



**European Network of Councils
for the Judiciary (ENCJ)**

**Réseau européen des Conseils
de la Justice (RECJ)**

**Mr Filippo Donati, President of the ENCJ,
contribution to the XVI Annual Meeting of the Judicial High Council of Portugal,
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Session on Independence of the Judiciary

Ladies and gentlemen, esteemed colleagues,

It is a great honor to attend the sixteenth-annual meeting of the Judicial High Council of Portugal and it gives me great pleasure to speak here today.

1. Introduction

The central importance of judicial independence in any democratic society has been acknowledged since the eighteenth Century.

Judicial independence is vital for the fairness of judicial proceedings and is an essential pre-requisite of democracy and the rule of law.

The independence and impartiality of judges is the necessary guarantee, for the members of any society, that their rights will be guaranteed and they will be treated in a fair and equal fashion before the law.

If a democratic society cannot guarantee that disputes will be managed in an impartial, independent, just and lawful manner, it will lose the legitimacy which is necessary for its survival. When people lose faith in the ability of their courts to act in a fair and independent manner, social stability cannot be guaranteed.

A judge or judiciary cannot be subject to the influence and instruction of the Parliament, the Executive or of any other external power. If this happens, there cannot be any more a real judge or judiciary.

Well-functioning and fully independent justice systems in each Member State are crucial for ensuring the fundamental values of Art. 2 TUE, on which the European Union is founded. They are also essential for judicial cooperation across the EU, as well as for the functioning of the Single Market, and the EU's legal order as a whole. As a matter of fact, effective justice systems are crucial for the application and enforcement of national and EU law, and for upholding the Rule of Law. independence, quality and efficiency are necessary requisites for an effective justice system.

The important role of the Councils for the Judiciary in safeguarding judicial independence is increasingly recognised. Councils for the Judiciary can act as a buffer between the judiciary and the other branches of power in matters such as the appointment and career of judges or magistrates, as well as their role in the management of the justice system.

Unfortunately, as shown in the latest annual rule of law report published by the European Commission, some Member states are still failing to guarantee sufficient levels of judicial impartiality and independence. Various surveys indicate that the perception of judicial independence remains low in many Member States. Serious concerns on the independence of national councils for the judiciary remain unaddressed in certain Member States. In other Member States, Councils for the Judiciary lack financial resources and have weak competences.

Against this backdrop, action is needed to ensure protection and reinforcement of independence, quality and efficiency of justice in all Member States.

2. The ENCJ

The autonomy that each State retains in the organization of its own judicial system makes it inevitable that differences exist with regard to the composition, powers and guarantees of independence of Councils for the judiciary or similar autonomous bodies.

However, Councils for the judiciary of EU Member States (and other institutions for the self-governance of the judiciary) belong to the European network of judicial councils (ENCJ). The ENCJ has 21 Members. In some Member States Councils do not exist. For example, Austria and Germany. From these countries, the Ministry of Justice, responsible for the management of the judiciary and the courts, participate in the ENCJ as an observer. The status of observers has been

granted also to the Court of Justice and to the councils of justice of the United Kingdom and of the candidate states to join the Union.

Central to the mission of the ENCJ is the reinforcement of independent, yet accountable judiciaries in the European Union to guarantee access to fair, independent and impartial courts.

Membership of the ENCJ brings together national Councils for the judiciary and has the benefit through dialogue of revealing strengths and weaknesses within their operation, thus assisting Councils in reflecting on their own judicial systems and in identifying areas for improvement, and thus contributing to the development of a European Judicial Culture.

The ENCJ promotes cooperation and the exchange of information between Councils of the judiciary of the EU as well as the identification of common standards and best practices for the protection and promotion of the independence of judicial systems and for the improvement of the efficiency and quality of justice.

Unfortunately, there is a recent tendency in our legal order that the other state powers not only not maintain and strengthen the judicial power, but do not protect the judiciary or individual judges in the face of any measures which threaten to compromise the core values of independence and autonomy.

The ENCJ plays an important role in protecting the values it stands for. It promotes dialogue with the other state powers and speaks out in favor of judicial independence. It also takes action if judicial independence is at stake. The expulsion of the Polish National Council of the Judiciary (KRS) from the network in October 2021 is one of the examples. Other examples are the interventions before the European Court of Human Rights in cases regarding judicial independence.

The ENCJ has developed indicators to measure the independence and accountability of national judiciaries and conducted a number of surveys among judges on this respect.

3. Structure and role of Councils for the judiciary

The ENCJ, the Consultative Council of European Judges (CCJE), and advisory body of the Council of Europe in matters concerning the independence, impartiality and competences of judges, and the Venice Commission have identified some requirements that an autonomous governing body should have, in order to effectively guarantee the independence of the judiciary.

First, constitutional guarantee must be provided against undue interference from the executive and legislative power.

Second, Councils for the judiciary should be composed by a majority of judges elected by their peers. Administrative and financial autonomy is further required to protect Councils from external interferences.

Third, Councils for the Judiciary should have competences that are essential for the protection and promotion of judicial independence, including those regarding selection, appointment, promotion, evaluation, and disciplining of judges.

The establishment of a Council for the judiciary is not sufficient to guarantee the independence of the judiciary, if it is not given significant powers over the choices relating to the status of judges. Hungary provides a good example.

The Hungarian National Council of the Judiciary (OBT) has only advisory powers, has no legal personality, does not independently control its finances and does not have sufficient human resources. A 2011 reform assigned the main competences in the administration of justice to the National Judicial Office (OBH), a body elected by the National Assembly on the proposal of the President of the Republic. The OBT, which is also formally assigned the task of ensuring judicial independence, is therefore not in a position to effectively control the administration of justice. It is therefore not surprising that the National Assembly, on October 19, 2020, was able to elect a magistrate as president of the Kúria, the Hungarian Supreme Court, without keeping into account the contrary opinion of the OBT. In the absence of sufficient powers, the OBT could not avoid attacks to the independence of the Hungarian judiciary.

As stated in the ENCJ Compendium adopted at the General Assembly in 2021, a Council for the Judiciary should have appropriate mechanisms and procedures in order to defend judicial independence effectively.

Councils for the Judiciary should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard. As stated in the ENCJ Sofia Declaration: The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened.

There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary (ENCJ Compendium 2021).

4.- Threats to the independence of the judiciaries

Councils for the judiciary are constantly subjected to attacks from external powers.

Poland offers a clear example.

Since 2015, a set of legislative reforms has undermined the independence of the prosecutor's office, the Constitutional Court, the president of Courts and the National Council of the Judiciary (Krajowa Rada Sądownictwa or KRS).

The KRS is made up of three members by right - the first President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice - six parliamentarians, four of whom are chosen by the Lower House (Sejm) and two by the Senate, and fifteen judges. The legislator established in 2017 that the fifteen judges are elected by the Sejm. This had a strong impact on the entire judicial system, since it is the KRS which proposes the appointment of judges to the President of the Republic.

The Court of Justice has ruled that, in order to establish whether the KRS is effectively independent and therefore can legitimately participate in the procedure for appointing judges, it is necessary to verify the ways in which its members are elected and the way in which itself exercises its role as guarantor of the independence of the judiciary and of individual judges (*A.K. judgment of 19 November 2019*). The Supreme Court of Poland stated that the KRS is not independent of political power. The lack of independence of the KRS casts doubts on the independence of the judges appointed on the proposal of this body. The problem emerged particularly with regard to the disciplinary section of the Supreme Court. The reform of 2020, known as the "Muzzle Law", further limited the independence of the Polish judiciary.

The KRS, captured by political power, failed to protect the independence of the Polish judiciary. The ENCJ, considering that this body does no longer fulfill the requirement of independence, has expelled the KRS from the network in October 2021. The ENCJ found that the KRS did not safeguard the independence of the Judiciary and it did not defend the Judiciary or individual judges in the face of any measures which threaten to compromise the core values of independence and autonomy.

Councils for the judiciary can play a fundamental role in upholding and strengthening judicial independence. The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition

to proposals from any government which tend to undermine the independence of individual judges or Councils for the Judiciary.

5. Conclusive remarks

Judicial independence is a pre-requisite of any democracy. There can be no democracy without independent judges guaranteeing the effective legal protection of fundamental rights and freedoms. Judicial independence lays at the core of the Rule of Law which, pursuant to art. 2 TEU, is one of the founding values of the European Union.

Comparative experience shows that, in the European Union, Councils for the judiciary, which are responsible for the protection of judicial independence, are subject to the constant threat of a “capture” by political power.

Constitutional guarantees, a national legislation that ensures a separation between the judiciary and other external powers, along with strong international safeguards, are necessary to limit such risk. Judicial independence would not be possible without such guarantees.

But alone, such guarantees are not sufficient.

We also need a culture of independence and impartiality.

We all have an important part to play to share and promote such a culture.

Thank you very much for your attention.