelsen* (= the Danish Council for the Judiciary established on 1 July 1999) in the event that this board takes demonstrable unlawful decisions with immediate and far-reaching consequences, or if the board is responsible for serious overspending.⁵³ Individual members of the board can only be dismissed in accordance with a separate procedure before the special '*Særlinge Klageret*' Court. In addition, the Minister can give instructions to the board, although the independence of the board does not, of course, prevent consultations and even meetings between the Minister and the Danish Council for the Judiciary.

⁵¹ See Committee on the Judiciary, *Extract of the report* (the English translation), Copenhagen 1996, p. 19.

⁵² See Pontoppidan Commission, *op cit* 1996, p. 19.

⁵³ See article 6, section 3, of the *Lov concerning Domstolsstyrelsen*.

In the Danish system, just as in the Irish and Swedish systems, the *Domstolsstyrelsen* plays a role in the budgetary cycle. In strategic long-range plans, the board submits the policy objectives for the coming years and every year the board presents budget proposals to the Minister of Justice. Furthermore, the board has to render account of the financial and administrative management of the courts. That is achieved by sending the Minister an annual report and annual accounts and, on request, to provide the Minister of Justice with information about its management on an ad hoc basis. The Minister, furthermore, acts as a link between Parliament and the board. The initiative also rests with the Minister, whenever necessary, to introduce bills in Parliament.

How the sharing of responsibilities will develop under the new system cannot be predicted for the time being: the first experiences still have to be gained. Just as in the Irish situation, the question naturally remains as to whether the division between ministerial responsibility and the responsibilities of the *Domstolsstyrelsen* will remain easy to distinguish in practice.

5.3. The Danish Council for the Judiciary (Domstolsstyrelsen): composition and powers

The Danish Council for the Judiciary, the most recent among the European councils for the judiciary, is – just as the Irish Courts Service – an imitation of the Swedish *Domstolsverket* in several respects. The Danish Pontoppidan Commission was clearly inspired by the Swedish model of the Swedish *Domstolsverket*⁵⁴ during the preparation of the report which lies at the basis of the Danish Council for the Judiciary. This exemplary role of the Swedish board concerns the composition as well as the tasks and powers that the Danish board will exercise. As from 1 July 1999, the Danish Council for the Judiciary (*Domstolsstyrelsen*) will act as a temporary board in Denmark. The Council will be a permanent body after amendments to the Danish Constitution.

The Council for the Judiciary in Denmark is under the chairmanship of a general director and a board of five members coming from the different judiciary organisations (Supreme Court, appeal courts, district courts, cantonal courts and the special courts), two board members coming from the ranks of the judicial staff of the courts,

⁵⁴ The Commission has undertaken study trips to Sweden and the director-general of the Swedish Council for the Judiciary, together with a number of assistants, was a guest in Denmark for an afternoon workshop. See Pontoppidan Commission, *op cit* 1996, p. 5.

and two from the courts registrar's office. In addition, a lawyer and two board members with managerial expertise are in the *Domstolsstyrelsen*. The Minister of Justice appoints the board members for a four-year period each time.⁵⁵ Board members cannot simultaneously be Members of Parliament, members of the Danish Board of State, or of any other representative body at local level.

A general director of the board handles the day-to-day management of the Council. This director implements the policies specified by the management of the board. The board of the *Domstolsstyrelsen* has the power to appoint and dismiss the general director.

The General Board of the Council is responsible for the general policy of the Council. One of the most important duties in this context is the involvement with the budgetary cycle. On the basis of the budget granted, the board apportions the budget among the different Danish courts. Expectations are that in this area, the distribution model used by the Ministry before 1 July 1999 will still be used for the time being. A number of items – such as salaries⁵⁶ and main items for administration of justice per Court – are already earmarked by the budget law itself. The board takes care of the distribution, the supervision and the justification of the expenditure of the budget. In doing this, the board is bound by the framework of the Danish Governments Accounts Act (Finance Act). Besides, the Board, just like other State organizations in Denmark, is subject to the financial supervision implemented by the Danish equivalent of the General Auditor's Office (Auditor General of Denmark and the Auditors of the Public Accounts). The supervision of the expenditure of the budget is exercised permanently by the board; just like Sweden, Denmark has opted to use a centrally operated accounting data system, making it possible to monitor spending periodically. The spending authority – insofar it does not concern matters for which the *Domstolsstyrelsen* has a special responsibility (accommodation, computerisation, training, and suchlike) – is decentralised as much as possible to the managers of the courts themselves. Every year, the Board sends a report to the Minister of Justice, who in turn passes it on to Parliament. The Board of the Danish *Domstolsstyrelsen*, within the framework of the strategic long-range plan that they draw up, also presents an annual budget proposal to the Minister of Justice. As the Pontoppidan Commission foresaw in 1996, this may give rise to the problem that the budget proposal of the board becomes invisible considering the rest of the Justice budget proposal in any year, or that a number of budgetary requests are not included in the budget

⁵⁵ See article 4 of the Lov on *Domstolsstyrelsen*.

⁵⁶ There is a separate independent committee (Judges' Salaries Committee) for fixing the level for the salaries in Denmark.

proposals. This has prompted the Commission to propose that the Board of the *Domstolsstyrelsen* be given the right to address Parliament directly, should the occasion arise, if the Board considers the funds for the administration of justice in the Minister of Justice's budget proposal in any year to be insufficient.

Besides the budgetary powers, the Danish *Domstolsstyrelsen* has a general competence in managing the Danish judiciary organisation. This concerns matters such as computerisation (business administration and financial administration), training, recruitment,⁵⁷ accommodation, advice, information and providing information about the Danish judiciary, etc. The competence of the Danish Council for the Judiciary is very broadly defined.⁵⁸ In the new system, many managerial powers will be exercised centrally by the Council itself. That also has to do with the size of many of the Danish courts. Nearly all *byretter* (except for the Copenhagen one) consist, for example, of only one judge, who has only a small secretarial staff. With regard to such small organization units, the *Domstolsstyrelsen* can play a strong service-rendering role.

Besides the direct powers with regard to the management of the judicial organizations, the Board still has a special power, namely to take care of the office support to the independent Judiciary Selection Committee, a board which functions independently of the *Domstolsstyrelsen*, and advises the Minister of Justice on judiciary appointments.⁵⁹ For complaints about the decisions or the dealings of the Danish *Domstolsstyrelsen*, there is an appeal both to the special *Klageret* and to the Danish Ombudsman.

5.4. Intermediate conclusion, Denmark

The intermediate conclusion for the Danish *Domstolsstyrelsen* can be brief. The Danish *Domstolsstyrelsen* shows a strong resemblance to the Councils for the Judiciary in Ireland and Sweden. The Council has, just as in Ireland and Sweden, tasks and powers in the area of distribution, allocation, expenditure supervision and justification of spending of the budget funds and general managerial powers on behalf of the Danish courts (accommodation, computerisation, training and recruitment, information and external information

⁵⁷ The Council for the Judiciary, together with the Danish Order of Barristers, is responsible for setting up an exchange programme of young lawyers and judge-substitutes/judge's assistants.

⁵⁸ See article 3 of the Lov on *Domstolsstyrelsen*.

⁵⁹ Apart from that, the Board has only the power to advise. In Denmark the appointment of judges is and remains vested in the Minister of Justice.

supply, etc.). In the Danish situation, too, the Minister of Justice is and remains responsible for the main aspects of the budgetary policy with regard to the judiciary, and the *Domstolsstyrelsen* is responsible for the allocation of funds and financial accountability. Exceptional features of the Danish system are the four-year term of the executive members of the Board and the possibility for the Minister of Justice to dismiss the entire executive team of the Council in the event of unlawful action of the Board with grave and acute consequences or excessive overspending. Besides, the Danish management of the Council for the Judiciary itself has the authority to appoint and dismiss the general director. More than other countries perhaps, Denmark has opted for means of public control over the exercise of power and the general performance of the Board other than control through ministerial responsibility (independent financial supervision, special legal protection against decisions and dealings of the Board, specific redress of the Board vis-à-vis Parliament, ombudsman inspection).

5.5. Comparative overview of the tasks and powers of the Danish *Domstolsstyrelsen*

I. Policymaking powers:

- ✓ external affairs
- ✓ public services
- judicial collaboration
- ✓ personnel management
- selection policy
- ✓ research policy
- ✓ advice to the Ministry of Justice
- policy on quality

II. Management-related powers:

- ✓ accommodation & safety
- ✓ automation
- ✓ accounting organization
- ✓ provision of administrative information

III. Budget procedure:

- ✓ budgetary policy
- ✓ distribution of funds
- ✓ spending accountability

IV. Other powers:

corrective powers/disciplining
(power to nominate candidates for) the appointment of
judges
promotion and posting of judges
education and training

Chapter 6. France (*Conseil supérieur de la magistrature*)

6.1. The constitutional position of the judiciary in France

At first sight, and measured in terms of the way in which the independence of the judiciary is guaranteed, the French constitutional system somewhat resembles the Dutch system. This is not surprising considering the background of the constitutional history: France and the Netherlands share a basis in the constitutional tradition which existed at the time of the French Revolution. Nevertheless, hiding behind these superficial similarities, there are marked differences relating to the cultural developments that the various public institutions and their constitutional position in the two countries have undergone since that time. In few areas does that difference appear greater than in the area of the judiciary. The French constitutional system – certainly in the eyes of observers within the French system itself – is characterised by rather strict forms of control with regard to the judiciary, aimed at calling guarantees into being against an all too independent judiciary. These guarantees can mostly be found in hierarchic power and supervision structures, which, just as in the French administrative structure, also play a major role in the judicial organisation.

The independence of the judiciary is chiefly guaranteed functionally and from the legal position perspective. Heading VIII of the Constitution of 1958 is devoted to the position of the judiciary, the '*Autorité judiciaire*'. This designation of the judiciary in the French Constitution alone shows that the judiciary in the French system has another role than the judiciary in, for example, the Dutch constitutional system. The judiciary in France is an '*autorité publique*' and not a '*pouvoir public*'.⁶⁰ The organisation and method of working, despite many reforms since 1958, are regularly exposed

⁶⁰ Please refer to C.A.J.M. Kortmann, *The French Republic* [The French Republic], in: L. Prakke, C.A.J.M. Kortmann (editor), *Het staatsrecht van de landen van de Europese Unie*, [The constitutional law of the countries of the European Union] 5th impression, Deventer 1998, p. 269. That the Constitution from 1946 – the Constitution of the IVth Republic – still used the term '*pouvoir judiciaire*' does not mean, however, that the judiciary at the time had a more powerful or more authoritarian position. Compared to the judiciary at the time, the present-day judiciary plays a significant role.

to criticism voiced in the literature and by the two influential unions for judges and magistrates, the '*Syndicat de la magistrature*' and the '*Union syndicale des magistrats*'. This rather different position of the judiciary in the French constitutional establishment has undoubtedly to do with the historical development of this State power in the French Republic, but also with the other way in which the constitutional 'checks and balances' are designed in the French semi-presidential system.

Under Article 64 of the Constitution, it is the President's responsibility in principle to guarantee the independence of the judiciary in a functional sense, supported by the French Board for the Magistrature, the *Conseil supérieur de la magistrature*. This judiciary – the *corps judiciaire* – consists of the 'standing' as well as the 'sitting magistrature'.⁶¹ However, there is an extra constitutional guarantee regarding the independence of the sitting magistrature. Art. 64 of the Constitution provides that members of the sitting magistrature – when appointed – cannot be dismissed (except as a result of disciplinary action). Furthermore, the independence of the judiciary in the French constitutional system in the functional sense is guaranteed by the fact that the executive, Parliament and the legislator are not competent to give orders or guidelines with regard to the discharge of judicial duties in individual cases.⁶²

Main aspects of the organisation of the French judiciary

The ordinary judiciary in France is characterised by a large number of courts. The *Code de l'organisation judiciaire* governs the organisation of the ordinary courts. Empowered to administer justice in civil cases, in the first instance, are successively the *Tribunal d'instance*⁶³ (comparable to the cantonal or county courts),

⁶¹ See art. 1 of the Ordonnance no. 58-170 du 22 décembre 1958 modifiée portant loi organique relative au statut de la magistrature, J.O. 23 décembre 1958.

⁶² Of course, French judges are to administer justice on the basis of legal regulations. See also C.A.J.M. Kortmann, *Rapport inzake het beheer van de gewone rechterlijke macht in Frankrijk* [Report concerning the management van the ordinary judiciary in France], in: P.J.J. Boven d'Eerd, C.A.J.M. Kortmann and M. de Werd/F.A.M. Stroink, Reports of the comparative law research into the management of the judiciary in Germany, France and the United States, federal and the federal state of New York [Reports from the comparative law research into the management of the judiciary in Germany, France and the United States, federal and the federal state of New York,] Nijmegen/Maastricht/the Hague 1996, p. 5.

⁶³ A single judge tries cases, just as in the case of the Dutch cantonal courts. Per *departement* there is at least one *Tribunal d'instance*. In total there are approximately 473. See Kortmann and others, *op cit* 1998, p. 270.

competent to try small claims⁶⁴, and the *Tribunal de grande instance*⁶⁵ (comparable to a district court), being competent to try all other civil disputes.⁶⁶ Appeal in civil disputes can be lodged with the *Cour d'Appel*⁶⁷ (comparable to a Court). The Cour de Cassation, sitting in Paris, performs the task of the court of cassation.

The organisation of the criminal court system is, in principle, regulated in the same manner as that of the civil system, although different names are used. In first-instance criminal cases the *Tribunal de police* (magistrate) is empowered to try offences, and the *Tribunal correctionnel* (courts) for crimes (*délits*) in general.⁶⁸ The *Tribunal de police* sits in the same place as the *Tribunal d'instance* and the *Tribunal correctionnel* in the same place as the *Tribunal de grande instance*. Appeal in criminal cases which were handled in the first instance by the *Tribunaux de police* or the *Tribunaux correctionnels* lie to the *Chambres d'Appel correctionnelles* (criminal appeal courts). For trying serious crimes (*crimes*), the French judicial organisation has – just as, for example, in Belgium – a special court procedure in the first instance for the *Cour d'assises*⁶⁹ (Assizes Court). The *Cour de Cassation* in Paris also sits as a court of cassation in criminal cases.

Besides the ordinary civil and criminal courts, there are various other courts empowered to deal with criminal and civil disputes. Thus, for example, there are separate juvenile court magistrates (*Tribunaux pour enfants*), commercial courts (*Tribunaux de commerce*⁷⁰), separate courts responsible for trying disputes relating

⁶⁴ The linking of the authority to the level of the claim is specified in the *Code civil* and the *Code de procédure civile*.

⁶⁵ In principle, cases in the *Tribunaux de grande instance* are heard by a full court, although use of single-judge sections is made wherever possible. In the large cities the *Tribunaux de grande instance* are divided into divisions. Per *département* there is at least one *Tribunal de grande instance*. In total there are 181 at present. See Kortmann, and others, *op cit* 1998, p. 270.

⁶⁶ The authority for this is specified in both the *Code civil* and the *Code de procédure civile*.

⁶⁷ There are 35 courts of appeal, which, in principle, administer justice in several divisions.

⁶⁸ The competence for that purpose is regulated in the *Code de l'organisation judiciaire* and *Code pénal* and the *Code de procédure pénale*.

⁶⁹ Every *département* has at least one *Cour d'assises*. A *Cour d'assises* is not a permanent court, but a court that only convenes if there is a reason for doing so. The court procedure at the *Cour d'assises* has a measure of trial by jury/non professionals, in that the three judges of the *Cour d'assises* are assisted by nine jurors.

⁷⁰ These commercial courts work with elected judges. Parliament now is discussing legislation which will provide for mandatory professional judges

to industrial law (*Conseils de prud'hommes*⁷¹), etc. The organisation of the civil and criminal system is thus highly fragmented.

The administrative courts are competent to deal with administrative disputes, in other words disputes as a result of a decision or treatment from administrative organs.⁷² In the first instance, administrative disputes are tried by the *Tribunal administratif* (administrative court). Some of the appeal cases in administrative disputes are handled by the *Cours administratives d'Appel*⁷³ (administrative appeal courts). The *Conseil d'Etat* in Paris (*contentieux department*) is competent in administrative disputes assigned to it. These may concern administrative disputes in the first instance, or appeal cases from *Tribunaux administratifs* or *Cours administratives d'Appel* or strict cassation law-suits in administratively tried disputes.

In France, the demarcation regarding the competence between the ordinary courts and the administrative courts is somewhat complicated. In this context, many criteria developed in case law also play a role. A separate court – the *Tribunal des conflits* – is empowered to resolve various competence issues between the ordinary and administrative judiciary.

Besides the courts dealing with criminal, civil and administrative cases, the French judicial system has other special courts in the area of constitutional matters. The two most important courts in this respect are the *Haute Cour de Justice*, a special judicial authority, regulated in articles 67 and 68 of the Constitution, responsible for cases involving high treason (or accusation thereof) of the President. The members of the *Assemblée* and the *Sénat* equally elect the *Haute Cour*. The *Cour de Justice de la République* – also elected by Parliament supplemented with three judges from the *Cour de Cassation* – hears criminal offences perpetrated by Ministers and State Secretaries in office.

In a number of cases, the *Conseil supérieur de la magistrature* is empowered to administer justice with regard to disciplinary matters involving judges and magistrats. For 'sitting magistrates', the CSM can pass judgment in disciplinary proceedings subject to appeal on points of law (*recours en cassation*), and for members of the

that preside over the courts of appeal in a number of cases.

⁷¹ *Conseils* also work with elected judges.

⁷² More particularly, the decisions and dealings of the 'administration' are appealable: all the decisions and dealings of public bodies, excluding those coming from the formal legislator and the judicial bodies.

⁷³ There are five of these courts, each of which are presided over by a member of the *Conseil d'Etat*. In principle, these courts sit as a full court.

'*parquet*' (State Prosecutors), the CSM gives an opinion ('avis') to the Minister of Justice. This opinion of the CSM is, de facto, always followed. The Minister's decision may be appealed to the Council of State (*Conseil d'Etat*) by a '*recours pour excès de pouvoir*'.

Finally, the *Conseil constitutionnel* also has a number of semi-judicial powers to settle disputes concerning specific constitutional matters. Strictly speaking, the constitutional court does not belong to the judiciary.⁷⁴ The *Conseil Constitutionnel* passes judgment over the compatibility of (proposed but not yet established or promulgated) statutory regulations with the Constitution, the permissibility of certain amendments, bills, disputes concerning referenda, different sorts of disputes concerning presidential or parliamentary elections, etc.⁷⁵

6.2. Scope of the ministerial responsibility and public control in the French system

In France, unlike the situation in Sweden, the management, support and budgeting of the court system are not decentralised through the granting of any competence to a Council for the Judiciary. In the French system these tasks and responsibilities fall to the Government, which is accountable to the French Parliament on these issues. In particular, it is the Minister of Justice⁷⁶ who is also accountable concerning the policy implemented by him in the field of administration, management and the judicial organisation. Ministerial accountability concerning policies with regard to the judicial organisation is, however, hardly ever requested. There are a number of reasons for this. First of all, France has the system of collective political ministerial responsibility of the Council of Ministers. Individual Ministers and State Secretaries are responsible only in the criminal and financial sense.⁷⁷ As far as the responsibility regarding the general policy, management and budgeting is concerned, the Minister of Justice is in most cases only called to account about the main aspects of policy in matters that concern the

⁷⁴ It is, for example, explicitly placed outside title VIII of the Constitution and the nine members of the *Conseil* are only appointed for a limited period of time (nine years) and are not eligible for reappointment. See art. 56 of the Constitution.

⁷⁵ See, *inter alia*, title VII of the Constitution.

⁷⁶ Also designated as the *Garde des Sceaux* (Keeper of the Seal).

⁷⁷ See art. 68 of the Constitution.

judiciary and the administration of justice. This general approach is further reinforced by the circumstance that the management and the funding of the courts are largely decentralised.

In France the *Cours d'Appel* (the appeal courts)⁷⁸ are chiefly responsible for the implementation of the budget. Through the Minister of Justice (*Direction de Services Judiciaires*) these *Cours d'Appel* apportion the financial budgets for the judiciary among the courts within their domain and monitor the use of the judicial budgets. The budgetary system works as follows. At the level of the *Cours d'Appel*, the budgetary requests of the districts' courts for the budgetary year are evaluated and formulated together with the annual programmes and policy objectives (*programmes et objectifs*). The budget programmes contain two elements: the costs of the judicial activities (*budget d'activités juridiques*) to be implemented and the costs of depreciation and investments based on policy objectives (*budget programme*). This evaluation is at the heart of the budgetary deliberations that the Minister of Justice holds annually with the presidents of the *Cours d'Appel* (and the Procurators-General with the courts who will not be considered here). This procedure is standardised to a large extent and takes place under the auspices of the *Direction des Services Judiciaires* of the Ministry of Justice.⁷⁹ On the basis of the outcome of this consultation, the Minister of Justice submits proposals for budget laws to Parliament.

The *Cours d'Appel* also monitor the use of the budgets by the courts within their domain. They do this in a rather direct sense: much of the direct managerial responsibility is not decentralised to individual courts. Most courts are indeed under the chairmanship of a president (designated as *chef de juridiction*), who has competence to assign cases, to regulate sessions and to evaluate judges. These *chefs de juridiction*, however, have hardly any management-related powers. There certainly is no integral management such as in Sweden.⁸⁰ Most managerial powers on behalf of individual courts, such as spending and purchasing, are performed through the *Cours d'Appel* themselves. The courts do not have the authority to incur any substantial expenses independently. They can only make proposals

⁷⁸ The *Cour d'Appel* receives the budgets directly from the Ministry of Justice. The Minister of Justice directly budgets for the *Conseil d'Etat* and the *Conseil constitutionnel*.

⁷⁹ See circular SJ.98-006-AB3/15-04-98 in which the presidents of the *Cours d'Appel* are asked, through model forms and information, to budget the legal costs for 1999 within their domain.

⁸⁰ One of the peculiarities of the French judiciary is that all courts have two heads, one for the sitting judges and one for the state prosecutors. They also have joint responsibility for the management of the court.

for payments addressed to the *Cours d'Appel* of their jurisdiction. The courts – just as is the case with the *Tribunal de grande instance de Paris* visited within the framework of this research – can order things independently within the framework of their budget, but payment is executed by the *Cour d'Appel*. The *tribunaux* themselves only check whether the order has been received and if the bill is correct. The supervision of the courts is very direct. Within the framework of that supervision, the presidents of the *Cour d'Appel* also regularly visit the courts within their jurisdiction. Regarding observed abuses, a president can warn⁸¹ (*Avertissement*) a judge. Sanctions which may be taken as a result of such a warning could be disciplinary measures, but also a form of direct control by the *Cour d'Appel*. An observer of the *Cour d'Appel* can, in the event of negligence, temporarily replace the president or chairman of a Court and perform managerial powers.

Through the data system GIBUS, a management data system used by the separate *tribunaux* and by the *Cours d'Appel*, as well as by the Ministry of Justice, the evolution of budget spending can be monitored. Every three months the *Cours d'Appel* provide the Ministry of Justice with intermediate budget overviews and once a year a justification concerning the expenditure is provided in the form of an annual account (*compte rendu*) and an annual report (*évaluatif*). The system of the earmarked budgeting is somewhat mitigated through the fact the courts can cope with temporarily occurring deficits through the system of the '*demandes individuelles*'. As far as the budget permits, the Ministry of Justice accepts these individual requests.

In practice, Parliament inspects the expenditure of the budgetary funds for the judiciary only from a distance. With the treatment of the budget proposals, there is political discussion about the level of the budgets, although there are always limited to the main points. These discussions relate mostly to increases in budget items.

Just as in Sweden, public control over the activities of the judiciary in the French system is only very partially organised through the instrument of the ministerial responsibility. Instead of parliamentary supervision over the management of the judiciary effected through ministerial responsibility (through questions, for example, to the Minister of Justice), Parliament uses its own powers to investigate. In France – much more than, for example, in the Netherlands – Parliamentary inquiries are conducted, for example, on the activities

⁸¹ See art. 44 of the *Statut de la magistrature*. The *inspecteur général des services judiciaire*, the Procurators-General, and the first *présidents de tribunaux* do possess of the same authority to warn.

of Government services. Parliamentary inquiries are held mainly in policy matters of national importance.

For the regular control of the activities of the judiciary and ad hoc matters use is made of inspections. These inspections are carried out by the *Inspection générale de services judiciaires*,⁸² a special inspection service that operates under the responsibility of the Minister of Justice. The inspections of this service can be carried out on all sorts of areas of the judicial activity, ranging from the management of courts to the discipline within the judicial corps of a Court. Such inspections are mostly carried out spontaneously, but sometimes also following a complaint. In general, the outcome of inspections in courts are not made public, which prevents outsiders from seeing what happens with the outcome. Indeed the reports, according to officials at the Ministry of Justice, often give rise to disciplinary measures.⁸³

6.3. The French Council for the magistrature (*Conseil supérieur de la magistrature*): composition and duties

The *Conseil supérieur de la magistrature* (hereinafter called ‘CSM’) is a Council for the Judiciary that has totally different characteristics than the *Domstolsverket* in Sweden. In the French system, the management and the care of the judiciary are mainly vested in the Government, not in a Council for the Judiciary, as in Sweden.

The CSM has existed since 1946⁸⁴ and functions as a board operating independently of the Government as a guarantee for judicial independence. During its fifty years’ existence, the CSM – through the constitutional amendment of 1958 and the law dated 27 July 1993 – has undergone various changes in the area of the board’s composition and organization. The tasks and powers of the *Conseil* –

⁸² Established in 1964.

⁸³ In 2001 the Minister of Justice took the unprecedented step of publishing a report by the Inspection, relating to the mismanagement of a number of criminal investigations in the region of Paris.

⁸⁴ The *Conseil supérieur de la magistrature* was already established in the Constitution of the 4th Republic. However, even before the establishment of the *Conseil* many of the functions (namely the Court procedure regarding the disciplinary measures) that the *Conseil* used after 1946 – since the law of 31 August 1883 – were already executed by the chambers of the *Cour de Cassation*. The composition and method of working of the *Conseil supérieur de la magistrature* is amended by the Constitution of 4 October 1958 (5th Republic) and once more by the constitutional law (*Loi constitutionnelle*) of 27 July 1993.

mainly in the area of appointment, advice and disciplinary jurisdiction – remained largely unaltered through the years. In 1993, the competence of the CSM was expanded. The CSM became the competent body for disciplinary cases relating to state prosecutors and was furthermore awarded the competence to make recommendations for the appointment of the ‘*présidents des tribunaux de grande instance*’ to the President of the Republic.

The French Constitution entrusts the independence of the judiciary to the President of the Republic (art. 64 of the Constitution) and further provides that the Head of State is supported by the CSM in this area. The powers of the CSM appear to constitute a counterweight between the President’s powers for judicial appointments on the one hand and, on the other hand, the Minister of Justice’s power with regard to the appointment of magistrates and the management of the judiciary. Nowadays, this balance is being reconsidered again.

At present the CSM consists of a majority of members who are part of the judiciary. The President of the Republic chairs the *Conseil*, with the Minister of Justice acting as vice-chairman. Subsequently, there are four general members, one of whom is appointed by the chairman of the Senate, one by the chairman of the *Assemblée Nationale*, and subsequently one coming from the ranks of the *Conseil d’Etat* and one coming from the ranks of the *Cour des Comptes* (Auditor General’s office). There are elected members besides the four general members: six of them elected by the members of the sitting magistrature through a system of representation, the other six (also a system of representation) by the members of the public prosecution (State Attorneys Office).⁸⁵ The CSM consists of two divisions: a ‘*formation de siège*’ and a ‘*formation du parquet*’. The *formation de siège*⁸⁶ is competent in matters relating to the sitting magistrature and the *formation du*

⁸⁵ See art. 65 of the *Constitution et la Loi organique no. 94-100 de 5 février 1994 sur le Conseil supérieur de la magistrature* which, in particular, regulates the way in which the members of the CSM are elected and the method of working of the CSM on giving advice and making appointment proposals.

⁸⁶ Consisting of: the President, the Minister of Justice, the four general members and five members elected by the members of the sitting *magistrature* supplemented with a member elected from the ranks of the public prosecution.

*parquet*⁸⁷ in matters relating to the public prosecution. Together the *formations* form the full Board.⁸⁸

However, this system of the CSM has been criticised since 1993. In particular, the fact that since 1993 – through the extension of the competence of the CSM – the appointment of magistrates has actually become an issue of the members of the judiciary itself – a majority within the CSM is judge. This calls for a form of public control over the appointments. As a result of a constitutional amendment, the CSM will be supplemented in the near future with ten members who come neither from the ranks of Parliament, the judicial profession nor from the ranks of the public administration. The proposal appears controversial among judges. They wonder what the ten external members will be able to add to the care and quality of the appointments. The real problem lies particularly in the way in which the members of the public prosecution service (State Attorneys Office) are now being appointed and how, in the future, representatives of ‘the general public’ will deal with matters in this area.

The proposal for constitutional amendment has already been accepted by Parliament in the first reading. For the second reading, Congress (the united session of Parliament) will have to accept the first reading proposal with a greater majority. It looks as if the proposal should have this majority. What we were waiting for back in 1999 was the decision of the President, who has the authority to convene Congress. He did not, however, send it to Congress. The amendment was abandoned in 2000.

The CSM now has two main powers, namely (a) to make appointment and promotion proposals for members of the sitting magistrature coming from the highest judiciary echelons or giving advice on appointment proposals from the Government for other members of the sitting – but also standing – magistrature, and (b) to take care of disciplinary proceedings for magistrates. Below, we

⁸⁷ Consisting of: the President, the Minister of Justice, the four general members and five members elected by the members of the public prosecution supplemented with a member elected from the circle of the sitting *magistrature*. The full Board itself does not have any jurisdiction. Only the *formations* have jurisdiction.

⁸⁸ See art. 65 of the Constitution.

⁹⁰ See art. 15-21(section I) of the previously cited Ordonnance n° 58-1270 modifiée portant loi organique relative au statut de la magistrature, J.O. 23 décembre 1958 (hereinafter: *Statut de la magistrature*). For admission to the Ecole nationale de la magistrature different forms of comparative entrance competitions are held. The requirements are particularly strict.

will deal with both aspects briefly, for the purpose of the assessment of the CSM.

The role of the CSM with judicial appointments and promotions

The elaborate and legally very detailed system of judicial appointments and promotions is typical of the French constitutional system. Particularly the fear of too great political influence and syndicalism of the principle of appointment and promotion seems to have resulted in the system – within which the CSM assumes such a large role as a consultative authority – being rich in detail.

In order to be appointed as a member of the sitting magistrature, or public prosecution service (collectively, the *corps judiciaire*), it is required that – through a comparative competition – a person is accepted into the *Ecole nationale de la magistrature*,⁹⁰ or directly appointed – based on professional experience – in the *corps judiciaire* (the *intégration directe*).⁹¹ Within the *Ecole nationale de la magistrature* a training course is given to the admitted candidates that shows similarity to that of the Dutch Raio training course. Once a member of the sitting magistrature has completed the training course – after advice from the CSM – he or she is then appointed in a specific court. The CSM is empowered⁹² to present proposals for the appointment of Judges of the *Cour de Cassation* and of Presiding Judges of the Courts of Appeal; for others (the remaining members of the sitting magistrature), the CSM can give its opinion on a proposal for an appointment put forward the Minister of Justice. In any case it is the government that exercises the actual final power of appointment. After the appointment to a court, the training course of a judge does not stop there. The *Ecole nationale de la magistrature* – linked to the entry training – has a special and continuous training programme, the '*formation permanente*'. Judges can participate in it during their entire career. This participation is again important to a judge's further career.

The *corps judiciaire* is hierarchically structured, even with regard to judges. There are judges of the first and the second grade (*premier et second grade*).⁹³ The second – highest grade – is in turn again divided into two subgroups. In addition, the first and the second grade are subdivided into ranks that indicate career progress. In order to be able to move up from the first to the second grade –

⁹¹ See art. 22-25 (section II) of the *Statut de la magistrature*.

⁹² Namely for the activities of judge in the *Cour de Cassation*, *premier président* of a *Cour d'appel* or *président* of a *Tribunal de grande instance*. See art. 65 of the Constitution.

⁹³ See art. 2 of the *Statut de la magistrature*.

necessary to become eligible for higher judicial posts⁹⁴ – and subsequently for appointment to a higher position, it is necessary first of all that a judge moves in and between the two grades. For that purpose, it is necessary that a judge be registered in the *Tableau d'avancement*. This *Tableau d'avancement* is drawn from in the event of a vacant post of judge. Applications outside the *Tableau* are not possible. Moving within the *Tableau d'avancement* is determined by the *Commission d'Avancement*,⁹⁵ a Council that consists of judges recruited from different sorts of courts and elected by their peers. Promotion through the *Tableau d'avancement* takes place on different – legally regulated – foundations. In this context, the information from a judge's dossier is important, *inter alia*, in the area of work experience, seniority, mobility, possible incidents and the evaluation reports.⁹⁶ The First president of a court of appeal (*premier président de la cour d'appel*) draws up these evaluation reports – after a job interview with the judge concerned – . The evaluation reports – two-yearly, in principle – state the activities of the judge concerned, a general opinion⁹⁷ from the President, an opinion about the suitability for other/higher positions, and – if under discussion – the training need of the person concerned.⁹⁸ In the event that a judge disagrees with his evaluation, he can lodge a complaint against it with the *Commission d'Avancement*.⁹⁹ The *Procureur Général* does the same for public prosecutors. The evaluation of a judge or, for that matter, of a public prosecutor may be challenged before the *Conseil d'Etat*.

The *Tableau d'avancement* is decisive for appointment proposals¹⁰⁰ which can be made by the CSM to the President (for the positions of

⁹⁴ See art. 4 Décret n° 93-21 du 7 janvier 1993 pris pour l'application de l'ordonnance no. 58-1270 modifiée portant loi organique relative au statut de la magistrature. Article 4 retains, for example, the positions of (premier vice-) président d'un Tribunal de grande instance, and conseiller de Cour d'appel for judges of the first grade, from the first group.

⁹⁵ See art. 34 *et seq.* (*chapitre IV de la Commission d'Avancement*) of the Statut de la magistrature.

⁹⁶ See art. 12 and further (*chapitre II de la carrière des magistrats*) Décret n° 93-21 du 7 janvier 1993 pris pour l'application de l'ordonnance n° 58-1270 modifiée portant loi organique relative au statut de la magistrature.

⁹⁷ A judgment on religious or political or life principles or on irrelevant elements of the private life of a judge may not be included in an evaluation report. See art. 12 *Statut de la magistrature*.

⁹⁸ See art. 20 Décret n° 93-21 du 7 janvier 1993 pris pour l'application de l'ordonnance n° 58-1270 modifiée portant loi organique relative au statut de la magistrature.

⁹⁹ See art. 12-2 Statut de la magistrature.

¹⁰⁰ See art. 65 of the Constitution.

judge in the *Cour the cassation*, *premier président* of a *Cour d'appel* or president of a *Tribunal de grande instance*) or by the Minister of Justice to the CSM for advice (for the remaining positions). No proposals are made outside the *Tableau*. However, when candidates are not proposed by the Minister, they may under the *Statut de la magistrature* send observations to the Minister and the CSM. It happens quite frequently that the CSM takes observations like these into considerations vetoes the Minister's appointment.¹⁰¹ Every year the *Commission d'Avancement* publishes a public report on its activities.¹⁰²

Mobility of judges is an important instrument of global quality in strongly centralised France, where little interest exists in judicial positions in the far North and South of the country. The career system through the *Tableau d'avancement* awards mobility through the fact that it is highly valued as a criterion for promotion. This mobility, however, is to an increasing extent a problem, because many magistrates have working partners. Mobility, however, is achieved through posting judges and members of the public ministry. A very frequent phenomenon in France is that members of the standing and the sitting magistrature are posted within other Government departments. Thus, the majority the officials of the Ministry of Justice are magistrates. Mobility through placement in other departments is, however, less highly esteemed than mobility within the judiciary itself. Posting legal experts from outside the *corps judiciaire* itself is possible these days, under the law of 25 February 1992 (L.O. no. 92-189, art. 37).¹⁰³

The disciplinary role of the CSM

The disciplinary regime for French judges is quite strict. Art. 43 of the *Statut de la magistrature* provides that: '*Tout manquement par un magistrat aux devoirs de son état, à l'honneur, à la délicatesse ou à la dignité, constitue une faute disciplinaire.*' This is a somewhat broad definition of an offence covering many shortcomings in the area of duty management, meticulousness, and violation against the

¹⁰¹ This power to veto proposals in theory only applies to ministerial proposals for sitting magistrates. The CSM can only give an opinion on a proposal for an appointment of a member of the 'parquet' (the public prosecution's office). Since 1997 the CSM has, however, also had a *de facto* veto power for proposals for members of the parquet due to the fact that the Minister of Justice promised in 1997 that she would always follow the CSM's proposals.

¹⁰² This report contains the authorised information on the activities of the Commission. For this enquiry use was made of the '*Report d'Activité de la Commission d'Avancement 1997-1998*'.

¹⁰³ See art. 41 and further *Statut de la magistrature*.

dignity and honour of the office. In any case, violation of legal rules which particularly relate to the judicial office will result in a disciplinary breach.¹⁰⁴ Judges are also responsible for their dealings in office, although they are only responsible for errors for which they can be personally blamed.¹⁰⁵ For legal mistakes for which judges cannot be personally blamed, judges and judicial organisations (*i.e.* the courts) are protected through the existence of state liability.¹⁰⁶

In disciplinary matters a special court procedure applies to the sitting magistrature. The Ministry of Justice puts the legal proceedings into operation and the CSM acts as the disciplinary judge. Art. 18 of the *Loi organique sur le Conseil supérieur de la magistrature*¹⁰⁷ provides that in disciplinary procedures the CSM is in session without the *Président de la République* or the Minister of Justice (members of the board in ordinary cases) participating in the deliberations. In most cases the Ministry of Justice will not institute disciplinary legal proceedings before an investigation by the *Inspection générale des services judiciaires*, although reports from first presidents of a *Cour d'Appel* or a *tribunal* can result in disciplinary legal proceedings. Before proceeding to disciplinary action the superiors and the *Inspecteur général des services juridiques* can give a warning (art. 44 *Statut de la magistrature*). Such a warning is filed in the judge's dossier, but after three years, it is automatically deleted if no new warning follows.

The CSM itself imposes the disciplinary penalties for the sitting magistrature. These penalties vary from reprimands to withdrawal of pension entitlement and disallowing the discharge of certain judicial duties.¹⁰⁸ There is an appeal against a disciplinary sanction to the *Conseil d'État*.¹⁰⁹

¹⁰⁴ Accordingly the *Statut de la magistrature* forbids, among other things, the execution of additional public functions (art. 8), membership of the European Parliament and other incompatible Parliamentary membership functions (art. 9), criticising the Government while in office or airing political convictions while in office and involving them in the consultation (art.10), etc.

¹⁰⁵ See art. 11-1 *Statut de la magistrature*.

¹⁰⁶ See art. 11 *Statut de la magistrature*. An interesting development has been taking place recently: under Art. L. 781-1 of the Code de l'organisation judiciaire, the State is liable in the judicial field in two cases only, a. for gross fault ('faute lourde') and denial of justice ('déli de justice'). The civil courts, followed by the Cour de cassation have created a libel case law using in fact more the 'faute simple'-criterion than the 'faute lourde' one. The last report of the CSM (2000) approves this trend.

¹⁰⁷ Loi organique n° 94-100 du 5 février 1994 sur le Conseil supérieur de la magistrature.

¹⁰⁸ See art. 45 *Statut de la magistrature*.

¹⁰⁹ Recours en cassation for penalties imposed on sitting judges and *recours pour*

6.4. Intermediate conclusion, France

The French Board for the Magistrature appears to be at the other end of the spectrum, compared to the Swedish *Domstolsverket*. The powers of the CSM lie precisely in the area of appointment (advice) and disciplinary jurisdiction, precisely the areas where the Swedish *Domstolsverket* has no powers. In any case, what is characteristic of the French system is the relatively rigid implementation of management of independence from the perspective of the judges' legal position and the management of courts. In France, judges do not have the same status – neither from the perspective of the legal position, nor socially – as many of their overseas colleagues. There is a rigid disciplinary regime and a great deal of hierarchy. We also find this hierarchy in the area of the management and the budgeting of individual courts. Individual courts, in this respect, are given little responsibility of their own. According to the respondents in the enquiry – which was conducted in France in December 1998 for the Ministry of Justice in the Netherlands – this very centralised structure is not beneficial to the sense of responsibility, the organizational coherence in and the management of individual courts. Even the method of appointment and promotion – completely detached from the way in which the CSM handles its duty – is criticised. According to the respondents, the system results in the fact that the wrong people are appointed in the wrong place in a number of cases. Controversial points are, for example, the appointment of young training judges who have insufficient experience to deal with the serious cases with which they are often confronted.

The French CSM has a broad, although predominantly judicial, composition. Even here, the representation concept seems to have been priority number one. It is striking that there is an increasing need for a larger contingent of non-judicial members on the board, besides the judicial representation on the board. In 1999, work was underway for a constitutional amendment to render that possible. By including more non-judicial members in the management, the element of societal control of the activities of the board and with it of the judiciary, one hopes, would be strengthened. This extension of the CSM with more 'external members' was, in France itself, not greeted with unanimous approval. In particular, judges are afraid of too great political influence – or a shadow thereof – over the appointment procedures if the proposed amendments come through. That might, in turn, affect the status of the judiciary in a negative sense. And the status of judges in France – according to the

excès de pouvoir for the Members of the Public Prosecutor's office.

respondents' own opinion – is vulnerable. In the end, the Reform was not adopted: the proposal for it was redrawn in 2000.

6.5. Comparative overview of the tasks and powers of the French *Conseil supérieur de la magistrature*

I. Policy-making powers:

external affairs

public services

judicial collaboration

personnel management

✓ selection policy

research policy

✓ advice to the Ministry of Justice

policy on quality

II. Management-related powers:

accommodation & safety

automation

administrative organization

providing administrative information

III. Budget procedure

budgetary policy

distribution means

spending accountability

IV. Other powers

✓ disciplinary powers

✓ (power to propose candidates) for the appointment of judges

✓ promotion and posting of judges

✓ education and training

Chapter 7. Italy (*Consiglio Superiore della Magistratura*)

7.1. The constitutional position of the judiciary in Italy

As far as its independence and status is concerned, the Italian judiciary shows many similarities to the French judiciary. Due to the country's struggle against organized crime, terrorism and corruption within the machinery of Government, Italy adheres to the greatest possible independence of the judiciary.

This also appears from the special care with which the Italian constitution¹¹⁰ regulates the court system.¹¹¹ The independence of the ordinary judiciary is first of all guaranteed from the legal position perspective by rules concerning the appointment and the dismissal of judges. Ordinary judges are appointed for life (*i.e.* until the age of 70 – or 72 at their request)¹¹² and are, in principle, irremovable. They can be dismissed, suspended or transferred only by a decree of the High Court for the Magistrature (*Consiglio Superiore della Magistratura*, hereinafter called 'CSM'). This CSM is a High Council of State, specifically established to guarantee the independence of the judiciary. In accordance with Article 105 of the Constitution, this Council is responsible for the appointment, assignment of duties, transfer and promotion of judges, as well as taking disciplinary measures against judges. Article 107, first paragraph, of the Constitution, guarantees that judges can only be discharged from their duties or transferred by a decision of the CSM. The second paragraph of Article 107 of the Constitution provides that the Minister of Justice is empowered to take the *initiative* to implement disciplinary measures. The tasks and powers of the CSM are regulated in a law of 24 March 1958.¹¹³ The Italian Constitution also

¹¹⁰ The Costituzione della Repubblica Italiana.

¹¹¹ For this assessment, also see E.M.H. Hirsch Ballin/E.R. Manunza, in "*de Italiaanse Republiek*", [In the Italian Republic]: L. Prakke and C.A.J.M. Kortmann (editor), *Het staatsrecht van de landen van de Europese Unie* [The constitutional law of the countries of the European Union] 5th edition, Deventer 1998, p. 462.

¹¹² Guarantees of independence are also issued to administrative judges of Regional Administrative Courts (TAR), of the Council of State and of the Court of Auditors.

¹¹³ Law of 24 March 1958, n. 195 (modified several times afterwards). See for these modifications, among other things, A. Pizzorusso, *Le Conseil supérieur*

grants a functional guarantee of independence to members of the ordinary judiciary: in discharging their judicial duties, judges are only governed by the law (art. 101). The guarantees of independence are only applicable to the members of the ordinary judiciary. The law regulates the independent position of judges and non-judges who participate in the administration of justice without being part of the judiciary.¹¹⁴

Besides individual guarantees for judicial independence, the Italian Constitution also provides guarantees of independence at macro level. Under Article 104 of the Italian Constitution, the judiciary is an autonomous organization and independent of any other power and it is managed by the CSM.

Organization of the judiciary in Italy

The organization of the ordinary judiciary is governed by the decree of 30 January 1941, no. 12 on the judiciary organization.¹¹⁵ The ordinary judiciary has five levels. The lowest level in the hierarchy are the *justices of the peace (giudici di pace)*, who in the first instance administer justice (or mediate) in civil and criminal legal proceedings of lesser importance. This task can and is often exercised by non-jurists. Until 2 June 1999, the praetors (*pretori*) constituted the second level of the Italian court system. These were professional judges who handled appeal cases from the justices of the peace and in the first instance administered justice in less serious civil and criminal cases. In June 1999 these praetors were unified with the district courts. At present, these district courts (*tribunali*) – which formerly only dealt with the somewhat more serious civil and criminal cases in the first instance and handled appeals against the judgments of the *praetori* – have jurisdiction in first-instance proceedings, both in civil and criminal matters.¹¹⁶

The courts of appeal (*corti d'appello*) hear appeals against the first-instance judgments of the district courts. Cassation of the Court decisions is possible by the special Court of Cassation (*corte di cassazione*) in Rome. The ordinary court system also has various other specialised courts, such as courts and divisions at the courts of appeal for matters relating to minors, regional courts for public

de la magistrature en Italie, in: *Revue française de droit constitutionnel*, 9, 1992, pp. 155-157.

¹¹⁴ See article 108 in conjunction with 200, third paragraph, of the Italian Constitution.

¹¹⁵ This Act has been amended several times after the Constitution of 1948.

¹¹⁶ With the exception of those proceedings for which the justice of peace has jurisdiction

waterways, and the Assize Courts (*corti di assise*) and the Assize Courts of Appeal (*corti di assise di appello*), where professional judges try cases in a collaboration with lay justices. Besides the ordinary judiciary, a special hierarchy of administrative courts has developed in the Italian system. Appeals against Governmental decisions and those relating to election results are in the first instance dealt with by regional administrative courts (*tribunali amministrative regionali*) subject to appeal to the Board of State. In addition to these courts, there are another few special judiciary bodies in specific areas such as the Auditor General's office, military tribunals, tax committees, the Supreme Court for Public Waterways, but also the Constitutional Court of Justice, which is empowered to decide on the constitutionality of laws and statutory orders as well as of those coming from the Government and the regions.

7.2. Ministerial responsibility and public control in Italy

Like most countries in the European Union, Italy has a parliamentary system of government, which means that the members of the Government are collectively accountable to the Italian Parliament for the decisions of the Council of Ministers, and Ministers individually for their own discharge of duties.¹¹⁷ With respect to the care and responsibility the Minister of Justice in particular has with regard to the administration of justice and the judicial organization, Article 110 of the Constitution is all-important. This article provides that – without prejudice to the competence of the CSM – the Minister of Justice is responsible for the judicial organization and the provision of judicial services. The Minister of Justice is accountable to Parliament in policy matters concerning the judicial organization and how the management of the judicial organization is taking shape. Effective parliamentary control in Italy is in practice, however, impeded by various factors.

The first factor lies in the way in which the Minister of Justice uses his responsibility for the management of the judicial organization. Furthermore, until recently, out of respect for judicial independence, Ministers of Justice pursued a non-intervention policy as much as possible, in the sense that the Minister made sure he had as little involvement as possible with matters that could affect the content of court proceedings. A consequence thereof is that precisely in the area of management of the judicial organization, there is no central management in Italy, and this has not done the efficiency of that

¹¹⁷ See article 95, second paragraph, of the Italian Constitution.

management any good.¹¹⁸ According to observers within the Italian system, the Ministers of Justice have insufficiently recognised the possibilities Article 110 offers for more substantial forms of management and management policy of the Ministry towards the judicial organization. During the last two years, there has been a change in this area under the new Government, and the Ministry is now attempting to do more to encourage efficiency and – wherever possible and desirable – the quality of judicial procedures. In this context, a new act was passed on 2 June 1999, which harmonises and unifies first-instance judicial procedures. The Act regulates the amalgamation of two different first-instance courts (*pretore* and *giudice tribunale*: the project *realizzazione giudice unico in primo grado*, somewhat comparable to the integration of the Dutch cantonal courts into new-style district courts).

The second factor that has contributed to the fact that Parliamentary control of the management and organization of the judiciary through ministerial responsibility received little chance in the past, is related to Parliament itself. Until about 15 years ago, the Speakers of the Houses in Parliament did not permit any question that concerned the judiciary. Once again, this was out of respect for judicial independence. During the last two years, this review in advance has been much less strict, and nowadays questions about the activities of the judiciary are being asked quite regularly. The Minister also answers these questions as far as points of quality are concerned, but the Minister should not comment on individual cases.

Supervision of the activities of judicial organizations

The Minister of Justice carries out systematic and random checks of the activities of the judicial organizations. A special inspectorate exists for this purpose, which falls under the responsibility of the Minister of Justice, and its task is to collect information about the

¹¹⁸ An example showing the strong inclination towards independent judicial procedures within the courts themselves and the problems that may be caused as a result thereof is the way in which the incoming cases are assigned to judges within the courts. For example, during the working visit within the framework of the discussion on case load management, the Italian system of the '*giudice naturale*' was referred to. That system uses a table system for the assignment of cases. The notion is that with the assignment of cases to judges an objective system must be deployed: the expertise or experience of a certain judge or chamber may not play any role. It is thus the order of arrival of cases that must be decisive. The table system means that very serious cases can end up on the table of an inexperienced judge, and that little leeway exists for the use or existence of certain sub-specialisation within a main specialisation (criminal law, civil law and suchlike). One sees the disadvantage of such a system from a viewpoint of efficiency, as a price that must be paid for the greater good of independence and impartiality.

activities of the courts and individual judges. Furthermore, it deals with such matters as completion times and organization, but also the treatment of parties, the public. Every three years, there is a general inspection of the courts, and in addition, special inspections can be carried out, for example, following an individual complaint. Currently, there is a Bill providing that the Italian Council for the Judiciary, the CSM, should be given a role in the assessment of judges, in the form of a power to conduct a *valutazione* every four years.

Budgeting of the judicial organization

Under Article 110 of the Italian Constitution, the Minister of Justice is also the authority responsible for the allocation of means to the judicial organizations. Through the budget law, Parliament and the Minister of Justice annually make the funds available to the judiciary. The Minister subsequently puts these funds to a more specific use, and is responsible for the payment of the magistrates' salaries. The distribution criterion and the apportionment of the budget among the different courts is established and earmarked by the Minister of Justice.¹¹⁹ The courts have a certain degree of self-management in spending funds. The authority to incur certain expenses with regard to goods and services and for non-judicial personnel is mandated by the Minister of Justice to the '*capo del ufficio*' of Italian courts.¹²⁰ , At this moment a certain autonomy of management is entrusted to the Presidents of the Courts of Appeal and to the Attorney Generals as well as to the individual Presidents of the *Tribunali* (courts) and to State Attorneys. But by and large, it is the Ministry of Justice that acts as the budgetary authority (also in the administrative sense). These circumstances mean that, within the Councils for the Judiciary at the level of intrinsic leadership, there is no deep insight into the administrative managerial organization of the Councils for the Judiciary. Persons from the ranks of the CSM and the Ministry of Justice are of the opinion that the executives of the Councils for the Judiciary do not focus much attention on the administrative side of things: these are often people who are more interested in writing fine judgments.

¹¹⁹ The CSM has advisory powers for its own organization on this point. The CSM has no say concerning the size of the budgets for the other courts. Also, the personnel of the CSM is in the Ministry's service.

¹²⁰ See A. Pizzorusso, *L'organizzazione della giustizia in Italia*, Torino 1996, pp. 109-110.

7.3. The Consiglio Superiore della Magistratura: composition and powers

The CSM, provided for by the Constitution of 27 December 1947, was actually established only some ten years later. The CSM was established by an Act of 1958 and started its operations on 1 January 1958. The CSM consists, in its present form, of 33 members. Three of them are permanent members, appointed by the law: the President of the Republic (who officially chairs the CSM), the President of the Court of Cassation, the Attorney General at the Court of Cassation. Twenty members coming from the ranks of the judges and members of the Public Prosecution Service (*togati*) and ten members of the board are non-judiciary members (*laici*).

The judges and public prosecutors elect the magistrate members themselves. In practice, this is effected through the association of magistrates (*Associazione Nazionale Magistrati*). Within this association, different movements exist (*correnti*, at present four) which present candidates. The association has a private law status and no special statutory basis. It uses lists of candidates, and a system of proportional representation. A list must have gained 9% of the votes. There are approximately 8800 magistrates. Our respondents estimate that approximately 90-95% of them are members of the association. As to the active or passive right to vote with regard to the composition of the CSM, it does not matter whether or not one is a member of the association of magistrates, but whether or not one is a magistrate.¹²¹ In practice, this system, with the electoral threshold of 9%, means that a list is not likely to be submitted outside the movements in the *Associazione Nazionale Magistrati*. There are five constituencies: one is reserved for the Court of Cassation: the members of the Supreme Court elect two members from the CSM. The remaining four constituencies are based on the districts of the courts of appeal. The districts which together form a constituency change per election (decided by lot; they are hence not geographically amalgamated constituencies). Two of these four constituencies produce four members from the CSM, each of the other two produce five members.

As mentioned above, ten members of the CSM come from outside the magistrates' circles. These outsiders (*laici*) must be jurists. These members should have the profession of professor or lawyer with at least fifteen years' experience (art. 106 of the Italian Constitution). They are elected by Parliament in united assembly, with voting by

¹²¹ The elections are regulated by law, law of 12 April 1974, NR. 74. See V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, p. 749.

secret ballot. The candidates are put forward by the political parties. A qualified majority is necessary. The Vice President of the CSM is elected by the CSM from the non-judicial 'outsiders'.

The elected members of the CSM (magistrates and outsiders) have a term of four years. The term for the magistrates and for the outsiders is the same. As a result, all but the three 'permanent' members are renewed every four years.

The circumstance that the CSM (all but the three permanent members) is entirely renewed every four years constitutes a factor of discontinuity. Some experience this discontinuity as undesirable. Others point to the fact that this discontinuity also has its advantages. Indeed, time will be lost during the gaining of expertise by the new board, but there is also more of a chance for some new ideas.

The role of the President of the Republic (officially the President of the CSM) as president of the CSM is considered to be ceremonial, at least his role should not lead to substantive involvement with the activities of the CSM. When on 13 May 1991, President Cossiga assumed the powers delegated to the vice-president, it led to the judicial members of the CSM's collective resignation, and as a result thereof the activities of the CSM were blocked. After the intervention of the Speakers of the Houses of Parliament, the resignation was withdrawn.

Non-judicial members of the Italian CSM

In itself, the fact that outsiders are members of the CSM is – also in magistrates' circles – accepted without complaining and it is even regarded as positive. The composition of the CSM, however, has not much homogeneity at present. This creates a potential weak point in the system concerning the outsiders elected by Parliament. If Parliament succeeds in appointing jurists who are elected merely by virtue of their recognised merits and qualities within the profession, they will be able to steer a course that is relatively independent of the political grassroots. For outsiders, however, who are selected primarily on account of their merits for a particular political group, it is much more difficult, also because they will have to rely on that group to find a new, appropriate position after their term of office has expired.

The circumstance that a qualified majority is required for the election of outsiders means that negotiations about the list of candidates between the political parties in Parliament are necessary. Because of that, and possibly also through the circumstance that the election is secret, the bond with certain political parties is somewhat weakened. Even if the party political influence is not strong – and not so

organized – as in Parliament, the party political origin nevertheless plays a role. And then right across the board: in practice it does not happen that ‘the’ outsiders are up against ‘the’ magistrates: directions within the CSM are determined more by political affinity than by the capacity in which people became members of the CSM. In this context, it was emphasised by the Italian respondents that apart from the manner of composition, the fairly large size of the CSM impedes the decision-making processes and makes it susceptible to politicisation. The Italian CSM is a parliament on its own.

Future

As part of the large-scale constitutional revision being effected in Italy at present, proposals concerning the SCM have also been presented. It is proposed to include a new Article 120 in the Italian Constitution. In accordance with the proposal, two Councils for the Judiciary will be established, one CSM for the ‘ordinary’ courts and one CSM for the administrative court system. In the proposal the CSM for the ‘ordinary’ courts, is divided into two parts: one for the judges and one for the public prosecution (State Attorneys Office).¹²²

The imposition of disciplinary measures would, in accordance with the proposals, be entrusted to another body, namely a court yet to be established (*Corte di Giustizia della Magistratura*). Furthermore, the Minister of Justice would, in accordance with the proposals, be formally authorised to participate in the meetings of the CSM, with the right to make proposals and requests, but without the right to vote. These proposals come from a Parliamentary Commission – made up of both Houses of Parliament – for the revision of the Constitution.¹²³ The constitutional revision bill did not gain a majority. However, the respondents have declared that they expect the proposals concerning the CSM to return at any moment, whether or not in an adapted form.

The role of the CSM in appointment, promotion and transfer

One of the most important powers of the CSM concerns the appointment of magistrates. In order to be appointed as judge in

¹²² The composition of the CSM for the ordinary judiciary is, according to the proposals: 3/5 of the magistrate-members, 2/5 of the non-magistrate members.

¹²³ Commissione parlamentare per le riforme costituzionali, Progetto di legge costituzionale, Revisione della parte seconda della Costituzione (Camera dei Deputati, N. 3931-A, Senato della Repubblica N. 2583-A), offered to both chairmen of the House on 4 November 1997, p. 95 et seq.

Italy, a person must first be admitted to the training for judges. This admission is effected, just as in France, by means of a competitive examination. Those who pass the competitive exam (*concorso*), are subsequently appointed as *uditore giudiziario* (a sort of judicial civil servant in training). After two years and a positive evaluation, they can then become magistrates.

Judicial transfers – a power of the CSM – have a dual character in Italy. A transfer ordered by the CSM can be imposed as a disciplinary sanction for a judge. The disciplinary transfers are very rare and can only be decided by the plenary assembly of the CSM. On the other hand, transfers can also be ordered without the judge concerned having done anything that would merit a sanction. This is possible, for example, if there are substantive reasons for such a transfer. One example related to a judge's son facing criminal prosecution in a provincial town. That is a clear case in which the judge himself has given no cause for any sanction. There are also borderline cases: behaviour of judges that in itself constitutes an insufficient ground for any sanction other than transfer. For example, the case of a judge who (as is shown by telephone conversations) evidently maintains bonds of friendship with criminals. Such transfers fall outside the disciplinary measures and are prepared by the first Commission.

Most of the time transfers are ordered at the request of the judge concerned.

The Minister must be involved in proposals for the appointment or transfer of presidents of courts (*magistrati dirigenti*). The appointment of the presidents takes place through the CSM, but the appointment is prepared by one of the commissions.¹²⁴ Before the proposal goes to the plenary assembly, it is submitted to the Minister of Justice. In Italy – just as in France – it is quite usual that judges are posted to the Ministry of Justice. Hence, a major proportion of the personnel of the *Ministero di Grazia e Giustizia* are magistrates.¹²⁵

With the appointment of the presidents (*magistrati dirigenti*) of the judicial offices (*i.e.* the different courts), the Minister of Justice is entitled to give his opinion on an appointment proposal.¹²⁶ Moreover,

¹²⁴ This takes place, namely, by the 5th Commission of the Board, the *Commissione per il conferimento degli Uffici Direttivi*.

¹²⁵ Worse still: executive positions within the Italian Ministry of Justice are reserved for magistrates.

¹²⁶ The Minister of Justice possesses a general power to give his opinion on the CSM's concept decisions, which (also) lie in the Minister's sphere of competence; only he hardly ever makes use of it in ordinary – non-

such appointments can be effected only if the Minister has been consulted about them: it concerns a '*concerto di ministro*'. The following procedure applies: the proposal for the appointment of a president (or for that matter, the head of any judicial office) is formulated by the competent Committee of the CSM and subsequently sent to the Minister of Justice, who reviews it. Should the Minister agree, the proposal is reviewed by the plenary assembly of the CSM, which may vote by passing or rejecting it. If the Minister cannot agree with the said proposal, he has to motivate his position. The proposing Committee of the CSM evaluates the motivation of the Minister and replies by presenting its own motivation. The case is then handed over to the plenary assembly of the CSM, which freely votes and decides. If the CSM sticks to its guns, this opinion is decisive. In practice, for that matter, this does not always lead to the appointment subsequently running immaculately, because the appointment must take place by a decision of the Minister. If the Minister remains opposed to the appointment, he has no further remedies at his disposal (and the CSM cannot turn back either), but in theory it can happen (as it happened once) that the appointment fails to materialise for a long time. There has once been a case before the Constitutional Court concerning this '*concerto*'. The Court did not give a direct answer to the question whether approval is really necessary, but emphasised that there is an obligation of collaboration.¹²⁷

At present, a judge requesting the assignment to a managing post of a judicial office, must ask for the necessary opinion to the Judicial Council. If this opinion is presented, it is sent to the CSM, which decides upon the request on the basis of the opinion. This is a specific opinion in addition to the usual ones provided for by law.

A problem for the Minister when it comes to using this possibility of influencing the appointment of presidents is that – even where there is doubt on a candidate's administrative capacities – he does not know the candidates at the ministry well enough in general to reject a candidate put forward by the CSM with objective arguments. On average, the Ministry has too little information about individual judges for this. In fact, there is information on them only if they have *passed* their competitive examination (*concorso*) two years after being appointed judge and later only if they, thirteen years after their inauguration, again apply for the status of judge at a Court of appeal

appointment – cases.

¹²⁷ See also article 11 of the law no. 195 of 1958 (Law on the CSM) and as an example the pronouncement of the Constitutional Court of 27 July 1992, no. 379. Here it concerned a case regarding the appointment of Cordova as anti-Mafia prosecutor in Palermo.

and if they, twenty years after their inauguration, wish to acquire the status of judge of the Court of cassation.¹²⁸ These intervening periods last too long. The need of information on the quality of individual judges cannot sufficiently be anticipated either through the systematic and random inspections to which the Ministry – through the inspectorate mentioned above in paragraph 7.2 – subjects the Councils for the Judiciary every three years or based on a complaint. At present a bill under is consideration that the CSM wishes to involve in this assessment of judges, *inter alia*, as a power to carry out a *Valutazione* every four years.

The role of the CSM in the disciplinary jurisdiction

The imposition of a disciplinary sanction is a discretionary power of the CSM (art. 107 of the Italian Constitution). This power to impose sanctions exists with regard to various forms of judicial misconduct, although these forms of conduct are not precisely described. Particularly with judges more clarity is needed concerning the criteria when using this power. The Minister of Justice can take the initiative to implement such a measure (in accordance with art. 107,-second paragraph, of the Constitution), after which the Attorney General further prepares the measure. The inspectorate – previously mentioned in paragraph 7.2 – collects the information for the purpose of such an action by the Minister of Justice. The Attorney General can also start the action as a matter of routine. The CSM¹²⁹ decides on the complaint in the plenary assembly.¹³⁰ An appeal can be lodged with the Court of Cassation. The CSM has a special Commission which is engaged in the examining of judges in connection with disciplinary penalties (*Commissione per le inchieste riguardanti i magistrati*).

Other powers of the CSM

The CSM provides professional training courses for judges. There is a compulsory training package for the judge who is still in training (the

¹²⁸ The system of promotions works as an automatic progress based on seniority, with the exception of cases of promotion by virtue of merit (*demerito*).

¹²⁹ The decision on disciplinary proceedings against judges falls within the competence of a specialized section of the CSM presided by the Deputy President and composed of eight components (members) elected out of the different components of the CSM itself. The disciplinary section differs from the Committee of the CSM which examines the claims against the judges, in order to propose, if possible, their transfer to another office.

¹³⁰ Article 10, introduction and subsection 3, of the law on the CSM. It is very rare that the assembly of the CSM decides unanimously on disciplinary action initiated by a public charge or complaint.

above-mentioned *uditore giudiziario*). Lawyers can also take part in some of the courses. There is always more interest in the courses provided by the CSM itself – on an ad hoc basis – than there are possibilities for placement. Most courses are three-day courses; some are five-day. Some 80 to 100 magistrates take part in these sessions.

During the interviews it was pointed out that the CSM, particularly during the last two years, has played an important role which does not appear to result from laws or regulations: the board sees it as its duty to intervene publicly – unanimously accepted by the board – in cases in which judges are publicly attacked, for example through the media. These resolutions were always intended to distinguish the right to criticise judges from ‘blunt’ denigration and suchlike that not only concern the person of the judge, but also discredit the credibility of the entire *magistrature*. It has happened that through a resolution, the CSM was able to show that the accusations expressed against judges were unfounded. With such publicly made resolutions, the faith in the *magistrature*, if necessary, can be enhanced or restored.

7.4. Intermediate conclusion, Italy

In Italy, the relationship between the Ministry of Justice (and the legislator, Parliament) and the *magistrature* is determined by a model in which the independence of the *magistrature* is a high priority. In the opinion of the CSM, the establishment of the CSM has reinforced the independence of the *magistrature* very much.

Interference from outsiders with judicial powers and responsibilities – insofar this interference is acceptable – must be subject to special guarantees. Furthermore, within the judicial organization a formalised method of work is considered to be necessary, in order to prevent personal factors to interfere with the allocation of tasks. The Dutch delegation was reminded that Italy has a history of exceptional problems: terrorism, corruption and organized crime. In Italy, tackling these problems is considered to be a duty which, in particular, rests with the *magistrature*. On several occasions, it has been said with respect to the disadvantages of the Italian system, that these are the consequences of the choice of a system in which judicial independence is a high priority – ‘That is the price that has to be paid.’

It is said that the advantages and disadvantages of the manner in which the CSM is composed are often closely knit. The fact that every four years the board has to work in a practically completely modified composition means that there will periodically be a clear period of transition, in which probably no too far-reaching decisions can be

taken, but on the other hand, it can facilitate policy renewal. The radical renewal, moreover, fits into the image of the great worry about independence and impartiality that prevails in Italy: it seems to be another example of preventing too much power in the hands of persons.

In addition, the strong emphasis on the independence of individual judges is remarkable and typical of the Italian system. That entails a reserved attitude from the Minister of Justice as well as from Parliament with regard to the content of the judicial work. This reserve has resulted in a strict separation of responsibilities. The judicial organizations perform their judicial powers in strict independence, while the Ministry of Justice centrally regulates the management and budgeting. There is hardly any mention of one's own budgetary responsibility at the judicial councils themselves, which means that there is also little management-related organization at court level, or of a professional organization. However, at present a few hesitating steps have been taken in the direction of more budgetary responsibility for the judicial organization itself. The need to bear one's own responsibility in the area of the management of courts does not, for that matter, seem to be too great in Italy.

The emphasis on judicial independence certainly has, just as in France, a great significance for the appointment and promotion for judges. Unlike, for example, the situation in the Netherlands, the Italian Minister of Justice cannot interfere at all with these appointments and promotions. According to the respondents, the organization of appointments, promotion, transfers and discipline through the CSM reinforces (through the strict upholding of the judicial independence of individual judges) the independence of the judiciary as a whole. However, there must still be a degree of give and take with the extent and the form of public control, which is present in this form of appointment and promotion. The relatively large Courts Service in Italy as regards the ratio is still open for discussion. Through this, a certain extent of politicisation of the Courts Service and, consequently, of the judiciary can appear. This is a risk that we have already come across when we discussed the French CSM.

7.5. Comparative overview: tasks and powers of the Italian CSM

I. Policy-making powers:

external affairs

public services

- judicial collaboration
- personnel management
- ✓ selection policy
- ✓ research policy
- ✓ advice to the Ministry of Justice
- policy on quality

- II. Management-related powers*
- accommodation & safety
- automation
- administrative organization
- providing administrative information

- III. Budget procedure*
- budgetary policy
- distribution of funds
- spending accountability

- IV. Remaining powers*
- ✓ disciplinary powers
- ✓ (nomination powers in the area of) appointing judges
- ✓ promotion and transfer of judges
- ✓ education and training

Chapter 8. The Czech Republic

8.1. The constitutional position of the judiciary in the Czech Republic

The Czech Constitution of 1993 guarantees the independence of the judiciary in different ways, both functionally and from the legal position perspective, and – to a certain extent – institutionally. Article 82 of the Czech Constitution contains a general functional guarantee: judges exercise their judicial powers independently. This independence may not be challenged by anyone. The first guarantee of independence, from the legal position perspective, is to be found in that same Article 82 of the Czech Constitution. This Article provides that judges cannot be dismissed or transferred to another Court against their will. However, the disciplinary regime may give rise to exceptions to this guarantee. From the legal position perspective, the independence of the judiciary is guaranteed by Article 93: the President of the Republic appoints Czech judges for an indefinite period. The institutional guarantees for independence in the Constitution are somewhat less direct. Article 2 of the constitution distinguishes the different State powers, including the judiciary. Furthermore, Article 81 assigns the trial of disputes to independent courts, while the main aspects of the organization are laid down in Article 83 in conjunction with 91 of the Constitution.

The independence of the judiciary is permanently embedded in the Czech Constitution of 1993. This system reflects the recent past. Under the Communist regime, the independence of the judiciary – certainly in the area of administrative disputes – was much less guaranteed.

Organization of the judiciary in the Czech Republic

The judiciary in the Czech Republic has a fairly complicated four-tier structure and a complicated appeal procedure, which will not be fully explained here. In the Czech Republic, there are 78 district courts (responsible for the administration of civil and criminal justice – but there are also administrative courts – in the first instance, for cases of minor importance), 8 regional courts (in certain areas of appeal jurisdiction against district court judgments. Separate appeal to a special Court of Appeal is in any case still possible), 2 ‘higher’ or ‘superior’ courts (responsible for appeal jurisdiction of *certain* judgments of regional courts where the initiative lies with of the Minister of Justice), 1 Supreme Court (responsible for cassation

jurisdiction). In addition to these bodies, there still are 3 commercial courts, established in Prague, Brno and Ostrava. These specialised courts are playing a major role in the liberalisation of the Czech economy. They deal in particular with professional and business cases relating to open and honest competition, prices policy, good trade practices, etc. Article 91 of the Constitution also provides for a Supreme Administrative Court in addition to the Supreme Court, but this has not yet been established. A special Constitutional Court monitors the constitutionality of administration and legislation. The judicial system in the Czech Republic is complicated and somewhat fragmented. Moreover, the complicated laws in this area are not such that the organization of the courts and the administration of justice are characterised by an effective and efficient settlement of matters. There is a huge backlog as to the disposal of cases – certainly at the commercial courts.¹³¹

The main aspects of the judicial organization are addressed in the Constitution, while the further details are laid down in a law. The disciplinary regime with regard to judges in the Czech Republic has a special structure. In principle, the court where the judge against whom disciplinary proceedings have been started is active is entrusted with disciplinary jurisdiction.¹³² This means that if a judge has committed a disciplinary offence, such an offence will be reviewed by his fellow judges. The president of the specific court is responsible for establishing the disciplinary tribunal. This system is to be revised soon, because it does not contribute to the public's confidence in the judiciary. The Czech judicial organization is at present subject to reforms in a more general sense. We will return to this in paragraph 8.3.

Since the velvet revolution of 1989, the judiciary in the Czech Republic has been confronted with various problems. First of all, in several areas, it had to put its past behind it, and this caused a purge of the judiciary and this involved rehabilitation procedures. In addition, the judiciary was confronted with many new types of cases linked to the transition from a socialist economy to a market economy. New legal areas, such as competition law, emerged, and the courts were overwhelmed by the increasing number of criminal (under the influence of a crime wave from the mid-1990s) and civil cases (as a result of the increased market activity, the still low industrial and business ethos, bankruptcies, a 'debt crisis', the return of wrongfully expropriated properties in the past, etc.). The existing

¹³¹ See the memorandum of the *Minister of Justice, Principles of Reform of the Judiciary* (14 April 1999), Prague 1999, and pp. 6-7.

¹³² See Law no. 412/1992 Coll. On Disciplinary Responsibility of Judges, in context of further provisions.

judicial infrastructure which, after the revolution, continued to form the basis for the judicial organization was by no means suited to the fast developments and lacked both the machinery and the necessary legal expertise to meet the great increase in cases. A true exodus of judges further worsened the situation. Nearly half of the sitting judges resigned between 1990 and 1993, partly for political reasons, partly due to the attractions of the private sector, where experienced jurists (particularly as notaries) were in great demand. These problems did not only cause troubles with the processing of cases, but also had a negative impact on the status and the authority of the judiciary. As a result of the combination of unfavourable factors, there is a certain lack of confidence in the judiciary among the public. In the period until 1994, this in particular discouraged the recruitment of young judges who were needed to stem the increasing workload. Not many young jurists wished to be a judge and this was also due to the very low salaries. At present, the negative 'spiral' affecting the judiciary is beginning to disappear, because there was some success in attracting more judges and in the long run in equipping the organization better in order to reduce backlogs.

According to EU experts, these efforts were, however, not yet sufficient to meet the requirements attached to the country's entry into the European Union. A mission of experts of the European Union, carried out in November 1997, drew the conclusion that the independence of the judiciary in the Czech Republic is still insufficiently ensured. Particularly the method of management (presidents of courts are both head of the court and responsible for management by order of the Minister of Justice), the complicated organizational structure and, consequently, the related stagnation in the processing of cases and the insufficient financial and material machinery of the judicial organization mean that the European experts take the view that the Czech organization is not yet capable of satisfying the entry requirements.¹³³

Regarding the problems the Czech judicial organization was not capable of really getting at the root of, resulting in its inability to satisfy the entry requirements that the European Union sets, preparations are currently under way to effect a far-reaching revision of the judicial system. The Czech Government discussed the main aspects of the reforms as early as 14 April 1999 (Principles of the Reform of the Judiciary). Adhering to the intention, the plan for reform was established on 15 June 1999 based on the basic ideas laid down earlier.

¹³³ See *Terms of Reference CZ 9810-03-02*, p. 1.

8.2. Ministerial responsibility and public control in the Czech Republic

The Czech Government has a system of collective responsibility of the Government. The head of this Government is the Prime Minister, appointed by the President (Article 68 of the Constitution). Parliament can withdraw its confidence in the entire Government through a motion of no-confidence (Article 72 of the Constitution), which compels the Government to resign. The Prime Minister tenders his resignation to the President, and the Ministers do so, through the Prime Minister, to the President.

At present, the Czech Minister of Justice is responsible for the management of the judicial system. This responsibility has different aspects. First of all, the Minister of Justice is the person in charge of the budget. The Minister of Justice takes care of the equipment and funding of the courts. At present in the annual budgetary cycle, the requirements of the district courts and the commercial courts are listed, co-ordinated and passed on by the regional courts to the Ministry of Justice every year. The Supreme Court, the high courts and the Constitutional Court themselves pass on their own requirements direct to the Minister of Justice. The requirements listed constitute the basis for the budget proposal that the Minister of Justice presents to Parliament. Once the budget proposal is established in the form of a budget law, the funds made available to the courts. This means that the regional courts play an important role as an intermediary organization: they take care of the allocation of funds to the district courts in their region. For that purpose, in accordance with a previously established allocation system – based on workload measurement – a twelfth of the budget for a court is made available to a district court every month.¹³⁴ This allows them to pay the costs relating to their courts. The funds system is relatively strict: interim supplements to or increases in the budget within the same budgetary year are actually not possible. Yet now and then the Regional Court sees possibilities by way of some specific reserves for granting additional funds to district courts in the event of unforeseen circumstances. In addition, there is a possibility to approach the Ministry of Justice in an emergency. Relatively little use is made of this possibility.

The Minister of Justice – and indeed in accordance with a staged system – also exercises control over the expenditure of funds. First of all, the regional courts carry out checks – announced beforehand –

¹³⁴ This indeed creates a problem, because the costs are not the same in every month. The courts themselves must make a provision for months with higher costs.

in district courts . The Ministry of Justice, which has a special department for this purpose, in turn, inspects the regional courts themselves – as intermediary organizations. These inspections are planned, too. For that matter, the inspection service of the Ministry of Justice can carry out inspections on the premises of every judicial authority. The inspections can lead to instructions to the President of any court which, in the Czech system, acts as administrative manager. The regional courts are accountable in terms of budget justification.

The management of the judicial organization in the Czech Republic has a special purpose. The presidents of courts not only have the final word in judicial matters in their organization (judicial agenda), such as delegation of the work to judges and assistance, disciplinary and personal matters, but they are also responsible for the general management of their organization (execution of the state administration in judiciary). In this context, presidents are responsible for the ‘material’ supplies for their organization (buildings, equipment, etc.), set-up and organization of the administration of a court (including the collection of court fees), the management concerning the expenditure of the budget etc. In implementing the latter tasks, the Presidents are subordinate to the Minister of Justice. The Minister, who can appoint and dismiss the judges holding the position of President, issues guidelines to the Presidents in the area of general court management, which are at odds with the judicial independence of the presidents who, during their term as president, also continue to do their usual work as judges in the court. In the opinion of the committee of experts who visited the Czech Republic within the framework of the entry inspection in 1987, the partial subordination of the Presidents to the Minister of Justice constitutes a danger to the independence of the Presidents. Even the presidents, who were interviewed within the framework of this inquiry, did not seem to be pleased in all respects with the managerial powers that they had to exercise under the authority of the Minister of Justice. They preferred to be involved with their strictly judicial tasks.

Besides his managerial responsibility, the Minister of Justice also has a responsibility in the area of training and appointing judges. Since 1999, the candidates for judicial positions have been recruited centrally by the Ministry of Justice. This replaces the former system in which the regional courts were responsible for recruitment. This decentralised recruitment system led to an unstable situation. Many prospective judges presented themselves at the regional courts, expecting to be appointed in a region. Now that the Ministry of Justice has centralised the recruitment system, it is easier to achieve a balanced distribution of the candidates (who are already scarce). After their registration, the candidates are subjected to various

examinations and selected or rejected. The selected candidates are subsequently appointed as an official of the Ministry of Justice and appointed as candidate judge ('trainee') in one of the district courts. This is followed by two years of practical training in different divisions and sections of a district court and an appellate court. During the training period, the regional court is the co-ordinating court. The courses and evaluations of the trainees are organized at that level as well. After three years, the regional court decides if a candidate is admitted to the final examination. If a trainee is entitled to take the final examination, he or she gets time to prepare for it. The final examination consists of a written part, but also of other evaluations, such as a psychological test. The final examination has one re-sit. If a trainee passes, he or she is recommended by the regional court to the Minister of Justice, who, in turn, makes an appointment proposal to the President of the Republic, the authority that is empowered to make appointments. There are different training courses (permanent education) during a judge's career. The Ministry of Justice takes care of a few of them, but most of the courses are organized by the association for judges (Union of Judges). The Supreme Court also organizes afternoon workshops.

In order to encourage exchanges of experience between public management and the judiciary, judges can be posted within the public management sector. A judge can, for example, be posted to the Ministry of Justice for a while. However, little use is made of this possibility; the average workload of the Czech courts, and in most cases the acute staff shortage does not permit a judge to be 'lent out' for a while.

Through training and because of the role the Minister of Justice has in the system of judicial appointments, he can play an active role in monitoring the quality of the administration of justice. The Minister's responsibility for quality is also dealt with by means of the responsibility for the judicial system for which he has a special responsibility (for example, through the proposals for reform of the judicial organization such as that which is now being proposed) and the authority that the Minister of Justice has to hold inspections in the area of the management of the judicial organization, to give instructions as a result of such inspections and his power to initiate disciplinary procedures against judges, if necessary.

The control that Parliament exercises on the way the Minister of Justice conducts the management of the judicial organization is indirect. Parliament monitors the management policy of the Government with regard to the judicial organization in general. There is little involvement with individual dossiers of courts (and the way in which they are managed) and still no parliamentary inquiries have been set up regarding the management of the judiciary. Even the training and appointment policy is monitored by Parliament

from a distance. The budget is usually scrutinised at the moment the management policy for the judiciary comes up for discussion. The discussions are thus concentrated mainly and firmly on the 'equipment' of the judicial organizations. Discussions concerning the content of the judicial work, out of respect for the judicial independence, are hardly ever held.

8.3. A 'Supreme Judicial Council' in the Czech Republic

The judiciary and judicial organization in the Czech Republic, already discussed in paragraphs 8.1 and 8.2, finds itself in a precarious situation. Notwithstanding the attempts to boost the independent status and the authority of the judiciary through the Constitution and organizational and administrative measures, this independence of the judiciary is not yet beyond dispute. The most important causes are to be found in: (a) the recent communist past and the then prevailing system of socialist administration of justice, (b) the increased workload as a result of new types of cases, new legal grounds and social developments, (c) the – until recently constantly increasing – staff shortage, expertise and funds to cope with the increased workload, (d) the current inefficient four-tier organization and the complicated procedural law that still adds to the delays and arrears in processing cases, (e) the double power structure with regard to the management of courts, where the president, as head of a court for management-related matters (execution of the state administration), is subordinate to the Minister of Justice, but not for the judicial direction (judicial agenda), and (f) the disciplinary procedures organized locally, where judges are actually tried by fellow judges from their own judicial organization. The problems, which were also noted by the European Union commission of experts in the 1997 inquiry, have recently induced the Czech Government to come up with a plan for the revision of the judicial organization (judicial reform). The main aspects for that plan were already established by the Czech Government in April 1999 and on 15 June, the Minister of Justice will lay them down in a plan for revision of the judicial organization. The most important elements of this reform are the following:

1. The establishment of an intermediary organization for the management of the judicial organization (a Courts Service/court administration authority). This independent organization – which will be called Supreme Judicial Council (SJC) – will play a role in the management of the judicial organization in the area of the administrative support for the courts' business-processing (automation, administration, progress-monitoring systems and the

like), of court personnel management, of the co-ordination of the disciplinary procedures, of the training of judges, etc.

2. A solution to the problem of the subordinate position of the presidents of courts in the area of their managerial powers. The first considerations favour a system in which the Presidents are granted more independent management in the area of their management-related powers (and, hence, less or no more direct influence on them by the Minister of Justice).

3. Simplification of the complicated judicial system. In the near future, there will be only three levels in the judicial system. The 'higher courts' will disappear as a distinct level and the commercial courts will be incorporated into the district courts.

4. The procedural law will be reformed and will become less complicated. More powers will be created for emergency procedures, accelerated procedures and simplified settlement, etc.

5. The material and technical support of the judiciary will be improved and extended.

The Czech Government intends to go ahead with these plans. At the end of 1999, the first bills must already have gone to Parliament.

In the meantime, the first proposals of the Czech Government have led to various discussions in the Czech Republic concerning the set-up and organization of the new Supreme Judicial Council. The Union of Judges and the Supreme Court in particular have expressed their opinions in this debate.¹³⁵

According to the Union of Judges, judicial self-management (self-governance of the judiciary) should be the starting point for the reform of the judicial organization.¹³⁶ That principle of self-management would need to be included in the Constitution. According to the Union of Judges, the SJC¹³⁷ should have a management with a majority consisting of judges.¹³⁸ Thus, in a board of 17 members, the Union of Judges visualises places for 8 judges elected from the members of judicial sections. The Presidents of the Supreme Court and the Constitutional Court, by virtue of their office, have seats and the remaining 7 members are elected by Parliament.

¹³⁵ In March a congress, organized by the Union of Judges, was devoted to the theme of the above-mentioned establishment of the SJC.

¹³⁶ See Resolution of the Assembly of Section Representatives of the Czech Union of Judges of 29 November in Plzen.

¹³⁷ At the Union of Judges also called 'Supreme Council of the Judiciary'.

¹³⁸ In 1995 even the option that the full board would consist of judges was held open.

There are appointment requirements in respect of the candidature, as well as in respect of the members elected by Parliament (representational and professional qualities). The purpose of the Union of Judges is, in any case, to ensure that judges themselves have a significant role to play in the management. In their proposals, there also is room for external members in the management. The SJC, in accordance with the proposal of the Union of Judges, has general tasks and powers as regards lists of recommendations for the appointment and transfer of judges, appointment and dismissal of executive judges (presidents) in courts, making budget proposals for the entire judiciary, the apportionment of the budget among the courts, giving advice on important measures for the judicial organization. An exceptional aspect in the proposals of the Union of Judges is that they envisage a system of independent judicial management at two levels. In their proposals the SJC will have a representation in the form of a department within every court. This idea, taken from the Hungarian system, means that Judicial Councils act as a delegation in all courts.¹³⁹ Such decentralised administrative representatives would then evaluate judges, make proposals for appointment and transfer of judges, draft budget proposals for their own court(s) for the coming year, approve the way of spending funds in a court, etc. According to the Union of Judges, this system has the advantage that the method of management and the problems that this entails become more transparent within a court. It is essentially a permanent monitoring system. Intermediate problems and needs become apparent earlier and this improves the communication between individual courts and the SJC, so that the latter can anticipate the court administration's needs more accurately. This allows better co-ordination.

The Supreme Court does not share the approval of this stratified and decentralised system of management of the judicial organization. The Supreme Court is looking more along the lines of a central SJC based on the Spanish model. Furthermore, the Supreme Court would like to see the principle of partial self-management laid down in the Constitution, through an own board. For the Supreme Court, the SJC should also be composed of a majority of judges. Besides an official representation of the President of the Supreme Court, judges could be appointed in it through representation. A proportion of the board members of the SJC would be appointed directly by Parliament. A delegation of the Minister of Justice and the President in the SJC – such as it exists in France and Italy – is deemed unnecessary by the Supreme Court. According to the Supreme Court,

¹³⁹ In very small courts with less than 10 judges, the general judges' meeting would be able to fulfil the office the Judicial Council.

the Minister of Justice and the President of the Republic should not be concerned with the election and management of the SJC. Only Parliament and the judicial organizations themselves decide – within the scope that applies to the appointment – who becomes a member of the SJC. The Supreme Court considers that the SJC will be given a role in the general management of courts, the allocation of funds and personnel, the budget preparation and the appointment and training of judges. In order to cope with the worsening position of the judicial organizations in the Czech Republic, all that is necessary, according to the Supreme Court, is to allow the SJC to make binding recommendations in the area of the budget proposals. The Minister of Justice must include the SJC's requests regarding size of staff and material supplies in his budget proposal to Parliament. The latter is, of course, free to decide whether the proposal is followed or not. In the area of the disciplinary jurisdiction, the Supreme Court supports a centralised system. A Central Court, from now on, should be empowered to execute the disciplinary administration of justice. It is possible that the SJC would play a role in the establishment or the support of such an organization.

8.4. Intermediate conclusion, the Czech Republic

The way in which the management of the judiciary is at present organized in the Czech Republic is what one could call *undivided*. There is no real intermediary organization that possesses separate managerial powers between the Minister of Justice and the judiciary. The presidents of the courts only act, in a management-related sense, as implementers of the management policy of the Minister of Justice to whom they are hierarchically subordinate in that respect. Such undivided systems of management of the judicial organization exist in France, Germany, Italy and the Netherlands. There, the managerial responsibility is also completely with the Ministers of Justice, who can be held liable regarding their policy in these matters by virtue of their political responsibility. Moreover, the way the regional courts are positioned as a budgetary relay station in the Czech system at present displays resemblance to systems such as we have in other European countries. For example, France also has the system of the *Cours d'appel* which fulfil an intermediary role in the budget allocation and the budget justification for the courts in their region.

Until now, the system of undivided managerial responsibility in the Czech Republic has not seemed able to solve the huge problems that the Czech courts are facing. Particularly the lack of personnel and funds, the lack of expertise and the associated delays and stagnation in the business-processing are such that the Czech judiciary cannot or can hardly cope with the still constantly rising flow of matters. As

a consequence thereof, the authority and the independent status of the judiciary, which is the basis of a democratic constitutional State, is at issue in the Czech Republic. Boosting that judicial authority and the independent status is of paramount importance, also in connection with the entry of the Czech Republic into the European Union. Recently the Czech Government made a first attempt at reform of the judicial organization.

The plans launched for this purpose contain, besides a simplification of the structure of the judicial organization, a simplification of the procedural law and a modified organization of disciplinary procedures and the management of courts, as well as the intention to put an independent judicial organization in charge of certain components of the management of judicial organizations. This Supreme Judicial Council is an independent Courts Service, which will manage the judicial organization in the area of the administrative support of the business-processing of the courts (automation, administration, progress-monitoring systems, and suchlike), the allocation and justification of funds, the personnel management of courts, the establishment and co-ordination of disciplinary courts and the establishment of a disciplinary appeals jurisdiction, the recruitment, training and appointment of judges. It is possible that the SJC will take over still more ministerial managerial powers. The precise future tasks and powers for the SJC have not yet been established, and nor is the way in which the Board will be set up. In the discussions, the preference of the Government and the Supreme Court as well as of the Union of Judges is for a broadly composed board, which consists mostly of judges and a part of whom – also based on representation of the relevant judicial sections – is partly appointed by judges, partly by Parliament. In both opinions, the President of the Supreme Court should also officially have a seat in the management of the SJC. As regards the tasks and powers of the SJC the Supreme Court holds the opinion that they must primarily be in the area of funds and staff allocation, training and appointments, and in a role in the preparation and implementation of the budget. The Supreme Court wants to empower the SJC to make binding proposals for the Minister of Justice's budget proposal in the area of the courts' staffing and funds requirements. The Union of Judges envisages the powers of the SJC as situated mainly in the area of appointments and transfer of judges, advising the Government and having a role in the budgetary cycle. The exceptional aspect of the proposals of the Union of Judges is that they want to have a decentralised system in which delegations or representations of the SJC are established at the level of nearly all courts. These delegations are mainly involved with management-related matters. The Supreme Court has little sympathy for this system. Both the Supreme Court and the Union of Judges adopt the

attitude that the status of the SJC requires constitutional establishment.

8.5. Comparative overview of the tasks and powers of the 'Supreme Judicial Council' in the Czech Republic

Below you will find a comparative overview that aims to reflect what the tasks and powers of the Czech Supreme Judicial Council will be. Aspects indicated with a '?' are those in respect of which no certainty exists or which are disputed.

I Policy-making powers:

- external affairs
- public services
- judicial collaboration
- personnel management
- selection policy
- research policy
- advice to the Ministry of Justice
- policy on quality

II Management-related powers:

- ?✓ accommodation & safety
- ✓ automation
- ✓ administrative organization
- ?✓ providing administrative information

III Budget procedure

- ✓ budgetary policy
- ✓ distribution of funds
- ✓ spending accountability

IV Other powers

- ✓ corrective powers/disciplining
- ✓ (power to propose candidates for) judicial appointments
- ✓ promotion and transfer of judges
- ✓ education and training

Chapter 9. Croatia (State Judicial Council)

9.1. The constitutional position of the judiciary in Croatia

The Croatian judicial system has its roots in the middle of the 19th Century and since then the system has been structured mainly on the basis of the experiences with the Austrian and German judicial systems. The Croatian judicial system is institutionally organised by the principles of the rule of law and the independence of the judiciary. In the Articles 117 to 123 of the Constitution of the Republic of Croatia, the main powers of the judiciary are laid down. Article 117 of the Constitution states that ‘the judicial power shall be exercised by the courts, the judicial power shall be autonomous and independent and courts shall administer justice on the basis of the constitution and law.’ The powers and the status of the Supreme Court is described in article 118 of the Constitution. ‘The Supreme Court of the Republic of Croatia, as the highest court, assures the unique application of laws and equality of citizens. The president of the Supreme Court is elected and dismissed by the Croatian parliament (*Hrvatski sabor*) upon the proposal of the President of the Republic, subject to the prior opinion of the general session of the Supreme Court of the Republic of Croatia and of the corresponding commission of the Croatian parliament. The president of the Supreme Court is elected for four years. Founding, competence, composition and organization of the courts and the procedure is regulated by law.”

Article 121 of the Constitution describes the immunity of judges. Judges enjoy immunity under the law. Judges and members of the jury that take part in a ruling cannot be held accountable for the opinions expressed or for voting during decision making, except if a judge commits a violation of the law that is defined by the law as a crime. A judge is not supposed to be arrested in the procedure started because of the criminal act exerted within the judicial ruling or to be put under detention without the permission of the State Judicial Council. In principle the appointment of a judge is for life. An exception of paragraph 1 of Article 122 of the Constitution is related to the first term of office as a judge. Judges are appointed for a period of five years. After this period they will be appointed for life. Judges are dismissed only on the basis of the following criteria: a personal request, the loss of capacities for the discharging his/her

duties, conviction of a crime, disciplinary acts of the State Judicial Council or retirement (at the age of 70). The judges may complain against dismissal decisions to the Constitutional Court within a term of 15 days from the day of delivery of the decision.

The principle of Article 6 of the European Convention of Human Rights can be found in Article 29 of the Constitution (right to a fair hearing). The publicity of hearings is further provided in article 119 of the Constitution, stating that 'judicial hearings are public and the judgments are pronounced in public, in the name of the Republic of Croatia.' The public may be excluded from the hearing wholly or partly for the reasons that are indispensable in a democratic society for the sake of private life of parties, in marriage cases and in cases connected with custody and adoption, or for the protection of the military, professional or business secrets, and for the protection of the safety and defence of the Republic of Croatia, but only in the measure that is according to the opinion of the court, unconditionally indispensable in special circumstances where the presence of the public might damage the interests of the justice"

The judicial organisation in Croatia

The structure and the powers of the courts are described in the Act on Courts¹⁴⁰. This law regulates the organisation and powers of the courts, their internal organisation, the conditions for the appointment and dismissal of judges, their rights and duties, and special arrangements regarding the Supreme Court. The territorial jurisdiction is also governed by the Act on Courts. Article 16 provides that 'in the territory of a county court where more municipal courts are established, a law may provide that one of these municipal courts hears a particular class of cases which fall within the competence of municipal courts in the territory of the same county courts'. The territorial jurisdiction of the courts is primarily based on the size of the population in a given area. The county courts cover several municipal courts and the law regulates which courts should be placed under the territorial jurisdiction of county courts.

The jurisdiction of the courts is described in Articles 15a to 24 of the Act on Courts. The Republic of Croatia has six different types of courts. The first type of courts is the municipal court. These courts are, in first instance, responsible for: criminal cases in the case of criminal offences for which imprisonment of up to ten years is prescribed. In addition to these criminal cases, the municipal courts

¹⁴⁰ Zakon o sudovima, Official gazette – "Narodne novine", 3/94, 100/96, 115/97, 131/97 and 129/2000.

handle all civil cases (maintenance, existence or non-existence of marriages, divorce cases, the challenge of paternity or maternity cases, custody cases, disturbance of possession, landlord and tenant cases, housing cases) and labour cases. Municipal courts are also responsible for cases regarding legacy and the Land Register, including the keeping of the Land registry, non-contentious and enforcement cases, legal aid, recognition and enforcement of decisions of foreign courts and international legal assistance (Article 16 of the Act on Courts). The second type are the county courts. These courts are responsible for adjudicating criminal cases which may be punished by imprisonment of more than ten years, conducting of investigations and other acts, conducting proceedings for the extradition of indicted or convicted persons (unless the law specifies the jurisdiction of the Supreme Court), enforcing foreign judicial decisions in criminal cases, deciding on appeals against the decision of an investigating judge, hearing appeals against municipal courts' decisions delivered in first instance proceedings, deciding on the conflict of jurisdiction between municipal courts. The County courts also conduct disciplinary proceedings and hear appeals against decisions delivered by disciplinary proceedings regarding malpractice of public notaries (Article 17 of the Act on Courts). Commercial courts, as the third type of courts, have jurisdiction on specific commercial cases (for instance disputes arising from commercial contracts, disputes concerning shipping and maritime navigation, aircraft disputes and intellectual properties (Article 19 of the Act on Courts). The Police courts – fourth type – have first-instance jurisdiction to adjudicate petty offences (Article 15 of the Act on Courts). The appeal cases of the police courts are sent to the High Police Court. The fifth type of court, is the administrative court. This court is responsible for decisions in cases against final administrative acts (Article 21 of the Act on Courts). The Supreme Court of Croatia has several competencies. First of all, they are responsible for the hearing of appeals against decisions of county courts rendered in first instance, against decisions of the High Commercial Court and the Administrative Court. The Supreme Court also decides in conflicts of jurisdiction between courts in the territory of the Republic of Croatia where they have the same immediate superior court. Another task of the Supreme Court is the promotion of the uniform application of the law and equal protection of citizens before the law and in the discussion of important legal issues. The Supreme Court has also a task in the training and education of judges (Article 22 of the Act on Courts).

There are 114 municipal courts, 21 county courts, 115 police courts and 13 commercial courts.

In addition to the municipal courts, county courts, police courts and

commercial courts, the Republic of Croatia has a Constitutional Court. The Constitutional Court decides on the conformity of laws with the Constitution, the conformity of other regulations with the Constitution and laws. It is also responsible for the protection of the constitutional freedoms and human rights, the decision on jurisdictional disputes between the legislative, executive and judicial powers, the impeachment of the President of the Republic, etcetera (see for further details Article 126 of the Constitution).

9.2. Ministerial responsibility in Croatia

The Ministry of Justice, Administration and Local Self-Government is responsible for the administration of Justice. It provides professional training and education of judges, State attorneys and employees in the judiciary. It is also responsible for the supervision of the administrative work in the various judicial organisations, the Public Defender's Offices and the State Attorney's Offices (see Article 25 and 26 of the Act on Courts). Activities related to the improvement of the performance of the judicial power, drafting of laws and other regulations intended to regulate the performance of the courts (competencies, jurisdiction, composition and organisation of courts, training and education, allocation of budgets) are included in the list of tasks of the Ministry of Justice (Article 38). The department for the administrative affairs and human resources in the judiciary performs the main tasks regarding the administration of justice. It keeps the personnel records of the judges and supervises the performance of the courts. The Ministry of Justice can ask the courts to provide reports and information regarding their performance. It can also obtain information of the work of the court incidentally. The Minister of Justice also determines the total number of judges for each court in accordance with the framework standards of judicial practice. This framework is issued by the Minister of Justice upon the proposal of an Extended Convention of the Supreme Court (Article 46 and 47 of the Act on Courts). The allocation of the budget lies as well in the hands of the Ministry.

The Minister of Justice is also responsible for the appointment of court presidents. The State Judicial Council only has the right and duty to propose candidates for the position of a court president. Court presidents are appointed for a term of four years by the Ministry of Justice among the candidates nominated by the State Judicial Council and may be re-elected for another term (Article 73a of the Act on Courts).

9.3. The State Judicial Council of Croatia: composition and powers

The State Judicial Council has its legal basis in Article 121 of the Constitution and the Act on the State Judicial Council (Gazette No. 58/93, 18 June 1993 and 49/99 and the amendments on the Act on the State Judicial Council Number 01-081-00-4344/2, December 2000).

The State Judicial Council comprises 11 members, the president being one of them. Senior judges, lawyers and professors of law can be selected for a position of president or member of the Council. In the recent past (before 2000), the Council consisted of 15 members, including representatives of the Public Prosecution agencies. According to the new rules, the Croatian Parliament will elect the 11 Council members from the ranks of judges (seven), lawyers (two) and professors of law (two). The election procedure is described in Article 2 of the Act on the State Judicial Council.

A competent committee of the Croatian Parliament can submit a request for the initiation of a candidacy procedure to the president of the Supreme Court, the President of the Croatian Bar Association as well as from the Deans of the Faculties of Law. The list of judicial candidates is composed by the President of the Supreme Court, whilst the Croatian Bar Association is responsible for the candidacy of lawyer members of the Council. A session of the Deans of the Faculties of Law composes a list of candidates drawn from the ranks of professors of law. The Croatian Parliament (Sabor) elects the members of the Council. The president and the members of the State Judicial Council are elected for a four-year term (see Article 123 of the Constitution).

The State Judicial Council performs four tasks: the appointment of judges, the conduct of disciplinary procedures, decision to release a judge from duty and the performance of other tasks in compliance with the law (see Article 11 of the Amendment to the Act of the State Judicial Council). The first two tasks will be described more extensively. Chapter IV of the Act on the State Judicial Council lays down the procedure for the appointment of judges. The Ministry of Justice is responsible for the publication of vacancies for judges in the Official Gazette and for summoning prospective candidates to apply for a position. After the deadline for sending an application to the Ministry of Justice, the Minister will request an opinion on the candidates from a responsible panel of judges (so called judicial council; Article 53 of the Act on Courts). The panel of judges will express their opinion in a written document sent to the Minister of

Justice. The Minister then submits the list of candidates satisfying the appointment conditions, with the opinion of the panel of judges to the State Judicial Council. The State Judicial Council must have received the opinion from the competent Committee of the Croatian Parliament about the proposed appointment before making its decision. The decision on the appointment of judges is published in the Official Gazette.

Another important task of the State Judicial Council relates to disciplinary measures. The disciplinary procedure is described in Article 19 of the Amendment to the Act on the State Judicial Council. This Article provides that a judge shall be held responsible for disciplinary offences such as abuse of power, or overstepping official authority, unjustified non-performance or disorderly performance of judicial duties (where a judge fails to draft and render court decisions within legally fixed deadlines without justified reasons, or if a panel of judges evaluates his/her work negatively, or if without justified reasons, the number of decisions he/she passes in a period of three years is significantly below the average of the Republic of Croatia), in the case of performing duties which are not compatible with the judicial work, causing disturbances in the work of the court that significantly affect the activities of the judicial authority, violation of the official duty of secrecy in relation to the performance of judicial duties and in a situation where a judge harms the reputation of the court or the judicial duties in any other ways. A disciplinary committee consisting of three members of the State Judicial Council is responsible for the disciplinary procedure (Article 21 of the Amendment). There are three disciplinary sanctions: the first is a reprimand; the second is a monetary penalty (this cannot exceed a third of a judge's monthly salary for a period not exceeding six months) and the final sanction is the suspension of a judge (Article 25 of the Act on the State Judicial Council).

Chapter 10. From an Undivided Model to a Council for the Judiciary: the Netherlands

10.1. The Netherlands and the constitutional position of the judiciary

a. Why the Netherlands?

At the close of this study, we will briefly go into the Dutch Government's plans for changing over to a Council for the Judiciary. In contrast with the other countries investigated here (with the exception of the Czech Republic), the plans in the Netherlands are not yet at the stage of concrete bills containing a clear statement about the position, organization, tasks and powers that the Dutch Council for the Judiciary is going to have. Many of these points still need to be considered and at present, they are being debated by the judicial organizations, other interested parties and Parliament. In order to give as broad an insight as possible into this study, we will deal with the Dutch intentions briefly here, although the analysis can be less detailed considering the stage of the process at this juncture.

b. The constitutional position of the judiciary in the Netherlands

At present, the most important guarantee we have for the independence of the judiciary is laid down in Article 117 of the Dutch Constitution, which provides that members of the judiciary entrusted with the administration of justice, as well as the Procurator General at the Supreme Court, are appointed for life by the Government and that the members of the judiciary can be suspended and dismissed only in the cases specified by the law, and only by the court designated for this purpose by law.¹⁴¹ Thus, the constitutional guarantee of independence of the judiciary is only for *individual* members of the judiciary. Further, this individual constitutional guarantee, is indirect: it does not involve the perspective of the legal side of the matter – the independence of the judiciary – the content of the position, the settlement of disputes. Yet the quintessence of the judicial independence in the Dutch system of government is precisely the guarantee of independent trial of disputes: the judiciary must, on

¹⁴¹ Article 118 of the Constitution contains another accessory guarantee by specifying that the appointment of the members of the Supreme Court takes place on the recommendation of the Lower House of the Dutch Parliament.

the basis on the law, hear disputes without being functionally dependent on other State powers, such as the legislative or executive powers. Accordingly, this kind of functional independence does not extend further than the independence of individual judges.

In a functional sense, the independence of the judiciary in the Netherlands is guaranteed at all these levels. However, in the Dutch system, there is no rigorous separation of powers, in the sense of absolute independence and an absolute separation of powers. The separation of powers in the Dutch system is characterized by 'checks and balances', where the most important State powers work in collaboration in certain areas, and influence and (as a consequence of that) control each other. In any case, the judiciary is organizationally and institutionally dependent on other constitutional powers. In the institutional sense, there is a certain degree of dependence between the legislative and the judiciary. The legislator specifies the judicial organization, procedural law, the legal position of judges and – to an important degree – the law on the basis of which judges administer justice. In budgetary matters, judicial organizations are dependent on the budget legislator. In the organizational sense, the judiciary relies partially on the executive, namely the Minister of Justice, who has managerial responsibility for the budgets and acts as a responsible authority for the auxiliary staff of the judicial organization. The Government is also involved with the appointments – whether or not by way of a list of nominees – of the members of the judiciary and – through the Minister of Justice – it monitors, in the general sense, different production data of a non-intrinsic nature of the judicial organization.¹⁴²

10.2. Ministerial responsibility and public control in the Netherlands

In the Netherlands, Ministers are collectively and individually accountable to Parliament. An unwritten rule of trust prevails in the Netherlands between Government and Parliament which is negatively formulated: only if it is clearly evident that a parliamentary majority has no confidence in a Minister or the Government, should the Minister or the Government resign.

As a general rule, the Minister of Justice is responsible for the management of the judicial organizations. He takes care of the

¹⁴² Under Article 105 in conjunction with Article 76 of the Dutch Constitution, Parliament has the actual power to control the expenditure of the authority granted to the judicial organization, but Parliament hardly ever uses this power.

allocation of the personnel and material funds that the judicial organizations need in order to be able to function. Until recently the local management of courts was in the hands of directors or heads of judicial organization (*directeuren gerechtelijke organisatie*: DGOs) subordinate to the Minister within the courts themselves. Since 1998, the functional management of the DGOs has no longer been vested in the Minister but in the Presidents of the courts. Nowadays these Presidents are entrusted with the day-to-day management of the courts, mandated for that purpose by a day-to-day management team that is elected by the general court meeting (= the assembly of all judges). The Minister of Justice is responsible for both the administration and the budget. He takes care of the budget proposals and the allocation and justification of the funds once they have been granted under the budget law. Like France, the Czech Republic and Germany, the Netherlands has an undivided management model, in the sense that there is no separate intermediary organization with a separate role in the management of the judicial organizations.

In the area of the appointments and the transfer policy of judges, the Minister of Justice also plays an important role. In reality he appoints the judges¹⁴³ and he also submits the members of the Supreme Court to Parliament for appointment. In addition to this power of appointment, the Minister of Justice performs an important duty in recruiting and training future judges.

The Dutch Minister of Justice is also responsible for the supervision and inspection of the individual courts. This supervision is sometimes effected through planned inspections, but mostly by the periodic monitoring of the administrative and financial data of courts kept up to date in digital form by the courts themselves.

Also out of reverence for judicial independence, the Dutch system has a system of detached control over the administrative and appointment policy that the Minister of Justice pursues with regard to the judicial organizations. Even now that the judicial organization is being radically revised, it hardly ever happens that Parliament examines or discusses individual dossiers from courts or management-related dealings of the Minister of Justice. Only during the budget debate do the staffing and equipment of the judicial organizations come up for discussion.

¹⁴³ See art. 117 of the Dutch Constitution.

10.3. A Council for the Judiciary in the Netherlands

a. Revision of the judicial organization in the Netherlands

Since 1992, in different phases, work has been carried out on a fundamental revision of the judicial organization.¹⁴⁴ This revision is particularly intended to create conditions for improving and maintaining judicial quality and the quality of the administration of justice, creating conditions for the improvement of the client orientation of the administration of justice and creating a balance in the structure of the judicial organization. The changes in the area of the organization and arrangement of the judicial organization have important consequences for the position of the judiciary in the Netherlands. During the last few decades, the judiciary has been under pressure to process an ever increasing number of cases of increasing complexity, without this always being accompanied by a proportional increase in the required funds and facilities. That has resulted in two sorts of questions.

First of all, questions with regard to the appropriateness of judicial procedures. Are, for example, the organizational and management-related arrangements that we have at present, for purposes of the administration of justice and the organization of the judicial organizations, still appropriate to ensure that justice is administered in the most efficient manner? Under the influence of the first phase of the revision of the judicial organization, for example, the organization and method of working within courts has radically changed. That has implications for the administration and management of these courts. The traditional administrative style, where the internal management mostly remained with the court's presidency or the general court meeting, was strongly based on the individual professionalism of judges in the distribution and execution of the work and a far-reaching management-related separation existed between support and judicial staff,¹⁴⁵ is lacking on different fronts to provide an appropriate answer to the challenges the increased case load and the much larger staff within the new-style courts.¹⁴⁶ New arrangements are needed to give the court's

¹⁴⁴ Parliamentary Documents II 1991/92, 22 495, no. 1-2.

¹⁴⁵ Until 1 January 1998 the control of the auxiliary personnel still rested with the executives of the judicial organization (*directeuren gerechtelijke organisatie*) and afterwards, by virtue of a mandate from the Minister of Justice, with the executive management of courts. The management of the judicial staff rests, by virtue of delegation from the general court meeting, with the president of the Court. Hence, there is as double management structure within the courts.

¹⁴⁶ See also the discussion minutes of the Ministry of Justice, *Het besturen van de*

management more possibilities of its own, to drive the essential processes directly – from intake to judgment – within the courts.¹⁴⁷ To do that effectively and efficiently, executives of courts¹⁴⁸ have, *inter alia*, their own responsibility and powers in financial and personal matters. This wish for greater powers and more streamlined driving of one's own working processes is indeed indicated as is the wish to arrive at forming integrated management within courts. This wish – at least as mentioned in the 'Justice in the 21st Century' – will come true.¹⁴⁹

New ways and arrangements for the judicial organization are badly needed because the suppliers (political) and clients of the courts are making new demands too. The possibilities for extra financial funds are limited and the social acceptance of large arrears in processing cases is minimal. Whatever applies to the new demands on the organization and the organization of the management and set-up of courts is also applicable *mutatis mutandis* to other judicial organizations.

A second group of questions concerning the revision of the judicial organization relates to the quality of the administration of justice. How can this be guaranteed with a higher turnover rate of cases and the ever higher quality requirements imposed on the processing of cases as well as on the judgments themselves? The individual judicial

rechtspraak, The Hague 1995, p. 4 *et seq.*

¹⁴⁷ Until recently – in other words, before the coming into force of the first phase of revision of the judicial organization – courts were in general still described as *organizations of professionals*, with strong horizontal – aimed at consensus between the judges – decision-making processes and management lines with regard to work and management processes within their own organization. Under the influence of the revision, the new-style courts are now continually pushed in the direction of a *professional organization* characterised by a more vertical and 'hierarchical' drive and more central command of the management processes. See, among other things, P. Albers, W. Voermans, and B.W.N. de Waard, *Integrated Courts*, part 2, Final report within the framework of evaluation research, Revision judicial organization, Tilburg 1994, pp. 90-91.

¹⁴⁸ In the Courts 'new style', in general, the president of the Court in collaboration with a day-to-day management team made up of a restricted number of representatives from the sections.

¹⁴⁹ According to the plans of the Ministry of Justice in the near future, every Court will be run by a 'collegial' management that bears the responsibility for the integral management of his Court. In order to achieve administrative responsibilities, the management has powers with regard to the judicial as well as the auxiliary personnel. The council meeting of judges, composed in that way, will perform a number of general and judicial tasks. See the Outline Policy Memorandum: modernising the judicial organization 'Justice in the 21st century' (hereinafter: Outline Policy Memorandum), Parliamentary Documents II 1998/99, 26 352, no. 1-2.

independence and the accompanying quality-oriented judicial professionalism remain the central guarantees here, but the question is whether the traditional judicial quality values are sufficient to achieve the quality expectations of the changed social environment. Judicial organizations are also expected to administer justice quickly and in a tailor-made, client-friendly manner. These new quality requirements call for efficient streamlining of the working processes within the courts, judicial precision during procedures, permanent training of judges and auxiliary staff, uniformity in applying substantive and procedural law, correct treatment, avoidance of long waiting periods, guarantees concerning the speed of settlement, etc.¹⁵⁰

Apart from the direct changes brought about by the revision of the judicial organization, these questions induced the Minister of Justice in 1997, at the instigation of the Dutch Lower House,¹⁵¹ to create a Commission whose task it was to give advice on the elements of the management-related equipment and quality of the organization of the administration of justice in the near future.¹⁵²

b. Dutch Council for the Judiciary

In January 1998, the Leemhuis Commission¹⁵³ published its final report *Updating the Administration of Justice* [*Rechtspraak bij de tijd*]. The heart of the report is the advice to the Minister of Justice to further the establishment of a Council for the Judiciary, which, in the Commission's opinion, should be an intermediary organization between the political system and the politically responsible administrators and the judicial organization itself. In the Netherlands, a Council for the Judiciary of a modest size is envisaged: three to five members will have a seat on the board. A majority of judicial officers is envisaged, but the members will be selected on the basis of their professionalism, and act as independent managers. The National Council for the Judiciary would have to

¹⁵⁰ Regarding this, please refer to J.B.J.M. ten Berge, *Contours of a policy on quality*, reading during the SSR congress, Quality of the jurisdiction, 25 September 1997 in Zutphen, quoted in the report of the Commission Leemhuis (note 4), p. 14.

¹⁵¹ See the motion by Dittrich et al., Parliamentary Documents II 1996/97, 25 000 VI, no. 30.

¹⁵² See Decree of 16 June 1997 for the establishment of the Advisory Committee on the Equipment and Organization of the Sitting Magistrature, Bulletin of Acts and Decrees 248.

¹⁵³ Commission on the Equipment and Organization of the Sitting Magistrature (Leemhuis Commission), *Updating the Administration of Justice*, The Hague 1998, p. 12

perform a number of policy-making duties (external affairs and public services, judicial collaboration, personnel management and appointment policy, advice to the Minister of Justice and policy on quality) and management-related duties (housing and safety, automation, administrative organization and providing administrative information). Furthermore, in the advice of the Commission, an important role is given to the Council for the Judiciary in the area of budget procedures and the distribution of the funds for the administration of justice as well as the supervision of the expenditure thereof. With these powers, the Council for the Judiciary becomes a double-edged sword: on the one hand, it encourages the independence – in the organizational sense – of the judiciary and on the other hand, it expands the self-responsibility and accountability of the judiciary in the area of administration, management and budgeting. The management-related, policymaking and budgetary powers that the Commission's proposals assign to the Council for the Judiciary still for the most part fall under the present responsibility of the Minister of Justice.¹⁵⁴ In this sense, the proposals of the Commission constitute quite a radical break with the past. In the meantime, the report of the Commission Leemhuis has received a sequel in the Outline Policy Memorandum on the modernisation of the judicial organization (hereinafter called 'Outline Policy Memorandum') issued by the Minister and Secretary of State of Justice.¹⁵⁵ Many of the proposals made by the Leemhuis Commission have been incorporated into it, even the one relating to the establishment of a Council for the Judiciary.¹⁵⁶ The proposals for policy-making duties in the area of uniformity with the formalities and administration of justice – whether or not through judicial policy regulations – are not included in the Government proposals. The purpose of the Government is to establish a Council for the

¹⁵⁴ Only a limited number of managerial powers had been decentralised from the end of the 1980s. Judicial support directors were responsible in each district for the decentralised management of the courts and the Public Prosecution Service. In connection with the transfer of powers from the Public Prosecution Service, the management is now, by virtue of a mandate from the Minister of Justice, carried out at a local level – even more independently – by Directors of Court Management and by the Directors of the district staff services (also operating for the Public Prosecution Service).

¹⁵⁵ See the Outline Policy Memorandum (note 12).

¹⁵⁶ Only on the issue of the co-ordinating powers the Courts Service should have, in the opinion of the Leemhuis Commission, does the Outline Policy Memorandum deviate. The Minister and State Secretary of Justice do not support the proposal of the Leemhuis Commission to grant the Council for the Judiciary the power – within the framework of judicial collaboration – to adopt binding policy regulations or guidelines aimed at furthering the unity and uniformity of the administration of justice. See the Leemhuis Commission (note 4), pp. 30-31.

Judiciary (whether or not on a provisional basis¹⁵⁷) with effect from 1 January 2002.

10.4. Intermediate conclusion, the Netherlands

The intermediate conclusion for the Netherlands can be brief. In the Netherlands the establishment of the Council for the Judiciary falls within the framework of a broader revision operation of the judicial organization. The motives are mainly of a practical nature: a Council for the Judiciary can contribute to the expansion of the judicial organizations' own managerial responsibility, and consequently, it can also, together with the integral management, promote the efficiency of these organizations. Besides, the reason on principle for the expansion of judicial independence also plays a role in the plans to establish such a board. The National Council for the Judiciary will have a number of policy-making powers (external affairs and public services, judicial collaboration, personnel management and appointment policy, advice to the Minister of Justice and policy on quality) and management-related powers (housing and safety, automation, administrative organization and providing administrative information). Furthermore, there is an important role for the board in the budget procedure and the allocation of the funds for the administration of justice as well the supervision of the expenditure thereof. The board will have a small management team of three to five members. These members are appointed on the basis of their professionalism.

10.5. Comparative overview of tasks and powers of the Council for the Judiciary in the Netherlands

Below you will find a comparative overview that aims to reflect what the tasks and powers of the Dutch Council for the Judiciary will be. Aspects indicated with a '?' are those in respect of which no certainty exists or which are controversial.

- I. Policy-making:*
- ✓ external affairs
 - ✓ public services
 - ?✓ judicial collaboration

¹⁵⁷ Depending on whether a constitutional amendment is necessary.

- ✓ personnel management
- ✓ selection policy
- ✓ research policy
- ✓ advice to the Ministry of Justice
- ?✓ policy on quality

II. Management-related:

- ✓ accommodation & safety
- ✓ automation
- ✓ administrative organization
- ✓ providing administrative information

III. Budget procedure

- ✓ budgetary policy
- ✓ distribution of funds
- ✓ spending accountability

IV. Other powers

- corrective powers/disciplining
- (power to propose candidates for) judicial appointments
- promotion and transfer of judges
- ✓ education and training

Chapter 11. Conclusions and Recommendations

11.1. Learning from the experiences with other European Council for the Judiciary?

Councils for the Judiciary are the products of cultural developments in a legal system, which in turn are deeply rooted in the historical, cultural and social context of specific countries. This means that every Council for the Judiciary is unique and we cannot see these boards out of their context. Accordingly, the question of whether we can learn something from the Councils for the Judiciary in other legal systems, which is now to be answered by the Czech Republic, is a tricky question in more than one respect. In any case, it is a fact that the examples of other countries cannot be followed in any direct sense of the word. Other countries' experiences with Councils for the Judiciary are very much defined by the specific social and constitutional context of these countries and the cultural developments that they have undergone. Every system has found its own balance through specific 'checks and balances'. To assess the value and significance of a system for other countries, a broad knowledge of the situation and history is required. In many respects, the constitutional guarantees for the independent administration of justice and independent courts and the forms of public control of the same system are closely interwoven.

That does not mean, however, that the Czech Republic cannot find inspiration in the discussions conducted in other European countries on Councils for the Judiciary. These discussions can contain important experience-related information and arguments that can be valuable for the Czech discussion. Below, we will give a brief survey of matters and experiences that struck us when we were describing the Council for the Judiciary. These remarks can be significant as 'confrontation' experiences for the Czech discussion concerning the organization of the Supreme Judicial Council. We will close with a number of recommendations that may be of value to the Czech discussion.

11.2. The Emergence of Councils for the judiciary in Europe

The most remarkable aspect in the country studies made in this research is that at the time of writing, new Councils for the Judiciary

had been established recently or are to be established soon in four countries (Ireland, Denmark, the Czech Republic and the Netherlands). In Ireland, this happened in 1998; in Denmark the establishment of the provisional Council for the Judiciary is scheduled for the summer of 1999, and in the Czech Republic it will be established at the end of 1999; in the Netherlands, there are plans to establish the Council with effect from 1 January 2002. This simultaneous advent is not entirely a matter of coincidence. First of all – certainly in Denmark – the model of the Swedish *Domstolsverket* and the good experiences the country had proved a source of inspiration. In addition, there are the recommendations the Council of Ministers of the Council of Europe made in 1994 within the framework of Article 6 of the ECHR – concerning judicial independence, the role of judges and the appropriateness of the administration of justice – that play a role.¹⁵⁸ These recommendations do not require a country to call an independent board for guaranteeing judicial independence into being, but they do demand, for example, that the appointment of judges should take place independently and that judicial organizations somehow can exert influence on their own working process. Thus, these recommendations have partially been the catalyst. All three countries (the Netherlands, Denmark and Ireland) had a situation where the management and support of the system was entrusted to the Ministers of Justice. From the perspective of guaranteeing judicial independence – as is clear from the Swedish experience – it is considered important that the management and support are carried out from a distance. In the Danish, Irish and Dutch plans, this is described as an important advantage for an independent Council for the Judiciary. The opposition against the Swedish Government's plans at the start of the 1990s to return certain managerial powers of the *Domstolsverket* to the responsibility of the Government illustrates that, also after some time, putting these duties at a distance is still viewed as an important guarantee.

11.3. New Councils for the judiciary based on the North European model

Not only is the advent of the independent Council for the Judiciary new, its package of responsibilities is remarkable. In the Netherlands, as well as in Denmark and Ireland, it was decided to entrust the new Council for the Judiciary with administrative and

¹⁵⁸ *Recommendation on the independence, efficiency and role of judges*, Recommendation No. R (94) adopted by the Committee of Ministers on 13 October at the 578th meeting of the Ministers' Deputies.

support duties (varying from training, accommodation, automation, providing information, help with recruitment and assistance to Appointment advisory committees) and powers in the area of budget, allocation of the budgets and spending accountability. Thus, not only are an increasing number of Councils for the Judiciary created in Europe, but the newcomers are all variants of the North European model. Certainly this is to some extent due to the success of the Swedish Council and the example it presents. By leaving managerial powers and – certain – budget responsibilities to the ‘own organization’ the organization’s own responsibility for the management of judicial bodies can be extended and this again improves efficiency. In Sweden it is claimed that this judicial organization’s own responsibility in its entirety has increased. The cause of this greater self responsibility – as we can see in Sweden – is to be found in the presence of a professional and specific organization responsible for the judicial management and budget affairs that acts as a buffer between the judicial organization and the Government. This buffer is equally an ally and a guard dog. A second cause of the greater degree of the organization’s own responsibility in Sweden lies in the combination of independent administration, management of the judicial organization through the *Domstolsverket* together with integral management at the courts. For their operational management, the courts are very much left to their own devices, which means that it is quite possible to allow parts of this own administrative responsibility to be implemented by the Council, through all sorts of possibilities that the *Domstolsverket* has. Also the Netherlands has opted for this ‘proved’ – at least in Sweden – combination of remote management and integral management. In any case, Sweden is strongly attached to this combination.

11.4. Practical motives or ideal motives for quality monitoring

Councils for the Judiciary contribute to the monitoring and promotion of the judicial system, according to those interviewed for this study. The Northern and the Southern European models actually express two principal methods to further the quality of a judicial system.

In the Southern European model this is effected primarily through a system of judicial responsibility for quality that addresses the person of the judge and his career. Countries such as France and Italy put the emphasis on recruitment, training, evaluation, appointment, promotion and transfer, and through the person of the judge during his or her entire judicial career, monitoring is used concerning the quality of the work rather than what a judge does. This control is

carried out by judges themselves. Through disciplinary penalties, the Southern European systems also have the possibility not only to reward but also to reprimand. With the quality monitoring in systems that work with the Southern European model of a Council for the Judiciary, the approach usually lies in the 'material' area. Through their own organization, without the distorting influence of the Government, attention is constantly focused on the needs of the judicial organizations. By being able to take care of direct material needs and to have a central information centre, the latter system tries to reach the highest possible quality of judicial services. Through increased efficiency, it is tried to increase the quality of the administration of justice.

11.5. Promotion of independence

An important incentive for establishing a Council for the Judiciary in just about all the investigated countries is the promotion of the independence of the judiciary. This independence and independent status of the judiciary is not the same in all countries. In France the judiciary does not have a high status, while in Italy the independence of the judiciary receives a special status: there, the judiciary, precisely due to the proven independence of judges in the recent past, has special prestige. According to the respondents in this study, the Council for the Judiciary contributes more to the preservation than to the promotion of the independence in Italy. The favourable effect of Councils for the Judiciary, whether they are based on the Northern or the Southern European model, on the independent status of judges and judicial organizations is clearly perceptible in all the countries investigated.

11.6. Constitutional establishment

Another issue in most of the countries investigated is the wish for the constitutional establishment of a Council for the Judiciary. In France and Italy the competence and the position of the Council for the Judiciary are regulated by the Constitution. In the Netherlands, Ireland and Denmark there are plans to do that. This wish for constitutional establishment is normal: a Council for the Judiciary is an important institution that assumes its own role in the constitutional distribution of the State powers. The main aspects of the distribution of the powers and positions of the most important State powers in a country should be regulated in the Constitutional law.

11.7. Broadly composed Councils for the Judiciary

Nearly all the Councils for the Judiciary investigated – with the exception of the Dutch – are broadly composed of 15 or more members. The majority of the councils are composed mainly of judges coming from the different sections of the judiciary. Some – mainly the highest – judges are members of a Council for the Judiciary by virtue of their office, while other judges are elected by judges. In France and in Italy, the President and Minister of Justice are officially members of the board. There are differences as to the non-judicial members (see also 10.8). Usually these members are elected in all sorts of ways by groups of interested parties involved in the administration of justice and/or in Parliament. The broad and representative composition of a Council for the Judiciary means that it is, in principle, susceptible to politicisation and syndicalism. At different times, the correct balance and correct relationship between the denominations of the board members can be perceived differently or lie otherwise. In order to retain the balance in the vote ratio within the Council for the Judiciary, there are two systems: first, that of the appointment requirements (only members who satisfy certain requirements of professionalism and representatively qualities can be appointed); secondly, the system of spreading appointment authorities (appointment by Parliament, by Government or again by others). The latter system is vulnerable in that it may cause a Council for the Judiciary unintentionally to consist only of judges, because, for example, Parliament only wished to appoint judges. In order to avoid this risk, most systems used a combination of both appointment systems.

11.8. ‘External’ members in the administration

The foreign Councils for the Judiciary, such as those discussed here, share practically without exception the element of the non-judicial members, who have a seat in the administration (external members). That element brings social control into the Council for the Judiciary. The examples of France and Sweden show that in both countries the system is geared to the vote of, for example, lawyers, clients and unions in the Council for the Judiciary. Denmark and Ireland have opted for this, too, and in the Czech Republic the wish for external members meets a broad consensus. By the contribution of external members an element of social control is introduced with regard to the work of the Council for the Judiciary. In most of the countries, the judicial/magistrates contingent within the Council for the Judiciary makes up the majority. The presence of external members in the Council for the Judiciary can indeed give rise to much

discussion, such as the example of France shows. In France and Italy, problems regarding the ‘politicisation’ or ‘syndicalisation’ through judicial appointments tend to be eased through the proportions in the board for the *magistrature*, as is clear from the proposed amendments with regard to the composition of the Council for the Judiciary in both countries. In fact, the foregoing confirms rather than solves the problem.

11.9. Broadly described tasks and powers

What is quite striking about many regulations for the Council for the Judiciary based on the Northern European model is that the job description of these boards is in many cases broad and that boards often have few ‘concrete’ judicial powers. This set-up of broad job descriptions, particularly in Sweden and Denmark, may be explained by the fact that these Council for the Judiciary are mainly general and technical organizations. These facilities are mainly offered through actual dealings. This is why it is less necessary that the powers are described with precision. This would only be necessary if legal consequences were linked to the dealings of the Council for the Judiciary to a substantial extent. Detailed description of the work of a Council for the Judiciary could, furthermore, limit the necessary flexibility of the Board’s activities. Sweden presents an example of a set-up where, within a broad job description, the *Domstolsverket* has developed a system, together with the courts, that meets the demand from the courts and this without it becoming rigid regarding what it can offer through a strict description of powers.

11.10. The combined action of public control and the role of the ministerial responsibility

The legal systems within which Councils for the Judiciary operate, as described in this study, consist of different combinations of constitutional checks and balances, where control through ministerial responsibility is usually only one of the instruments. Compared to France and Sweden, the way in which control is exercised, through ministerial responsibility, on the management and budgeting of the judiciary in the Netherlands is – at least in theory – very intrusive. The Dutch discussions on more independence and also the discussions concerning the introduction of the Council for the Judiciary are pre-eminently based on ministerial responsibility as an instrument of control. The question is, however, if ministerial responsibility as a mechanism of control with regard to the budgeting and management of courts is always an

effective instrument. Management and budgeting of the judicial organizations is hardly a current political theme in most of the countries studied. The focus of the political discussions between Government and Parliament is more on maintaining law and the prosecution of crimes. That also means that the ministerial responsibility as an instrument of control must not be overrated. The examples from other countries make it clear that, even if there is entirely different, less intrusive, control on the budgeting and management of the judicial organizations through ministerial control, there are different alternative and effective mechanisms of control, such as publicity, official control, legal protection which can be provided by public control or a Council for the Judiciary as well as by the activities of the management and the budget appropriation of judicial organizations.

11.11. Recommendations to the Czech Republic

The present study, and its conclusions, causes us to make the following recommendations for the establishment and organization of a Supreme Judicial Council in the Czech Republic.

The establishment of a Supreme Judicial Council is, in different ways, a suitable instrument to further the independence of the judiciary in its entirety and that of the judicial organization in general. Thus the intention of the Czech Republic to establish a Supreme Judicial Council deserves support.

It is recommendable to regulate the position of a Supreme Judicial Council in the Constitution since it concerns the constitutional standardisation and positioning of an important state body. This does not need to mean that a provisional Supreme Judicial Council should not be established in anticipation of a constitutional amendment. Other countries have also opted for this solution (including Denmark and the Netherlands).

The combination of granting managerial authority to the Supreme Judicial Council and making integral management possible at the level of the courts themselves provides great possibilities to make the judicial organization more efficient, as we learn from the Swedish example. In the Czech Republic this system already exists to some extent in that the court presidents are also entrusted with managerial tasks in the court. If the control over these managerial duties is no longer exercised by the Minister of Justice, but by the courts' 'own' Supreme Judicial Council, there is a fair chance to increase the courts' own responsibility for their own management and efficiency.

A broad description of the powers that a Supreme Judicial Council performs in the management-related area has the advantage that the

board can operate flexibly in that area and can dynamically respond to the current needs of the courts at any moment. Particularly the Swedish example shows that a service-oriented attitude of the board, under which it tests, at the courts' request, some services and facilities (training, automation, administration, etc.), can constitute an important contribution to the success of and the satisfaction about the activities of a Supreme Judicial Council.

A Supreme Judicial Council can develop into an important intermediary and negotiating partner, if it has negotiating instruments itself. In this way, a Supreme Judicial Council can be prevented from becoming too dependent on the Minister of Justice. The example of Denmark shows which checks and balances can be important in such a balanced system. In Denmark the board itself can address Parliament if budget requests are not adopted by the Minister. Parliament can summon the Chairman of the Board to a commission to give an explanation concerning components of the management and the Minister can suspend the management of the Supreme Judicial Council if they knowingly exceed their budget with considerable consequences.

In a country with many judicial organizations, such as the Czech Republic, a – partially – representatively composed Supreme Judicial Council is certainly recommendable. Having a majority of judges in the executive of the council and an official participation of at least the President of the Supreme Court also deserves consideration.

On establishing the board, it merits recommendation – within the framework of public control – to allow 'non-judicial' members to be part of the board. Furthermore, the membership of representatives of interested parties from within and outside the courts can be considered. A delegation of judicial auxiliary staff, a delegation of lawyers' organizations is a natural choice. Possibly delegations of other interested organizations can also be allowed. The idea of having part of the board elected by Parliament ensures further balance in the executive of the Council. In order to prevent the board from acquiring too one-sided a composition, further appointment requirements for the applicants could be devised.

For purposes of more general public control of the Board's activities, it is important to find a balanced combination of different means of control. Where direct control through ministerial control is abandoned, new forms of control can be developed in the form of the publication of the annual reports of the board's budget proposals. Regulations for complaints and claims could also be taken into consideration.

Appendix A

11.12. Questionnaire A: Judicial Council

I. The position of the Judicial Council

1. Can you give a brief description of the organizational structure of the Judicial Council?
2. Who are appointed to the Board of the Judicial Council?
3. Which of the following tasks does the Judicial Council carry out?

Tasks with reference to the policy areas concerning Personnel, Information, Organization and Finance: (Managerial affairs)

- personnel policy (judges and supporting personnel);
- appointment of judges;
- allocation of funds;
- financial control;
- housing policy;
- security policy;
- information policy (including automation);
- administrative organization.

Tasks with reference to the field of quality (of adjudication) and external affairs:

- public relations (including transparency of the Court organization)
- complaints;
- quality (judicial quality, organization of the courts, rapidity of procedures).

How are these tasks performed by the Judicial Council?

4. Does the Council for the Judiciary state/enact policies of its own in matters concerning all courts?
How does the Council for the Judiciary co-ordinate matters that exceed individual courts?
5. Does the Judicial Court offer spontaneous advice to courts and/or Government on issues that relating to adjunction policies (e.g. the promotion of the unity of law)
6. What kind of powers does the Council for the Judiciary have in the field of:

- access to information (in relation to the individual courts and in relation to the Government/Parliament);
 - approval of the budget;
 - steering through the budget;
 - formulation of recommendations and instructions for the courts;
 - suspend orders or set aside a decree (of the board of a Court) (overrule Court managerial decrees form Court boards);
 - appointment of a temporary trustee or administrator;
 - suspension and resignation of judges or Court administrators.
7. How is the Council for the Judiciary – as an intermediary – involved in the budgeting process?
 8. How is the control (in terms of accountability) of the budget process of the Council for the Judiciary organized?
 9. How is the information supply of relevant data for the responsible Minister arranged, when we look at the following items?
 - data about the performance of courts (input, throughput and output data);
 - data about the deployment of funds by the individual courts;
 - incidents and problems in the courts
 - budget shortages or budget overruns
 10. Who is responsible for the formulation of (policy and performance) targets for the individual courts (for example, in the field of the quality of the courts)? How does the formulation take place and what role does the Judicial Council play?
 11. Where the policy and performance targets are not achieved by the courts, what is the response of the Judicial Council? In relation to this question: what are the powers of the Council for the Judiciary to correct the (mis-) performance of the courts?
 12. Is there a possibility for the Minister to influence the (formulation and realisation of) targets of the individual courts and/or the Judicial Council?
 13. What kind of powers has the Minister in a situation where the budgets are not properly spent or the targets are not met by the individual courts or the Judicial Council?

14. Does the Minister have instruments to gather information on an incidental basis from the individual courts or the Judicial Council?
 15. Can you describe situations where the Council for the Judiciary reports directly to Parliament (Congress or Senate; for example where there are substantial problems in the courts)?
 16. Do the policy information of the Council for the Judiciary and the information of the individual courts fall under the 'publicity'-regime?
 17. Is it possible for the individual courts to appeal the decisions of the Judicial Council?
 18. Which instruments or practices are used by the Council for the Judiciary to guard the 'independence of the judges'?
 19. Has the Council for the Judiciary a policy concerning the quality of the administration of justice? What is the role of the CJ in the formulation and implementation of a quality policy? Have the individual courts their own quality policy and which is the role of the Minister of Justice in the formulation and realisation of a quality policy?
 20. What is the opinion of the courts, the ministry of Justice and Parliament about the performance of the JC?
 21. How would you like to define the typical role of the JC? As a 'interest party' for the judiciary (e.g. the individual courts)?
- II The division of responsibilities between the Council for the Judiciary and the ministry of Justice (the Directorate)*
22. Is there a clear formal division of responsibilities and powers between the Council for the Judiciary and the ministry of Justice?
 23. How is the division of responsibilities and powers in practice effectuated?
 24. Are there problems with the division of responsibilities and powers?
 25. Is the Minister of Justice (or maybe the president) politically responsible in any way for the way in which justice is administrated? If so, can you give us your opinion about the functioning of the ministerial responsibility in relation to tasks and powers of the Judicial Council?
 26. What advantages and disadvantages does the current division of responsibilities and powers between the Council for the

Judiciary and the ministry of Justice have? (Are there any common problems?)

III The allocation of funds, accountability and control

27. Who allocates funds to the courts on whose initiative?
28. What is the procedure for allocating funds?
29. What criteria are applied for the allocation process?
30. Who renders the account for the control of funds?
31. Are there assessment criteria for the control of funds? If so, what are they?
32. Are there penalties in terms of funding, in respect of staff or other factors, and if so who imposes the penalties (sanctions) and to whom?

11.13. Questionnaire B: Ministry of Justice

I. The position of the Judicial Council

1. What were the major reasons to set up a Judicial Council?
2. What kind of powers does the Council for the Judiciary have in the field of:
 - right for information (in relation to the individual courts and in relation to the Government/Parliament);
 - approval of the budget;
 - steering through the budget;
 - formulation of recommendations and instructions for the courts;
 - suspend orders or set aside a decree (of the board of a Court) (overrule Court managerial decrees form Court boards);
 - appointment of a temporary trustee or administrator;
 - suspension and resignation of judges or Court administrators.
3. How is the Council for the Judiciary - as an intermediary-involved in the process of budgeting?
4. How is the control (in terms of accountability) of the budget process of the Council for the Judiciary organized?

5. How is the information-supply of relevant data for the responsible Minister arranged, when we are looking at the following items?
 - data about the performance of courts (input, throughput and output data);
 - data about the deployment of funds by the individual courts;
 - incidents and problems in the courts
 - budget shortages or over budgeting
6. Who is responsible for the formulation of (policy and performance) targets for the individual courts (for example in the field of the quality of the courts)? How does the formulation take place and what role does the Judicial Council play?
7. When the (policy and performance) targets are not achieved by the courts, what is the response of the Judicial Council? In relation to this question, what are the powers of the Council for the Judiciary to correct the (mis) performance of the courts?
8. Is there a possibility for the Minister to influence the (formulation and achievement) of the targets of the individual courts and/or the Judicial Council?
9. What sort of powers has the Minister in a situation where the budgets are not properly spent or the targets are not met by the individual courts or the Judicial Council?
10. Does the Minister have instruments to gather information on a random basis by the individual courts or by the Judicial Council?
11. Can you describe situations where the Council for the Judiciary reports directly to Parliament (Congress or Senate; for example where there are substantial problems in the courts)?
12. Do the policy information of the Council for the Judiciary and the information of the individual courts fall under the 'publicity'-regime?
13. Is it possible for the individual courts to appeal the decisions of the Judicial Council?
14. Which instruments or practices are used by the Council for the Judiciary to guard the 'independence of the judges'?
15. What is the opinion of the ministry of Justice and Parliament about the performance of the JC?

16. How would you like to define the typical role of the JC? As an 'interest party' for the judiciary (e.g. the individual courts)?

II The position of the ministry of Justice (the Directorate responsible for the Court organization)

17. How is the Directorate responsible for the Court organization structured?

18. Has the Ministry of Justice a policy formulating and/or an advisory role?

19. Which tasks performed by the Directorate?

20. What kind of powers has the Directorate towards de Judicial Council, and the individual courts, in the field of

- setting the budget
- deployment of budget funds
- information regarding judicial and managerial performance of courts
- defining performance standards
- appointment and suspension of judges
- safeguarding the quality of adjudication
- dealing with complaints
- resolving incidents

III The division of responsibilities between the Council for the Judiciary and the ministry of Justice (the Directorate)

21. Is there a clear formal division of responsibilities and powers between the Council for the Judiciary and the ministry of Justice?

22. How is the division of responsibilities and powers in practice effectuated?

23. Are there problems with the division of responsibilities and powers?

24. Is the Minister of Justice (or maybe the President) politically responsible in any way for the way in which justice is administered? If so, can you give us your opinion about the functioning of the ministerial responsibility in relation to tasks and powers of the Judicial Council?

25. What advantages and disadvantages does the current division of responsibilities and powers between the Council for the Judiciary and the ministry of Justice have? (Are there any common problems?)

IV The allocation of funds, accountability and control

26. Who allocates funds on whose initiative?
27. What is the procedure for allocating funds?
28. What criteria are used in the allocation process?
29. Who renders the account for the control of funds?
30. Are there assessment criteria for the control of funds? If so, what are they?
31. Are there penalties in terms of funding, in respect of staff or other factors, and if so who imposes the penalties (sanctions) and to whom?

Questionnaire C: courts

I. The position of the Judicial Council

1. Who is responsible for the formulation of (policy and performance) targets for the individual courts (for example in the field of the quality of the courts)? How is the formulation taking place and what is the role of the Judicial Council?
2. When the (policy and performance) targets are not realised by the courts, what is the response of the Judicial Council? In relation to this question: what are the powers of the Council for the Judiciary to correct the (mis) performance of the courts?
3. Is there any possibility for the courts to influence the (formulation and realisation of the) targets of the Council for the Judiciary and/or the Minister of Justice?
4. What kind of powers do the Minister/JC have in a situation where the budgets are not properly spent or when the targets are not met by the individual courts?
5. Does the Minister have instruments to gather information on an incidental basis by the individual courts?
6. Does the policy information of the individual courts fall under the 'publicity' regime?
7. Is it possible for the individual courts to appeal against the decisions of the Judicial Council?
8. Which instruments or practices are used by the Council for the Judiciary to guard the 'independence of the judges'?
9. Has the Council for the Judiciary a policy concerning the quality of the administration of justice? What is the role of the CJ in the formulation and implementation of a quality policy? Have the individual courts their own quality policy and which is the role of the Minister of Justice in the formulation and realisation of a quality policy?
10. What is the courts' opinion about the functioning of the JC?
11. How would you like to define the typical role of the JC? As an 'interest party' for the judiciary (e.g. the individual courts)?

II. The Court Organization

12. How are the courts organized?
13. Is there a formal or informal management structure within the courts?

14. Who are in charge of a court?
15. Who decides - in what way - on managerial issues, the workload of judges, problems with individual cases, spending and accountability, stock, case databases, Court communication, appointment and training of new judges, staff training and education, judicial quality of the courts decisions, automation, etc. within the Court? Are these decisions in any way subject to direct supervision by the CJ or the responsible Minister?)
16. How is the independence of the judiciary guaranteed in your legal system?
- 17a. What effect has the system of a Council for the Judiciary on the 'independence of the judiciary'?
- 17b. Is it a threat in relation to ministerial responsibility or an opportunity?

III The allocation of funds by the Courts, accountability and control

18. Who allocates funds on whose initiative?
19. What is the procedure for allocating funds?
20. What criteria are applied for the allocation process?
21. Who renders the account for the control of funds?
22. Are there assessment criteria for the control of funds? If so, what are they?
23. Are there penalties in terms of funding, in respect of staff or other factors, and if so who imposes the penalties (sanctions) and to whom?

11.14. Questionnaire D: Lawyers and Legal Scholars

N.B. The questions in this questionnaire are quite detailed. During the interview we will not deal with every question in detail but rather deal with these questions as topics of discussion

I. The position of the Judicial Council

1. What were the major reasons to set up a Judicial Council? What are the major benefits? What are the major drawbacks?
2. How is the Council for the Judiciary – as an intermediary – involved in the process of budgeting?

3. How is the control (in terms of accountability) of the budget process of the Council for the Judiciary organized?
4. How is the information supply of relevant data for the responsible Minister arranged, when we are looking at the following items?
 - data about the performance of courts (input, throughput and output data);
 - data about the deployment of funds by the individual courts;
 - incidents and problems in the courts
 - budget shortages or over budgeting
5. Who is responsible for the formulation of policy and performance targets for the individual courts (for example in the field of the quality of the courts)? How does the formulation take place and what is the role of the Judicial Council?
6. If the courts do not meet the policy and performance targets, what is the response of the Judicial Council? In relation to this question: what are the powers of the Council for the Judiciary to correct the bad performance of the courts?
7. Is there a possibility for the Minister to influence the (formulation and realisation of) targets of the individual courts and/or the Judicial Council?
8. What kind of powers has the Minister in a situation where the budgets are not properly spent or the individual courts or the Judicial Council do not meet the targets?
9. Does the Minister have any instruments to gather information on an incidental basis by the individual courts or the Judicial Council?
10. Can you describe situations where the Council for the Judiciary reports directly to Parliament (Congress or Senate; for example where there are substantial problems in the courts)?
11. Do the policy information of the Council for the Judiciary and the information of the individual courts fall under the 'publicity' regime?
12. Is it possible for the individual courts to appeal against the decisions of the Judicial Council?
13. Which instruments or practices are used by the Council for the Judiciary to protect the 'independence of the judges'?
14. What is the opinion of the Ministry of Justice and Parliament about the performance of the JC?

15. How would you like to define the typical role of the JC? As an 'interest party' for the judiciary (e.g. the individual courts)?

II The position of the Ministry of Justice (the Directorate responsible for the court organization)

17. How is the Directorate responsible for the court organization?

18. Has the ministry of Justice a policy-formulating and/or an advisory role?

19. Which tasks are performed by the Directorate?

20. What kind of powers has the Directorate towards de Judicial Council, and the individual courts in the field of:

- setting the budget
- deployment of budget funds
- information regarding judicial and managerial performance of courts
- defining performance standards
- appointment and suspension of judges
- safeguarding the quality of adjudication
- dealing with complaints
- resolving incidents

III The division of responsibilities between the Council for the Judiciary and the Ministry of Justice (the Directorate)

21. Is there a clear formal division of responsibilities and powers between the Council for the Judiciary and the Ministry of Justice?

22. How is the division of responsibilities and powers put in practice?

23. Are there problems with the division of responsibilities and powers?

24. Is the Minister of Justice (or maybe the President) politically responsible in any way for the way in which justice is administered? If so, can you give us your opinion about the ministerial responsibility in relation to tasks and powers of the Judicial Council?

25. What are the advantages and disadvantages of the current division of responsibilities and powers between the Council for the Judiciary and the Ministry of Justice? (Are there any shared problems?)

IV The allocation of funds, accountability and control

26. Who allocates funds on whose initiative?
27. What is the procedure for allocating funds?
28. What criteria are applied for the allocation process?
29. Who renders the account for the control of funds?
30. Are there assessment criteria for the control of funds? If so, what are they?
31. Are there penalties in terms of funding, in respect of staff or other factors, and if so, who imposes the penalties (sanctions) and on whom?

Appendix B

11.15. Overview of the interviewees in France, Italy and Sweden

France

Visit from 14 to 16 December 1998 to Paris, *Conseil supérieur de la magistrature* (CSM), Ministère de la Justice (Ministry of Justice) & Tribunal de Grande Instance de Paris

Mr. Ph. Lemaire, sous-directeur de l'organisation judiciaire et de la planification du Ministère de la Justice, Direction des Services Judiciaires

Mrs. E. Pelsez, chargée de mission du réseau judiciaire européen, Ministère de la Justice, Service des Affaires Européennes et Internationales

Mr. Y. Droguet, juge Adjoint au Premier Vice-Président, Tribunal de Grande Instance de Paris

Mr. R. Errera, Conseiller d'Etat (Council of State), également membre du Conseil supérieur de la magistrature

Mr. H. Robert, Président du Tribunal de grande instance de Blois, également membre du Conseil supérieur de la magistrature (président de la formation Parquet)

Mr. M. Lernout, Premier Substitut près le Tribunal de grande instance de Paris, également membre du Conseil supérieur de la magistrature (président de la formation Siège)

Mr. J.-C. Gironde, Premier Président de la Cour d'Appel de Lyon, également membre du Conseil supérieur de la magistrature

Mrs. M.-C. Berenger, Conseiller à la Cour d'Appel d'Aix-en-Provence, également membre du Conseil supérieur de la magistrature

Mr. P. Delarbre, Juge au Tribunal de grande instance de Rennes, également membre du Conseil supérieur de la magistrature

Italy

Visit on 23 and 24 March 1999 to Rome, Consiglio Superiore della Magistratura (CSM) and the Ministero di Grazia e Giustizia (the Ministry of Justice).

Armando Spataro (*Consigliere*), directeur of the Ufficio Studi of the CSM;

Vice President and eight other members of the CSM. Among them the chairman of the VIth Commission of the CSM, prof. Giuseppe Riccio;¹⁵⁹

Stefano Mogini (*Direttore del Servizio*) Ministero di Grazia e Giustizia;

Pres. Franco Ippolito, Direttore Generale dell'Organizzazione Giudiziaria, Ministero di Grazia e Giustizia;

Pres. Vladimiro Zagrebelsky, il Capo dell'Ufficio Legislativo, Ministero di Grazia e Giustizia;

Domenico Carcano, il Capo segretaria direzione generali affari penali, Ministero di Grazia e Giustizia.

The last four (3 up to and including 6) are all magistrates, attached to the Ministry of Justice. All four, in addition, have been part of the CSM

Sweden

Visit on 11 to 13 June 1997 to Stockholm/Jönköping Sweden, General Auditor's Office, Stockholm, Ministry of Justice Stockholm, High Council, Sweden Stockholm, Court of Appeal Stockholm, Executive Court, Jönköping, Council for the Judiciary (Domstolsverket) Jönköping

Martin Engman (auditor) and Per Dackenberg (senior auditor) General Auditor's Office Sweden

Carina Stävberg (assistant secretary), Anders Wiklund (head) of the Directorate for Courts and Prosecution at the Ministry of Justice

Anders Knutsson, President High Council, Sweden and Erik Ternert, Director of Management, High Council

Johan Hirschfeldt, President Court of Appeal, Stockholm, Jan Öhman and Anders Eka, directors of management at the Court of Appeal, Stockholm

Bertil Hübinette, General Director Domstolsverket, Jan Bäckström, director division (general) management Domstolsverket and Bengt-Ake Engström, senior judicial counsellor Domstolsverket

Hans-Erik Jonasson, President of the Executive Court, Jönköping

¹⁵⁹ The VIth commission is the Commission for the Revision of the Judicial Organization and for the Administration of Justice (*Commissione per la riforma giudiziaria e l'amministrazione della giustizia*), which, *inter alia*, deals with law comparison studies with the countries of the EU (internal regulation CSM, of 20 January 1999, p. 45 under f).

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