

Comparative study on the appointment of national judges

Poland - Hungary - Netherlands - France - Spain - Sweden - Germany

INDEX

Summary

Introduction

I. Towards a *de facto* competence of the Union in matters of the appointment of judges?

A. The procedure for appointing judges, a key element of judicial independence

B. The Commission's approach to the appointment of judges

C. Total sanctuary for the judiciary?

II. Case studies

A. Poland

B. Hungary

C. The Netherlands

D. France

E. Spain

F. Sweden

G. Germany

Conclusions

Bibliography

Summary

When it comes to the rule of law, the independence of the judiciary and the appointment of judges, the spotlight is on Poland and Hungary. These two Member States are the subject of procedures under Article 7 of the TEU, partly because their systems for appointing judges would not meet the European standards defended by the Commission, even though the organisation of justice is a national competence. The Commission invokes respect for the values of the Union cited in Article 2 of the TEU, Article 47 of the Charter of Fundamental Rights and the standards set by a consultative body of the Council of Europe, the Venice Commission, to urge the Member States to reform their systems for appointing judges and reduce the role played by the legislative and executive powers. The Commission's policy of standardisation poses a problem of legal basis, given that a number of Member States do not comply with the relevant standards but are not exposed to the same scrutiny as Poland and Hungary.

Introduction

On 5 July, the European Commission published its **fourth annual report on the rule of law**¹. Intended to "take the pulse of the situation of the rule of law in each Member State", this report is based on four pillars: national justice reforms, anti-corruption frameworks, media pluralism and other institutional issues linked to checks and balances. As regards national justice systems, the Commission advocates strengthening the independence of the judiciary, in particular by increasing the independence and effectiveness of judicial councils, improving procedures for appointing judges and the operation of the highest courts, and strengthening the autonomy of public prosecutors' offices². **The Member States are following these recommendations by implementing judicial reforms to meet the Commission's requirements.**

In accordance with Article 19 of the TEU, the organisation of justice is a matter for the Member States which decide on the procedure for recruiting, training and appointing judges, as well as the criteria for their promotion. If this is the case, why do **the Commission, the CJEU and the Council of Europe** intend to take a position on these issues and give the Member States a direction to follow in terms of the appointment of judges? The question of the appointment of judges, by its very nature, is a contentious issue in that it is one of the stumbling blocks between the judicial, legislative, and executive powers, and it seems even more complex in the context of relations between the Union and the Member States. Not only is it an issue of the separation of powers but it also seems to be at the crossroads between **the sovereignty of European nations** and the desire to go beyond it.

Do the European institutions have a clear vision of the appointment of national judges that is gradually being imposed on the Member States? In what way is this vision an integral part of the **rule of law within the meaning of Article 2 of the TEU**, and how are attempts being made, not without a series of frictions, to impose it on the Member States? The examples that come to mind first are obviously those of **Hungary and Poland**, two States that are in conflict with the European institutions, particularly on the issue of the independence of the judiciary and therefore the appointment of judges. In reality, many other Member States are affected by this phenomenon of the standardisation of procedures for appointing national judges, yet they do not receive the

¹ Rule of Law Report 2023, European Commission, 5 July 2023. Online at https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en

² Rule of Law Report 2023: progress made on 65% of recommendations, but further action needed, Press release, European Commission, 5 July 2023. Online at https://ec.europa.eu/commission/presscorner/detail/fr/ip_23_3631

same political and media attention as Hungary and Poland do - a **difference in treatment and a double standard** that raises questions.

I. Towards a *de facto* competence of the Union in matters of the appointment of judges?

A. *The procedure for appointing judges, a key element of judicial independence*

Although the organisation of justice remains a national competence, the Treaties contain several provisions that put this lack of transfer of competence into perspective. **Article 19 of the TEU** states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", while **Article 47 of the Charter of Fundamental Rights** enshrines the right of every person to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The independence of the **judiciary** is central to the ability of judicial systems to guarantee **respect for the values of the Union within the meaning of Article 2 of the TEU**³. As the procedure for appointing judges is a key element of this independence, it becomes an issue in its own right, making it possible to give a normative character to the values cited in Article 2 of the TEU.

Thus, the appointment of judges has gone from being a matter of national sovereignty to being a *de facto* issue that is taken seriously by the European institutions. The appointment of judges has become an **essential pivot in the establishment of a Union based on shared values which no longer have only a recognitive character but also direct implications for the justice systems of the Member States**⁴.

B. *The Commission's approach to the appointment of judges*

The annual **"Justice Scoreboard"** and the **"European Semester"**, form part of the EU's **"Toolbox" on the rule of law**, in which the Commission most clearly sets out its views on

³ "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

⁴ Opposed to this development in the construction of Europe, Jean-Éric Schoettl, Honorary Councillor of State and Secretary of the French Constitutional Council from 1997 to 2007, goes so far as to say that this is the creation of a "second treaty". See "Faut-il en finir avec le gouvernement des juges", *Cercle Droit et Liberté*, 3 May 2022.

the independence of the judiciary and the appointment of national judges. The independence of the judiciary is presented as one of the three parameters for effective justice⁵. The latest edition of the Scoreboard, dated 8 June 2023⁶, recalls that **European standards** for the independence of the judiciary and judges were set by the Council of Europe in 2010⁷ and adds new indicators to refine the assessment of the situation in the Member States.

In this annual assessment, the Commission looks in particular at **the prerogatives of judicial councils and the procedures for appointing the presidents of supreme courts**, particularly from the point of view of the role played by the executive and legislative powers. **The appointment of public prosecutors** is another issue examined by the authors of this scoreboard

The criteria used to compare the Member States suggest that the Commission has developed its own doctrine on these issues, taking up the observations made by the Council of Europe in its European standards. These include the "**Magna Carta of Judges**"⁸, a charter adopted by the **Consultative Council of European Judges (CCJE)** in 2010 setting out the fundamental principles to be followed in this area.

Point 5 of this charter provides that decisions relating to selection, appointment and career are based on objective criteria and are taken by the body responsible for guaranteeing the independence of the judiciary. The Charter sets out the nature and composition of this body, as recommended in **point 13**:

"To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions."

⁵ The other two parameters are the efficiency of the judicial systems and their quality.

⁶ The 2023 EU Justice Scoreboard, 8 June 2023, European Commission. On line at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en

⁷ 2010 Council of Europe Recommendation on judges: independence, efficiency and responsibilities. Available online at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI\(2021\)690623_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf)

⁸ Magna Carta of Judges (CCJE - Consultative Committee of European Judges), Strasbourg, 17 November 2010. Online at <https://rm.coe.int/2010-ccje-magna-carta-anglais/168063e431>

In line with this charter, the Commission has a clear objective in terms of the appointment and career management of judges: namely to **reduce as far as possible the role of the legislature and the executive in order to allow judges to be appointed primarily by their peers, seen as a guarantee of the independence of the judiciary.**

C. Total sanctuary for the judiciary?

This year, in its assessment of the Member States' justice systems, the Commission seems to have found an ideal category: those Member States in which **neither the parliament nor the executive participate in the appointment of supreme court presidents.** Only Denmark, Luxembourg, Portugal and Romania fall into this category. All the other Member States have systems involving the legislature and/or the executive, either in the proposal or appointment process⁹.

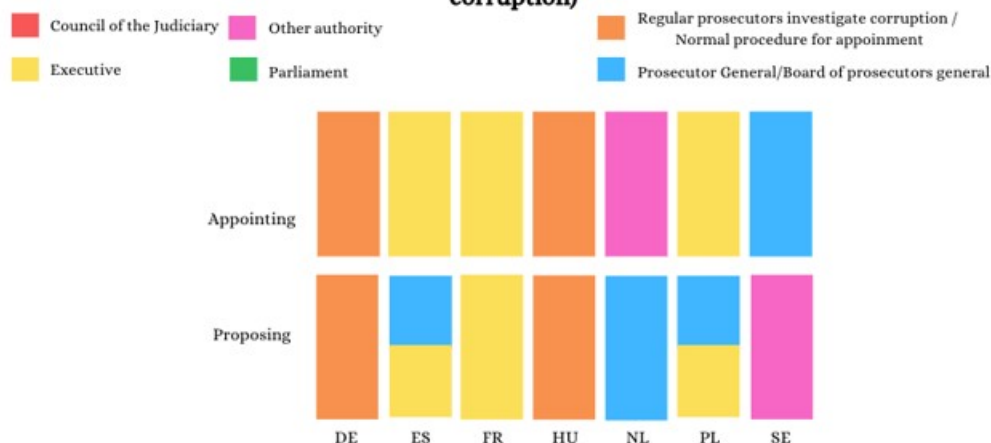
Is the European Commission planning to **standardise all procedures** and arrive at systems corresponding to the one that exists in Denmark, where the President of the Supreme Court is appointed by the other judges of that court? In 2016, in its **Rule of Law Checklist, the Venice Commission** pointed out the risk of a form of corporatism in the case of bodies and courts whose members are appointed exclusively by their peers. **While the politicisation of appointments is one extreme to be avoided, corporatism is another one**¹⁰. This risk seems to be secondary in the eyes of the Commission, although it should be noted that only the four States mentioned above are in line with the Commission's vision regarding the politicisation of supreme courts or that of judicial councils¹¹.

⁹ In the Czech Republic, the two heads of the executive are involved throughout the procedure, while in Malta it is the legislature that plays this role in the proposal and appointment of the president of the supreme court.

¹⁰ Rule of Law Checklist, 11-12 March 2016, Venice Commission of the Council of Europe. Online: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

¹¹ In its 2023 report on the rule of law, the Commission points the finger at Slovakia, Bulgaria and Cyprus, countries where the appointment procedure of the members of the respective judicial councils run counter to the European standards upheld by the Council of Europe and the Commission. Yet, these Member States do not receive the same political and media attention as Hungary and Poland.

Appointment procedures for the heads of prosecutor's offices specialised for dealing with corruption (Source: European Commission with the National Contact Points for Anti-corruption)



While the Commission could take a resolutely critical approach towards the overwhelming majority of Member States with regard to the procedures for appointing judges, there are only two Member States, **Hungary and Poland**, that are subject to a procedure **under Article 7 of the TEU** for "*clear risk of a serious breach of the values referred to in Article 2*", and where the independence of the judiciary is openly called into question. In both cases, the judicial reforms undertaken by these Member States are at issue, and the provisions for appointing judges are at the heart of the debate. In other Member States, however, the situation regarding the appointment of judges is just as problematic when compared with the Commission's standards.

II. Case studies

A. Poland

As far as Poland is concerned, the infringement procedure dates from **20 December 2017** and was initiated by the Commission because of **three justice reforms** passed by the Polish Parliament: the reform of the ordinary courts, the reform of the Supreme Court (a court of cassation) and the reform of the National Judicial Council¹².

With regard to the appointment of judges, the objections addressed to Poland by the Commission mainly concern the change in the **composition of the National Judicial Council (KRS)**: of its twenty-five members in total, fifteen were appointed by their peers

¹² "L'État de droit dans les conflits entre Bruxelles et le couple polono-hongrois", 2022, Fondation ID, p. 12

before the reform, and today, they are appointed by the Sejm¹³. The Commission refers to the work of the Venice Commission in opposing this method of appointment; in its recommendation of 20 December 2017 supporting the triggering of Article 7 against Poland, it argues that

"Well-established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, stipulate that at least half of the members [of councils for the judiciary] should be judges chosen by their peers from all levels of the judiciary and with full respect for pluralism within the judicial system. It is up to the Member States to structure their judicial systems, and in particular to decide whether or not to set up a judicial council. However, where such a council has been established, as is the case in Poland, its independence must be guaranteed in compliance with European standards.¹⁴"

It is in the case of Poland that the Commission's doctrine on the appointment of judges is most apparent. In this year's Rule of Law Report, Poland received by far the most criticism from the Commission for the issue of the independence of the judiciary. The conflict between the Commission and the CJEU on the one hand and the Polish government on the other is still highly topical, and common ground similar to that found between Hungary and the Commission on issues of judicial independence does not seem possible in the current situation.

In its judgment of 5 June 2023¹⁵, the CJEU further clarified the EU's requirements regarding the independence of the judiciary through the case of **the disciplinary chamber of the Polish Supreme Court**, created by a reform of the judiciary in 2017. The Commission was behind this decision as its President asked the CJEU to impose financial penalties on Poland following **the decision of 14 July 2021** ordering Poland to suspend the activities of this disciplinary chamber, an injunction that the Polish government had refused to comply with. This chamber is made up of members appointed by the KRS, which was reformed in 2017 **in order to introduce a degree of parliamentary control.** Evidently, this runs counter to the standards defended by the Commission and the CJEU with regard to the appointment of judges¹⁶, which now considers itself competent to rule on these issues.

¹³ An appointment system similar to that in Spain, see *below*.

¹⁴ <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52017PC0835&from=EN>

¹⁵ Case C-204/21, *Commission v. Republic of Poland*.

¹⁶ See judgments of 15 July 2021, *Commission v Poland*, C-791/19, paras. 98-108; of 20 April 2021, *Repubblika v Il-Prim Ministru*, C-896/19, para. 66; of 2 March 2021, *AB and Others (Appointment of judges to the Supreme Court - Actions)*, C-824/18, paras. 66, 124 and 125; and of 19 November 2019, *AK et al*, joined cases C-585/18, C-624/18 and C-625/18, paras. 137 and 138.

The CJEU considers the reform of the Polish Supreme Court to be contrary to Union law and invokes the rule of law as the very identity of the Union as a common legal order embodied in principles containing obligations that are legally binding on the Member States. Thus, Poland is still obliged to pay a penalty payment of 500,000 euros per day¹⁷.

In addition to the **blocking of funds from the recovery plan**, which also applies to Hungary, Poland is being further penalised financially by a penalty payment mechanism that the CJEU, at the Commission's request, justifies as the price to be paid for failing to respect the rule of law. This unprecedented situation in the history of European integration is rooted in a reform of the method of appointing members of the Council of the Judiciary and shows just how **crucial this issue has become in the eyes of the Commission**.

No European standards for constitutional courts?

The Polish case also provides an opportunity to reflect on the nature and composition of the constitutional courts. The Commission's doctrine in this respect is not as assertive as it is with regard to the composition of the Councils for the Judiciary, but it is mentioned in the "Scoreboards on the Judiciary" published each year. Although the Venice Commission has acknowledged that there are no European recommendations for the composition of constitutional courts¹⁸, which is the responsibility of the Member States, the example of Poland shows that a shift is also taking place in this area.

One of the grievances against Poland concerns the dispute over the appointment of three out of fifteen judges to the Polish Constitutional Tribunal. The controversy erupted in 2015 when the previous parliamentary majority changed the law to appoint five judges in advance to replace judges whose terms were due to expire in November and December 2015, while parliamentary elections were due to be held in October. The new majority invalidated these five appointments and appointed five new judges in their place, and then refused to take account of the Constitutional Tribunal's ruling recognising the validity of three of the five previous appointments. The conflict also relates to the successive laws adopted by the Polish Parliament from December 2015 to the end of 2016 to reform the Constitutional Tribunal. One of these laws modified the procedure for appointing the new President of the Constitutional Tribunal in December

¹⁷ The daily amount was €1 million prior to the order of the Vice-President of the Court of 21 April 2023.

¹⁸ CJEU, judgment of 22 February 2022, RS (Effect of the decisions of a constitutional court), C-430/21, EU:C:2022:99, para. 38.

2016 when the previous President's term of office expired, which the Commission considers illegitimate¹⁹.

In this case, it would be pointless to try to identify European standards, as the 2023 "Scoreboard" shows a wide diversity in the nature and jurisdiction²⁰ of these courts, making a distinction between constitutional courts, supreme courts, supreme administrative courts and the only Constitutional Council, in France, whose political appointment system²¹ makes it an anomaly within the European Union.

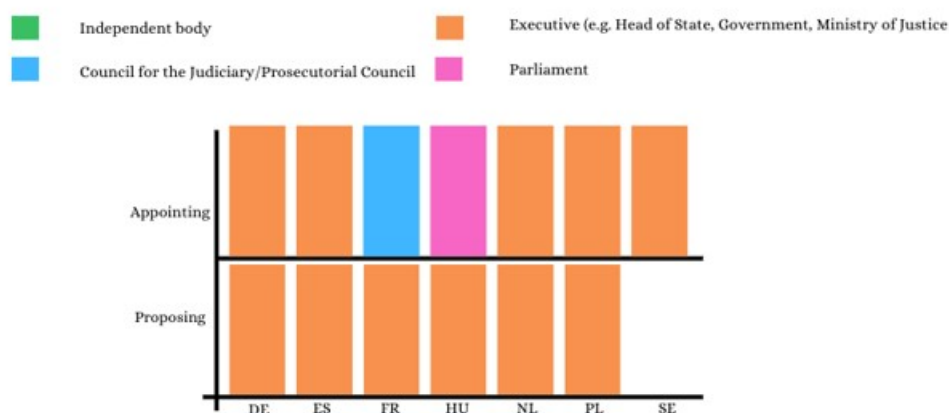
In this sense, the problem with the Commission's criticism of Poland is that there are no texts or practices on the basis of which the composition of a constitutional court can be judged at European level. Moreover, given the current state of appointment procedures in other Member States, notably in France, it seems difficult to push for European standards, however, the Polish case is perhaps a gateway to this type of standardisation initiative.

¹⁹ "The rule of law in conflicts between Brussels and the Polish-Hungarian couple, 2022", Fondation ID, p.12

²⁰ These are numerous and far from uniformly distributed in all the Member States: constitutional review of draft laws, constitutional review of laws in force, handling of constitutional appeals by persons (natural or legal) challenging a law of general application in their specific case, and constitutional appeals by persons (natural or legal) challenging an individual act of a public authority (including judicial decisions) which directly affects their rights.

²¹ In accordance with Article 56 of the Constitution, the Constitutional Council is made up of 9 appointed members plus ex officio members. One third of the Constitutional Council is renewed every three years. Three members are appointed by decision of the President of the Republic, who also appoints the President of the Council. Three members are appointed by the President of the National Assembly and three others by the President of the Senate. In addition, former Presidents of the Republic are ex officio life members of the Constitutional Council. The Presidents of the Council are usually former leading political figures.

Proposal and appointment of the Prosecutor General (Source: EU Justice Scoreboard, 2023)



- The system for appointing members of the Polish Judicial Council is similar to that in Spain.
- The Commission and the CJEU are putting financial pressure on Poland to change the procedure for appointing Polish judges.
- There is a risk of a shift in the Commission's views on the appointment of constitutional judges.

B. Hungary

The procedure against Hungary was triggered by **the European Parliament, which, in its resolution of 12 September 2018**, called on the Council to note a *"clear risk of a serious breach of the values on which the Union is founded."*²²

Among the **27 objections addressed to Hungary** in this resolution, one in particular concerns the appointment of national judges, namely the creation of the **National Office for the Judiciary (OBH)**, whose head is appointed by Parliament, the only chamber in Hungary, which takes over some of the powers of the **National Judicial Council (OBT)**, whose members were elected by their peers. According to the authors of the resolution, this trend runs counter to European standards as well as the Commission's current thinking on the appointment of national judges.

Since the adoption of this resolution, the situation in Hungary has changed, as shown by the conclusions of the latest report on the rule of law in Hungary. On 5 July 2023, the Commission acknowledged that **the recommendations made to Hungary in 2022**

²² https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html

concerning the relationship between the OBH and the OBT had been followed: the role of the OBT had been strengthened to counterbalance the powers of the OBH president. Hungary has also implemented the Commission's recommendation to adapt the rules relating to the *Kúria*, the Hungarian Supreme Court, by abolishing appointments made outside the normal procedure, and to strengthen the eligibility criteria for the president of this court as well as the judicial control exercised over him - with the aim of complying with European standards in this area²³.

Thus, the logic of the **judicial reforms implemented in 2011** by the new majority that came to power in 2010 has been partly unravelled by the pressure exerted on Hungary by the Commission and the European Parliament, notably through the conditionality mechanism adopted in 2020. On the issue of the appointment of judges, the 2011 reforms abolished the former National Judicial Council (OIT), which had existed since 1997, in particular because the government considered that it operated as a corporatist body beyond any democratic control. Its members were often also presidents of courts, the President of the OIT himself was the President of the Supreme Court, and the Council only met once a month, demonstrating inefficiency in the supervision of the judicial system and a lack of transparency and objectivity in the process of appointing judges by their peers on the Council²⁴.

It was this Hungarian judicial reform policy that inspired the Polish government from 2015 onwards: **a rebalancing in favour of the legislature in the appointment of judges**, in other words the exact opposite of the ideas set out by a consultative body of the Council of Europe, which the Commission has taken on board. **With the help of the conditionality mechanism**, the Commission has managed to impose its views on the appointment of judges on Hungary and is pressing Poland to bring its judicial system into line with European standards.

- **As in the case of Poland, the disputes between Hungary and the Commission over the appointment of judges stem from the role played by Parliament.**
- **Hungary has followed the Commission's recommendations and now meets the requirements concerning the operation of its supreme court and its judicial councils.**

Hungary and Poland, which are regularly in the media spotlight, are not the only countries to be the subjects of recommendations concerning the independence of the judiciary and the procedures for appointing judges. In fact, justice systems of many other countries are far from meeting the European standards advocated by the Commission.

²³ https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf

²⁴ The rule of law in conflicts between Brussels and the Polish-Hungarian couple, 2022, Fondation ID, p. 87

C. The Netherlands

According to the European Commission's indicators, the Netherlands is one of the Member States with one of the highest levels of public perception of the independence of the judiciary, yet its **system for appointing judges is heavily weighted in favour of the executive**. The Council for the Judiciary (*Raad voor de rechtspraak*) has empowered the National Judicial Selection Committee to draw up a list of candidates who are then appointed for life by the executive on the proposal of the Minister of Justice²⁵.

In its chapter on the Netherlands, the 2023 report on the rule of law notes that **the influence of the executive and legislative powers** must be further reduced in the process of appointing judges and argues for an even greater proportion of judges in the Council for the Judiciary - currently half of its members are professional magistrates. In the same document, another remark makes the whole thing paradoxical: the authors of the report note the added value of **Parliament's involvement in the process of appointing judges from the point of view of democratic legitimacy**. It is precisely this legitimacy that the Hungarian and Polish governments put forward to justify their judicial reforms of 2011 and 2017, which were then widely criticised by the European institutions.

Furthermore, although the public prosecutor's office is separate from the Ministry of Justice and Security, it falls **under the political responsibility of the Minister of Justice**. It is on this point that the Commission has been making recommendations to the Netherlands since 2020, asking it to put an end to the possibility granted to the executive to **give instructions to the public prosecutor in individual cases**²⁶. This year, the Dutch authorities told the Commission that this withdrawal was under discussion.

Another stumbling block between the Commission and the Netherlands is the possibility for judges to be national or European MPs, which GRECO (Group of States against Corruption) is calling for to be ended.

- **The Commission calls for a reduction in the role of the legislative and executive powers in the process of appointing judges.**
- **The Commission calls for reform of prosecutor's role in individual cases.**
- **Despite these substantial recommendations, the Netherlands has not received the same media and political attention as Poland and Hungary did.**

²⁵ In practice, the Minister always follows the recommendations of the Selection Committee, while the Monarch is responsible for signing these appointments by decree.

²⁶ Recommendations also made in the case of Germany, see *below*.

D. France

In France, the degree of perceived independence of the judiciary is lower than in the Netherlands²⁷, especially as these figures have been falling in recent years. As for the composition of the Conseil supérieur de la magistrature, it **does not meet European standards because it includes a high proportion of members appointed from the executive and legislative branches**²⁸. The Council nominates candidates for senior judicial posts and, with regard to the appointment of judges by the Minister of Justice, issues binding opinions, a practice that has been in place since 2008. **The public prosecutor's office is part of the judicial authority and is placed under the authority of the Minister of Justice.**

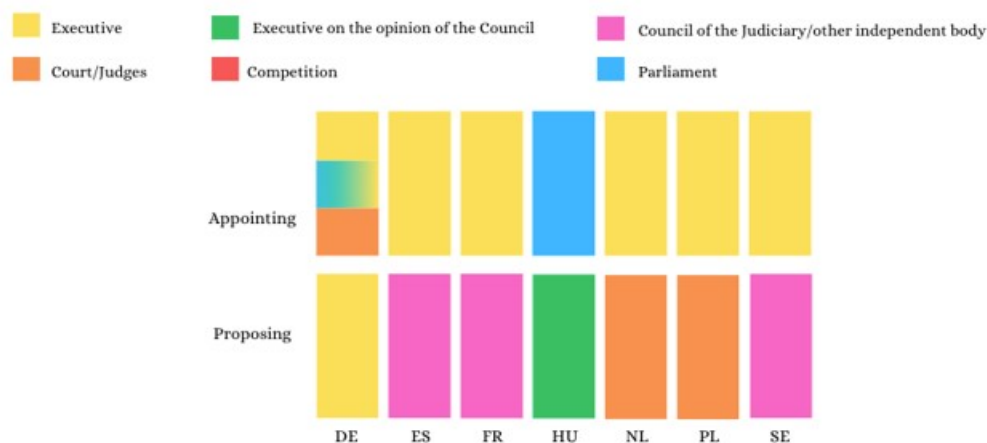
Despite the current reform projects and the work of the Comité des États généraux de la justice, the appointment process prosecutors remain under the influence of the executive, as the Venice Commission pointed out in its 2023 opinion²⁹, citing France as a **country that does not follow European practice in this area. The European Commission**, in its 2023 report on the rule of law, sees the reasons for the absence of constitutional reforms concerning the status and appointment rules of public prosecutors in the lack of a political majority.

²⁷ Justice Scoreboard, 2023, European Commission

²⁸ In the chapter devoted to France, the authors of the report on the Rule of Law 2023 give the essential facts about the Supreme Judicial Council: "The Supreme Judicial Council has two distinct formations. The High Council of the Judiciary is made up of the President of the Court of Cassation, five judges, a public prosecutor, a councillor of State, a lawyer and six other qualified members who are not members of Parliament, the judiciary or the administrative order. An additional judge completes the panel when it acts as a disciplinary board. For the section dealing with public prosecutors, the Conseil supérieur de la magistrature is composed of the Attorney General of the Cour de cassation, five public prosecutors, one magistrate, the same Conseiller d'Etat mentioned above, the same lawyer mentioned above, and the six other qualified members mentioned above. An additional magistrate from the public prosecutor's office completes this panel when it acts as a disciplinary board".

²⁹ Point 51 of the opinion also shows in several respects that the appointment systems in France still have some way to go if they are to meet the requirements of the Venice Commission. In the case of the CSM, for example, the Commission deplors the fact that it does not have the power to modify the nomination proposal made by the Minister of Justice for the appointment of judges. Released on 13 June, this opinion gives its views on the composition of the CSM, the appointment (but also promotions and transfers) of judges and prosecutors, and disciplinary procedures and the difference between judges and prosecutors. Online: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)015-e)

Appointment of Supreme Courts Presidents: proposing and appointing authorities (Source: EU Justice Scoreboard, 2023)



France is also the only Member State in which the executive is involved in both the proposal and appointment phases of the procedure for the election of the prosecutor in charge of corruption cases, who directs **the Parquet national financier (PNF)**. France also has two autonomous branches of jurisdiction, the ordinary courts for civil and criminal matters and the administrative courts. The president of the supreme administrative court, the Conseil d'État, is appointed by the President of the Republic. Moreover, the 300 members of the Conseil d'État, divided into five categories (auditeur, maître des requêtes, conseiller d'État, section president and vice-president of the Conseil d'État) **do not have the status of magistrates but are civil servants**. Although their independence is guaranteed by law and was also confirmed by Article 12 of the Act of 20 April 2016 on the ethics, rights and obligations of civil servants, the political influence on the composition of this court is the subject of debate³⁰.

- A high proportion of the members of the Conseil supérieur de la magistrature are appointed by the executive and legislative powers.
- The members of the Conseil d'État do not have the status of magistrates but are civil servants.
- France does not meet European standards for the nomination of public prosecutors' judges.
- France is the only Member State in which the executive is involved both in proposing and appointing the prosecutor responsible for corruption cases.

E. Spain

³⁰ "Il est temps de demander au Conseil d'État de se réformer pour asseoir son indépendance et son impartialité", Opinion column by Me Camille Mialot, 9 July 2020, *Le Monde*

Article 117 of the Spanish Constitution enshrines the independence of judges and magistrates. It is ensured by the functioning of the **General Council of the Judiciary (CGPJ)**, which exercises disciplinary functions and is responsible for the appointment, transfer, and promotion of judges, as well as their training and recruitment.

The CGPJ is made up of the President of the Supreme Court and twenty other members, elected equally by the Senate and the Congress of Deputies (*Cortes Generales*) by a **three-fifths majority**, and then appointed by the monarch. Advocates of judicial reform in Poland regularly cite the example of Spain, whose **system of appointment corresponds to that put in place by the Polish government** and is partly at the root of the latter's conflict with the Commission.

Once again this year, the Commission expressed its serious concerns about the current institutional crisis of the CGPJ which is facing a **deadlock in the renewal of its members**. The EU is deploring the fact that nothing has been done to adapt the procedure for appointing the magistrate members of this body, all of which is having a negative impact on the functioning of the Supreme Court and the judicial system as a whole. This stalemate has lasted since 2018. In 2021, Commissioner for Justice Didier Reynders attempted to mediate between the government, the opposition and the unions . At the time, Mr Reynders deemed it urgent to reform this judicial body and took the following position:

"We are concerned by what we have slowly observed in Spain and in other Member States: when there is a blockade and there is a provisional council for the judiciary and you do not give a clear signal on reform, it is difficult to maintain the confidence of all the different citizens in the system.... It is now very important to continue the discussions and try to organise the best possible renewal of the Council."³¹ "

In addition, like a number of other Member States, Spain has also been criticised by the Commission for not taking the necessary measures to strengthen **the status of the public prosecutor**, who is not sufficiently independent from the government in terms of European standards on the independence of the judiciary and the autonomy of investigations. The Prime Minister, Pedro Sánchez, had also openly admitted that the public prosecutor's office depended on the government³².

³¹ "La nomination des juges de la Cour suprême pose problème en Espagne", 20 September 2021, Euronews. Online: <https://fr.euronews.com/my-europe/2021/09/20/la-nomination-des-juges-de-la-cour-supreme-pose-probleme-en-espagne>

³² https://www.youtube.com/watch?v=bbDsPfoE_a4

- Spain does not receive the same media and political attention as Poland, even though its system for appointing members of the General Council of the Judiciary is similar to that of the equivalent body in Poland.
- The General Council of the Judiciary has been in a renewal crisis since 2018, which is having a negative impact on the functioning of the entire Spanish judicial system.
- The status of the public prosecutor does not meet European standards of judicial independence.

F. Sweden

In Sweden, the National Courts Administration, a body under the Ministry of Justice, is responsible for the overall management of the courts, while an independent body, the Judges' Proposal Committee, prepares the nomination proposals on the basis of which **judges are appointed by the government**. This committee is made up of nine members: five judges or former judges, two legal experts from outside the courts (one lawyer and another proposed by the local authorities and the Swedish Agency for Equal Opportunities) and two representatives from civil society. **The latter are appointed by Parliament, while the other seven members are appointed by the government**. The weight of the executive in the body appointing judges is clearly not a problem for the Commission which is in favour of judges being appointed by their peers on the judicial councils.

This year, the Commission criticised Sweden for its failure to act on the **problems posed by the system for appointing lay judges**. Acknowledging the "**wide-ranging debate in society**" on the issue, in the chapter devoted to Sweden in its report on the rule of law in 2023, the Commission notes **that these appointments are still made by political parties and therefore the independence of the judges appointed is not guaranteed**. This view is also shared by the Swedish Judges' Association and the Swedish Bar Association, which believe that **lay judges should not be appointed by political parties**. Since 2002, the Commission has been trying to persuade the Swedish authorities to reform this system, so far without success.

Sweden is also one of a minority of Member States (including Cyprus, Malta, the Czech Republic and Ireland) **in which the executive and legislative powers play too large a role by European standards in the process of appointing the President of the Supreme Court**. In these Member States, the legislative and/or executive powers can reject a candidate and choose any other candidate, are not obliged to give reasons for their refusal to appoint a candidate, and there is no judicial review in the event of a candidate not being appointed. This is the exact opposite of Denmark, Luxembourg, Romania and Portugal, where the executive and legislative powers are not involved in the procedure.

- Lay judges are appointed by political parties, the Commission has been calling for changes to this system since 2002.
- There has been a "wide-ranging social debate" on this issue, but nothing concrete has been achieved.
- The executive and legislative powers play too large a role in the appointment of the President of the Supreme Court in relation to European standards in this area.

G. Germany

The case of Germany is worth taking a closer look as it is a Member State which the Commission sees as a model in terms of the efficiency, quality and independence of the justice system³³. However, in formal terms, Germany's judicial system does not correspond to European standards insofar as **the legislative and executive powers, both at federal and state levels, play a key role in the process of appointing judges.**

The appointment of judges and public prosecutors, with the exception of the Federal Courts and the Chief Public Prosecutor of the Federal Court of Justice, falls within the remit of the *Länder*, i.e. the federated states. Appointment procedures differ from one *Länder* to another, but share the same principles, particularly that of respect for merit and judicial control of the process of selecting judges by a committee (*Richterwahlausschuss*) before appointment by the executive. As regards the Administrative Court, its judges are elected by a committee made up of the *Länder* ministers responsible for administrative jurisdiction and an equal number of members elected by the Bundestag, while the Federal Minister of Justice chairs the election committee.

In Germany, **the public prosecutor reports to the executive**, and public prosecutors' offices also exist at *Länder* level. In its chapter on Germany, the 2023 report on the rule of law notes that no progress has been made in Germany since last year to put an end to the possibility for the Ministry of Justice to give instructions to the public prosecutor's office in individual cases³⁴. The reform announced by Germany to this effect has remained a dead letter.

³³ The three criteria assessed in the annual Justice Scoreboard.

³⁴ The Commission's requirement is based on a CJEU judgment concerning the definition of judicial authority in the context of the European arrest warrant procedure. Judgments of the Court of Justice of the European Union of 27 May 2019, OG and PI, Joined Cases C-508/18 and C-82/19 PPU and of 24 November 2020 - C-510/19, ECLI:EU:C:2019:456.

Discussions are underway at federal and *Länder* level with a view to adopting targeted amendments to the status of judges in order to respect constitutional values. In its report on the rule of law in 2022, the Commission noted that in most of the *Länder* **there was insufficient verification of security guarantees prior to the appointment of judges**, and that European standards were not being met since, in several cases, this verification was carried out by an external body and not by the independent authority appointing the judges. This is an anomaly that the Commission revealed in its 2022 "Justice Scoreboard"³⁵.

- **The executive and legislative powers, both at federal and state levels, play a key role in the process of appointing judges.**
- **The Commission calls on Germany to make progress on the issue of the role played by the Minister of Justice (possibility of giving instructions to the public prosecutor) in individual cases.**
- **In most of the Länder, there are insufficient checks on security guarantees before judges are appointed, and checks in this area do not meet European standards.**

Conclusions

- **The European standards on which the Commission is basing its call for a change in the way national judges and members of judicial councils are appointed were drawn up by the Venice Commission, a consultative body of the Council of Europe. They are not provided for in the Treaties.**
- It is the operation of **Article 2 of the TEU** and the fact that it ceased to have a recognitive character that has made it possible that a competence of the Member States becomes a *de facto* competence of the Union, *which* can be interpreted as an abandonment of sovereignty without the approval of the Member States.
- The vision of the European institutions is clear: to impose **the appointment of judges by their peers**, at the risk of creating **corporatism**, which is considered to be preferable to the politicization of the judiciary.
- When it comes to the appointment of judges, the Commission focuses mainly only Hungary and Poland, while, according to the country chapters published each year as part of the report on the rule of law, there is **no Member State whose judicial system corresponds perfectly to the Council of Europe's European standards, which the Commission adopts as its own.**
- **In Spain, the members of the Council for the Judiciary are appointed in the same way as in Poland**, but this Member State does not seem to interest the Commission in its desire to standardise procedures for appointing judges.

³⁵ See Figure 56, 2022 EU Justice Scoreboard

- While the Commission does note the problem of politicisation posed by the procedure for appointing the prosecutor in charge of the **National Financial Prosecutor's Office (PNF) in France**, it does not draw any conclusions in this regard. At the same time, it seems to be **harsher on Poland and Hungary**, where the problems in terms of judicial independence are less obvious than those posed by the nature of the French PNF.
- The work of the **Venice Commission**, on which the Commission bases its reports, which are then used as a basis for decisions by the CJEU, reflect the diversity of justice systems, which makes it difficult to establish uniform European standards.
- It is in this diversity of legal systems that **Article 4(2) of the TEU** takes on its full meaning. The Member States have different legal histories which form their respective national identities. **Standardising these legal traditions appears to be an approach destined to create tensions.**
- The Hungarian and Polish governments are taking a political line opposed to **"government by judges"** and intend to restore **parliamentary legitimacy and control to the judiciary**. This policy is meeting with opposition from the European institutions and seems to be becoming difficult to maintain since the introduction of a conditionality mechanism in 2020.
- If these legal limits are difficult to identify, it is because the reasons for the current dissensions within the European Union on the question of the rule of law seem to be **more political than legal**, and stem from the condemnation of political lines that run counter to those of the Commission and the majority in the European Parliament.

Bibliography

- Rule of Law Report 2023, European Commission, 5 July 2023
- Rule of Law Report 2023: progress made on 65% of recommendations, but further action needed, Press release, European Commission, 5 July 2023
- The 2023 EU Justice Scoreboard, European Commission, 8 June 2023
- Rule of Law Checklist, Venice Commission of the Council of Europe, 11-12 March 2016
- 2010 Council of Europe Recommendation on judges: independence, efficiency and responsibilities.
- Magna Carta of Judges (CCJE - Consultative Committee of European Judges), Strasbourg, 17 November 2010
- « L'État de droit dans les conflits entre Bruxelles et le couple polono-hongrois », 2022, Fondation ID, 116 pages
- Ghislain Benhessa, *Le Totem de l'État de droit: concept flou et conséquences claires*, L'Artilleur, 2021, 240 pages
- Jean-Éric Schoettl, *La Démocratie au péril des prétoires: de l'État de droit au gouvernement des juges*, Gallimard, 2022, 256 pages
- « Faut-il en finir avec le gouvernement des juges? », Cercle Droit et Liberté, 3 May 2022
- « Il est temps de demander au Conseil d'Etat de se réformer pour asseoir son indépendance et son impartialité », Tribune de Me Camille Mialot, 9 July 2020, *Le Monde*
- « La nomination des juges de la Cour suprême pose problème en Espagne », 20 September 2021, *Euronews*