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**SHAPING JUDICIAL COUNCILS  
TO MEET CONTEMPORARY CHALLENGES**

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**PRESENTATION**  
by

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**THE WORK OF GRECO REGARDING THE COMPOSITION  
OF THE JUDICIAL COUNCILS**



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GRECO - the Group of States against Corruption - was established as the anti- corruption monitoring body of the Council of Europe in 1999. It works by a dynamic process of mutual evaluation, with, as its most visible component, country visits by teams of evaluators, who serve as independent experts rather than as the representatives of their home states, and who, with critically important support and input from the highly impressive GRECO Secretariat, prepare reports which evaluate the arrangements in the State being visited against objective standards to which that State has agreed and make recommendations for improvement. Those reports are then discussed by Member States in Plenary and adopted, with such changes as Plenary chooses to make. A process of compliance reporting then takes place.

Evaluation proceeds in rounds which examine particular themes and one of the themes for the fourth round of evaluation is prevention of corruption in relation to judges. It follows that GRECO's interest in judicial councils is in relation to their role as a bulwark against corruption. That particular perspective informs and constrains GRECO's recommendations about judicial councils.

GRECO and its evaluators do not have a general remit to examine judicial systems and make recommendations for improvement.

I shall illustrate what I am about to say with examples. I am not singling those States out for criticism. They are chosen simply because they provide reasonably clear examples of themes seen across multiple States. And, of course, the examples I am giving reflect the position at the time of the Fourth Round evaluations. Arrangements in the particular States referred to may be expected to have changed in line with the recommendations.

In the 48 Fourth Round evaluation reports published so far, GRECO has spoken clearly: there cannot be a real, effective fight against corruption without a truly independent judiciary. Crucially, the guarantee of independence of the judiciary as a whole safeguards the independence of judges individually. This is important to prevent any undue influence over the judiciary. At the same time, enshrining the independence of the judiciary as a constitutional principle must translate into practice. For that purpose, whilst recognising that other effective models exist, GRECO considers that vesting independent self-governing bodies of the judiciary with the key decision-making role on the recruitment, career and discipline of judges is one appropriate method for guaranteeing the independence of the judiciary and GRECO has recommended States which are revising their arrangements to give serious consideration to the establishment of a judicial council. According to GRECO, it is essential that judicial councils are not only free, but also seen to be free from political influence. One of the prerequisites for securing the true independence of the judiciary lies with the composition of its governing bodies, to avoid the risk of politicised, or biased decisions on appointments and promotions of judges.

So, for example, the Fourth Round Evaluation Report for the Czech Republic made such a recommendation and also outlined the characteristics envisaged for a suitable body. It stated "While there are no binding international standards requiring the establishment of such a body, the GET shares the preference expressed by various instances – including of the Council of Europe – for a council for the judiciary or equivalent body, independent from legislative and executive powers, entrusted with broad competence for questions concerning the status of judges (including appointment, promotion and disciplinary matters) as well as the organisation, the functioning and the image of judicial institutions. Such a body should be composed either of judges exclusively or of a substantial majority of judges elected by their peers; its members should not be active politicians, in particular members of government".

On the other hand, GRECO has not sought to persuade Member States which do not have judicial councils on that model that they are essential. Those states include the USA, the UK and Switzerland – though one may detect uneasiness about the Swiss approach which – for coherent but, for GRECO, ultimately unpersuasive reasons - involves the election of judges by an essentially political body, the Judiciary Committee, and the affiliation of each judge to a political formation.

There are some general conclusions to be drawn from GRECO's Fourth Evaluation Round and I deal with them in five chapters:

First, judicial self-governing bodies should be in the hands of the judiciary to the greatest extent possible. Indeed, GRECO considers their composition to be decisive and there is a clear minimum standard to attain in all cases: not less than half of their members should be judges elected by their peers. This requirement stems in particular from Recommendation CM/Rec(2010)12 of the Council of Europe Committee of Ministers "Judges: independence, efficiency and responsibility". In Montenegro, GRECO heard, but was not persuaded by, criticism of that model as liable to create a perception of judicial cronyism. In neighbouring Bosnia and Herzegovina the High Judicial and Prosecutorial Council, whilst autonomous and independent, had responsibilities for both judges and prosecutors and was composed of 15 members, among whom five or six were judges and five or six were prosecutors. GRECO expressed significant concern about that composition.

Second, it is important that all judges should have the right to vote and to be elected to judicial councils. Their election should be fair and transparent. For this reason, political authorities should not be involved, at any stage, in the selection process. GRECO emphasises that when members are selected by parliament or by the executive, that increases risks of judicial councils becoming politicised and subject to partisan considerations, for instance where it concerns the selection and appointment process of judges. In the event that some judge members are to be appointed by parliament, the procedure should be based on a public competition open to all judges and be fully transparent in order to avoid them being, or being perceived to be, selected on partisan lines. If there are non-judicial members, objective and measurable selection criteria should be established to assess their professional qualities and impartiality. GRECO expressed some concern about the arrangements in Moldova, where a procedure with the laudable aim of dispelling impressions that members of the Superior Council of Magistracy might be elected according to political criteria was implemented in a way which GRECO characterised as "rather rushed" and was, as a result, less robust in practice than might be desired.

Third, GRECO emphasises that the chair of a self-governing body should be one of its judicial members. Concern was expressed about the fact that in Azerbaijan the Minister of Justice was always the chair of the Judicial Legal Council. Being presided over by someone from the executive may cast serious doubts as to a judicial council's independence, especially if they can object to decisions taken about career and discipline. More generally, it risks giving rise to suspicions of politicisation of the judiciary, thereby jeopardising its independence as perceived by citizens.

Fourth, and along the same lines, there should be no ex-officio membership of representatives of the executive or parliament in self-governing judicial bodies. In Spain, GRECO heard criticism that, while the judiciary is independent at its base, it is politicised at the top of its governing bodies, including the General Council of the Judiciary, and recommended an evaluation of the legislative framework governing that body for its effects on its real and perceived independence of that body from any undue influence.

There are, of course, always exceptions. I was a member of the Fourth Round evaluation team for Croatia, where a judicial council with a clear majority of judges also included two members of Parliament. Most of the interlocutors we met considered that, rather than creating any risk

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of political interference in the daily work of the Council, their involvement provided different points of view and was an asset rather than a weakness of the system. It had made the role of the judiciary better understood in Parliament and the political members had not, at the date of our visit, interfered in decision-making processes or brought particular partisan interests to bear. This is as I say, an exception and it might depend on the good sense of the particular political appointees – which cannot be assumed.

Fifth, and finally, GRECO considers that the membership of judicial councils should reflect the whole judiciary and not just judges from the highest courts. The particular situation in Cyprus was noted with some concern. There, the Supreme Council of Judicature was made up of the 13 justices of the Supreme Court and the President of the Supreme Court, who was also the President of the Supreme Council. This unique composition reflected strong independence from the executive and legislative powers, which is to be welcomed, but could lead to situations of conflicting interests within the judiciary and confusion as to whether the justices take decisions on behalf of the Supreme Council or on behalf of the Supreme Court, or where there are disciplinary proceedings against one of their own number.

I want to close by emphasising again the connection between an independent judiciary and GRECO's mission to help States prevent and fight corruption. A judiciary which is not independent undermines the effective enjoyment of the right to a fair trial. It compromises public confidence in the state institutions, in the rule of law, and ultimately perhaps even in democracy itself. Moreover, a judiciary whose independence is incomplete or under threat may struggle, or be reluctant, to deal with alleged cases of corruption and is less likely to convict and impose effective, dissuasive and proportionate sanctions. The role of judicial councils in guaranteeing judicial independence is, in GRECO's estimation, critically important.

The first draft of this paper was prepared by Anne Weber of the GRECO Secretariat and I record my great appreciation of her work. I take full personal responsibility for the final version of the paper and, in particular, for any errors which might have been made.