



European Network of Councils  
for the Judiciary (ENCJ)

Réseau européen des Conseils  
de la Justice (RECJ)

## ENCJ contribution for the European Commission Rule of Law report

### Relevant developments in relation to the independence of the judiciary

The ENCJ would like to contribute to the Rule of Law report. There are 4 sections to the contribution. Section 1 deals with the ENCJ statements in the last 15 months on Rule of Law issues. The second section deals with the ENCJ surveys that took place in 2019. The third section provides an overview of relevant developments in the ENCJ Member countries in relation to Judicial Independence and is based on information provided by the Members. The last section gives an overview of the status and functioning of the Councils for the Judiciary and their administrations in the EU.

#### 1. ENCJ general statements and letters

In the reference period the ENCJ adopted a number of statements and opinions in relation to the Rule of Law in general and regarding specific EU Member States in particular.

- [ENCJ Bratislava manifesto](#), 7 June 2019  
In the manifesto, which was addressed to the new European Commission and Parliament, the ENCJ calls for a European dialogue between the state powers as a means to achieve effective protection against intervention by other branches of state. The ENCJ stands ready to play its part in that dialogue. The also ENCJ calls upon the European Institutions, in particular the European Commission, to encourage further investments by the Member States in their judiciaries and to ensure that Member States involve judiciaries in relation to reform or modernization plans.
- [Letter to President \(elect\) Von der Leyen 20 September 2019](#)  
The letter was signed by the Presidents of the ENCJ, the Network of Presidents of the Supreme Courts of the EU and the European Judges Association. The three Presidents expressed their concern over developments in several EU Member States regarding the independence of the judiciary.
- [Statement of the Executive Board on the situation in Poland – 10 January 2020](#)  
In a reaction to the adoption of the Muzzle Law by the Polish government the Executive Board of the ENCJ reiterated that it is the duty of every judge in the European Union to apply European Union Law without any restrictions - whatsoever - from other branches of a state. Judicial independence is indispensable in order to comply with this duty. Furthermore, the Executive Board of the ENCJ stated that judicial independence is essential to guarantee the rights of the citizens of the European Union, is essential for mutual respect of the European Union's common values, is essential for mutual trust among European Union judges, and is an essential pre-condition for the mutual recognition of judgements within the European Union. Without judicial independence the European Union will – eventually – cease to exist as a

common space for Democracy and the Rule of Law. The Executive Board of the ENCJ called upon everyone in the European Union to defend the independence of judges and thus defend the European Union.

- [Letter to President Von der Leyen 21 February 2020](#)

In the letter the Presidents of the ENCJ, the Network of Presidents of the Supreme Courts of the EU and the European Judges Association reiterate the message of their first letter and demand specific actions to be taken against Poland as a consequence of the entering into force of the Muzzle law in Poland.

## **2. ENCJ project on the Independence and Accountability of the Judiciary**

The project started in 2013 and aims to improve and strengthen the Independence and Accountability of the Judiciary by mapping the strengths and weaknesses of the judicial systems. The project consists of an improvement cycle that should be applied by participating Councils for the Judiciary. As part of the mapping exercise surveys among judges on their independence is organised each 3 years.

### **ENCJ survey among judges 2019**

In 2019 the ENCJ organised a survey among judges on their independence for the 3<sup>rd</sup> time. The full data of the survey can be found [here](#). In total 11,355 judges from 27 judiciaries of 25 countries participated. The target for participation was set at 15%, which most judiciaries (easily) achieved. The analysis of personal and professional characteristics in relation to perception of independence shows that per judiciary judges hold similar views.

#### **Main findings**

1. Judges in Europe generally evaluate their independence positively. On a 10-point scale judges rate the independence of the judges in their country on average between 6.5 and 9.8.
2. Two countries show a large increase of their independence score since the first survey in 2015: Spain and Slovakia. Two countries show a large decrease: Portugal and Romania.
3. Examining the answers to all questions, Hungary and Romania, in particular, face issues across a range of aspects of independence. As the response rate of Romania was low, the outcomes for that country must be used with caution.
4. In many judiciaries judges are critical about human resource decisions concerning judges and, in particular, about appointment and promotion. In the survey a distinction is made for the first time between appointment to the courts and to the Supreme Court/Court of Cassation. Appointments to the Supreme Court/Court of Cassation is seen as most problematic in many countries.
5. Many judges are very critical about their working conditions, and believe that these affect their independence. Case-load and court resources are a great concern in many countries, and this concern has increased much since the previous survey. Also, issues about salary, pensions and retirement age have become more serious.
6. The implementation by government of judgments that go against the interest of the government proves to be an issue in many countries across Europe.
7. Many judges experience - and increasingly so - a lack of respect for their independence by the other state powers and the media. In a variety of judiciaries more than 40% of the respondents feel their independence not respected by government: Bulgaria, Hungary, Italy, Latvia, Portugal, Romania

and England and Wales. Generally, only few judges feel their independence is negatively affected by the judicial governance institutions and the leading courts.

8. Three questions deal with accountability. While judges generally believe that their colleagues adhere to ethical standards, they are more critical about the mechanisms to combat judicial misconduct and judicial corruption in several countries.

## **ENCJ – CCBE Survey among the lawyers of Europe**

Together with the Council of Bars and Law Societies of Europe (CCBE) a survey was conducted among lawyers ([full report](#)). In total 4.250 lawyers participated. The response is much lower than that for judges and varies widely among countries. Consequently, outcomes cannot be presented for all countries that participated, and the outcomes that are presented need to be interpreted with caution.

Still, the results are informative about the state of the independence and accountability of the judiciary in Europe. The perspective of lawyers is an important addition to that of judges. In addition, the participation in the survey by countries that did not participate in the judges survey, in particular Poland but also Cyprus, fills an important information gap.

The main conclusions are the following.

1. In general, lawyers are more critical than judges about judicial independence.
2. On a 10-point scale lawyers rate the independence of the judges in their country on average between 5.2 and 9.0. Most countries get a positive score, but several score just above 6.
3. In general, the lawyers are more critical than the judges, overall and on most aspects of independence.
4. Especially, with regard to the appointment and promotion of judges many lawyers believe that such decisions are not solely based on ability and experience. Poland, Hungary, Cyprus and Slovenia have particularly low scores on all aspects.
5. As to an aspect of accountability, the handling of judicial corruption by the judicial authorities is considered by lawyers not to be effective in many countries.

## **3. Councils for the Judiciary - Information from the ENCJ Members**

### **Poland**

The information on Poland was not gathered through the KRS, the National Judicial Council. In September 2018 the ENCJ General Assembly suspended the membership of the KRS (Krajowa Rada Sadownictwa) of Poland. The KRS was no longer allowed to participate in the ENCJ activities. Therefore, no information was gathered from KRS for the Rule of Law report of the European Commission. The ENCJ wants to put forward the following information in relation to the Rule of Law in Poland and the KRS in particular.

The ENCJ has continued to follow the developments in relation to the judiciary in Poland. An ENCJ delegation visited Poland for discussions with relevant stakeholders every six months. The general

conclusions from these visits that the situation has not improved from 17 September 2018 until now, but has deteriorated on several issues.

- The relations between the KRS and the Minister of Justice are even closer than suspected previously.
- Attacks by the government on the judiciary continue undermining the trust in the judiciary.
- A smear campaign against judges which seems to have been coordinated from the Ministry of Justice occurred.
- New legislation was proposed by government and adopted by parliament that directly affects judicial independence. The new law provides a possibility to discipline judges for the content of their judgements, for applying European Law and for asking preliminary questions to the CJEU.

As a result of the deteriorating situation and the role of the KRS in it, on 22 April 2020 a [draft position paper](#) of the ENCJ Board on the proposed expulsion was sent to the KRS with a letter in which they were given a month to state their position as a reaction to the draft Position Paper. Based on the reaction of the KRS the Board will finalise the Position paper and decide if and when to table the expulsion of the KRS at a General Assembly meeting of the Association.

## Changes in the functioning of the Councils

### General remarks

In the reference period a majority of the Councils<sup>1</sup> did not report any changes to the Council, or its functioning. The recent establishment of the **Irish Council** has to be underlined. The latter held its first plenary session on 7 February 2020. For those Councils that do report changes to the functioning the information can be found in the country specific section of the report (see below).

### Country specific section

The **VSS – the Supreme Judicial Council of Bulgaria**, reported that for the reference period from January 2019 to date, there have been no significant changes related to the structure, competencies and functioning of the members of the Supreme Judicial Council (SJC). However, for the reference period after 01.01.2019 following strategic documents were adopted:

1. By a decision of the Judges' College under Protocol No. 31 / 23.10.2018, *Standards for Independence of the Judiciary* were adopted and published on the SJC website.
2. By a decision of the Prosecutors' College under Protocol No. 9 / 20.03.2019, a *Mechanism for Public Response of the SJC Prosecutors' College* in case the independence and the reputation of prosecutors and investigators are violated was adopted. According to the Mechanism, when establishing a case of violation of the independence and the reputation of a prosecutor or investigator, the Prosecutors' College should decide as soon as possible on the course of action.
3. By decision of the Judges' College under protocol no. 8 / 10.03.2020, a *Mechanism for action of the Judges' College* of the SJC was adopted in cases of violation of the independence and / or an attempt to exert pressure on the judges and the court was adopted. According to the Mechanism, the Judges' College can be referred by any judge, a general assembly of judges to the respective court, the respective administrative head or a professional association of judges, in case of interference with the independence of the judge, as well as in case of exerting pressure on him through insults, slander, threats, suggestions, disclosure of personal information on his personal life and that of his relatives, regardless of the forms and means used.

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<sup>1</sup> The Councils of : Belgium, Croatia, Greece (Administrative Council), Portugal, Romania, and Spain.

4. Among other significant developments, the adoption of the SJC annual reports needs to be underlined.

The **Conseil Supérieur de la Magistrature of France** underlined that it has been renewed in February 2019 with a new president. It has drawn up a draft mandate based on three main objectives:

1. Assert the Council's independence by positioning itself as a central focus for the management of the human resources of the Judiciary. The rules and principles of appointment of judges are under discussion, notably for more transparency for the appointment process. The Council took part of debates on the reform of access to the highest position in civil service and on the assessment of head of courts.
2. A better contribution to assert the quality of justice by using specific indicators in order to improve the appointment process and to have clear and complete data on the courts. In that matter, the staff of the Council was reinforced.
3. Build a real European and international policy.

The **Hungarian Judicial Council, OBT**, acknowledged that it is functioning with lower number of members since some of them have resigned in 2018 (11 instead of 15). No assembly had been organized to elect new members despite requests of the OBT, because the president of OBH (Judicial Office) and presidents of regional courts (and courts of appeal) blocked it. The electors have been voted in 2020 but the additional members hadn't been elected yet due to the COVID-19 outbreak.

**Structure of the Council:** In December 2019, the structure of the OBT has been modified with effect in April 2020, in accordance with changes in the system of administrative and labour courts. This amendment -necessary due to the changes in the court system- changes the number of members of the Council.

**Competences:** In 2019, the former OBH president sent proposals to the Ministry of Justice to lower the efficiency of the OBT but the government didn't bring these to the legislation. The competences of the OBT did not change even though it asked the government to strengthen its positions and maintain its operation without interference, all the more so as OBT performs its powers in a very limited way because of the former president of the OBH.

The **Council of Lithuania, Teisėjų Taryba** reported following changes to the Council :

1. The composition of the Judicial Council has been amended. Effective from 1 November 2020 the Judicial Council will consist of 17 members (currently 23). The number of judges elected by the General Assembly of judges was revised.
2. Seniority requirement for a candidate to the Judicial Council is now reduced: minimum period of service as a judge to enter the Judicial Council will be 3 years instead of 5. The number of terms of office is also fixed – judges may be elected to the Judicial Council for a maximum of 2 consecutive terms (Article 119 of the Law on Courts).
3. The competence of the Judicial Council in the selection procedures of judges has been strengthened. The Judicial Council appoints three members of the panel for the selection of judges.
4. The Judicial Council has approved the criteria for the selection of candidates for judges.
5. The Judicial Council may submit a reasoned proposal to the President of the Republic to initiate proceedings for the temporary appointment of a judge for 2 years period (in the event of circumstances preventing a judge of the district court or of chamber of the court from serving as a judge).
6. In accordance with the Law on Courts the Judicial Council is now authorised to decide on the immediate sending of a judge for medical examination prior to the end of five years period.
7. The draft of the Law on Strategic Management has been prepared which officially establishes the role of Judicial Council and/or National Courts Administration, in the process of formation of the State budget and strategic planning.

The **Raad voor de Rechtspraak of the Netherlands**, reported that a dialogue within the Judiciary was initiated on the nomination process of Council members and of members of the Board of the court. The dialogue started after internal debate within the Judiciary on several aspects of the procedure and a motion of Parliament. This dialogue is still ongoing.

In addition to the internal dialogue within the Judiciary, the Minister of Justice and Security has asked the Council of State to advise on possible (constitutional) vulnerabilities within the Act of 18 April 1827 on the composition of the judiciary and the organisation of the justice system regarding nominations, dismissal and suspension.

The **Council of Slovakia, Sudna Rada** informed that it can temporarily suspend a judge when there are doubts as to its liability and when judges endangers the Judiciary or the reputation of the Judiciary on a proposal the president of the Council, Minister of Justice or President of the Supreme Court.

**Sodni Svet, the Judicial Council of Slovenia** acknowledged the adoption of some amendments to the Legal Protection in Public Procurement Procedures Act. A new Candidate Suitability Assessment Commission was instituted. Furthermore, a significant increase of the amount of work done by the Council was observed in the field of proceedings concerning selection and appointment of judges (+ 144 % compared to 2018); promotion of the judges (+ 92 % compared to 2018) and also in the area of Councils working bodies (the Ethics and Integrity Commission, disciplinary authorities and electoral commission). In parallel, the work of the Judicial Council caught a much greater media interest comparing to the previous years.

## Relations with the other State Powers

A number of Councils for the Judiciary (Belgium, Croatia, CSM Italy, Portugal, Romania, Slovakia) reported that there were no special remarks about their relations with other state powers.

The **VSS of Bulgaria** implemented a Partnership Council for dialogue on the professional interests of judges, prosecutors and investigators. In 2020, the Partnership Council held its first two meetings, with the first co-chairs decision and the first minutes published on the website. The SJC also implements public initiatives and programmes aimed at civil society, with an emphasis on adolescents. Successful practices for introducing models for active dialogue between the judiciary and citizens are: Educational Program "The Judiciary - Informed Choice and Civil Trust. Open Courts and Prosecutors' Offices" ; Information campaign "Open days" in the bodies of the Judiciary under the heading "Open to the Judiciary"; National Student Essay Competition.

The **CSM of France** informed of its relations with the two other powers:

With the executive power: the Council met once with the Ministry of Justice but not with the President of the Republic who the Council assists in his role as guarantor of the independence of the Judiciary. In the relation with the latter, two information were reported.

1. The Council pointed to the President a provision of the Franco-Monegasque convention (of 8 Novembre 2005) according the one-sided right to Monaco to terminate the secondment of French judges in the Principality -the position of judges in Monaco are occupied by Monegasques or French magistrates in secondment for a three years period renewable once.
2. The President of the Republic commented publicly about a decision in a penal affair (Sara Halimi's case) which was to be examined by the Court of Cassation, declaring that a public hearing was necessary. The Prime president and the General prosecutor of the Court of Cassation published a statement reminding the essential condition of independence of Justice for the functioning of democracy.

With the legislative power: the Parliament set-up a commission of inquiry on “Obstacles to the Independence of the Judiciary” on 8 January 2020, to “identify better obstacles and to make recommendations in order to guarantee a stronger independence of the Judiciary”. The commission heard several members of the Judiciary and representative bodies of the Bar. The next hearings are postponed due to the coronavirus outbreak.

The **Council of Hungary, OBT**, reported that in 2019, the former president of the OBH, that has the right to participate in the sessions of the OBT with the right of consultation but without the right to vote, unilaterally considered the OBT “non-functioning and illegitimate” and triggered a procedure, still pending, in front of the Constitutional Court affirm this position. Nevertheless, the Minister of Justice stated that the OBT is operating in a legitimate way.

The OBT notified eight times serious interferences with the law in the administration of courts and stated that the president of the OBH has omitted to fulfil her obligations for more than 90 days. The OBT turned to the Parliament on 8 May 2019 and proposed the dismissal of the President of OBH. The proposal was rejected, and politicians accused members of the OBT to be biased and to act in self-interest.

In November 2019, the newly appointed Minister of Justice participated personally in a session of the OBT with the Chief Prosecutor’s Office and the OBH (after more than a year). The Parliament elected the former OBH’s president to the Constitutional Court, terminating her previous position as president of OBH. In December 2019 the OBT unanimously supported a new candidate for position of president of OBH to be elected and the Ministry of Justice reacted to the previous request of the OBT to strengthen its position and powers by amendments to the law but these amendments are not on the agenda of the legislation.

**The Judicial Council of Ireland** noticed that the independence of the Council has rather been respected, however, a leaked correspondence revealed that a member of government tried to influence the conduct of a specialist committee established to adopt guidelines for awards for personal injuries. The approach was rebuffed.

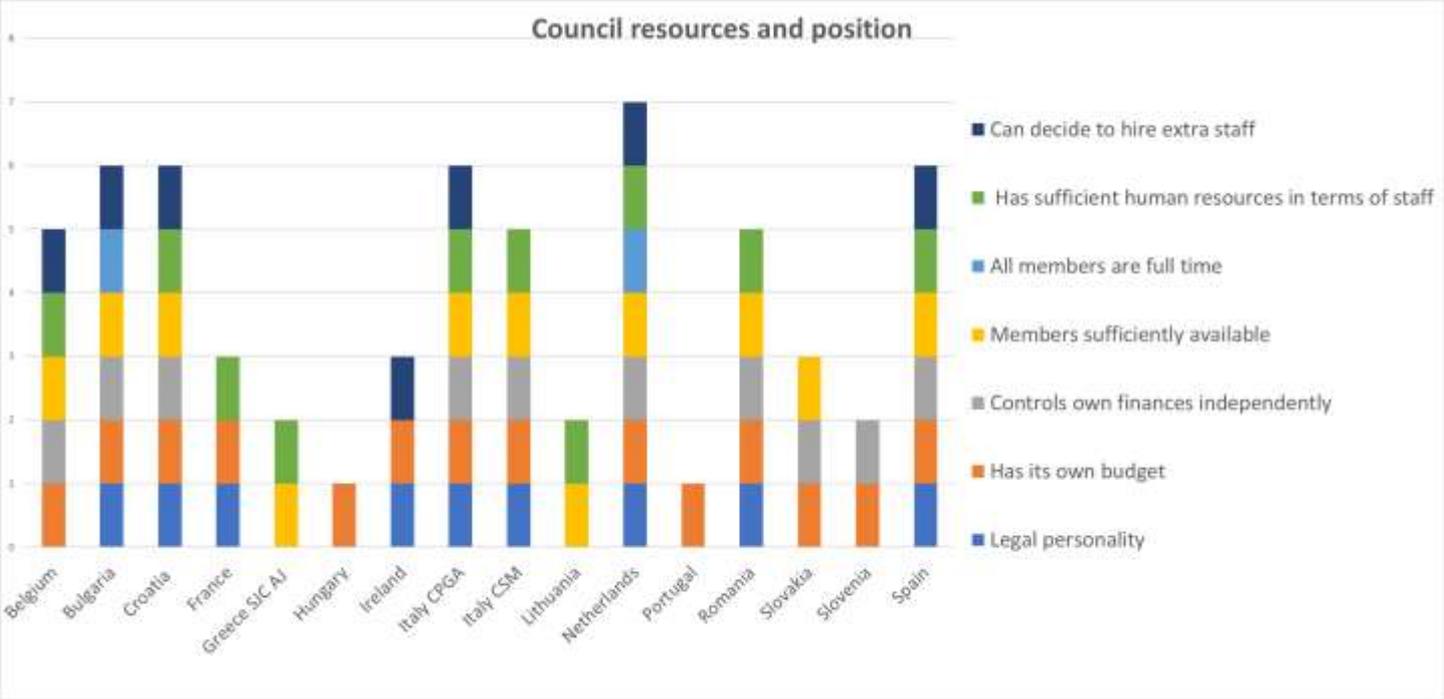
**The Rvdv, the Netherlands** reported national debates on the role of the judiciary following certain cases, notably the Urgenda ruling. In this case, the government argued that it is solely the task of the legislator to decide whether certain legislation is made or not, and some parliamentary politicians criticised the judges considering that they took the place of the parliament, denouncing “dicastracy” or “government by the judges”. A round table on the subject was organised by the House of Representatives of the Netherlands. The ROB stated that the judiciary is under pressure and over demanded. Even if, formally, the independence of the judiciary is guaranteed, the Council sees clear signs that the level of knowledge and conduct of parties involved on value of an independent judiciary put the judiciary under pressure. Challenges seen include the increasing workload due to more complex cases and vague legislation, a strong orientation on efficiency of the judiciary and access to the judiciary.

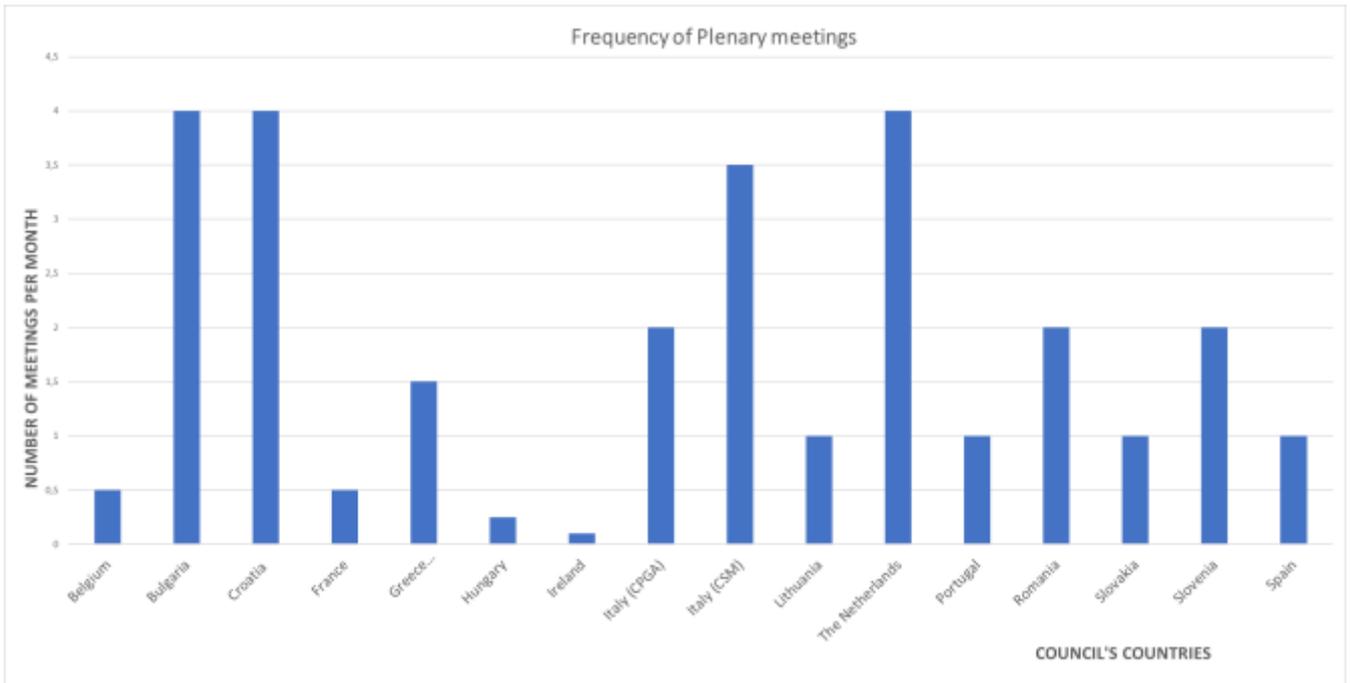
**Sodni Svet Slovenia** based on its Constitution and the Parliament Inquiry Act, the National Assembly, on the request of the National Council of the Slovenian Parliament, ordered in July 2019 a parliamentary investigation to establish a political responsibility of holders of public offices, among them also judges, who were involved in the criminal prosecution of the former mayor of the City of Maribor and Member of the National Council, Mr. Franc Kangler. Mr. Kangler faced several criminal proceedings as a defendant in the past few years. Most of these procedures have already been

completed in favour of him. Some are still pending. The Judicial Council adopted a position that the legislative branch exceeded its constitutional powers and violated the principle of separation of powers and the constitutional principles of the independence of the judiciary and immunity of judges by ordering such parliamentary inquiry through which a political responsibility of judges, who participated in adjudicating in criminal proceedings against Mr. Kangler, would be investigated and established. In order to determine the constitutionality of the Act, the Judicial Council initiated in September 2019 a procedure before the Constitutional Court of the Republic of Slovenia. Pending its final decision, the Constitutional Court issued a temporary decision in November 2019 by which it put on hold the implementation of the Parliament Inquiry Act and of the Rules on parliamentary inquiry as regards judges.

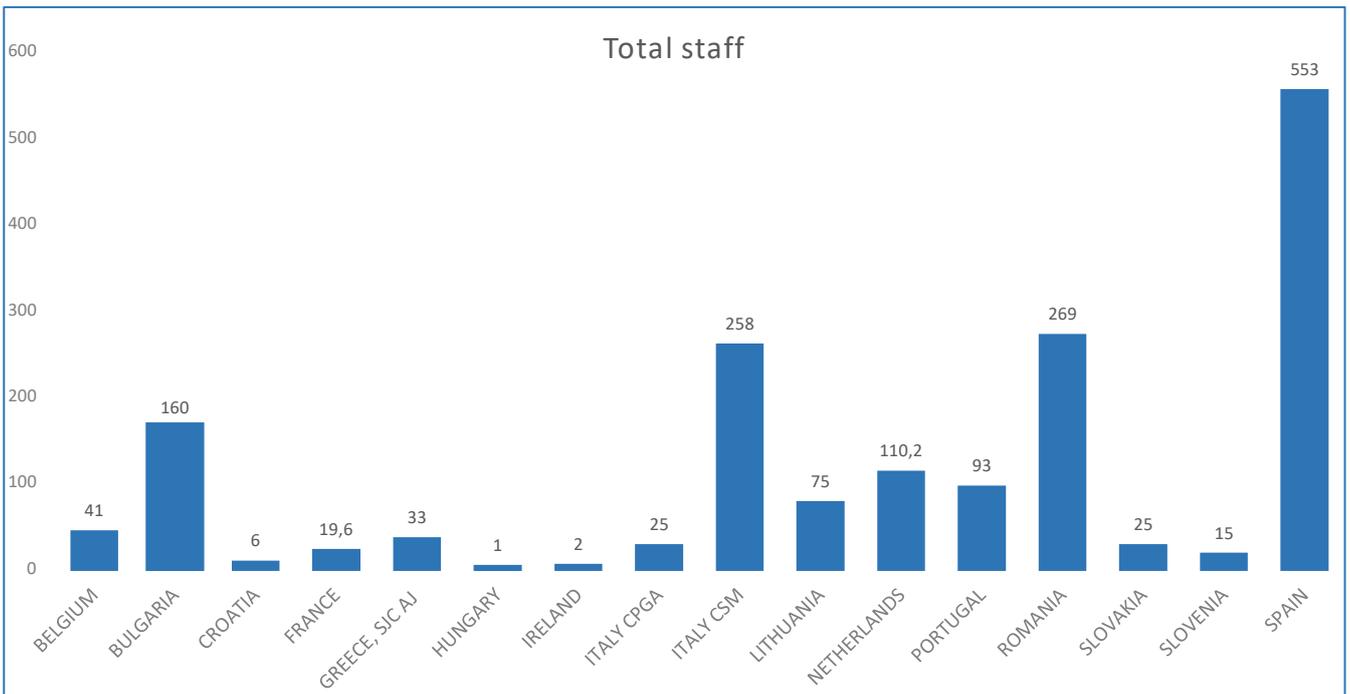
**The Consejo General del Poder Judicial of Spain**, reported not to have established a relationship with any of the other state powers except information relations with the legislative branch (annual report on the status, functioning and activities of the Council, the courts and tribunals).

**4. Resources available to Councils for the Judiciary**





The replies of the Councils were simplified in order to better reflect the reality. It should be noted that the majority of Councils reported that they also hold extraordinary meetings depending on actual workload. In addition, in a number of Councils work is done in commissions that may even have the competence to take final decisions. These data are not represented in the present graph.





**\* Specification other staff:**

- Belgium: translators/interpreters;
- Bulgaria: personnel from directorate “Property management”, “Competitions of magistrates”, “Appraisal of magistrates” and the Secretary General;
- Lithuania: 4 administration, 2 office staff, 4 commission secretaries, 1 management consultant, 1 linguist, 4 construction engineers, 1 supply manager, 5 local training organization specialists, 3 public procurement specialists and 1 project management;
- Portugal: support to the Judicial Inspectors;
- Romania: classified documents and psychologist.