The Third Step of the Guðmundur Test and the Importance of a Seamless Implementation of the Principle of Separation of Powers Into the Process of Appointment of Judges for Independent Tribunals Established by Law

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Abstract

Independent commissions and other bodies take ever-growing importance in the process of the selection and appointment of judges, but they are not a cure against all threats to judicial independence. Starting from the Guðmundur case in a comparative perspective yet focused on the Hungarian model the paper will investigate other elements of the selection process that also play a role in guaranteeing judicial independence, as the question of judicial appointments is of great importance for an independent tribunal being established by law. The paper argues based on recent case-law that the requirement of judicial review against breaches of the appointment process will lead to a judicialization of this now rather political question and can enhance the system of checks and balances in this field. This will again probably entail the need for more defined selection criteria. The Hungarian model shows weaknesses, the analysis of which may help to avoid some "faux-pas" and trigger a more systematic European response. The paper uses the comparative legal method and relies on the analysis of legal texts, mostly from European and national courts and other European fora within the Council of Europe.

Keywords: *checks and balances; effective judicial protection; judicial independence; selection of judges; tribunal established by law; separation of powers.*

JEL Classification: K10, K40, K41

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1. Introduction

The selection and appointment of judges is a field with numerous questions, all overarched by the question of the independence of judges: which model of appointment guarantees the optimum of independence of the judges – of course within

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the constraints that flow from the fact that judges are human beings, too. These concerns cannot be separated from each other, of course, as they exist at the same time. We want the best people to be judges and judge our disputes, but we do not have a certain knowledge of who is the best person for the job, and neither can we say who can decide this question best. Thus, we are striving for the best possible (optimal) solution amid the constraints our social and political system creates. Taking the Guðmundur Andri Ástráðsson case[2] as a starting point, the paper wants to analyse some elements of this huge question set into the framework of European standards and focus on some elements of the selection of judges that are determined by an interplay of different powers and raise questions of the separation of powers, like selection criteria or the procedures for the selection of the best candidates and the possible remedies against the selection decisions. As we are confronted by the endeavours of the executive to have a decisive influence on appointment decisions, it comes to light that judicial selection committees are not sufficient to guarantee an unbiased appointment procedure, and even in settings that seem to be in line with European standards, these questions are accorded a growing weight. The paper will also highlight some Hungarian cases in the "grey zone" to advocate for more checks and balances.

The methodology used is thus the comparative analysis of different solutions and the requirements set up by different European stakeholders, like the Venice Commission or the Committee of Ministers of the European Council, as well as the case law of the European courts.

2. Standards in European law for the appointment of judges

There has been much thought and written about the question on a European level, much more than we could summarise here. One of the strongest pivots we have is Art 6 (1) ECHR which declares that „[E]veryone has a right to have disputes concerning his or her civil rights and obligations, or any criminal charge against him or her, heard by an independent and impartial tribunal established by law, in a fair hearing, in public and within a reasonable time.", of course together with the extensive case law from the ECtHR on these standards.[3] Here we already see in the text of the Convention a linkage: a tribunal (and its members, the judges) can only be independent, if that tribunal or court is "established by law". This requirement of "established by law" according to Art. 6(1) ECHR especially reflects the principle of Rule of Law[4] and covers the composition of the bench of a tribunal, its organisation in

[2] ECtHR, Guðmundur Andri Ástráðsson v. Iceland, no. 26374/18 (1 December 2020) ECLI:CE:ECHR: 2020:1201JUD002637418.

[3] See eg. Alastair Mowbray, 'Article 6 Right to a Fair Trial', in *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd ed. (Oxford: OUP, 2012), 344–470; David Harris et al., '9: Article 6: The Right to a Fair Trial', in *Law of the European Convention on Human Rights*, 5th ed. (Oxford: OUP, 2023); Katharina Pabel, 'Judicial Independence and the Court´s Organisation from the Perspective of the European Convention on Human Rights', in *Supervision over Courts and Judges*, ed. Wojciech Piątek (Berlin, Germany: Peter Lang Verlag, 2021), 27–50, https://doi.org/10.3726/b18615.

[4] Cf. on this in detail Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on

general, and its competence. This "law" must be a generally binding provision having a "higher degree of legal validity" in order to be capable of preventing arbitrary conduct. And this already brings in the principle of separation of powers, which is undetachable from the principle of the rule of law. To be established by law, the basic rules on the organisation and jurisdiction of the court system should be set out by Parliament. This does not mean, that everything has to be regulated by law. Particular matters can be left to the executive. But here again we need checks and balances: the decisions of the executive should be subject to judicial review so that illegal or arbitrary actions from the executive can be prevented.[5] Not only the organisation and other "static" components have to be regulated, but the dynamics of the tribunals, too. Here we see the importance of procedural and other formal rules that shape the functioning of the court. Of course, it will not be Parliament that regulates, delegated statutory rules or even internal rules are sufficient.

A very important element of being established by law is thus the composition of tribunals. This has at least two important elements: what are the criteria for selection and who decides on the selection? These are of course strongly intertwined, as the composition of selection committees in itself pre-determines the interpretation of the selection criteria.

3. Different models for the organs deciding on the appointment of judges

The question of (selection) committees is perhaps the question that was mostly in the focus of reforms of court administration in the last decades.[6] Thus is it no wonder that there is a wide range of models to confer competences for appointments to different organs, creating different sets of checks and balances.[7] The traditional, pure executive discretion still exists in a lot of countries, while in some countries recommending committees have been accorded some shared competences with greater or smaller influence on these discretionary decisions. In Iceland for example, there is an independent evaluation committee that has an advisory role to the Minister of Justice to assess the competences and qualifications of candidates. Five of its members are appointed by the Supreme Court, the district courts and the Icelandic Bar Association respectively. The Minister of Justice can only appoint the candidates that the committee considers to be the best qualified for a particular post. And, to appoint a candidate who had not been deemed best qualified by the committee, the Minister of Justice has to seek the approval of Parliament.[8] In Ireland, the minister had

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Human Rights: The Strasbourg Court and the Independence of the Judiciary', *European Law Journal* 27, no. 1–3 (1 January 2021): 217., https://doi.org/10.1111/eulj.12377.

[5] Just to name only a Hungarian, see ECtHR, *Miracle Europe Kft. v. Hungary,* no. 57774/13, 12/01/2016.

[6] See in detail David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', *German Law Journal* 19, no. 7 (2018): 1567–1612, https://doi.org/10.1017/S2071832200023178.

[7] See for a rich global selection the chapters of Kate Malleson and Peter H Russel, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto - Buffalo - London: University of Toronto Press, 2006), https://doi.org/10.3138/9781442670921 0-fm.

[8] See the facts of the case of Guðmundur Andri Ástráðsson v. Iceland, no. 26374/18, ECtHR [GC] 1

up until the End of 2023 more discretion. Here, the Advisory Council for Judicial Appointments was composed of the presidents of the five jurisdictions of the country, the Attorney General, one representative each from the barrister and solicitor professions; and three persons were appointed by the Minister of Justice. The names of seven applicants per post were forwarded to the government, without ranking, and the Government was not even bound by this selection. The advisory panel procedure for judicial appointments did not apply to the promotion of judges. Interestingly, the new act which took away this discretion from the minister, experienced harsh critique – actually in favour of this discretion. It was the first and only case when the president of state referred an act to the Supreme Court for constitutional scrutiny, the bill being finally promulged at the end of 2023.[9]

This new Irish bill follows the model used in quite many countries, where the competence has been transferred to appointment committees. In Spain for example, there is a General Council that has 20 members, 12 judges and prosecutors, 6 elected by the House of Representatives and 6 by the Senate, who are elected with a 3/5 majority from a list of 36 candidates proposed by the professional associations of judges and public prosecutors according to the number of members. The remaining 8 lawyers (attorneys, professors, etc.) with recognised competence and more than fifteen years of professional experience are again elected by the House of Representatives and the Senate with a 3/5 majority. President of the Council is the President of the Supreme Court. In Portugal, administrative judges are selected by the Supreme Council of Administrative and Fiscal Courts. The composition of the Council is again mixed: Besides the President of the Supreme Administrative Court, 2 members are appointed by the President of the Republic, 4 members are elected by the Parliament and 4 judge-members are elected by the judges. This is similarly in the ordinary courts. There are of course also models where the appointments are controlled by the judiciary, and mixed models, as well.

The Venice Commission – though acknowledging that in older democracies the traditional "discretionary" model might function well[10] – yet realising that informal structures are fragile[11] recommends that an independent judicial council with a pluralistic composition should be established with decisive influence over decisions on the appointment and career of judges.[12] Already Recommendation (94)12 reflected

December 2020.

[9] https://www.tcd.ie/news_events/articles/2023/oran-doyle-supreme-courts-interpretation-of-judicial-appointments-bill-matters-greatly-for-future-of-this-country/.

[10] Venice Commission, CDL-AD(2007)028:*"45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time. 46. New democracies, however, did not yet have a chance to develop these traditions,which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges."*

[11] Patrick O'Brien, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland', *German Law Journal* 19, no. 7 (2018): 1871–1900, https://doi.org/10.1017/S2071832200023269.

[12] Council of Europe, Venice Commission, CDL-AD(2007)028, Chapter IV. Summary, 82: 4.

the same preference,[13] and the CCJE favoured the involvement of an independent body, too, both recommending an independent authority with mixed composition, but substantial judicial representation with judges chosen democratically by other judges.[14] Recommendation (2010)12 of the Committee of Ministers on judges' independence, efficiency and responsibilities repeats the same requirements while acknowledging other models, too: *"46. 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. 47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice. 48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation."*

Similarly, according to the case law of the ECtHR, the appointment by the executive or parliament is not per se obstructive: It may be legitimate that the executive appoints the members of the tribunal.[15] Then, the judges should be able to perform their duties individually and independently. This can be ensured e.g. by a previous consultation of judicial organs, obligatory compliance with the appointment proposals put forward by the judiciary, or the establishment of general selection criteria. The ECJ recalls, that this body itself should be sufficiently independent of the legislature and executive, and of the authority to which it is required to deliver such an appointment proposal.

4. The Hungarian solution for the selection of judges v3.0

The Hungarian solution is a very eclectic one. It uses different elements that were listed above, both regarding the shared competences and the regulation of criteria to be assessed when selecting candidates for the position of judges (first-time appointments and promotions). Here again, the only stable element of the system is

[13] Council of Europe, Commitee of Ministers: Recommendation R(94) 12 to Member States on the Independence, Efficiency and Role of Judges. Principle I, point *c): "The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedural rules. However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above".*

[14] CCJE, Opinion No. 10 on "the Council of the Judiciary in the service of society", to be found at https://rm.coe.int/168074779b (last accessed 2023. 11.30.).

[15] ECtHR, Kleyn and Others v. the Netherlands [GC], nos. 39343/98, 39651/98, 43147/98 & 46664/99, ECLI:CE:ECHR:2003:0506JUD003934398, (06/05/2003), para 193.

that of continuous change. After departing from ministerial supervision to a council model in 1997, in 2011 again a change of model followed. Although the model from 1997 prima facie was in line with the mentioned recommendations, setting up a judicial council with a pluralistic composition, the details of the election of the judge members led to dysfunctions.[16] This was mainly due to the fact that court presidents were not excluded from the candidates to be elected by the judges to sit on this board. As the function of the council was to control the judicial administration activities of the presidents themselves, of course, no real supervision took place, as mostly presidents have been elected by the judges. This deficiency resulted in nepotism when selecting and appointing judges as well as court clerks aspiring to become later trainee judges. However, instead of fine-tuning this model, an aggressive centralised judicial administration system was set up with the National Office for the Judiciary (NOJ), and the council was transformed into a weak supervisory organ of this authority, composed only of judges (HJC).[17] So, for the moment, the selection of judges in Hungary is a process with several actors: the judicial council of the court where the judge is going to have a status and the court president of this court, as well as the president of the NOJ, and the HJC.[18]

First of all, a call for application is launched by the state judicial authority, mainly upon the signalisation of the vacancy from the court president. This call shall include all legal requirements and may specify the need for eventual special expertise. After the deadline expired, the judicial council of the respective court (whose members are elected by the judges themselves) determines the order of the candidates after a hearing. This is not a discretionary decision, as a Decree of the Minister of Justice fixes the criteria that can be evaluated, with altogether a maximum of 162 objective points, and 10 subjective points to be given based on the personal interview led with the candidate. And, if the subjective points given here change the ranking according to the objective points, it must be reasoned. The same goes for the situation if there are several candidates with equal points: the judicial council decides on the order of applications and gives its reasons. When the court president receives the ranking, he/she forwards it to the president of the NOJ.

He either proposes the first candidate to the President of the Republic for appointment or, in the case of a promotion, transfers the candidate ranked first. The President of the NOJ/Kuria (as well as the court president affected) may however propose a deviation from the ranking. This proposition has to be submitted to the Hungarian Judicial Council. The HJC is the supervisory body of the central court administration. In addition to its supervisory function, the HJC contributes to the administration of the courts. It has as members 14 judges elected by the delegates of

[16] See a detailed desription of this system in Zoltán Fleck, 'Judicial Independence in Hungary', in *Judicial Independence in Transition*, ed. Anja Seibert-Fohr (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012), 793–833, https://doi.org/10.1007/978-3-642-28299-7_19.

[17] Samantha Joy Cheesman and Attila Badó, 'Judicial Reforms and Challenges in Central and Eastern Europe', *International Journal for Court Administration*, 2023, https://doi.org/10.36745/ijca.532.

[18] As the Kuria, the supreme court of Hungary is not subject to central administration, in the case of the appointment of judges, the president of the Kuria exercises the competences of the president of the NOJ, too.

the judges and is presided by the President of the Kuria (who is elected by Parliament with a supermajority). Permanent consultative participants of the meetings of the HJC are the President of the NOJ, the Minister of Justice, the Attorney General, and the presidents of the Hungarian Bar Association and the Hungarian Chamber of Notaries. The President of the HJC can invite other consultative participants, such as ad hoc experts or the representatives of NGOs and other advocacy organisations.

This centralized model was a heavy reaction to the previous model of justice administration where there was only a National Judicial Committee responsible for the administration of justice, that consisted of 15 members: 9 judges, the Minister of Justice, the Prosecutor General, the President of the Hungarian Bar Association, as well as two MPs appointed by each of the Constitutional and Judicial Committees and the Budget and Finance Committee of Parliament. The President was the President of the Supreme Court. The elected judges were almost all court presidents, so there was no real control, and the problems of justice administration were many, besides the nepotism mentioned especially the inability to address problems of timeliness.

In the new system, administration is done by the NOJ whose activities are overseen by the HJC. The very weak status of the HJC allowed in appointment procedures only for a competence to consent to a deviation, as well as issuing recommendations with a soft law character.[19] Other than the first candidate can thus only be proposed to the President of the Republic or promoted with the consent of the HJC. In lack of consent, the president of the NOJ often recurs to the declaration of the call to be unsuccessful. This is a tool often used if the outcome of the call diverts from the wishes of the presidents. To some extent this is due to the selection criteria set out by law.

5. Criteria for selection

When confronted with the need for selection criteria, a lot of questions immediately arise. Should the system be only meritorious[20], can it be such a system at all,[21] or should diversity also play a role?[22] Should the judges be appointed or elected?[23] How can the suitability of a candidate be measured? What is competence and what role does it play,[24] and should other than legal skills be of importance, like managerial skills, knowledge of foreign languages, teaching aptitude or scientific

[19] This has changed recently due to the conditionality procedure, s. infra.

[20] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection', *Journal of Law and Society* 33, no. 1 (2006): 126–40.

[21] Tamás Győrfi, 'Why Is the Equal Merit Principle (Almost) Straightforwardly Wrong?', *The Modern Law Review* 80, no. 6 (2017): 1052–72.

[22] Charles Gardner Geyh, 'Methods of Judicial Selection & Their Impact on Judicial Independence', *Daedalus* 137, no. 4 (2008): 86–101.

[23] Joanna M. Shepherd, „Are Appointed Judges Strategic Too?", *Duke Law Journal* 58, no. 7 (2009): 1589–1626.

[24] Stephen J. Choi, Mitu Gulati, and Eric A. Posner, 'The Role of Competence in Promotions from the Lower Federal Courts', *The Journal of Legal Studies* 44, no. S1 (2015): S107–31, https://doi.org/10.1086/682692.

involvement?

The ECtHR stresses the importance of the meritorious principle when stating that judges should be selected based on merit, and the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.[25] Within the Council of Europe, the Venice Commission is dealing eminently with the questions of judicial independence and especially appointment procedures and bodies. Its Report on the Independence of the Judicial System[26] sums up the most important requirements as common European standards to ensure internal and external judicial independence: *1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability. 2. All decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.*

And as a counterpart to appointments, it also states that "*Rules of incompatibility and for the challenging of judges are an essential element of judicial independence."*[27] Already before that the Council of Ministers of the Council of Europe already formulated in its Recommendation (94)12 somewhat broader on the basis of appointment decisions that *"[A]ll decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."*

In 2001, the Consultative Council of European Judges (CCJE) adopted its opinion No. 1 on "independence of judges" after having collected answers by judges to the questionnaire that was edited on the standards concerning the independence (including the principle of irremovability) of judges contained in Recommendation No. (94) 12 and, in particular, the relevance of these standards and any other international standards to current problems in these fields.[28] Out of the replies to this questionnaire was formulated the need for the introduction of objective criteria, as "qualifications, integrity, ability and efficiency" were deemed to be too vague. The Venice Commission adds to that: „*Merit is not solely a matter of legal knowledge, analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements,*

[25] ECtHR, Guðmundur Andri Ástráðsson, para 222.

[26] Venice Commission's Report on the Independence of the Judicial System Part I: The Independence of Judges. CDL-AD(2010)004, especially the 2nd and 3rd chapter.

[27] ibid, [82] point 3.

[28] Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges (Recommendation No. R (94) 12 On the Independence, Efficiency and Role of Judges and the Relevance of its Standards and any other International Standards to Current Problems in these Fields) under https://rm.coe.int/1680747830.

etc.''[29]

The ECtHR put it likewise: *"it is inherent in the very notion of a 'tribunal' that it be composed of judges selected on the basis of merit — that is judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required in a State governed by the rule of law".*[30]

Of course, there are systems very much differing from each other, as there are countries where special training institutions exist for judges, whereas in other countries access to judicial positions is more open, and in some countries, it is even a precondition for a judicial appointment to have gained experience outside the judiciary. This diversity is again certainly reflected in Opinion No.1. of the CCJE, that lists the diverse approaches and even the lack of formulation of criteria as the status quo in 2001. And again, this question arises in a completely different manner for positions of justices of highest or constitutional courts. We want to focus now on some of the general selection criteria for lower instance courts, to keep things simpler, and even leave aside the very general statutory criteria as legal education, age, no criminal report and sufficient years of practice.

6. Selection criteria as a system of fixed points (?!)

One can wonder first of all, how a minister of justice, who is not responsible (any more) for the administration of justice[31] can issue such a decree, and how this piece of legislation and the empowerment given for this regulation in the Act on the Legal Status and Remuneration of Judges ("Bjt.") is not put into question.[32] As there is no room for this question now, let us leave this question aside, to turn to the first question whether this system of points sufficiently reflects the different skills and capacities needed? This list reflects a hard question of the separation of powers by itself: can the decision of the judicial body be bound to such a degree by the executive? The discretion the minister enjoyed in the old model before 1999, has been practically transformed into a normative act binding the hands of the judicial body responsible for evaluating and ranking the candidates.

We have to start with a disclaimer: it is not only these selection criteria to be listed soon – there is an examination of suitability (fitness to practise examination) for the position of judge that is done by a commission of judicial experts at the National Institute for Expertise (who are not lawyers but mainly psychologists, supporting the judiciary) appointed by the Minister responsible for Justice, with the approval of the President of the Supreme Court. This shall include an examination of the psychological and health grounds which might preclude or significantly affect the

[29] ibid, [24].
[30] ECtHR, Guðmundur Andri Ástráðsson, para 220.
[31] According to the Constitution, that is the task of the National Office for the Judiciary (NOJ).
[32] Decree 7/2011 (III. 4.) KIM of the Minister responsible for justice on the detailed rules for the evaluation of applications for judicial posts and the scores to be awarded when establishing the ranking of applications. We have to add, that there is a recommendation for its application by the Hungarian Judicial Council from 2012, which is however somewhat outdated, as there was a major revision of the decree in 2017.

performance of judicial duties, and the judges' personal qualities of intelligence and character. An opinion shall be given, in accordance with criteria laid down by law, as to whether the personality traits of the candidate are such as to make him or her apt to perform the duties of a judge. The Bjt. contains in one of its appendixes the competences, qualities to be examined. There is also a ministerial decree on the details of this examination. So, we see quite a few reminiscences in legal regulation to the times when the minister of justice was responsible for the administration of courts.

Decree 7/2011 (III. 4.) KIM of the minister responsible for the justice contains – a decree to be promulged upon the consent of the president of the NOJ – the following criteria that are worth points in the evaluation of applications:

1. the judicial activity (containing on the one hand the professional assessment - maximum score: 20 points and the duration of legal activity) - maximum score: 32 points).

2. in the case of promotions or appointments to higher courts the opinion of the College of the Regional Court, of the Higher Court or of the Kuria (according to the percentage of favourable votes) - maximum score: 20 points.

3. the results of the legal exam (the exam needed for autonomous practice of any legal profession, after at least 3 years of practice) - maximum 10 points.

4. academic degree, title – maximum score: 20 points.

5. specialised or other (vocational) second degree (like master decrees from law faculties in special fields of law or a diploma in other discipline than law needed for the judicial work, like economics for penal judges or competition judges) – maximum number of points: 15 points.

6. study trip abroad in the field of law after completion of the degree in law (connected to the future position) – maximum 5 points.

7. language skills – maximum score: 10 points.

8. legal publications – maximum score: 10 points.

9. participation in compulsory continuing education courses and participation in optional courses – maximum number of points: 5 points.

10. additional professional activities that may be assessed in connection with the exercise of the judicial office – maximum 20 points.

11. results of the oral interview - maximum score: 10 points

The same question arises with both this examination and the selection criteria: can a list of different criteria ensure that the best candidates get the vacant positions? Can an examination by psychologists who of course have seen a lot of judges working, but never had to do that job themselves really discern fatal problems? Can such a punctual examination bring to light all the faults of personality? It may bring some relief from the burden of this question, that for most (at least inner) candidates, there will be an evaluation of the judicial activity, by which the supervisor of the judge can report on his or her longstanding experiences (which again will certainly only provide partial information on the merits). Thus, there are plenty of criteria listed and there are also details for inner points (eg. how many points does the candidate get for papers in foreign journals and how many for those published in serious Hungarian legal journals, or the correlation of the note given at the last professional assessment).

Now the question is, if we have such a stringent and well-defined set of criteria, amounting to a maximum of 162 points, can we speak about a decision brought by a judicial council regarding the order of candidates? Can the 10 subjective points alter anything? And what meaning can we accord to the opinion of the college of the court, comprising all judges working in the same field, which even in the case of a support of 0,1 % accords two points to the candidate (!!!) and at its maximum has a proportion of influence amounting to roughly 12%? Should activities that are not accessible to all, like working in the ministry or the NOJ, or taking part in the mentoring system, for which tasks judges and secretaries are chosen and designed by the leaders of the courts or the NOJ being accorded such a great weight? Is this not already an undue interference by the judiciary?

Still, with the deficiencies and caveats, it seems that the idea of such a matrix of points regulation can contribute to the objectiveness of the selection. Here again, the question of separation of powers is raised: if we have such a system, who should define the categories and their weights? Should it not be the same independent authority with a pluralistic composition and not the executive? The Guðmundur Astradsson case raised the same question from the other direction as there the minister was convinced that the decision was not taken based on the most important criteria (she argued that more weight should be accorded to the seniority of judges and their experience as judges) – by this she expressed doubts on whether the criteria should be set by the council itself.

Of course, the point system still reflects the closed world of the judiciary and offers an argument that is viable. The alterations in the system of appointment were in fact made necessary in view of the excessive nepotism reported in the 1990s in the judiciary as well as the selection methods for admittance to the judiciary as clerks.[33] As most judges are appointed from within the judiciary, from among the court secretaries who started their professional career right after graduation as court clerks.[34] To become a clerk, there is nowadays a serious concours that examines legal skills and knowledge. Here again, the question is raised whether we want the traditional career path judges who enter right after graduation and get vocational training and finally arrive to be a judge for a lifetime? The correctness of this thought cannot be proven empirically, because of the indefinability of the qualities that make up for a good judge. So, this leads very far and we will always only have punctual empirical – and subjective – experience, thus beliefs for policy decisions. This question is particularly very acute in administrative justice.[35] We could also raise the question mentioned in

[33] Zoltán Fleck, 'Judicial Independence in Hungary', in *Judicial Independence in Transition*, ed. Anja Seibert-Fohr (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012), 801–5, https://doi.org/10.1007/978-3-642-28299-7_19.

[34] And we may add that most judges are appointed from among the court secretaries who started their professional career right after graduation as court clerks, but unfortunately no relevant statistical data is available.

[35] Cf. eg. Andrzej Skoczylas and Wojciech Piątek, 'Judges' Appointments To The Administrative Judiciary: How To Guarantee Knowledge And Experience To Adjudicate Disputes In The Area Of Administrative Law?', *ELTE Law Journal* 11, no. 1 (2023): 55–70, DOI: 10.54148/ELTELJ.2023.1.55 But even if we favour the diversity of career paths and think that especially in administrative justice work

the introductory part, that is also reflected in the new composition of the Irish judicial appointment board with four non-jurist members, who should evidently bring in other aspects and criteria of selection.

After having examined this point system, we can only agree with the judges within CCJE. They are aware of the non-objectivity and the difficulties of assessing these merits, as well as the criteria of having a sense of justice and fairness. As a solution to this difficulty, they recommend transparent procedures and a coherent practice in their application.[36] Recommendation (2010) 12 of the Committee of Ministers also stresses this: *"Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."*[37]

The Recommendations wording already shows that the question of remedies is inseparably connected to selection procedures, again a check that assures the separation of powers and the rule of law. This idea is expressed in the three-step test developed by the ECtHR on the „tribunal established by law" in the case of Guðmundur Andri Ástráðsson.[38] The consequent and sound use of the selection criteria is on the one hand guaranteed by the diversity and pluralism of the composition of the selecting body, but on the other hand safeguarded by judicial review. If both are missing, like in Hungary, then a set of objective criteria clearly cannot guarantee the best selection, as the guarantees of the separation of powers are not overarching this field.

7. The importance of effective judicial review against selection decisions – some empirical experience

The three-step test developed by the ECtHR on the „tribunal established by law" in the case of Guðmundur Andri Ástráðsson is an important step in the caselaw of the ECtHR, as it detaches the notion of established by law even more from the requirements of independence and impartiality and by this enhances its meaning. Being established by law is a precondition to independence, there is not only an interdependence. Of course, it is not only the manner of appointment of members that is of importance for the independence of a tribunal, as the term of office, other guarantees against outside pressure and adequate remuneration are also constituent

experience outside the judiciary can enhance the professional qualities by far, we can consent to the aim that outsiders should first enter the judiciary on the level of court secretaries and have to practise at least one year under the supervision of a judge or senate and not directly become a judge. On the other hand, we dismay the practice of Hungarian courts of rather appointing court secretaries from the civil branch of ordinary courts as administrative lawyers with no prior experience in administrative law, just because of the lack of vacancies in the civil branch.

[36] The problem of diversity is also already touched upon, concluding that equal access to positions should be granted.

[37] Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges' independence, efficiency and responsibilities, para 48 2nd and 3rd sentences.

[38] ECtHR, Guðmundur Andri Ástráðsson.

elements, as well as the appearance of independence,[39] but the strongest link between being established by law exists with the appointments. Since its elaboration, this three-step test meant significant help in the fight for the independence of tribunals in Poland.[40] Through the analysis of some Hungarian experience we would like to emphasise the importance of remedies. Hence the best procedures and the existence of independent organs cannot help if there are serious infringements that cannot be brought before courts and the actors of the appointment process are not accountable.[41]

According to this decision of the ECtHR, a problem with the appointments of judges will lead to the lack of this quality of being established by law, if there is a manifest breach of the domestic law which is objectively and genuinely identifiable. This breach must have pertained to a fundamental rule of the procedure for appointing judges. This quality must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. The ECtHR added in this regard, that a procedure that is seemingly in compliance with the domestic rules may produce incompatible results. And, having regard to the subsidiarity of the protection by the ECtHR, the third requirement is that this breach was not or not effectively reviewed by the domestic courts. To be effective, domestic review must be carried out based on the relevant Convention case law and the principles derived therefrom.[42] Serious infringements of the procedure for appointing judges that cannot be remedied lead to the infringement of the right to a tribunal established by law, and thus to the infringement of Art 6 ECHR.

In Hungary, the possibility of judicial review of appointment decisions is scarce. In the course of the codification of administrative court procedures, this problem came up and the draft of the code suggested opening access to administrative courts in all cases that are of public law nature, not only for administrative activities. The actual president of the NOJ heavily fought against this policy decision, which was no wonder, as it would have been first of all her decisions that would have become susceptible to judicial review. Finally, this regulation was basically altered upon the critique of the President of the NOJ in the Code of Administrative Court Procedure. This means that such decisions are susceptible to judicial review only if statutory law expressly allows for that.

Of course, there was and is some remedy in the appointment procedure. Its insufficiency is clearly shown by decision 13/2021 (IV. 14) AB of the Constitutional Court. In this case, the Constitutional Court found that the restriction in the Bjt. that an unsuccessful candidate can only file an action 'if the successful candidate does not

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[39] Campbell and Fell v. the United Kingdom, nos 7819/77 & 7878/77 (28/06/1984), para 76.

[40] See for a comprehensive summary by the ECtHR itself in the case no. 50849/21 (23/11/2023), ECLI:CE:ECHR:2023:1123JUD005084921, especially para 167-182.

[41] On the tension between accountability and independence, see Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations', *Indiana Journal of Global Legal Studies* 20, no. 1 (2013): 253–77, https://doi.org/10.2979/indjglolegstu.20.1.253.

[42] Guðmundur Andri Ástráðsson, as summed up in the Xero Flor w Polsce sp. z o. o. v Poland, ECtHR (First Section) no. 4907/18 (07/05/2021), ECLI:CE:ECHR:2021:0507JUD000490718.

fulfil the conditions for appointment as a judge laid down in this Act or if the successful candidate does not fulfil the conditions set out in the call for applications'[43] and the court can only examine whether certain listed 'conditions for appointment as a judge are fulfilled', as well as in the case of promotions (ie. the transfer of a judge), whether 'the conditions of the application are fulfilled', were unconstitutional and annulled them with effect from 30 September 2021.

As however the regulation about the narrow path of access to court remains in force after the annulment of these restrictions on the grounds, the remedy practically is as ineffective as it has been, as the court has only the competence to notify the person responsible for assessing the candidature (the president of the NOJ or the Kuria), and only if the successful candidate could not have been appointed judge, or did not meet the conditions laid down in the call for applications. Most of infringements cannot be taken into regard, and there is no possibility to squash the decision. This is understandable in the case of the President of the Republic, but still, there could have been a more effective decision regulated also in his case. And there is no further remedy against this decision.

Parallelly, the ECJ also tackled the question of the problems of appointments depriving judicial protection of its effectiveness,[44] based on the Portuguese judges' case.[45] However contradictory and faint this case law may be,[46] it could have brought some help to some extent to the Hungarian situation, but for that, the sincere cooperation of national courts at all levels would have been necessary. Although this case law was applied, it only arrived for a short period of the proceedings at broadening this restricted judicial review, a finally did not have this effect.

There was a judge who applied for a promotion and was first in the order set up by the judicial council in the application procedure for two positions. Nevertheless, the President of the NOJ declared the call for unsuccessful and did not appoint any of the candidates for the position. The unsuccessful candidate had a threefold strategy.[47] On the one hand, it started an administrative court procedure, where his claim was rejected. On the second hand, it then turned to the same court as the labour court and

[43] Contained in Article 21(4) of the Bjt.

[44] Mathieu Leloup, 'The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence', *German Law Journal* 24, no. 6 (2023): 995–1010, https://doi.org/10.1017/glj.2023.57.

[45] C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018). Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case', *Common Market Law Review* 55, no. 6 (2018): 1827–54, https://doi.org/10.54648/cola2018146.

[46] See for a critical assessment Dimitry V. Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe', *JCMS: Journal of Common Market Studies* 60, no. S1 (1 September 2022): 154–57, https://doi.org/10.1111/jcms.13418.

[47] See on another strategic litigation of the same judge in the IS case (C-564/19, ECLI:EU:C:2021:949). György Ignácz and Anna Madarasi, 'Can a Judge Protect the Independence of the Judiciary?', in *The Inseparable Triangle: Democracy, Rule of Law and Human Rights in the EU*, ed. Sára Hungler (Budapest: ELTE Eötvös Kiadó, 2021), 89–104; or Dániel G. Szabó, 'A Hungarian Judge Seeks Protection from the CJEU: Part I', ed. Maximilian Steinbeis, *Verfassungsblog: On Matters Constitutional*, 28 July 2019, https://doi.org/10.17176/20190728-200951-0.

referred to both the Guðmundur Andri Ástráðsson case of the ECtHR and the A.K. case of the ECJ[48], insisting on having the right to access to this court as the decision of the NOJ is a decision about his judicial service relationship. By this, he tried to circumvent the regulation of the Bjt., which offers only the remedies seen above, i.e. according to that piece of statutory law, there was no remedy possible if the President of the NOJ declares a call to be unsuccessful. Similarly to the A.K. case, his attorney also introduced a plea to refer the case to the ECJ.[49]

The court of first instance correctly interpreted, in line with the judgment of the European Court of Justice that the Bjt. 145-146 provides for a general legal remedy by which access to court is granted in these cases. It stated that the fact that the call was declared unsuccessful had an effect on the applicant's employment as a judge and substantially affected it, since the decision prevented his promotion to the General Court as a higher court. However, it only declared that the decision of the NOJ was unlawful and did neither annul nor oblige the NOJ to take a new decision. Upon the appeal of the parties, the appellate court however annulled the judgment and terminated the procedure, stating, that in this case, there is no access to court granted by law, thus no labour law dispute can take place on this issue. The Kuria's labour law senate stated, after citing some paragraphs of the A.K. decision almost word for word, that *"[55] It follows from the foregoing that, in accordance with EU law, the possibility of bringing an action before the court is not precluded by national law, and it may be also concluded on the basis of the interpretation of Hungarian law that against the decision affecting the applicant's judicial service relationship an action under labour law could be brought before the administrative and labour court."*

The Kuria stressed, that the appellant's right to bring a claim cannot be limited, and contrary to the appellate court it found, that generally, access to court is granted by force of the Basic Law and it has to be precluded by a provision of law, which is not the case at present. Thus, the denial of the right to appeal was therefore an error of law which affected the merits of the case and annulled its resolution on that ground. It also referred to the decision of the Constitutional Court that confirmed that a judge may bring an action before the labour court against measures of the NOJ of a personnel nature affecting his employment.[50] In its guidance, it however stressed, that among the merits of the case it must be analysed whether the claimant has locus standi. Since the NOJ decisions in the present case concerned the applicant's employment as a judge, any applicant to the call could have appealed against them. A different question is though whether the actual claim could be upheld against the NOJ as defendant in the appeal procedure. Given all this the Kuria ordered the court of second instance to retrial and to decide on the merits of the appeals.

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[48] A. K. v Krajowa Rada Sądownictwa (C-585/18), C.P. (C-624/18) and D.O. (C-625/18) v Sąd Najwyższy, Judgment of the ECJ (Grand Chamber), 19 November 2019, ECLI:EU:C:2019:982.

[49] Mfv.X.10.251/2019/12.

[50]Decision No 13/2013 (IX. 23.) AB, para 45. https://hunconcourt.hu/datasheet/?id=3E97CA663040C528C125804F00589767. This was a symbolic case initiated by the Minister of Justice in the name of the Government. Zoltán Pozsár-Szentmiklósy, '13/2013. (VI. 17.) - bírósági szervezeti törvény', in *Az Alkotmánybírósági gyakorlat*, ed. Fruzsina Gárdos-Orosz and Kinga Zakariás (Budapest: HVG-ORAC, 2021), 197–220, https://m2.mtmt.hu/api/publication/32604727.

In the repeated procedure the second instance court granted locus standi and obliged the President of the NOJ to either transfer the claimant to the position he applied for or submit the case to the HJC to allow her to deviate from the established order. It also allowed in its ruling as an alternative to declare the call unsuccessful upon serious grounds. In the subsequent revision procedure, the same panel of the Kúria that was favourable to grant access to court in the name of effective judicial protection through the primacy of EU law followed the argumentation of the defendants' application for revision. It stated, that based on the fact, that the judge had no legal relationship with the NOJ he had no locus standi. When arriving at the merits, the Kuria annulled the judgement of the second instance court dismissed the appeal arguing that whereas access to court has to be guaranteed based on EU law and the fundamental right to a fair trial, the question of locus standi is a question of national material regulation, which has no connection to EU law. Referring to a recent decision of the Constitutional Court[51] it found that there is no possibility to set aside national law in this relation.[52] It cynically remarked: "*Nevertheless, the fact that the applicant did not have a right of action against the second defendant does not constitute an infringement of the principle of effective judicial protection laid down in the TEU and the Charter of Fundamental Rights, because the applicant had a remedy against the third defendant in connection with the declaration of the tender being unsuccessful.*"[53] That the third defendant had no powers in connection with the tender seemed to be irrelevant to the court.[54]

This case not only points out the deficits of the Hungarian remedy system and the weakness of protecting judicial independence through the preliminary ruling procedure. It shows that European law can only help to protect the independence of courts if the judges and courts are supporting and using these instruments. Whereas in Poland there was another court that could proceed to grant effective judicial protection, in Hungary, the General Court clearly did not want to do that initially.[55] The Kuria itself granted judicial protection, but only formally, not on the merits. Judicial review was provided, but it turned out not to be effective – underlying again the importance of the third criteria of the Guðmundur test. These patterns may partly be due to the historical heritage of the Hungarian judiciary that resulted in the systemic lack of autonomy of judges.[56]

Lastly, let us turn to another similar that we can connect to the first step of the Guðmundur test. In the previous case, the right of the president to declare a call for

[51] Decision No 16/2021. (V. 13.) AB, https://hunconcourt.hu/datasheet/?id=F096DC0E9F15ABA0C12586170053AE5A.
[52] Mfv.X.10.049/2021/16.
[53] Mfv.X.10.049/2021/16. [69]
[54] The Constitutional Court granted the application for constitutional review of the judge in February 2022 (IV/03595/2021), but the case is still pending in April 2024.
[55] See some cases presented in István Hoffman, Mónika Papp, and Márton Varju, 'Can EU Law and the Right to Effective Judicial Protection Rescue Judicial Review in Hungary?', *European Public Law*, 2023, 255–74.
[56] Zoltán Fleck, 'Changes of the Political and Legal Systems: Judicial Autonomy', *German Law Journal* 22, no. 7 (2021): 1298–1315, https://doi.org/10.1017/glj.2021.64.

unsuccessful was underlying the dispute. Without any concrete reasoning, only invoking the text of statutory law this decision was issued on the ground that there is no more need for that position, which reason was revealed the day after not to be true, as another judge was transferred to that status for several months. The labour court deemed that procedure to constitute an abuse of rights. Here, the breach of domestic law was – as set out in the first and second step of the Guðmundur case – objectively and genuinely identifiable and it adhered to a fundamental element of the procedure. In this second case – although fulfilling the second step – the breach is a more subtle one. This case concerned several positions of judges at the Kuria, where the president did not issue calls upon the vacancies but waited for a longer time and in the meantime, had judges from the general court be seconded to the Kuria.[57] When there were already quite a few vacancies, several calls were issued at the same time. Most candidates applied for several or all positions. Thus, it was just a matter of timing, in which order the selection decisions were made: so, came, that there were several candidates, who were not among the three best candidates, finally were selected, as the candidates ranked before them already were selected for other calls. As there is no legal provision on this situation, the president of the Kuria founds no problem in his procedure, whereas heavy doubts can be raised whether it is possible to deviate in such a situation without the permission of the HJC, as he does select a candidate who was not ranked among the first three. If we accept the second argumentation, we have a manifest breach of the law. Even if this rule should not apply to this situation, the three-step test of the ECtHR also emphasises – probably it is in view of such procedure: *There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right. In such circumstances, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention.*[58]

Unfortunately, up until now we do not have any knowledge of cases similar to the Polish ones before the ECtHR. This is to be traced back to other factors, which would merit empirical research among the parties and their legal representatives. The decline in the numbers of requests for preliminary rulings clearly shows the narrowing of judicial independence.[59]

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[57] See in detail Ágnes Kovács, 'Defective Judicial Appointments in Hungary', in *Verfassungsblog: On Matters Constitutional*, ed. Maximilian Steinbeis, 2022, https://doi.org/10.17176/20220927-230658-0; Krisztina F. Rozsnyai, 'Judicial Review in Hungary: The Turmoil of Organisational Changes through the Lenses of Procedural Law', *ELTE Law Journal*, no. 1 (2023): 40–41, https://doi.org/10. 54148/ELTELJ. 2023.1.95.

[58] ECtHR, Guðmundur Andri Ástráðsson, para 245.

[59] Gergely Barabás and András György Kovács, 'Why Judicial Independence Matters? Administrative Judiciary: The Transmission Point Between National and EU Law', *ELTE Law Journal*, no. 2 (2018): 127–55.

8. Final remarks

We could have continued to list other cases that show that the lack of remedy makes almost all guarantees null and void. This emphasises on the contrary the importance of the third step third step of the Gudmundur test. Since then, in other European cases, the principle of effective judicial protection, which initially made it possible to start judicial review procedures based on the concerns of the independent tribunal established by law resulted in effective judicial procedures for the judges in situations where the requirement of the tribunal established by law is or would be harmed. Thus, we arrived from effective judicial protection by judges at the very important requirement of judicial protection for judges, which in itself is a great development. Appointment decisions, traditionally deemed to adhere to the political question doctrine[60], are (or should be) gradually transformed into discretionary decisions apt for judicial review.[61] Because of this judicialisation, the fixing of the selection criteria within the system of checks and balances will gain importance.

Again, we have to stress that if there is not a strong system of checks and balances to overarch both the composition and competences of the panel deciding or participating in the appointment and the concretisation of selection criteria, and further, if there exist no checks is in the form of remedies, the independence of judges will be at risk. Until no or no effective remedy exists at national level, the multilevel legal protection guaranteed by the ECJ and the ECtHR is (or would be) thus vital, as the examples of Polish – and contrasting with this, Hungarian – judges clearly shows.

The conditionality procedure for example now has contributed to the strengthening of the competences of the HJC according to it the right for judicial review against decisions of the NOJ infringing its rights, and a better organisational and financial situation with a legal personality, to be maybe able to use its competences better. Still, most of the amendments made by the Hungarian Parliament in connection with the judiciary seem to be showcase amendments until now. We can only hope (amid serious doubts) that there will be future procedures where the ECJ – and the Commission – will find ways to have a stronger impact on Hungarian judicial appointments. Our doubts are due to the fact that the guarantees of separation of powers also need brave judges who dare to use them. The independence of judges can nevertheless only be truly effectuated in a political culture where on the one hand stakeholders of different powers are able to recognise (or are made to recognise) the importance and value of such principles; and on the other hand where judges are able to interiorise the qualities necessary for judicial independence, so that these form an integral part of their personality and they even try to defend this independence against those abusing their power, be it external or internal. Statutory law cannot protect judges from all types of external pressure, but – eminently through rules on effective judicial protection against appointment decisions – it can protect them from some. So,

[60] See for many János Fazekas, 'The European Court of Justice as Political Actor in Intergovernmental Coordination', *Journal of Comparative Politics* 17 (2024): 5–18.
[61] Of course, the ECtHR's Eskelinen criteria also have valuable merits in this field, cf. Vilho Eskelinen and Others v. Finland [GC], no. 63235/00 (19/04/2007).

we can conclude together with the CCJE (with the caveat that the need to limit the influence of internal judicial actors should stringently be added to the last sentence): *"Formal rules and judicial councils have been introduced in Member States to ensure the independence of judges and prosecutors. However, as welcome as these developments may be, formal rules alone are no guarantee that appointment decisions will be impartial, based on objective criteria and free from political influence. The influence of the executive and the legislature on appointment decisions should be limited in order to prevent appointments for political reasons ..."*[62]

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[62] CCJE Report on "Judicial Independence and Impartiality in the member states of the Council of Europe in 2017". II. A., https://rm.coe.int/2017-report-situation-ofjudges-in-member-states/1680786ae1.

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