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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS
ON THE DRAFT OPINION
OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
ON JUDICIAL COUNCILS**

by
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1. *The Terms of Reference of the Consultative Council of European Judges (CCJE) for 2007 (CCJE (2007) 2, point 4.i) request the CCJE to adopt an opinion on the structure and role of judicial councils and to consult on this opinion with the Venice Commission.*

2. *In view of this consultation, the Commission adopted its report on judicial appointments at its 70th Plenary session (Venice, 16-17 March 2007) as a contribution to the elaboration of opinion no. 10 of the CCJE. The Commission presented its report (CDL-JD(2007)001rev, now CDL-AD(2008)028) at the meetings of the Working Party of the CCJE (CCJE-GT) in Rome (28-29 March 2007) and in Graz (25-26 June 2007).*

3. *The CCJE invited the Venice Commission to give its comments to draft Opinion no. 10 (CCJE(2007)5PROV2), adopted by the CCJE-GT at its Graz meeting.*

4. *The present comments are the reply to this request. They were adopted by the Venice Commission at its ... Plenary Session (Venice, ...)*

General remarks

5. The Commission welcomes draft Opinion no. 10 in general and **fully endorses the thrust of the Opinion**, which focuses on judicial councils as the key element for the guarantee of judicial independence.

6. In its contribution to the opinion of the CCJE, the Venice Commission emphasised the importance of judicial appointments because these were seen as giving rise to major problems in new and even in old democracies. This does not mean that other tasks of judicial councils, such as training, are important, on the contrary, the Commission approves of the manner in which these topics are treated in the draft Opinion.

7. The Venice Commission particularly **welcomes** the CCJE-GT's concern for **transparency of the work of the Judicial Council, especially with respect to disciplinary matters** (draft Opinion, para. 95).

8. Nonetheless, the Commission notes that some of the points presented in the draft Opinion do not fully correspond to the approach of the Commission in its Report on Judicial Appointments. The Commission would like to highlight these points in order to allow the CCJE to adopt its opinion at its plenary session on 21-23 November 2007 on the basis of a clear comparison. As an independent body, the CCJE is of course in no way bound to follow the recommendations of the Venice Commission.

Composition of the Judicial Council

9. A major divergence between the CCJE opinion and the Commission's report relates to the composition of the Judicial Council. The Venice Commission states that "a **substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary** itself" (report, para. 29), whereas the CCJE considers that, "in order to prevent any manipulation or undue pressure, **seventy-five per cent of the members should be judges**" (draft opinion, para. 18). This divergence need not necessarily be a contradiction because judges could, of course also be appointed by other bodies than the Judiciary itself. It remains however evident that the Commission can also accept a "substantial element" of judges, i.e. slightly less than half of the members.

10. However, a clear contradiction appears when the Commission considers that "other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest" (para. 29) as opposed to the CCJE-GT, which

accepts elections by Parliament but “commend[s] a system that entrusts appointments to non political authorities” (para. 32, see also para 31). The Commission is of the opinion that the **involvement of Parliament provides for democratic legitimacy of the Judicial Council**. It is however fair to say, that in the event of parliamentary election by Parliament, the CCJE-GT and the Commission agree in insisting on a qualified majority in order to guarantee a balanced representation.

11. While there is convergence as to a possible role of the Head of State in the Council, the CCJE-GT insists that no minister can be among its members (para. 23). The Commission could accept **membership of the Minister of Justice** under certain conditions: “[s]uch presence does not seem, in itself, to impair the independence of the Council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council’s decisions, for example, the ones relating to disciplinary measures”. The more stringent position of the CCJE-GT is of course perfectly valid.

Chair of the Judicial Council

12. The CCJE-GT followed the Venice Commission’s suggestion (para. 35) that “in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary” (draft Opinion, para. 33), whereas in other systems, the chair should be elected by the Council itself.

13. While the CCJE-GT insists that in the latter case the chair should be a judge (para. 33), the Commission proposes that the “**chair of the Council could be elected by the Council itself from among the non judicial members of the Council**” (para. 35). The chair holds a key position within the Council and such an arrangement could help to avoid any appearance of judicial ‘corporatism’ (self-interest, self protection and cronyism within the Judiciary).

Disciplinary procedures

14. The Venice Commission is not in favour of the CCJE-GT’s proposal that “some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel” (para. 20). It seems that behind this suggestion lies the issue of disciplinary action, which the CCJE-GT would like to see dealt with in a judges-only composition. The Venice Commission favours a different model. In order to avoid any ‘corporatism’, the Commission suggests a different approach when it states that an “appeal against disciplinary measures to an independent court should be available” (para. 25). The Commission therefore suggests that the **Council, or a committee within it having a mixed composition, should adopt disciplinary measures in the first instance. An appeal to a court would then be an additional safeguard for the independence of the Judiciary**.

15. The CCJE-GT draft however proposes the reverse: “In first instance, disciplinary procedures, when not within the jurisdiction of a disciplinary court, should preferably be implemented by a disciplinary commission composed of judges elected by their peers, different from the members of the Council for the Judiciary. There should be a right of appeal to the Council for the Judiciary” (para. 64). The Commission considers that the subsequent control by an independent tribunal may be lost in such a procedure.

Court administration

16. In paragraph 42 of the draft Opinion, the CCJE-GT recommends that, *inter alia*, “the administration of justice / facilitation of court management” should be tasks of the Judicial Council. The Commission fears that the day-to-day administration of the court system (buildings, administrative staff, IT matters etc.) would overburden the Judicial Council and detract it from its most important task to guarantee the independence of the Judiciary. In its

report, the Commission states: “While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice. ‘An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The **management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.**”

17. This does not mean that the Venice Commission opposes the “Northern European model with competences for management and budget matters” (draft Opinion, para. 46). The Commission rather suggests that a Judicial Council should focus on judicial appointments, promotion and career of judges. If required, a different body could deal with administrative issues.

18. Finally, the Commission notes that the draft Opinion is seen to be relevant “in particular in the countries where a separate system of administrative justice exists”. The Commission is of the opinion that judicial councils are equally important for all countries, whether old or new democracies, and whether or not they have a separate system of administrative justice.

Conclusion

19. The CCJE-GT and the Venice Commission mostly converge in their approaches to Judicial Councils. Differences often relate to varying degrees placed on one or the other point. While there is agreement on most issues, divergences remain in the field of the composition of the Judicial Council (mixed vs. judges only as an option), appointment of its members (by Parliament or other bodies), the chair (non-judicial or judicial) and disciplinary procedures (outside appeal to court vs. internal appeal within Council). Nonetheless, the Venice Commission looks forward to the adoption of Opinion no. 10 as a further reference of the establishment for independent judiciaries in Europe.

20. The Venice Commission remains at the disposal of the CCJE and its Working Party for further discussion.