



Research and Documentation
Directorate

RESEARCH NOTE

Procedures for the appointment and designation of judges in the Member States and the role played by the executive or legislature in those procedures

[...]

- Subject:
- Description of the procedures for the appointment and designation of judges in the relevant Member States;
 - Respective role of the executive and legislature in those procedures.

[...]

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[...]

SUMMARY

I. INTRODUCTION

1. [...] ¹
2. This research note concerns the legal systems of the following nineteen Member States: **Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovenia, Spain and Sweden.**
3. For the purposes of defining the material scope of this note, the terms ‘designation’ and ‘appointment’ of judges are to be understood, indiscriminately, as covering the entry of judges to *judicial* office ² and, therefore, as excluding the prosecutors of the State Prosecutor’s Office or any law officers appointed to roles involving the administration of justice (in particular within the competent prosecutor’s offices). In addition, the note covers both ordinary and constitutional courts, but not courts with specialised or limited jurisdiction. Furthermore, examples of rules relating to appointments to the higher courts are included in the national contributions and in this summary. Lastly, it should be noted that this study focuses on the final process of selecting and appointing judges by the authorities involved and that, given the diverse nature of the appointment scenarios encountered within each national legal system, the same Member State may, in some cases, appear in more than one of the categories established for the purpose of this analysis.
4. It should also be noted, having regard to the specific substantive scope of this research note, that this exercise of comparative law is shaped by the constitutional and institutional diversity of the systems studied. The sheer number of models in place, in which the separation of powers can vary significantly from one Member State to the next, has an impact on the procedures for appointing judges, which differ in turn according to the

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² Appointments to the judiciary, in the course of their career, of judges of the ordinary and administrative courts etc.

requirements linked to how interaction between the various constitutional stakeholders concerned is organised.

5. Moreover, it must be borne in mind that a number of European³ and international⁴ rules have a direct or indirect impact, according to whether or not they are binding, on the status of judges and on the national rules governing their appointment. Those different rules set out guiding principles that lay down requirements related to the organisation of judicial institutions. Those requirements are set out, in brief, in paragraphs 44 and 46 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe of 17 November 2010, ‘Judges: independence, efficiency and responsibilities’. The first of those provisions in fact states that ‘decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.’ The second provision states that ‘the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.’
6. For the purposes of this comparative law study, it is proposed, as a first stage, to examine the detailed rules and procedures governing access to the judiciary and the appointment of judges of the ordinary courts (Section II), before then considering the procedures for appointing the members of the constitutional courts (Section III).

³ Namely, the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), signed in Rome on 4 November 1950 (Article 6); the Charter of Fundamental Rights of the European Union (Article 47); the [European Charter on the statute for judges](#), drawn up by the Council of Europe, Strasbourg, 8-10 July 1998; [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers of the Council of Europe of 17 November 2010, ‘Judges: independence, efficiency and responsibilities’](#); and various [opinions adopted by the Consultative Council of European Judges \(CCJE\)](#), consultative body of the Committee of Ministers of the Council of Europe (see in particular Opinions Nos 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, 4(2003) on training for judges, and 10 (2007) on the “Council for the Judiciary in the service of society”).

⁴ The same is true of the [International Covenant on Civil and Political Rights](#), adopted by the United Nations General Assembly on 16 December 1966 which entered into force on 23 March 1976 (United Nations Treaty Series, Vol. 999, p. 171) (and in particular Article 14 thereof); the [Basic Principles on the Independence of the Judiciary](#), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and confirmed by the United Nations General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (and in particular Principle No 10); and the [Universal Charter of the Judge](#), approved on 17 November 1999 by the Central Council of the International Association of Judges (updated in November 2017).

II. APPOINTMENT OF JUDGES OF THE ORDINARY COURTS ⁵

7. There are three stages to this analysis: first, the rules and procedures for the selection of judges for entry to the judiciary are described (Section II.A) and the bodies representing the judiciary involved in the procedures for appointing judges are presented (Section II.B). Next, the analysis focusses on the different appointment procedures, giving particular consideration to the role of those bodies representing the judiciary (Section II.C). Finally, reference is made to the judicial review of the appointment decisions adopted (Section II.D).

A. METHODS OF SELECTION FOR ENTRY TO THE JUDICIARY

8. It can be stated from the outset that, in the majority of the **Member States** covered by this study, *objective criteria* prevail in the selection of candidates for the judiciary. Those criteria are defined either by law or by the authority responsible for selecting candidates. Familiarity with the law is the primary criterion of assessment, and thus legal knowledge is systematically assessed. The personal and social skills of candidates are also sometimes assessed in certain Member States. Furthermore, in **Estonia** and **Lithuania**, the candidates' suitability to handle, respectively, State secrets or confidential information is also assessed.
9. With regard to the *training* required to become a member of the judiciary, a law degree is a minimum requirement in the **nineteen Member States** covered by this note. In some of those Member States, professional experience in the field of law is also required. This is the case in particular in **Belgium** (for judges of the ordinary courts), **Bulgaria** (with the exception of junior members of the national legal service), **Estonia** (with the exception of candidates for positions as judges of first instance), **Lithuania** and **Hungary**.
10. In **fourteen Member States** covered by this study, the *main path to entry to the judiciary* lies in passing a *competition* or one or two *examinations*, at least in the case of judges of the ordinary courts, where a distinction between the two court systems exists. Except for in **Estonia**, those competitions and examinations are systematically preceded and/or followed by one or more placements or training at a national institute for judges or a judicial training college. In some States, that

⁵ This chapter concerns courts of first and second instance, where that distinction between the two levels of court exists, and the higher courts.

main pathway to entry is also linked, in the case of specific nominations, to a pathway to entry for legal practitioners (see, for example, **Bulgaria, France, Italy, Poland and Romania**).

11. By contrast, in **Cyprus, Denmark, Ireland** ⁶ and the **Netherlands**, the *pathway to entry to the judiciary* is open *solely to experienced practitioners*, who must have worked for a long period of time (between two and ten years depending on the Member State in question) in most cases as lawyers, but also sometimes as employees of the Ministry of Justice, assistant judges or registrars. In these four Member States, the candidates' legal practice is assessed by the competent body/bodies in addition to their legal knowledge. ⁷
12. In **Sweden**, the main pathway to the judiciary involves undertaking *judicial training* over a number of years. ⁸ At the end of that process, they become judges of the ordinary courts.

B. PRESENTATION OF THE BODIES REPRESENTING THE JUDICIARY

13. **Almost all of the nineteen legal systems** covered by this study ⁹ provide, in connection with the procedure for the appointment of judges of the ordinary courts, for the involvement, on one basis or another, of bodies representing the holders of judicial office, composed primarily of judges. Those 'Councils of the Judiciary' or judicial entities are involved in that office, thus ensuring a selection and/or appointment process of judges by 'their peers' (hereinafter: 'bodies representing the judiciary'). Across the systems studied those bodies play a more or less central role in the procedure for appointing judges and enjoy a power of appointment or designation, or simply a power of proposal or consultation.

⁶ However, in **Ireland**, solicitors, who can also become judges, do not necessarily have to hold a law degree. Nevertheless, in order to obtain the title of solicitor, they must pass an examination which includes legal tests.

⁷ It should be noted that, in **Denmark**, the period of training undertaken for entry to the position of a more senior judge involves performing judicial duties on an interim basis at a lower court. In the **Netherlands**, judges undertake between (approximately) one and four years' training, depending on their prior experience.

⁸ At the end of their legal studies, judges of the 'non-ordinary' courts undertake training consisting primarily of working as judges of the non-ordinary courts, within courts of appeal and of first instance, and also lessons in theory. This judicial training is followed by a number of years working (in most cases) at a prosecution service.

⁹ In accordance with the procedure described below, provision is made in the **Czech Republic** for the involvement of the judicial councils solely in respect of the appointment of judges of the ordinary courts.

1. COMPOSITION OF THE COUNCILS OF THE JUDICIARY AND
SIMILAR COMMITTEES INVOLVED IN THE PROCESS OF
APPOINTING JUDGES

14. **In all the Member States** covered by the study,¹⁰ with the exception of **Cyprus**, those bodies, which go by various names ('Superior Council of the Judiciary', 'Justice Council', 'Judicial Council' etc.), take the form of a single or unitary entity.¹¹ The role of judicial representation in the process of selecting and proposing candidates may, however, sometimes be decentralised within the courts themselves where the judicial positions are to be filled and thus be performed by staff senates/committees (**Austria**)¹² or by committees of judicial representatives (**Germany**).¹³
15. In general, as some authors point out, 'balancing the composition of the Council [of the Judiciary] remains a crucial parameter for ensuring the independence of the judiciary. Accordingly, it is the view of the European courts, as well as the organisations of judges in different countries, and of the International Association of Judges, that 'at least half' of the Superior Councils should be composed of judges, on account of the specific judicial challenges involved in their roles and, furthermore, that the judges who are members ... should be representative and elected by their peers'.¹⁴
16. Indeed, in all the systems studied,¹⁵ the vast majority of the members of the Councils of the Judiciary (or equivalent committees) involved in the procedures

¹⁰ In the **Czech Republic**, the judicial councils, elected by assemblies of judges, are involved, on a consultative basis, solely in the context of the promotion and the transfer of judges and not their initial appointment.

¹¹ In **Estonia**, the following bodies perform this role of judicial representation: the Kohtunikueksamikomisjon (Judicial Review Commission) (KEK) does so as part of the procedure for selection of the judges of the ordinary courts, and the Kohute haldamise nõukoda (National Justice Council) (KHN) as part of the procedure for selection of the judges of the Supreme Court.

¹² Role of the *Personalsenate* and external committees in the appointment of judges in **Austria**.

¹³ Role of the *Präsidentialrat* in the appointment of federal judges in **Germany**.

¹⁴ Kriegk, J.-F., 'Les Conseils supérieurs de justice, clef de voûte de l'indépendance judiciaire? (examen comparatif à partir de critères internationalement reconnus)', *Recueil Dalloz* 2004, p. 2166. In Germany, some authors note, however, that the involvement of the executive and legislature in the process of appointing judges stems from the principle of democratic legitimation, which is intended to prevent the co-optation of members of the judiciary amongst themselves (see, to that effect, Böckenförde, E.-W., 'Verfassungsfragen der Richterwahl', 2nd edition, Duncker & Humblot, Berlin, 1998, p. 80).

¹⁵ See the table summarizing the composition of these Councils of the Judiciary and similar committees in the annex to this research note. The situation in **Germany** is presented having regard to the intervention of the various committees that may operate at *Land* level in certain *Länder*.

for appointment of judges, where they exist as single entities, are judges,¹⁶ but their members also include lawyers of proven ability (**Belgium, Bulgaria, Denmark, Estonia, France, Germany, Ireland, Italy, Romania, Slovenia, Spain and Sweden**), members – or representatives – of the executive (**Bulgaria,**¹⁷ **Estonia,**¹⁸ **France,**¹⁹ **Germany, Italy,**²⁰ **Poland**²¹ and **Romania**²²), members of the legislature (**Estonia,**²³ **Germany**²⁴ and **Poland**²⁵) or even citizens representing civil society (**Denmark and Sweden**).

17. Their judicial peers are involved, by means of co-option, in the election of the members of those Councils of the Judiciary (in **Belgium,**²⁶ **Bulgaria,**²⁷ **Denmark,**²⁸ **Estonia,**²⁹ **France,**³⁰ **Hungary,**³¹ **Italy,**³² **Lithuania,**³³ the

¹⁶ In **France**, the composition of the panel of the Conseil supérieur de la magistrature (Superior Council of the Judiciary), competent in relation to the appointment of judges of the ordinary courts, sees judges in the minority on that panel. By contrast, in the case of the administrative court system, the majority of the members of the Conseil supérieur des tribunaux administratifs et cours administratives d'appel (Superior Council of the Administrative Tribunals and Administrative Courts of Appeal) are administrative judges. For the rules governing its composition and the appointment of its members, see Annex.

¹⁷ The meetings of the Vish sadeben savet (Superior Judicial Council) (VSS) are chaired by the Minister for Justice, who does not take part in the voting.

¹⁸ A representative of the Ministry of the Justice and a prosecutor are members of the KEK; the Public Prosecutor sits on the KHN.

¹⁹ Except for in disciplinary matters, the Minister for Justice may sit on two panels of the Conseil supérieur de la magistrature (Superior Council of the Judiciary): one panel is competent in relation to sitting judges, the other in respect of judicial officials within the public prosecutor's office.

²⁰ The Consiglio Superiore della Magistratura (Superior Council of the Judiciary) is chaired by the President of the Republic.

²¹ The Minister for Justice is a member by right of the Krajowa Rada Sądownictwa (National Council of the Judiciary) (KRS).

²² The Minister for Justice is a member by right of the Consiliul Superior al Magistraturii (Superior Council of the Judiciary).

²³ Two members of Parliament are members of the KHN.

²⁴ The committees responsible for the election of judges at *Land* level in nine *Länder* are composed, inter alia, of MPs.

²⁵ Four members of the KRS are elected by the Diet, from amongst MPs, and a further two members are elected by the Senate, from amongst senators.

²⁶ The twenty-two judges who are members of the Conseil supérieur de la justice (Superior Council of the Judiciary) (CSJ) are elected by their peers.

²⁷ Eleven members of the VSS are elected by the judiciary (six by judges, four by prosecutors and one by investigators).

²⁸ The members of the Dommerudnævnelserådet (Judicial Appointments Council) are appointed on proposal, inter alia, from the Højesteret (Supreme Court), the regional courts of appeal, Den Danske Dommerforening (Danish Association of Judges) and the Advokatrådet (Bar).

²⁹ In **Estonia**, it is the Riigikohtu üldkogu (General Assembly of the Supreme Court) which elects the judges to the Supreme Court, as well as four supreme judges to the KEK, within which the plenary assembly of the judges elects, in turn, eight judges.

³⁰ This is the case for some of the members (judges) of the Conseil supérieur de la magistrature (Superior Council of the Judiciary) (in relation to the ordinary court system) and also for some members of the Conseil supérieur des tribunaux administratifs et cours administratives d'appel (Superior Council of the Administrative Tribunals and Administrative Courts of Appeal) (in relation to the administrative court system).

³¹ The fourteen members of the Országos Bírói Tanács (National Judicial Council) are elected by MPs from Hungarian judges.

³² Two thirds of the twenty-four elected members of the Superior Council of the Judiciary are elected by all judges of the ordinary courts (professional or '*togati*' judges).

Netherlands, Romania,³⁴ **Slovenia**³⁵ and **Sweden**³⁶), but some systems also provide for the involvement of the legislature (in **Belgium,**³⁷ **Bulgaria,**³⁸ **France,**³⁹ **Italy,**⁴⁰ **Poland,**⁴¹ **Romania,**⁴² **Slovenia**⁴³ and **Spain**⁴⁴) or even of the executive, or a royal authority (**Denmark,**⁴⁵ **Ireland,**⁴⁶ the **Netherlands,**⁴⁷ **Poland,**⁴⁸ **Slovenia,**⁴⁹ **Spain**⁵⁰ and **Sweden**⁵¹), to propose or confirm nominations.

18. In some Member States, proportionally, all (**Denmark**) or more than two thirds of the members of those Councils of the Judiciary are designated or elected by

³³ The fourteen judges of the Teisėjų taryba (Judicial Council) are elected by the general assembly of Lithuanian judges.

³⁴ The fourteen judges who are members of the National Council of the Judiciary (CSM) are elected at the general assemblies of law officers (judges or prosecutors, depending on the section of the CSM in question).

³⁵ The six judges who are members of the Sodni svet (Superior Council of the Judiciary) are elected by Slovenian judges.

³⁶ In **Sweden**, the members and alternates who must be or have been judges of the ordinary courts are appointed on proposal of the general tribunals and the general administrative tribunals. The members and deputies who must be lawyers practicing outside the judiciary are appointed on proposal from administrative authorities and organisations determined by the Government.

³⁷ In **Belgium**, the twenty-two members elected to the CSJ who are not judges are appointed by the Senate.

³⁸ In **Bulgaria**, eleven members of the VSS are elected by the National Assembly from amongst judges, prosecutors, investigators, academics or lawyers.

³⁹ In **France**, the appointment of six of the members of the Conseil supérieur de la magistrature (Superior Council of the Judiciary) is a matter for the standing committee with responsibility for the organisation of the courts of each of the parliamentary assemblies. In addition, each of the presidents of those assemblies proposes two of those six members.

⁴⁰ In **Italy**, one third (lay members) of the twenty-four elected members of the Superior Council of the Judiciary are elected by a joint session of Parliament. The four experienced legal practitioners who are members of the Consiglio di Presidenza della Giustizia amministrativa (Presidential Council for Administrative Justice) are elected on a 50-50 basis by the Chamber of Deputies and the Senate.

⁴¹ In **Poland**, pursuant to the Law of 12 May 2011, the view was taken that it followed from the provisions of the Constitution that the fifteen members of the KRS had to be elected by the judiciary. However, in accordance with the Law of 8 December 2017, those fifteen members of the KRS are now elected by the Diet.

⁴² In **Romania**, the appointment of the fourteen judges who are members of the Superior Council of the Judiciary is approved by the Senate.

⁴³ In **Slovenia**, the five jurists who are members of the Superior Council of the Judiciary are elected by the Parliament on proposal from the President of the Republic.

⁴⁴ In **Spain**, the Senate and the Congress of Deputies are involved in the appointment of all members of the Consejo General del Poder Judicial (General Council of the Judiciary) (CGPJ). The twelve members who are judges are elected directly in plenary session, six by each chamber. As for the other eight posts that are open to certified jurists, each political group within the two chambers can put forward candidates for election.

⁴⁵ The Minister for Justice appoints the members of the Judicial Appointments Council.

⁴⁶ Three members of the Judicial Appointments Advisory Board are designated by the Minister for Justice.

⁴⁷ The members are appointed by royal decree on proposal from the Minister for Justice and Security on the basis of a list of recommendations drawn up jointly by the Raad voor de Rechtspraak (Council of the Judiciary), the Minister for Justice and Security and representatives of the courts.

⁴⁸ One member of the KRS is designated by the President of the Republic.

⁴⁹ It is noted that the five jurists who are members of the Superior Council of the Judiciary elected by the Parliament in **Slovenia** are so elected on proposal from the President of the Republic, who is not part of the executive but is rather a *sui generis* authority.

⁵⁰ The members of the CGPJ are appointed by the King.

⁵¹ The Government appoints seven of the members of the Domarnämnden (Judicial Appointments Committee).

their judicial peers (**Estonia, Hungary, Lithuania and Romania**). Where that proportion is lower, such representation of judges in those Councils of the Judiciary is, however, often bolstered by the representation as of right of members of specific courts (**Bulgaria, Italy and Ireland**). Moreover, the legislature is involved in the election, or the appointment, of just under half (**Bulgaria and Slovenia**), half (**Belgium**), more than half (**Poland and Romania**) or all (**Spain**) members of those Councils of the Judiciary.

19. It is noted that, in **Cyprus**, the Anotato Dikastiko Simvoulia (Superior Council of the Judiciary) is formed of the same judges who make up the Anotato Dikastirio (Supreme Court),⁵² who are themselves appointed by the President of the Republic.

2. JUDICIAL BODIES INVOLVED IN THE PROCESS OF APPOINTING JUDGES

20. In most of the systems, the court at which a position is to be filled is often also involved in the *initial* process of selecting candidates (**Austria, Belgium, Cyprus, Denmark, Estonia, Germany, Hungary, the Netherlands, Poland, Slovenia and Sweden**).
21. In addition, alongside ‘Council of the Judiciary’ style bodies, and other equivalent committees, judicial bodies are directly involved, in addition to or in place of those Councils of the Judiciary,⁵³ in the *final* process of selecting/appointing judges.
22. Such bodies are, for example, involved in the procedure for the appointment of judges of the ordinary courts in **Hungary** and the **Czech Republic**, or, in the case of certain administrative courts, in **Austria**⁵⁴ and **Belgium**.⁵⁵ This is also the case for appointments of judges of certain supreme courts (see, for example, **Cyprus, Denmark and Estonia**).

⁵² In **Cyprus**, the Anotato Dikastirio (Supreme Court) consists of a merger of the Anotato Sintagmatiko Dikastirio (Supreme Constitutional Court) and the Anotato Dikastirio (High Court), which have remained inactive since 1963.

⁵³ The appointment process may also see the combined involvement of these two types of bodies (see, for example, **Denmark, Estonia and Hungary**), in particular in the case of appointments to some of the highest judicial posts (see, for example, **Austria and Bulgaria**).

⁵⁴ For the appointment of judges to the Verwaltungsgerichtshof (Administrative Court of Justice), for example.

⁵⁵ For the appointment of administrative judges, including to the Conseil d’État (Council of State), for example.

C. PROCEDURES FOR THE APPOINTMENT OF JUDGES OF THE ORDINARY COURTS: THE ROLE OF THE BODIES REPRESENTING THE JUDICIARY

23. As entities involved in almost all procedures for the appointment of judges in the Member States studied, the Councils of the Judiciary, and other equivalent committees, as well as any judicial bodies directly concerned by the judicial appointment procedures (see Section II.B.2), have varied powers as part of those procedures. A sliding scale of decision-making authority between those bodies can be observed. Thus, in some States, those bodies have the power to appoint and designate judges, potentially subject to formal approval of the choices made by another authority (Section II.C.1). In other States, they have a non-binding power of proposal (Section II.C.2). Appointments are, in principle, a matter for the executive and the Presidents of the Republic. However, in some procedures concerning, in principle, the higher courts, the legislature is also involved (Section II.C.3).

1. PROCEDURES PROVIDING FOR A BINDING POWER OF APPOINTMENT OR DESIGNATION BY A BODY REPRESENTING THE JUDICIARY

24. Amongst the States in which bodies representing the judiciary have a formal or substantive power of appointment, that power exists on a sliding scale. In two States (**Bulgaria** and **Cyprus**), the body representing the judiciary has a decision-making power over the appointment of judges that can be regarded as being independent. In four other legal systems studied (**France, Italy, Romania** and **Spain** ⁵⁶), ⁵⁷ that body has a power of designation or of veto, in particular vis-à-vis the executive, whose involvement is – in principle – limited simply to formalising the choice made by the body representing the judiciary. In **Germany**, provision is made for joint appointment procedures involving the executive and the bodies representing the judiciary, with the latter holding a power of designation.
25. Accordingly, in **Bulgaria**, judicial appointments are decided independently by

⁵⁶ With the exception of the appointment of certain judges to the civil and criminal chambers of the *Tribunales Superiores de Justicia* (High Courts of Justice), which the legislative assembly of the autonomous community in question propose to the CGPJ.

⁵⁷ In **Estonia**, in the case of the appointment of the presidents of the district courts, although the opinion of the plenary assembly of the court concerned is not binding on the minister, the minister can however appoint and remove the presidents of those courts only with the consent of the KHN; this demonstrates the not insignificant role played by that body in that procedure.

the Vish sadeben savet (Superior Judicial Council) (VSS), which is regarded as a ‘judicial collective body’ that determines the composition of the judiciary. The VSS is chaired by the Minister for Justice. He or she can propose candidates and take part in debate but does not have a vote. The VSS itself notifies the candidates of the appointment decisions taken by it.⁵⁸

26. Similarly, in **Cyprus**,⁵⁹ the appointment of the judges of the lower courts, including the judges of the Diikitiko Dikastirio (Administrative Court), falls within the exclusive competence of the Superior Council of the Judiciary, which is in fact composed of judges of Anotato Dikastirio (Supreme Court), who are themselves exclusively appointed by the President of the Republic.⁶⁰
27. In **Spain**, the appointment procedures that involve a margin of discretion or an assessment of the candidates’ merits,⁶¹ including for the Tribunal Supremo (Supreme Court), are made by the plenary assembly of the Consejo del Poder Judicial (General Council of the Judiciary) (the CGPJ).⁶² Judges in training are also appointed and assigned to their court of placement by decree of the CGPJ. Appointments of ‘law officers’ and decisions to promote judges and ‘law officers’ are the subject of a royal decree⁶³ countersigned by the Minister for Justice, who has no discretion. The power of appointment exercised by the executive authority by decree is formal.
28. In **France**, as regards the appointment of the majority of judges of the lower

⁵⁸ In **Bulgaria**, the President of the Republic – who is not part of the legislature, executive or judiciary – but interacts with each of those branches, is involved in the appointments procedure only in the limited cases of appointment of presidents of the Varhoven kasatsionen sad (Supreme Court of Cassation), the Varhoven administrativen sad (Supreme Administrative Court) and of the Public Prosecutor. The President’s power is however limited, since he or she can reject candidates proposed by the VSS only once.

⁵⁹ The Cypriot legal system is currently undergoing reform intended, inter alia, to alter the composition of the Superior Council of the Judiciary such that judges from the various courts, the Public Prosecutor, the president of the Cypriot Bar Association and a lawyer who has been in practice for a particular period of time are members of that council, and to create new Councils of the Judiciary.

⁶⁰ The President of the Republic has the exclusive prerogative to appoint the judges of the Anotato Dikastirio (Supreme Court) and its president. In practice, the President seeks that court’s opinion and follows its recommendations almost systematically.

⁶¹ Geographic transfers of judges and law officers, as well as promotions, are organised on the basis of career advancement (*‘escalañón’*). In the case of procedures in which the CGPJ’s competence is limited, the margin of discretion is very narrow.

⁶² In **Spain**, by way of exception to the system of judicial appointments, district judges are elected by the municipal councils. As they are not professional judges, they are appointed by the Tribunal Superior de Justicia (High Court of Justice) of the corresponding autonomous community.

⁶³ In **Spain**, the King is not part of any of the three branches of State and holds merely an honorific title; his acts are therefore always a matter of executive responsibility.

courts of the ordinary court system,⁶⁴ the Minister for Justice, who has the power to propose nominations to the President of the Republic (the formal appointment authority), is bound by the opinion – whether consenting or dissenting – issued by the competent panel of the Conseil supérieur de la magistrature (Superior Council of the Judiciary) on the proposals for nominations that that panel submits to the Minister. Similarly, as for the appointment of the judges of the Cour de cassation (Court of Cassation), the first presidents of the courts of appeal and the presidents of the ordinary courts, the panel of the Superior Council of the Judiciary competent in relation to sitting judges adopts the nomination proposal which it submits to the President of the Republic. In the case of the appointment of administrative judges of first and second instance, a minority of them is appointed by the “external” pathway, by which the Conseil supérieur des tribunaux administratifs et cours administratives d’appel (Superior Council of the Administrative Courts and Administrative Courts of Appeal) selects candidates and makes appointment proposals to the President of the Republic. Those proposals have always been followed. The appointment decree signed by the President of the Republic also appears to be a formal act, since the choice of candidates has already been made.

29. The same is true in **Italy**, where all decisions concerning the appointment of judges of the ordinary courts (professional, non-remunerated and advisory judges at the Corte suprema di cassazione (Supreme Court of Cassation)) are adopted by decree of the President of the Republic, countersigned by the Minister for Justice, in line with the reasoned deliberations of the Consiglio Superiore della Magistratura (Superior Council of the Judiciary) (CSM). The President of the Republic and the Minister for Justice have no power of review of the merits of the CSM’s decisions in this regard.⁶⁵ As for the appointment of administrative judges, the Consiglio di Presidenza della Giustizia amministrativa (Presidential Council for Administrative Justice) (CPJA) also enjoys an independent power of appointment; the involvement of the executive is subject to the prior decision of the CPJA. All such appointment decisions are adopted by decree of the President of the Republic⁶⁶ countersigned by the Minister for

⁶⁴ Posts other than those of judges of the Court of Cassation, the first president of courts of appeal or the presidents of courts of justice.

⁶⁵ The same is true in relation to the posts of president of the ordinary courts.

⁶⁶ In **Italy**, the President of the Republic is not part of the executive branch but is rather the highest office of State and represents its unity.

Justice.

30. In **Romania**, judicial appointments are a matter for the judicial division of the Consiliul Superior al Magistraturii (Superior Council of the Judiciary) (CSM). That division makes proposals for the appointment of judges to the President of the Republic. In that regard, it must be clarified that the appointment is merely formalised by the President of the Republic, who cannot reject the proposal from the CSM.⁶⁷
31. In **Germany**, the federal judges of the supreme courts of the Federation are appointed by the competent federal minister, together with the Richterwahlausschuss (committee responsible for the election of judges).⁶⁸ The competent federal minister and the committee members, which include the ministers at *Land* level, may propose candidates. The Präsidialrat (committee representing the judiciary) of the court for which the candidates are proposed is also consulted. The committee responsible for the election of judges votes on the candidates and communicates its decision to the minister so that he or she can give consent to the appointment by the Federal President. The minister ensures that the committee's decision is lawful. Since the appointment decision is usually based on an agreement between those two authorities, who are bound by a reciprocal duty of good faith, the competent federal minister has, in any case, a de facto veto in that procedure. At *Land* level, nine of the *Länder* have decided that the appointment of law officers is a matter for the relevant *Land* minister in conjunction with a committee responsible for the election of judges. However, in the *Länder* in which provision is not made for a committee responsible for the election of judges, the formal and substantive act of nomination is a matter for the *Land* Governments alone. In such cases, the human resources departments of the public prosecutor's offices and/or, for example, of the higher regional courts are involved in the appointment process as far as concerns the appointment preparations and the recruitment procedure.

2. PROCEDURES PROVIDING FOR THE NON-BINDING PROPOSAL OR OPINION OF A BODY REPRESENTING THE JUDICIARY

32. In many national procedures, the power exercised by the bodies representing the

⁶⁷ The judicial division of the CSM is also competent for the designation of the president, vice-presidents and section presidents of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice).

⁶⁸ This committee is composed of ministers of the *Länder*, sixteen in total, and an equal number of members elected by the Bundestag (German Parliament) under a proportional voting system.

judiciary involved in the procedures for appointing judges is a non-binding power of proposal or a consultative role. In some procedures, the President of the Republic and the executive have the power not to follow those proposals or opinions of the representative body involved, but do not however have an independent power of designation (**Belgium, Denmark, Estonia, Lithuania, the Netherlands, Poland and Sweden**). However, in the majority of those legal systems, the representative body does play a central role in the appointments procedure. Under other procedures, the executive appointment authority also has a power of designation (in **Austria and Ireland**).

33. In **Denmark**, the Minister for Justice submits for approval by the Queen ⁶⁹ the appointment proposals submitted to him or her by the Dommerudnævnelsesrådet (Judicial Appointments Council) which that minister has previously accepted. The Judicial Appointments Council makes its proposals to the Minister for Justice for the appointment of judges ‘of the ordinary courts’. ⁷⁰ The act of appointment is countersigned by the minister, who can accept or reject the proposal made to him or her, but does not have his or her own right of initiative. In practice, however, the minister systematically follows the (reasoned) proposal for the single candidate submitted to him or her.
34. In the **Netherlands**, judges of the lower courts are appointed by royal decree countersigned by the minister. Save in the case of the Hoge Raad (Supreme Court), the Raad voor Rechtspraak (Council of the Judiciary) receives proposals of candidates from the court concerned, which it examines and then forwards to the Ministry of Justice, together with its opinion, which the Minister for Justice is at liberty not to follow. However, in practice, the Minister opts not to follow the proposals made to him or her only in very exceptional cases. Thus, although the Government does enjoy, as a matter of a law, a decision-making power in this regard, practice shows that the recommendations from judicial bodies or bodies representing the judiciary involved are in fact decisive, entailing a de facto system of co-option.

⁶⁹ In **Denmark**, the Monarch (the Queen) is part of the executive. In practice, it is the government and ministers which exercise executive authority.

⁷⁰ This is also the case for the appointment of presidents of the courts (with the exception of the President of the Højesteret (Supreme Court), who is designated by his or her peers). As for the selection of judges of the Højesteret (Supreme Court), that court is involved beforehand in the selection of candidates by organising deliberations ‘for assessment purposes’ with those candidates, whose opinions are then submitted to the Judicial Appointments Council.

35. In **Lithuania**, responsibility for appointing a candidate is shared between the final choice of the President of the Republic and the opinion of the Teisėjų taryba (Judicial Council). The Judicial Council advises the President of the Republic in relation to the appointment of all judges of the ordinary courts.⁷¹ Once the selection panel has drawn up the list of candidates for appointment to the judicial posts within the ordinary courts and communicated that list to the President of the Republic, the President is free to present his or her chosen candidates to the Judicial Council. Where the Judicial Council advises the President of the Republic to appoint a candidate to the post of judge, the President is then free to follow or not follow that advice. By contrast, where the Judicial Council advises that a candidate is not appointed, the Constitution does not allow the President of the Republic to appoint that candidate.⁷²
36. In **Sweden**, the executive's power of nomination is discretionary,⁷³ since the proposals of the judicial or representative bodies,⁷⁴ which are involved in these procedures, even though those proposals are reasoned, are not binding on the Government. Those proposals do however have a certain weight. Thus, if the Government does not follow them, it is required to consult the Domarnämnden (Judicial Appointments Committee) once more about the candidates that it chooses to propose on its own initiative. In practice, the executive opts not to follow the recommendations made to it only in very exceptional cases.
37. In **Belgium**, for the appointment of judges of the ordinary courts, the Conseil supérieur de la justice (Superior Council of Justice) (CSJ) presents a single candidate to the Minister for each post, together with a record of that candidate's deliberations. The King may either accept or, provided reasons are stated, reject the candidate presented. He thus retains some power to assess whether the CSJ has exercised its competence correctly; the involvement of the King in the appointment process is therefore not merely formal. However, since he cannot present a candidate, he does not enjoy an 'active' decision-making power. In

⁷¹ The same is true for appointments of the judges of the Court of Appeal and the Supreme Court, which also see the Parliament involved in the process.

⁷² Given this limit on the discretionary power of appointment enjoyed by the President of the Republic, the role of the Judicial Council cannot, in this respect, be regarded as strictly consultative.

⁷³ In **Sweden**, non-professional law officers are appointed by municipal councils or by the local general council.

⁷⁴ In the case of recruitment to the supreme courts, the judicial nominations committee itself receives the opinion of the supreme courts; that opinion is not binding on the committee.

addition, in the case of the administrative judges of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings), the executive, to which appointment proposals are made by that court itself, also has some power of assessment before proposing them for signature by the King. The power to appoint judges in Belgium, except in the case of the Conseil d'État (Council of State),⁷⁵ is therefore shared between the bodies involved that make proposals and the executive.⁷⁶

38. In **Estonia**, the judges 'of the ordinary courts' are appointed by the President of the Republic on proposal from the general assembly of the Supreme Court,⁷⁷ which makes a choice on the basis of the list of candidates approved by the Kohtunikueksamikomisjon (Judicial Review Commission), after also hearing the opinion of the court with the vacant post; such recommendations or opinions are not binding on that commission. However, it puts forward just one candidate to the President of the Republic. The President can refuse to appoint that candidate if his or her appointment is contrary to the law or to the interests of the State.⁷⁸
39. In **Poland**, judges of the ordinary courts are appointed by the President of the Republic⁷⁹ on proposal [from the] Krajowa Rada Sądownictwa (National Council of the Judiciary) (KRS), which selects candidates. The President of the Republic can reject an appointment, in particular if he or she considers that the KRS' proposal is contrary to the values protected by the Polish Constitution. However, he or she cannot independently choose a person who is not on the list proposed by the KRS.
40. In **Hungary**, the appointment proposal is submitted to the President of the Republic by the President of the Országos Bíróügyi Hivatal (National Office of Justice).⁸⁰ The President of the Republic does not, in principle, have any

⁷⁵ Appointments of judges to the Conseil d'État (Council of State), which involve the judiciary, the executive and the legislature, are examined in Section II.C.3.

⁷⁶ In **Belgium**, as regards the federated entities, it is however the regional and community governments which appoint the candidates directly proposed by the regional and community administrative courts, meaning that the power of appointment enjoyed by the executive is, in such cases, strictly formal in nature.

⁷⁷ For the appointment of the members of the Riigikohus (Supreme Court), see Section II.C.3.

⁷⁸ In **Estonia**, the presidents of the district courts can be appointed by the Minister of Justice only with the consent of the general assembly of the Supreme Court and of the KHN.

⁷⁹ The President of the Republic also appoints the President of the Sąd Najwyższy (Supreme Court) and the President of the Naczelny Sąd Administracyjny (Supreme Administrative Court). The Minister for Justice appoints the presidents of the courts.

⁸⁰ The President of the National Office of Justice (ONJ), or the President of the Kúria (Supreme Court) in

discretion; however, he or she is required not only to ensure that the proposal submitted to him or her is free of any substantial or formal errors, but also that the appointment in question does not threaten the democratic functioning of the Hungarian State or the constitutional operation of the courts system.

41. In the **Czech Republic**, the Ministry of Justice enjoys a degree of discretion as regards the candidates proposed by the Presidents of the regional courts, in so far as he or she ensures that the conditions required to become a judge are duly satisfied. The list of candidates accepted by the ministry is then sent to the Government for approval, which forwards the approved list of candidates to the President of the Republic, who makes the appointment with the countersignature of the Prime Minister. The President of the Republic can refuse to make the appointment in the light of the conditions laid down in the Constitution or by law, provided that the reasons for his or her decision are duly and clearly stated.⁸¹
42. Turning to the countries in which the executive also has a power of designation, it must be observed that, in **Austria**, in relation to the appointment of judges of the ordinary courts,⁸² the staff senates/committees and the external staff committees make their proposals to the Minister for Justice, but those proposals are not binding on that minister. The Minister can therefore make his or her own

the case of the appointment of the judges of that court, draws up the definitive list of candidates proposed by the review committee of the court of origin. If he or she does not accept the first candidate proposed by that committee, the President of the ONJ selects another candidate. In this situation, it is for the President to refer the matter to the National Judicial Council with a view to obtaining its favourable opinion as to the candidate who could be proposed for appointment to the President of the Republic. The National Judicial Council is therefore involved only with a view to examining the candidacies presented to it and does not have its own power to select and appoint candidates.

⁸¹ In the **Czech Republic**, although the judicial councils are not involved in matters of appointment, they are involved in the promotion and transfer of judges. They give an advisory opinion concerning new postings of judges in the courts concerned, as well as on the candidates for the presidency and the vice-presidencies of those courts. Those candidates are appointed from amongst the judges of the court in question by representatives of the executive. The President and the Vice-Presidents of the Nejvyšší soud (Supreme Court) and of the Nejvyšší správní soud (Supreme Administrative Court) are appointed by the President of the Republic. All the presidents of the higher and regional courts are appointed by the President of the Republic on proposal from the Minister for Justice.

⁸² For vacant posts at the Oberster Gerichtshof (Supreme Court) and the posts of president and vice-presidents of the higher regional courts, it is the staff committee of the Oberster Gerichtshof (Supreme Court) which makes the proposals addressed to the Minister for Justice. The Government also has a discretionary power in the case of the appointment of the Presidents and Vice-Presidents of the Oberster Gerichtshof (Supreme Court), the Verwaltungsgerichtshof (Supreme Administrative Court), the Bundesverwaltungsgericht (Federal Administrative Court) and the Bundesfinanzgericht (Federal Finance Court). Since those appointments are not the subject of proposals by a staff committee or a competent plenary conference, a judicial body is not involved in those appointment procedures and those persons are therefore appointed by the Federal President solely on proposal from the Minister with Government approval.

proposal to the Government for final appointment by the Federal President. As far as concerns the appointment of federal judges, the plenary conference and, depending on the circumstances, the staff committee involved present their proposals to the executive, which can also put forward its own candidates.⁸³ With the exception of the procedure for the appointment of judges to the *Verwaltungsgerichtshof* (Supreme Administrative Court),⁸⁴ appointments of judges of the administrative courts (at federal and *Land* level) follow very similar consultative procedures. Judges of the administrative courts of the *Länder* are, in turn, appointed by the Governments of the *Länder*, again further to proposals presented by the plenary conferences of the courts or their staff committee. Since the proposals of the plenary conferences and staff committees are not binding, the federal executive's power of appointment, and that of the *Länder*, is discretionary. In practice, the minister generally follows the proposals made to him or her by the staff senates/committees and any other panels that may be involved.⁸⁵

43. In **Ireland**, the appointment of judges is, under the Constitution, a constitutional prerogative of the government: judges are proposed by the government and formally appointed by the President of Ireland, who, whilst being part of the legislature (*Oireachtas*), plays only a primarily honorary role. The procedure for appointing judges may see the involvement of the Judicial Appointments Advisory Board, whose mission is to identify suitable individuals for appointment as judges and to inform the government accordingly. However, that board is involved only at the request of the Minister for Justice. In those circumstances, the government, which is not required to rely on that proposal in order to proceed with a particular appointment, is thus required merely to examine first the candidates recommended by the Board. In practice, the government virtually always chooses from amongst the individuals recommended by the Board.

⁸³ Save in the case of the appointment of judges to the *Verwaltungsgerichtshof* (Supreme Administrative Court).

⁸⁴ The appointment of judges to the *Verwaltungsgerichtshof* (Supreme Administrative Court) specifically involves the plenary conference of that court, or a committee formed by that court, which submits its proposals to the Government for appointment by the Federal President. In that situation, unlike the procedure in force for the appointment of judges of the ordinary courts, the Minister does not have a power of initiative that allows him or her to put forward his or her own candidates.

⁸⁵ An informal arrangement exists to this date between the association of judges, the Minister for Justice and the staff committees, under which an opposing decision by the minister should be reasoned in order to allow the committees concerned to take a view on that decision.

3. PROCEDURES PROVIDING FOR THE INVOLVEMENT OF THE LEGISLATURE

44. Beyond the potential involvement of the legislature in the composition of the Councils of the Judiciary considered above (see Section II.B.1), the legislature can also participate in certain procedures for the appointment of judges. In the large majority of cases, those procedures involve supreme court judges.
45. In **Germany**, in the case of federal judges and the judges of the nine *Länder* appointed according to the joint procedures previously described (see above, paragraph 31), the appointment is based on the agreement of the competent federal minister with the election carried out by the committee responsible for the election of judges, which is composed of the ministers of the *Länder* and an equivalent number of members elected by the Bundestag (Federal Parliament). The election takes place after consultation with the committee representing the judiciary of the court for which the candidates are proposed. Similarly, in the nine abovementioned *Länder*, the appointment of law officers is a matter for the relevant minister of the *Land* in conjunction with a committee responsible for the election of judges, which may take the form of an expanded parliamentary committee.
46. In **Slovenia**, the Parliament is at the heart of the final appointment process for all judges of the ordinary courts. However, its actions are narrowly circumscribed by the proposals of the Sodni svet (Superior Council of the Judiciary) (CSM).⁸⁶ Once the President of the court with the vacant post has communicated his or her opinion on the candidacies (for ordinary courts and the Vrhovno sodišče (Supreme Court)) to the CSM, the latter chooses the candidate that it considers to be the most suitable and communicates its proposal to the Parliament for approval.⁸⁷ It falls to the plenary session of the Parliament either to confirm or to reject the candidate. If the candidate is rejected by the Parliament, the CSM must once again be asked to propose the same or a new candidate, or to organise a new recruitment procedure. If the Parliament votes in favour, the candidate is sworn in before the President of the Slovenian Parliament. Candidates are,

⁸⁶ However, the CSM retains exclusive competence vis-à-vis the advancement and promotion of judges and as regards the appointment of the presidents and vice-presidents of the courts. Those decisions do not therefore require formal confirmation by the executive or the legislature.

⁸⁷ This also applies to the appointment of judges to the Vrhovno sodišče (Supreme Court) and of the president and vice-president of that court.

however, rarely rejected.

47. In **Lithuania**, the judges of the Apeliacinis teismas (Court of Appeal) ⁸⁸ are appointed by the President of the Republic following approval by the Parliament of the proposal made by the President of the Republic. By contrast, the judges of the Aukščiausiasis teismas (Supreme Court) ⁸⁹ are appointed by the Parliament on proposal from the President of the Republic. In both cases, where the President of the Republic decides to propose a candidate to the Parliament, he or she must take account of the opinion of the Judicial Council concerning that candidate.
48. In **Belgium**, the legislature has a corrective role in the appointment of the judges of the Conseil d'État (Council of State) which it does not have in the appointment process for judges of the ordinary courts or the Council for asylum and immigration proceedings. The appointment of judges of the Council of State sees, firstly, the involvement of the general assembly of that court, when candidates are proposed, for subsequent appointment by the Minister for the Interior and the Chamber of Representatives or the Senate, depending on the circumstances. A unanimous proposal can be refused, in essence, only where one of the statutory conditions for appointment is not met. If the proposal is not unanimous, or when a new proposal is made following a refusal, the Chamber of Representatives or the Senate, depending on the circumstances, can either confirm the list presented by the Council of State or present its own list to the minister, who thus remains free to make his or her own choice, before formal approval by royal decree countersigned by the same minister.
49. In the **Netherlands**, as regards the judges of the Hoge Raad (Supreme Court), the second chamber of the States General proposes to the minister, from amongst the candidates proposed by that court, a reduced list of candidates for appointment by the minister (by royal decree). In practice, although the second chamber is not bound by the proposals of the Hoge Raad (Supreme Court), it generally selects the three best candidates who it puts forward to the minister, who, lacking his or her own right of initiative, makes the final choice. By the constitutional convention of co-option, it has been the practice of the second chamber to put forward for appointment by the minister only the first three

⁸⁸ The same is true of appointments to the presidency of the Apeliacinis teismas (Court of Appeal).

⁸⁹ The same is true of appointments to the presidency of the Aukščiausiasis teismas (Supreme Court).

candidates on the list proposed by the Hoge Raad (Supreme Court), with the government systematically proceeding to appoint the first of them.

50. In **Estonia**, the judges of the Riigikohus (Supreme Court) are appointed by the Parliament on proposal from the President of that court, after seeking the opinion of the court's general assembly and that of the Kohtute haldamise nõukoda (National Judicial Council), neither of which is binding. The Parliament thus enjoys broad discretion, since it is free, as the political representative body, to reject the proposals made to it. However, over recent years, the Parliament has not rejected any of the candidates proposed by the President of the Riigikohus (Supreme Court).
51. Lastly, in **Spain**, before their appointment by royal decree countersigned by the Minister for Justice, the legislative assemblies of the autonomous communities are involved in the selection of certain judges of the Tribunales Superiores de Justicia (Higher Courts of Justice). The CGPJ is therefore somewhat restricted in its powers of proposal, since it shares them with a regional legislative body.

D. JUDICIAL REVIEW OF THE SELECTION PROCEDURES AND/OR APPOINTMENT DECISIONS ⁹⁰

52. In **eighteen Member States** considered in this note, ⁹¹ a judicial remedy may be exercised in respect either of the selection procedure or of the appointment decision. The scope of the review varies depending on the Member States concerned, ranging from a review as to the existence of a substantial procedural defect that might have had an impact on the objectivity of the evaluation of the candidates' merits (**Lithuania**) to a review as to whether sufficient reasons are stated for the appointment decision (the **Netherlands**). In most of the Member States concerned, such litigation is a matter for the administrative courts, ⁹² sometimes in the form of the Supreme Court itself.

III. APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL COURTS

53. It must be observed, first of all, that in six of the nineteen Member States

⁹⁰ [...]

⁹¹ In **Cyprus**, there appears to be no such possibility of judicial review of the decision not to select a candidate for the judiciary and/or of the act of appointment.

⁹² In **Hungary**, it is the Szolgálati bíróság (Civil Service Tribunal) of the courts which hears and determines this type of action. This specialist court, which is responsible, primarily, for disciplinary procedures concerning judges, comes under, at first instance, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) and, at second instance, the Kúria (Supreme Court).

covered by this study (**Cyprus, Denmark, Estonia, Ireland, the Netherlands and Sweden**), there is no judicial body specifically devoted to reviewing issues of constitutionality. In those States, such review, where it is permitted, is entrusted to the ordinary or higher courts, which have no specific rules of appointment in relation to that function.⁹³

54. In addition, the procedures for the appointment of members of the constitutional courts of the Member States studied differ, **in most of the Member States considered in this study**, from the procedures for the appointment of judges of the ordinary courts examined above.
55. As guarantors of compliance with the basic law and of the review of the constitutionality of legislation generally initiated by the executive and adopted by the legislature, the constitutional courts often stand at the ‘crossroads’ between the legislature, executive and even judiciary (in particular where objections are brought before them). In view of that landscape, which is both ‘political’ and judicial, it is therefore unsurprising to note that the methods of appointment of the members⁹⁴ of those constitutional courts, and therefore their composition, are intended both to preserve a certain *institutional* balance between the authorities concerned as well to reflect *political* balances existing between the political parties that represent society. Indeed, a good many contributions point to the willingness of the framers of the Constitution (or of the legislature) to allow the broadest and most legitimate representation possible, within the judicial body entrusted with this function, of the various schools of thought that exist in civil society.
56. First of all, the members of the constitutional courts are not necessarily trained law officers. The majority of the systems require that the candidates satisfy, at the very least, conditions related to high moral character (**Bulgaria, Cyprus, the Czech Republic and Lithuania**), legal competence (**Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Hungary, Italy, Lithuania, Poland, Romania and Spain**) and professional experience (**Austria, Belgium,**

⁹³ In this latter scenario, we refer to the observations made in relation to such courts in Section II.

⁹⁴ It is noted at this point that the members of these judicial bodies do not necessarily have the status of ‘judges’, and those bodies may not necessarily be composed of professional law officers. Furthermore, nor are these judicial bodies necessarily classified as ‘courts’ in the judicial sense of that term (see, for example, **France**, where reviews of constitutionality are carried out by the ‘Conseil constitutionnel’ (Constitutional Council)) and are often constitutionally and statutorily independent, meaning that they are not part *stricto sensu* of the judiciary.

Bulgaria, Cyprus, the Czech Republic, Germany, Hungary, Italy, Lithuania, Poland, Romania and Spain), or must come from the political world and be former parliamentarians (**Belgium** ⁹⁵). In addition, rules prohibiting the holding of multiple functions or offices and on ineligibility, and even rules prohibiting membership of political parties, are likewise often laid down in order to bolster their independence in principle (**Austria, Bulgaria, the Czech Republic, France, Germany, Hungary,** ⁹⁶ **Italy and Poland**). The composition of the constitutional courts is therefore not monolithic.

57. The framers of the Constitution (or legislature) also have several options available for appointing or electing members, across the existing models of democratic government, by dividing between the stakeholders concerned the powers of proposal, election and/or appointment.
58. Based on our study, in six Member States, the power of selection and election was found to be, in principle, centralised in the hands of the Parliament with a view to securing the democratic legitimacy of the constitutional body (**Poland**), whilst taking into account the federal structure of the country (**Germany**), or to act as a counterweight to the power of the executive (the **Czech Republic**) or even to give a political dimension to the appointment process (**Belgium and Hungary**).
59. In five other States (**Bulgaria, France, Italy, Lithuania and Spain**), the composition of the constitutional court is based on the (quasi-)equal distribution of the power to designate its members between the various branches of State, and, in three of those States, provision is also made for the involvement of bodies representing the judiciary or judicial bodies (**Italy, Lithuania and Spain**).

A. APPOINTMENT OF ALL MEMBERS OF THE CONSTITUTIONAL COURT BY THE LEGISLATURE

60. The legislature is in fact responsible for the election of *all the judges of the constitutional court* in six of the systems studied (**Belgium, the Czech Republic,**

⁹⁵ This is the case with six of the twelve judges who make up the Cour constitutionnelle (Constitutional Court), who have some experience of the workings of parliamentary assemblies, thus ensuring a mixed composition of legal practitioners and former parliamentarians (**Belgium**).

⁹⁶ Constitutional judges can also be appointed as judges of the ordinary courts by the President of the Republic, without following the standard appointment procedure.

Germany, Hungary, Poland and Slovenia).

61. Thus, in **Germany**, the sixteen judges of the Bundesverfassungsgericht (Federal Constitutional Court), who are assigned to two chambers of eight judges, are elected on a 50/50 basis by the Bundestag (Federal Parliament) and Bundesrat (Federal Council). Ten members are chosen from amongst the people proposed by a parliamentary group within the Bundestag, by the Federal Government or by the Government of a *Land*. The other six members are chosen by the Bundestag and the Bundesrat from amongst the judges of the supreme courts of the Federation.⁹⁷ The Bundestag and the Bundesrat designate alternately the President and the Vice-President of the Federal Constitutional Court. The Federal President makes the appointment.

62. In **Belgium**, the judges of the Cour constitutionnelle (Constitutional Court) are chosen alternately by the Chambre des représentants (Chamber of Representatives) and the Sénat (Senate). In particular, the legislature adopts the measure determining the presentation of the candidates, which is a political measure negotiated between the political parties, not only with a view to achieving a qualified two-thirds majority but also in order to uphold the principle that the appointment of a judge must ensure that the political forces within the Federal Parliament at the time of the appointment are reflected. Accordingly, although the constitutional judges are appointed, as are all judges in this Member State, by royal decree, the decision-making power over those appointments therefore lies with the Parliament.

63. In **Hungary**, the Parliament has a central role in the procedure for appointing the fifteen judges who make up the Alkotmánybíróság (Constitutional Court). After having itself selected the candidates (the selection is made by an appointments committee of the Parliament composed of nine to twelve MPs, on which each parliamentary party is represented), the Parliament assesses those candidates⁹⁸ and then elects them. If the Parliament does not elect the candidate proposed, the appointments committee of the Parliament then proposes an alternative

⁹⁷ Of the judges making up each chamber of the Federal Constitutional Court, three are chosen from amongst the judges of the supreme courts of the Federation. In each chamber, one of those three judges is elected by the Bundestag or the Bundesrat and the remaining two are elected by the other.

⁹⁸ The candidates make oral submissions before the Parliamentary standing committee with responsibility for constitutional matters, and that committee issues an opinion addressed to the Parliament.

candidate. In this Member State, the role of the Parliament is magnified to the point that it controls the entire process for the appointment of judges of the constitutional court without the involvement of any other authority; the candidates ultimately take the oath before the Parliament.

64. In **Poland**, the Diet also plays a central role in the process of selecting and electing the judges of the Trybunał Konstytucyjny (Constitutional Court), since it is the Diet which elects them. Once elected, the judges are then sworn in before the President of the Republic in order to be formally appointed.
65. In the **Czech Republic**, the appointment of the fifteen judges of the Ústavní soud (Constitutional Court) sees the Senate approve, by way of resolution, the proposals made by the President of the Republic (the President enjoys significant discretion in choosing the candidates), but it is the President who formally appoints them. Countersignature by the Prime Minister is not required.
66. In **Slovenia**, in the case of the Ustavno sodišče (Constitutional Court), which is composed of nine judges, the President of the Republic, who enjoys broad discretion, proposes the candidates who are appointed by the Parliament, after putting the candidacies to a vote and after the candidates have taken the oath before it.

B. SELECTION OF MEMBERS OF THE CONSTITUTIONAL COURT SHARED BETWEEN SEVERAL AUTHORITIES

67. In the seven other Member States covered by this note, the selection of the members of the constitutional court is shared between various authorities, each of which proposes a certain number of constitutional judges.
68. This is the case in **Austria**: of the fourteen judges making up the Verfassungsgerichtshof (Constitutional Court), the Parliament votes on its own candidates, that is to say, on six judges, three of which are proposed by the Nationalrat (National Council, the lower house) and three by the Bundesrat (Federal Council, the upper house). The other eight judges of the Constitutional Court (including the President and the Vice-President) are proposed by the Federal Government. Formally, it is then the President of the Republic who appoints the judges of the Austrian Constitutional Court.

69. In **Bulgaria**, for appointments to the Konstitutsionen sad (Constitutional Court), the Parliament votes on its own candidates, that is to say, on four of the twelve judges who make up that court. The President of the Republic ⁹⁹ also chooses four of the judges of the Constitutional Court. Finally, in this Member State, the judiciary is itself involved in the process of appointing candidates to the Constitutional Court, since the final third of those candidates are presented by the general assembly of the judges of the Varhoven kasatsionen sad (Supreme Court of Cassation) and of the Varhoven administrativen sad (Supreme Administrative Court).
70. Of the nine members of **France's** Conseil constitutionnel (Constitutional Council), a third of which are replaced every three years, as is the case for the Presidents of each of the two chambers of Parliament, the President of the Republic also designates a third of the members of the Council, namely one member every three years for a nine-year term. In addition, the procedure for the appointment of members of the Constitutional Council involves, for the purpose of issuing a public opinion, in line with detailed rules that vary depending on the selection body, the standing committee on legislation of each parliamentary assembly. By a three-fifths majority of the votes cast by each committee, the appointment of a proposed candidate can be blocked. Formally, it is the President of the Republic who then appoints the members of the Constitutional Council. Former Presidents of the Republic are members of the Council for life.
71. Lastly, in **Romania**, the Parliament is given the power to appoint two thirds of the judges of the Curtea Constituțională (Constitutional Court), that is to say, six judges, three of which are proposed by the Chamber of Deputies and three by the Senate, out of the nine judges that make up that court. The other three judges of the Romanian Constitutional Court are appointed by the President of the Republic.
72. Provision is made in some procedures for appointments to the constitutional courts for the involvement of technical judicial bodies or bodies representing the judiciary. This is the case in **Spain**, where the CGPJ does, however, have the power to put forward two candidates for the twelve positions on the Tribunal

⁹⁹ In **Bulgaria**, the President of the Republic does not belong to any of the three branches of State – the legislature, executive or judiciary – but does interact with each of them.

Constitucional (Constitutional Court). In this Member State, the Parliament also votes on its own candidates, that is to say, on eight judges, four of whom are proposed by the Congress of Deputies and four by the Senate, from amongst the candidates put forward by the legislative assemblies of the Autonomous Communities. The Spanish Council of Ministers proposes the final two candidates. The Spanish constitutional judges are then formally appointed by the King.¹⁰⁰

73. Similarly, in **Italy**, the process for the appointment of constitutional judges involves the three branches of State. Of the fifteen judges who make up the Corte costituzionale (Constitutional Court), the Parliament, sitting in both chambers, votes on its own candidates (that is to say, on five judges). A further third of the Italian constitutional judges are designated by the President of the Republic, by presidential decree, which is countersigned by the President of the Italian Council of Ministers. Lastly, the final third of constitutional judges are put forward by the ordinary and/or administrative supreme courts.
74. Lastly, in **Lithuania**, the three branches of State are involved in the overall process of appointing constitutional judges. Of the nine judges who make up the Konstitucinis Teismas (Constitutional Court), the Parliament votes on the candidates put forward by its president (that is to say, on one third of the candidates for that court). It also falls to the President of the Republic to propose three candidates. Lastly, the President of the Aukščiausiasis Teismas (Supreme Court) also proposes three candidates. The names of those nine candidates are then put to the vote in Parliament.

IV. CONCLUSION

75. The considerations above reveal the wide diversity in the legal systems studied as regards the procedures for the appointment of judges. Certain trends can however be identified.
76. First of all, given the nature of judicial competence and the institutional position of the courts, a marked difference was noted between the rules governing the selection and appointment of, on the one hand, the members of the ordinary

¹⁰⁰ In **Spain**, the King is not part of any of the three branches of State and holds merely an honorific title; his acts are therefore always a matter of executive responsibility.

courts and, on the other, the members of the constitutional courts.

77. In the case of the appointment of the judges of the ordinary courts, a central role is conferred on the bodies that represent judges, such as the Councils of the Judiciary or committees representing the judiciary. Although, from a strictly formal perspective, in almost all the procedures studied, the appointment is ultimately made by an act of the executive, the President of the Republic or the Monarch, the decision-making “centre of gravity” – the perspective favoured in this study – points to the dominant role, alongside other authorities, of the bodies representing the judiciary in the overall process of judicial appointments. Indeed, even where the powers of those bodies are consultative in nature, they play a central role in the process, since the authorities making the appointments generally act in line with those bodies’ proposals. Lastly, it is also important to point out that the legislature is involved in some procedures for the appointment of judges of the ordinary courts, and that this generally concerns the members of the supreme courts.
78. As for constitutional judges, in the thirteen States studied which have a constitutional body, the appointments procedure satisfies the requirements that that court is ‘representative’, requirements that are linked to its role within the national institutional system. It is in the nature of the role of constitutional courts to ensure respect for the Constitution by the different authorities of State and to review the constitutionality of legislation. The nature of that rule largely explains the difference in the rules governing the appointment of the judges of the constitutional courts as compared with those of the ordinary courts. In that regard, the comparative study reveals that, in six of the legal systems studied, the legislature directly elects all constitutional judges, in order inter alia to ensure that that requirement that the court be representative of civil society is met. In the seven other legal systems, the choice of the members of the constitutional court is shared between different authorities, each of which proposes a particular number of constitutional judges, in order to guarantee that the different institutions of State are represented.

ANNEX

	<u>Composition of the Councils of the Judiciary and similar committees</u>
Belgium	The Conseil supérieur de la justice (Superior Council of the Judiciary) (CSJ) is composed of forty-four members, divided into two language-based colleges. Each college consists of eleven judges and eleven people who are not judges. The group of non-judges comprises at least four experienced lawyers, three university or graduate school professors and four members with professional experience that is valuable to the work of the CSJ.
Bulgaria	The Vish sadeben savet (Superior Judicial Council) (VSS) is composed of twenty-five members: three members by right (the Presidents of the Court of Cassation and the Supreme Administrative Court plus the Public Prosecutor) and twenty-two judges or experienced jurists. Eleven members are elected by the National Assembly from amongst judges, prosecutors, investigators, academics and lawyers. The remaining eleven members are elected by the judiciary itself.
Cyprus	The Anotato Dikastiko Simvoulío (Superior Council of the Judiciary) is composed of the same judges who make up the Supreme Court.
Denmark	The Dommerudnævnelserådet (Judicial Appointments Council) has six members: a Supreme Court judge, a judge of a regional court of appeal, a municipal court judge, a lawyer and two representatives of civil society.
Estonia	The Kohtunike üldkogu (Plenary Assembly of Judges) (KÜ), which brings together all Estonian judges, is involved in the composition of an all-party body, the Kohtunikueksamikomisjon (Judicial Review Commission) (KEK), created for the purpose of appointing judges of the 'ordinary courts' and composed of sixteen members: eight district judges elected by the KÜ, four supreme judges elected by the Riigikohtu üldkogu (General Assembly of the Supreme Court), one academic, one representative of the Minister for Justice, one licensed lawyer and one prosecutor. The Kohtute haldamise nõukoda (National Council of Justice) (KHN), which is involved in the procedure for the appointment of judges to the Supreme Court, has eleven members: the President of the Supreme Court, five judges elected by the plenary assembly of judges, two members of Parliament, the Public Prosecutor, the President of the Bar Council and the Chancellor of Justice or his/her representative. The Minister for Justice or his/her representative is also involved and has the right to speak.
France	Since a 2008 reform, judges are in the minority on the panel of the Conseil supérieur de la magistrature (Superior Council of the Judiciary) competent in terms of the appointment of judges of the ordinary courts, since it consists of seven judges elected by their peers and eight people who are not judges ('lay persons'). Those eight 'lay persons' are a State Councillor (elected by the Conseil d'État (Council of State)), a lawyer (designated by the President of the National Bar Council) and six qualified individuals who are not members of Parliament or the Bar Association, two of whom are designated by the President of the Republic, two by the President of the National Assembly and two by the President of the Senate. Parity between judges and lay persons is however restored in disciplinary matters. As for the administrative courts, the Conseil supérieur des tribunaux administratifs et cours administratives d'appel (Superior Council of the Administrative Tribunals and Administrative Courts of Appeal), which is chaired by the First Vice-President of the Council of State, is, for its part, composed of a majority of judges, since it includes the State Councillor who is the President of the Administrative Courts Inspectorate, the Secretary General of the Council of State, the Judicial Services Director at the Ministry of Justice, one head of a court and an alternate elected by their peers and five representatives of the judges of the administrative tribunals and administrative courts of appeal.
Germany	Special committees are involved in certain <i>Länder</i> (see German contribution)
Hungary	The Országos Bírói Tanács (National Judicial Council) (CNJ) is composed of fifteen members: the President of the Supreme Court and fourteen judges.

Ireland	The Judicial Appointments Advisory Board (JAAB) consists of eleven members: the President of the Supreme Court, the Presidents of the Court of Appeal, the High Court, the Circuit Court and the District Court, the Attorney General, a barrister, a solicitor and three people nominated by the Minister for Justice.
Italy	Two separate bodies are involved in the appointment of judges of the ordinary courts and of the administrative courts: – the Consiglio Superiore della Magistratura (Superior Council of the Judiciary) (CSM), which has three members by right (the President of the Republic, the First President and the Public Prosecutor of the Court of Cassation) and twenty-four elected members, two thirds of which are elected by all ordinary judges and one third by Parliament; – the Consiglio di Presidenza della Giustizia amministrativa (Presidential Council for Administrative Justice) (CPGA) is composed of the President of the Council of State, four judges of the Council of State, six judges of the regional administrative tribunals and four experienced legal practitioners or university law professors.
Lithuania	The Teisėjų taryba (Judicial Council) has seventeen members: three members by right (the Presidents of the Supreme Court, Court of Appeal and Supreme Administrative Court) and fourteen other judges.
Netherlands	The Raad voor de Rechtspraak (Council of the Judiciary) is composed of three to five members, at least half of whom must be judges.
Poland	The Krajowa Rada Sądownictwa (National Council of the Judiciary) (KRS) is composed of twenty-five members: the First President of the Supreme Court, the President of the Supreme Administrative Court, the Minister for Justice, a person appointed by the President of the Republic, fifteen members elected from amongst sitting judges and six members elected from amongst parliamentarians.
Romania	The Consiliul Superior al Magistraturii (Superior Council of the Judiciary) (CSM) has nineteen members: fourteen judges, two jurists of proven ability and three members as of right (the Minister for Justice, the President of the Court of Cassation and the General Prosecutor).
Slovenia	The Sodni svet (Superior Council of the Judiciary) (CSM) is composed of eleven members, six of whom are judges and five of whom are jurists of proven ability.
Spain	The Consejo General del Poder Judicial (General Council of the Judiciary) (CGPJ) is composed of twenty members: twelve members are chosen from amongst judges and judicial officers and eight from amongst lawyers and jurists of proven ability.
Sweden	The Domarnämnden (Judicial Appointments Committee) consists of nine members. Five are, or have been, judges of the ordinary courts, two members must be jurists from outside the judiciary (one of whom must be a lawyer). Those members are designated by the Government. Two members represent civil society and are elected by the Parliament.