

2021 THEMIS COMPETITION

SEMI-FINAL D • JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

JUDGING THE JUDICIARY

Responding to judicial misconduct without threatening independence

Morgane Coué • Mélanie Vianney-Liaud • Justine Pédrón

Ecole nationale de la Magistrature • France

Tutor : Hugo Rialland



***Acknowledgments:** As part of this research, and in order to better understand the different disciplinary systems of the EU and beyond, we called upon several judges and prosecutors from the countries studied. Only some of them are mentioned in this essay. However, these exchanges were all incredibly rich and brought a great deal to our reflection. We therefore thank them all for their availability and thoughts. We also thank our supervisors at the ENM for their indispensable and benevolent support.*

Introduction

Judicial accountability inevitably clashes with independence, a cornerstone of the rule of law. All democratic countries have to find the right equilibrium between these two principles. The concept of accountability lends itself to different meanings, going from the revision of judicial decisions through appeal to the global public liability of the judiciary.¹ This essay addresses disciplinary responsibility, one of the most controversial forms of accountability with regard to its relation to judicial independence. On the one hand, the responsibility of judges and prosecutors forms part of a complex relationship between the judiciary and other state powers.² It may happen that in the event of a conflict with politicians, the judiciary is deliberately weakened. Judicial discipline may then be used as a disruptive political tool to diminish the impact of some judicial decisions by discrediting those who delivered them. On the other hand, there is nowadays a legitimate public demand to sanction judges or prosecutors who, through their behavior, decisions or failures, cause damage or disturbance. The current legitimacy of the judiciary and its authority no longer rest solely on the power conferred by law, but also on the way its members prosecute and judge.³

The search for an appropriate disciplinary regime is the subject of many attempts at rationalization. Although the need for international standards has been stressed, national disciplinary systems differ significantly. The European continent is a representative example of the gap between a commitment to common standards and a reality that presents disparate national regimes. Recent events in Europe, notably in Poland, and the newly created European Public Prosecutor's Office ('EPPO'), have furthered the necessity to build some kind of homogeneity within the European Union ('EU') regarding the liability of the judiciary.

After giving details of the existing international standards on this matter (1), this essay will demonstrate, through a comparative analysis, that the diversity of the national judicial disciplinary regimes in the EU renders the building of a unified system difficult (2). Drawing

¹ Consultative Council of European Judges ('CCEJ'), Opinion No. 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, 16 October 2015, § 30. If a judge has engaged in improper actions, he or she must be held accountable through the application of disciplinary procedures and, if appropriate, the criminal law. Civil liability, which also works as a sanctioning mechanism insofar as it entails censure of judges' decision-making behavior and payment of damages, will not be studied in this essay.

² In European countries, the judiciary is defined broadly. "Magistrates" refers to judges and prosecutors in France and Italy. In other countries, judicial officers such as public prosecutors are also considered as members of the judicial corps (notably Belgium, Portugal, and the Netherlands). For this reason, this essay considers the terms "judiciary" and "judicial disciplinary regimes" as applicable to judges and prosecutors, when the latter are institutionally integrated in the judicial branch.

³ Canivet, Joly-Hurard, 'La responsabilité des juges, ici et ailleurs', 4 *Revue internationale de droit comparé* (2006) 1050, at 1050-1051.

from the example of Poland and Slovakia in particular, it will argue that although a clear common disciplinary framework would be appreciable, importing a foreign system without taking into account local specificities can prove to be unsuitable. However, as national shortcomings remain and since no country is immune to a sudden weakening of the balance between accountability and independence, this essay will include a number of proposals to respond to judicial misconduct without threatening independence (3).

1. Existing standards at international and regional levels

At international and European levels, the discourse on judicial independence has long overshadowed that of accountability, the relevance of which has only been acknowledged lately.⁴ Consequently, the guarantees defined to ensure balanced responses to judicial misconduct remain relatively broad (A). The case-law of the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('ECJ') nevertheless highlights significant aspects of disciplinary proceedings (B).

A. *Generic standards belatedly defined*

General statements, rather than concrete guidelines, on judges and prosecutors' duties have been produced. Alongside Article 11 of the United Nations Convention against Corruption,⁵ the 2006 Bangalore Principles provided for six values aiming at the preservation of judicial ethics and introduced implementation mechanisms.⁶ Non-binding charters have also been developed, such as the 1999 Universal Charter of the Judge.⁷ Regarding disciplinary proceedings, tangible recommendations have been made, notably in the 1985 Basic Principles on the Independence of the Judiciary, which advocate for fair procedures subjected to independent review, and based on legally determined offenses.⁸ These principles, which sketch

⁴ For example, CCEJ, Opinion No. 18, *supra* note 1.

⁵ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

⁶ ECOSOC Res. 2006/23.

⁷ International Association of Judges, Central Council, Universal Charter of the Judge, 1999.

⁸ United Nations Office on Drugs and Crime ('UNODC'), Basic Principles on the Independence of the Judiciary, 1985, Principles 17 to 20. At European level, a number of regional instruments contain provisions on the disciplinary responsibility of judges, namely the European Charter on the Statute for Judges (1998) and the Council of Europe ('CoE') recommendation on judicial independence, see Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. Advisory bodies of the CoE also contributed to clarifying the main aspects of judicial liability. The CCEJ adopted an opinion devoted to the principles and procedures governing the liability of judges (*supra* note 1), and referred to this issue as well in the Magna Carta of Judges (2010). With regard to prosecutors, see, for example, Consultative Council

the outlines of judicial discipline in democracies still allow for major diversity in national practices.⁹

B. The ECtHR and ECJ: case-law focused on institutional and procedural aspects

The ECtHR and the ECJ seek to guarantee procedural fairness and judges' rights in order to protect judicial independence as a safeguard of the rule of law. The ECtHR has considered disputes involving judges who contested the legality of their dismissal or suspension from judicial office. Notably, it condemned States that infringed upon the freedom of expression of judges, guaranteed by Article 10(1) of the European Convention on Human Rights, by imposing unjustified disciplinary sanctions. The Court assessed whether the disciplinary proceedings initiated against judges who allegedly misused their freedom of expression were necessary and proportionate to the violation of their duty of loyalty, reserve and discretion.¹⁰ It sanctioned proceedings that provoked a chilling effect on judges in order to discourage them from participating in the public debate about the justice system.¹¹ The ECtHR also ensures that judicial disciplinary proceedings respect the fair trial guarantees protected by Article 6(1). In *Olujić v. Croatia*,¹² the Court appreciated the violation of fair trial standards in the light of four criteria: the lack of impartiality of the tribunal, the violation of the principle of equality of arms, secrecy and excessive length of proceedings. In addition, the Court found that when the same disciplinary body brought charges, conducted proceedings and ultimately imposed sanctions, its impartiality appeared open to doubt.¹³ Finally, the ECtHR considered in several cases that judicial councils were dependent and partial due to their composition and mode of designation.¹⁴ In this perspective, there are pending applications regarding the legal reforms of the judiciary in Poland.¹⁵

of European Prosecutors, Opinion No.9 on European Norms and Principles regarding Prosecutors (2014); Conference of Prosecutors General of Europe, European Guidelines on Ethics and Conduct for Public Prosecutors, the 'Budapest Guidelines' (2005).

⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, A/75/172, 17 July 2020.

¹⁰ ECtHR, *Albayrak v. Turkey*, Appl. no. 38406/97, Judgment of 31 January 2008; ECtHR, *Kudeshkina v. Russia*, Appl. no. 29492/05, Judgment of 26 February 2009. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

¹¹ ECtHR, *Baka v. Hungary*, Appl. no. 20261/12, Judgment of 23 June 2016

¹² ECtHR, *Olujić v. Croatia*, Appl. no. 22330/05, Judgment of 5 February 2009

¹³ ECtHR, *Kamenos v. Cyprus*, Appl. no. 147/07, Judgment of 31 October 2017, at para 102-110

¹⁴ ECtHR, *Oleksandr Volkov v. Ukraine*, Appl. no. 21722/11, Judgment of 9 January 2013; ECtHR, *Kulykov and others v. Ukraine*, Appl. no. 5114/09, Judgment of 19 January 2017

¹⁵ ECtHR, *Tuleya v. Poland*, Appl. no. 21181/19; ECtHR, *Grzęda v. Poland* Appl. no. 43572/18; ECtHR, *Broda v. Poland*, Appl. no. 26691/18; ECtHR, *Żurek v. Poland*, Appl. no. 39650/18

The recent case-law of the ECJ sets out guarantees that disciplinary proceedings should include in order to respect the principle of independence: a procedure led before an independent body that respects the rights of the defense and the right of appeal, as well as the formalization of rules defining disciplinary offenses and sanctions.¹⁶ Sanctions should be adequately motivated and fair trial safeguards respected, especially that of an impartial and independent tribunal.¹⁷

Despite these guarantees at international and regional levels, national disciplinary systems remain diverse in the EU and protect judicial independence with mixed results.

2. The maze of national judicial disciplinary systems in the EU

From judicial council systems, like Italy and France (A), to federal states such as Germany (C), including more recent democracies like Slovakia and Poland (B), judicial disciplinary regimes in Europe are miscellaneous.

A. The “Judicial Council system”: the examples of Italy and France

Judicial council systems embody common features: the constitutional affirmation of a judiciary’s autonomy and responsibility through judicial councils, similar disciplinary prosecution methods and measures.¹⁸ As this scheme subtends an ongoing interconnection between politics and the judiciary, its ability to safeguard independence sometimes hangs by a thread. France and Italy are distinctive examples that present striking similarities.

Both countries saw their judiciary, composed of judges and prosecutors, re-defined after the Second World War. The 1947 Italian Constitution and the 1958 French Constitution established strong guarantees of judicial independence¹⁹ and envisaged a judicial council to which judges and prosecutors are accountable. The establishment of a single council is historically rooted, designed to create consistent values shared by both judges and prosecutors.²⁰ However, in France, differences between the disciplinary treatment of judges

¹⁶ Case C-216/18, *Minister for Justice and Equality* (EU:C:2018:586) at para 67

¹⁷ Case C-64/16, *Associação Sindical dos Juizes Portugueses* (EU:C:2018:117) at para 16

¹⁸ The Spanish Constitution consecrates the principle of judge’s responsibility in Article 117(1). This affirmation is the democratic counterpart of judicial independence, CSM Conference, *L’effectivité de la responsabilité des magistrats en droit français et approche en droit comparé*, 6 May 2021 (Speech by C. Lesmès).

¹⁹ Constitution of 22 December 1947 (Italy); Constitution of 4 October 1958 (France).

²⁰ See M. Fabri, *Regulating Judges in Italy* (2014), available at <https://www.ippublicpolicy.org>, at p. 3.

and prosecutors persist and are highly debated, as representatives of the *Cour de cassation* strongly advocate for their unification.²¹

1. The art of balance: the composition of judicial councils

One specific debate about the judicial council system pertains to the composition of judicial councils, and the potential corporatist bias they carry.²² In 2008, the composition of the French Judicial Council was renewed in order to lower the number of magistrates on the board.²³ The disciplinary sections (one responsible for judges and one for prosecutors) are now made up of a president, seven members of the judiciary elected by their peers, one administrative judge, one lawyer and six lay members appointed by the executive and legislative powers.²⁴ In Italy, the judicial council has a mixed composition with a majority of magistrates. Only one-third of its members are elected by Parliament. Its single disciplinary section, responsible for both judges and prosecutors, includes four magistrates and two laypersons.

The predominantly judicial make-up of councils has been criticized. Professor S. Benvenuti pointed out that the overrepresentation of the judiciary in the Italian Judicial Council has long prevented the opening up of judicial recruitment to alternative channels.²⁵ Articles 2 and 3 of the Universal Charter of the Judge state that disciplinary authority shall include members from outside the judicial profession, but exclude members of the legislative or executive branches. The presence of lay people within the disciplinary authority does not always form a barrier against the drifts of corporatism. The example of the Italian Council is emblematic as lay members were themselves involved in the circuits of influence dominated by magistrates' associations,²⁶ and favored the appointment of magistrates ideologically close to their parties of origin.²⁷

²¹ CSM Conference, *Indépendance et responsabilité des magistrats: les enjeux du débat*, 12 April 2021.

²² Martinel, Natali, 'Le Conseil Supérieur de la Magistrature, protecteur des magistrats ou des justiciables ?', 30 *Après-Demain* (2014).

²³ Constitutional Law of 23 December 2008.

²⁴ Article 65 of the French Constitution.

²⁵ Benvenuti, 'The Politics of Judicial Accountability in Italy: Shifting the Balance', 14 *European Constitutional Law Review* (2018) 369, at 383.

²⁶ In the 1960s, formal magistrates' associations (*correnti*) were institutionalized in the Council. In the beginning, such a development allowed for mutual checks and balances. In the long-term, however, the influence of the judicial associations fossilized, and the politicization of the Council increased, *ibid.*, at 382-383.

²⁷ Interview with Prosecutor Airoma (Italy), 31 May 2021.

2. Defining moral duties and disciplinary offenses

Disciplinary offenses are not homogeneously defined in judicial council systems. Some countries implement non-binding ethical codes while others provide for strict legal definitions. Authors are divided over the influence of constraining rules on the prevention of judicial misconduct. The absence of clear definitions can be seen as a threat to independence, as it leaves the political power with a gap in which to pursue unjustified disciplinary actions. In this sense, Article 5.1 of the European Charter of the Statute of Judges recommends the definition of ethical duties by legal statute. To others, the binding definition of ethical duties is a risk, as it limits judges' critical thinking.²⁸

While France has chosen a non-legally binding ethical guideline produced by its Judicial Council, notably because of the constantly evolving nature of judicial ethics,²⁹ Italy has ensured a clearer definition of disciplinary offenses. In 2001, the ECtHR issued a decision criticizing the lack of foreseeability of disciplinary offenses.³⁰ In reaction, the Italian Parliament formalized the definition of such offenses.³¹ Judges in Italy are divided over the legalization of disciplinary offenses. For some, current legislation does not yet provide the precision required by European standards.³² For others, this precision may be a drawback, as it entraps the definition of misconduct, leading to applying administrative (less protective) proceedings and disguised sanctions to non-legislated behavior.³³

3. Problematic political interference in proceedings and sanctions

Judicial council systems provide guarantees aiming to ensure a balance between the response to judicial misconduct and the preservation of independence. Disciplinary proceedings present a jurisdictional character in Italy³⁴ and in France³⁵, which secures the fair trial rights of the defendant magistrates. Disciplinary sanctions, prescribed by law, go from admonition to complete dismissal.³⁶ In France, nonetheless, the Judicial Council determines

²⁸ Y. Gaudemet, 'La déontologie : un pouvoir masqué', *Académie des Sciences Morales et Politiques, Institut de France*, 27 April 2021, available at <https://academiesciencesmoralesetpolitiques.fr>.

²⁹ Conseil Supérieur de la Magistrature (France), *Compendium of the Judiciary's Ethical Obligations* (2019).

³⁰ ECtHR, *NF v Italy*, Appl. no. 37119/97, Judgment of 2 August 2001

³¹ Law No. 150/2005 of 25 July 2005 and Legislative Decree No. 109/2006 of 23 February 2006 introduced three categories of disciplinary offenses depending on whether they have been committed during or outside the exercise of judicial functions and whether they result from committing a crime.

³² G. Oberto, *The Italian Experience in the Fields of Judicial Ethics and Judicial Discipline*, available at <http://biblioteca.cejamericas.org>, at 11-18.

³³ Airoma, *supra* note 27.

³⁴ Italian Constitutional Court, Judgment of 2 February 1971, Case No. 12.

³⁵ Articles 49 to 58 (for judges) 58-1 to 66 and (for prosecutors) of Law of 22 December 1958 relating to the statute of the judiciary.

³⁶ *Ibid.*, article 45 (France); Articles 19, 20 and 21 of Royal Decree No. 511 of 1946 (Italy).

the penalty imposed on a judge, whereas the Minister for Justice is the competent authority for prosecutors.³⁷

The framing of disciplinary proceedings according to fair trial rules does not prevent judicial council systems from being subjected to political influence. In both Italy and France, the Minister for Justice can take the initiative of disciplinary proceedings, even after the General Prosecutor has closed a case (in Italy) or after the Judicial Services Inspectorate (in charge of conducting a preliminary administrative inquiry in France) has concluded that there has been no misconduct.³⁸ In a 2021 statement,³⁹ the French Judicial Council expressed its concern about a disciplinary procedure initiated by the executive against prosecutors based on fragile accusations and insufficient proof of judicial misconduct. In such cases, disciplinary procedures are the mirror of a crisis in the judiciary, as defendant magistrates are exposed to disciplinary initiatives intended for political interest.

Even if it was imperfect, the ‘judicial council model’ later served as a template promoted to increase judicial independence, particularly in Central and Eastern Europe. After 1989, countries of the former Soviet Union created their own judicial councils in order to enter the EU. Slovakia and Poland, an analysis of which shows the limits of such a system, may be cited as an example.

B. The limits of the “judicial council system” in Slovakia and Poland

In the 1990s, Slovakia and Poland started a democratic transition eventually leading to their accession to the EU that included the development of a strong judiciary with the creation of judicial councils. The experiment, however, resulted in a pitfall as it did not prevent the politicization of the judicial branch. In both countries, prosecutors are excluded from the judiciary and have their own disciplinary regimes. This is the reason that they will not be addressed in this essay.⁴⁰

³⁷ Articles 59, 65 to 66 of Law of 22 December 1958. The Judicial Council gives only its opinion.

³⁸ *Ibid.*, articles 50-1 and 50-2; Article 107(2) of the Italian Constitution.

³⁹ CSM Public Communication (16 April 2021), available at <http://www.conseil-superieur-magistrature.fr>.

⁴⁰ In Slovakia, public prosecutors come under their own institutions, in particular the Public Prosecution Office. It is composed of five disciplinary commissions and two appeal panels, including exclusively prosecutors. Law No. 154/2001 of 28 March 2001 set forth the basic provisions for prosecutors’ liability. In Poland, the disciplinary regime of prosecutors was reformed through the Law on the Public Prosecution Office of 28 January 2016. The structure of the proceedings is quite similar to that of judges, with the difference that disciplinary judges are appointed by the general assembly of prosecutors at regional level. The Themis association of judges criticized

1. *The controversial implementation of judicial councils*

The introduction of the Judicial Council of the Slovakian Republic ('JCSR') in 2002⁴¹ significantly affected the disciplining of judges.⁴² The JCSR is competent to elect and recall members of the disciplinary panels that are attached to the Supreme Court. It also decides on the number of disciplinary panels and their schedules. The number of judges in the disciplinary panels has evolved as a reorganization in 2003 changed their composition so that judges became a minority.⁴³ In 2008, following a ruling by the ECtHR,⁴⁴ the law reestablished the requirement of a majority of judges on each panel.⁴⁵

The *Krajowa Rada Sądownictwa* ('KRS') is an institution vested by the 1989 Polish Constitution with the mission to protect judicial independence as well as to motion the executive power to appoint judges for an indefinite period.⁴⁶ Although not an adjudicating body, its activities are related to the professional activities of judges: appointment and admission, promotion, transfer, dismissal or early retirement.⁴⁷ Article 187 of the Constitution sets the number of members at 25, including 15 members chosen from the judiciary. Until the 2017 reforms,⁴⁸ they were elected by their peers. In 2017, the appointment procedure changed, and the term of office of the 15 judicial members was prematurely interrupted. The new KRS was only staffed in March 2018 as the elections were boycotted, following a negative position taken by judges' associations on this new procedure.⁴⁹ Indeed, since then, the 15 judicial members are appointed by Parliament. Consequently, the legislative branch now appoints 21 of the 25 members of the KRS.

the reform as it enabled the demotion of almost one-third of public prosecutors (113 prosecutors) from the two highest levels of the Prosecution Office.

⁴¹ Article 141a of the Constitution of Slovakia of 1 October 1992; Law No. 185/2002 of 11 April 2002 on the Judicial Council of the Slovak Republic.

⁴² D. Kosar, *Perils of Judicial Self-Government in Transitional Societies* (2016), at 304-307.

⁴³ Art. 119(6) of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 185/2002. In practice, professional judges were in the majority in the judicial council as even other institutions appointed judges as members. See Bobek, Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15-7 *German Law Journal* (2014) 1257, at 1284.

⁴⁴ ECtHR, *Paluda v. Slovakia*, Appl. no. 33392/12, Judgment of 23 May 2017

⁴⁵ Kosar, *supra* note 42.

⁴⁶ Articles 178 and 186 of the Constitution of Poland of 2 April 1997 (Dz. U. No. 78, item 483).

⁴⁷ Filipek, 'New national council of the judiciary and its impact on the supreme court in the light of the principle of judicial independence', *Problems of Contemporary International, European and Comparative Law (PWPM)*, (2018) 177, at 178.

⁴⁸ Act of 8 December 2017 amending the Act of 12 May 2011 on the National Council of the Judiciary and certain other laws (Dz. U. 2018, item 3).

⁴⁹ Only 18 candidates ran for these positions, see Gajda-Roszczyńska and Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', *Hague Journal on the Rule of Law* (2020) 451, at 459.

While this reform was presented by the Government as an evolution towards a greater democratic representativeness of the judiciary, the change has been denounced as lessening judicial independence and endangering the rule of law. According to Pawel Filipek, *‘the new appointment mechanism introduces a domination of political powers over the judiciary and is inconsistent with the principle of the separation of powers (...). It violates not only the Polish constitutional standards but also the European rules.’*⁵⁰ The European Network on the Councils of the Judiciary suspended KRS membership in September 2018, considering its members no longer met the independence criteria.⁵¹

2. Disciplinary proceedings: theory versus reality

In 2003, Slovakia opted for a comprehensive list of disciplinary misconduct.⁵² On the contrary, Poland has no such detailed list. The law provides that judges are liable for professional misconduct including obvious and gross violations of the law and breach of the dignity of office.⁵³ Nevertheless, both countries have similar sanctions: reprimand, salary reduction, dismissal from function or office, and demotion to another court.⁵⁴

In Slovakia, the JCSR initiates disciplinary motions⁵⁵ together with the Minister for Justice, the Ombudsman, the President of the Supreme Court, presidents of district and regional courts, and since 2005, judicial boards.⁵⁶ The fair trial rights of the defendant judges are guaranteed by law.⁵⁷

In Poland, disciplinary proceedings have profoundly evolved since 2017.⁵⁸ At first instance, cases are heard by disciplinary courts at appellate courts or by the newly created

⁵⁰ European standards require that at least half of the national judicial council consists of judges who are elected by their peers, see Filipek, *supra* note 47, at 180.

⁵¹ European Network on the Councils of the Judiciary (‘ENCJ’), Position Paper on the membership of the KRS of Poland (2018), available at <https://www.ency.eu/node/495>.

⁵² Articles 116 and 117 of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 426/2003, see Kosar, *supra* note 42, at 308.

⁵³ Article 107(1) of Act of 27 July 2001 on the Organization of Common Courts.

⁵⁴ Slovakia: Kosar, *supra* note 42, at 309; Poland: Helsinki Foundation for Human Rights, *Disciplinary proceedings against judges and prosecutors* (2019), available at <https://www.hfhr.pl>. Additionally, Poland has a sanction of admonition that does not exist in Slovakia.

⁵⁵ Kosar, *supra* note 42, at 307.

⁵⁶ Article 120(2) of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 185/2002.

⁵⁷ See the Submission of Slovakia for the report of the United Nations Special Rapporteur on the Independence of Judges and Lawyers on the disciplinary, civil and criminal liability of judges (2021), available at <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ResponsesDCCLJ.aspx>.

⁵⁸ Act of 8 December 2017 on the Supreme Court (Dz. U. of 2018, item 5); Act of 8 December 2017 amending the Act on the National Council of the Judiciary and some other acts (Dz.U. of 2018, item 3); Act of 20 December 2019 amending the Act on the Organization of the Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland.

Disciplinary Chamber of the Supreme Court.⁵⁹ At second instance, all cases are adjudicated by this Disciplinary Chamber. The Disciplinary Chamber members are judges selected by the KRS.⁶⁰ They do not report directly to the President of the Supreme Court. The Disciplinary Chamber has jurisdiction over disciplinary proceedings involving Supreme Court judges. The Disciplinary Commissioner and the disciplinary officers carry out the investigation and decide upon the initiation of proceedings before the relevant disciplinary court. They are appointed by the Minister for Justice. Before the reform, the KRS was competent to appoint them. The Minister for Justice, as Prosecutor General, may also appoint the Disciplinary Commissioner for the purpose of conducting a specific case relating to a judge. He or she plays a predominant role in disciplinary proceedings, having the power to initiate proceedings, appeal decisions, and object to the discontinuation of proceedings.⁶¹

3. Critical analysis: the use of disciplinary proceedings for political purposes

The Slovakian disciplinary system complies with most international standards. Statistics even suggest that it has been a real success as the number of disciplinary motions increased significantly in 2003 and has remained high in the following years.⁶² However, the so-called ‘judicial council Euro-model’, as implemented in most Central and Eastern European countries, was severely criticized. As it did not fit the legal cultures and social conditions of post-communist societies, the system presented major shortcomings.⁶³ By bestowing overly extensive self-regulatory powers on judiciaries immediately after the fall of the totalitarian regime, the model produced isolated and largely unaccountable entities.⁶⁴ In Slovakia specifically, the judicial disciplinary mechanism was used by Štefan Harabin, former President of the Supreme Court (1998-2003 and 2009-2014) and former Minister for Justice (2006-

⁵⁹ Helsinki Foundation for Human Rights, *supra* note 54.

⁶⁰ At first instance, the Disciplinary Chamber is composed of two judges of the Disciplinary Chamber and one lay judge of the Supreme Court. At second instance, it is composed of three judges of the Disciplinary Chamber and two lay judges of the Supreme Court.

⁶¹ Justice Defense Committee (KOS), *A country that punishes. Pressure and repression of Polish judges and prosecutors* (2019), available at <http://citizensobservatory.pl>.

⁶² 225 motions lodged in 2003-2010, and 222 in 2010-2020, see Kosar, *supra* note 42, at 317. The author pointed out that the overall success rate of disciplinary motions was low (only 29%). It noted that only in 72% of the disciplinary motions, impugned judges did not face any sanction, *ibid.*, at 317-318.

⁶³ See Kosar, *supra* note 42; Moliterno, Curos, Berdisova, Mazur, ‘Independence Without Accountability: The Harmful Consequences of EU Policy Towards Central and Eastern European Entrants’, 42-2 *Fordham International Law Journal* (2018) 481; Preshova, Damjanovski, Nechev, ‘The Effectiveness of the “European Model” of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms’, 1 *Centre for the Law of EU External Relations Papers (CLEER)* (2017).

⁶⁴ See Moliterno, *ibid.*, at 534; Bobek, *supra* note 43, at 1281.

2009),⁶⁵ to intimidate judges who disagreed with him.⁶⁶ In the wake of these shortfalls, reforms were introduced to balance the independence of the judiciary with appropriately strong accountability. In 2014, for example, the position of the President of the JCSR became separated from that of the President of the Supreme Court, with the goal of diluting the previous concentration of the judicial management power in one individual.⁶⁷ Recently, however, following revelations in the media of serious unlawful misconduct on the part of several judges, legislative changes have been made.⁶⁸ In 2020, the CCJE expressed an adverse opinion to this reform that it considered contrary to judicial independence.⁶⁹

In Poland, many argue that the reforms spurred by the Justice and Law Party concerning judges' disciplinary regime endanger the rule of law, as the judicial authority is being put under the tutelage of the Government and its majority in Parliament.⁷⁰ Authors relate that politically motivated disciplinary and explanatory proceedings are currently pending against at least 81 judges. Some judges have even been criminally charged.⁷¹

The European Commission filed a complaint before the ECJ in October 2019 to declare this new disciplinary regime illegal under EU law.⁷² Firstly, the Commission argued that Poland had failed to guarantee the independence of the Disciplinary Chamber as it is composed of judges appointed by the newly politicized KRS.⁷³ Consequently, it highlighted that the interpretation of disciplinary offenses by the Disciplinary Chamber may cover the content of judicial decisions. Secondly, the Commission considered that fundamental procedural rights were not respected in the disciplinary proceedings. Lastly, it criticized the possibility of engaging disciplinary proceedings if a judge referred to the ECJ through Article 267 of the Treaty on the Functioning of the EU, resulting in a 'chilling effect' for judges. Indeed, since the adoption of 'the muzzle law' in 2019,⁷⁴ disciplinary proceedings may be initiated against judges applying ECJ rulings. In 2020, Judge Paweł Juszczyszyn was sanctioned after being the

⁶⁵ Submission of Slovakia, *supra* note 57.

⁶⁶ As Štefan Harabin was President of the Supreme Court, he also chaired the JCSR, which decides on the composition of the disciplinary panels, Kosar, *supra* note 42, at 319.

⁶⁷ Constitutional Law No. 161/2014, amending Article 141a of the Slovakian Constitution.

⁶⁸ Articles 22a and 22b of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 459/2019.

⁶⁹ See CCJE, Opinion of the CCJE Bureau following a request by the CCJE member in respect of Slovakia as regards the reform of the judiciary in Slovakia, CCJE-BU(2020)3, 9 December 2020.

⁷⁰ Helsinki Foundation for Human Rights, *supra* note 54; Justice Defense Committee, *supra* note 61; Gajda-Roszczyńska, *supra* note 49, at 451–459.

⁷¹ Gajda-Roszczyńska, *ibid.*, at 451. ; Pech, Wachowiec and Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', *Hague J Rule Law* 13, 1–43 (2021)

⁷² Case C-791/19, *Commission v. Poland*, 25 October 2019

⁷³ On that basis, the ECJ granted the request for interim relief emanating from the Commission and ordered Poland to suspend the activity of the Disciplinary Chamber, Case C-791/19, *Commission v. Poland* (ECLI:EU:C:2020:277).

⁷⁴ Act of 20 December 2019, *supra* note 58.

first judge to implement the ECJ verdict of 19 November 2019,⁷⁵ establishing the criteria for independent and impartial courts.

The cases of Poland and Slovakia show perfectly the interconnectedness between the disciplinary regime, the independence of the judiciary and the rule of law. Through the politicization of their judicial councils, a dangerous shift may be observed. In both countries, judicial discipline was used to set aside obtrusive judges. Unlike Poland, where politicization came from the outside, imposed by legislative reforms, instrumentalization in Slovakia came from within. The judges themselves misused the system for personal ends. In addition to removing unwanted peers, they took advantage of the independence of the judiciary to remain untouchable.

The judicial council system fails to completely protect judicial disciplinary procedures from political interference. In established democracies, such as Italy or France, these procedures, when instrumentalized, at worst destabilize the judges concerned. In countries such as Slovakia or Poland, where judicial independence is a more recent guarantee, they may have led to completely sidelining importunate judges. Federal systems without a judicial council, such as Germany, propose a different approach.⁷⁶

C. Systems without judicial councils: The German example

Germany being a federal state, its judiciary is composed of federal and state judges.⁷⁷ Therefore, the disciplinary system at federal level coexists with the regimes of each federated state. In Germany, judicial independence is protected by Article 97 of the Federal Constitution,⁷⁸ and in the constitutions of the states.⁷⁹ Noticeably, it is also one of the main obligations of judges.⁸⁰ Another distinctive feature of Germany is that judges and prosecutors,

⁷⁵ Case C-585/18, *A. K. v. Krajowa Rada Sądownictwa* (EU:C:2019:982)

⁷⁶ Germany has been criticized by the Council of Europe thereupon. See CoE, Parliamentary Assembly Res. 1685, 30 September 2009, § 5.4.1

⁷⁷ Articles 95 and 96 of the German Constitution of 8 May 1949, the so-called “Basic Law”.

⁷⁸ However, for historical reasons, there is still heavy executive and legislative influence in the appointment procedures of federal and state judges. See Sanders, von Danwitz, ‘Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a New Approach to Judicial Legitimacy’, 19-4 *German Law Journal* (2019) 770, at 794-798.

⁷⁹ The state constitutions copy *verbatim* or analogously repeat Article 97 of the Basic Law. Judges are appointed for life to a specific position. Once appointed, a judge cannot be removed against his or her will.

⁸⁰ Section 25 of Federal Judges Act of 19 April 1972.

although the latter being part of the judicial branch, constitute distinct bodies subject to different disciplinary courts.

1. The discipline of judges

According to the Federal Judges Act, which specifies the legal status of German judges, the misconduct of a federal judge is adjudicated by a special panel of the Federal Court of Justice, the Federal Service Court, exclusively composed of judges.⁸¹ They are all appointed by the presidium of the Federal Court of Justice.⁸² With regard to the procedure in judicial disciplinary cases, the Federal Discipline Act, which regulates the sanctioning of misconduct of civil servants, applies *mutatis mutandis*.⁸³ With respect to the discipline of state judges, the state legislature is free either to designate a specific disciplinary law or to declare the procedural law for civil servants to be applicable.⁸⁴ In Lower Saxony, for example, the Lower Saxony Judges Act applies. In Section 94, however, it refers to the Lower Saxony Disciplinary Act, valid for civil servants.

The rules applicable to state and federal judges are largely similar. Indeed, the provisions of the different state laws only differ in detail as the Federal Judges Act sets out a basic common framework. Notably, it provides that states shall establish special service courts,⁸⁵ which each include a presiding judge and an equal number of permanent associate judges (who may be judges or lawyers admitted to the state bar) and non-permanent associate judges (who practice in the court to which the defendant judge belongs).⁸⁶ Proceedings in the service courts may be brought before at least two instances, but the state legislation can also envisage an appeal before the Federal Service Court.⁸⁷

⁸¹ *Ibid.*, Sections 61 and 62. The Federal Service Court includes a presiding judge and two permanent associate judges, who are members of the Federal Court of Justice. It also encompasses two non-permanent associate judges who are members of the court to which the defendant judge is attached.

⁸² There is a “presidium” in every German court or tribunal. It consists of a group of judges, chosen by their peers exercising in the same court or tribunal, whose main function is to spread cases amongst the judges.

⁸³ Sections 39 and 63 of Federal Judges Act.

⁸⁴ Rechlupé, *Das Disziplinarverfahren gegen einen Richter – und seine Einleitung durch das Justizministerium* (2016), available at <https://www.rechtlupe.de>

⁸⁵ Sections 67, 77 and 78 of Federal Judges Act.

⁸⁶ All members are elected by the presidium of the court in which the service court is established, on the basis of proposals made by the judges of all the courts and tribunals of the state.

⁸⁷ Sections 62, 79, 81 and 82 of Federal Judges Act.

2. *Judicial supervision*

In Germany, in order to ensure that judges act dutifully, they are subject to disciplinary supervision, provided there is no interference with their core judicial functions.⁸⁸ However, the dividing line between what falls within “core judicial functions” and what does not⁸⁹ may be elusive.⁹⁰ In principle, supervision is exercised by the president of the court to which the judge belongs. It includes the power to censure an improper mode of executing an official duty and to urge appropriate attention to official duties. As such, it includes monitoring and correction. Under the supervisory procedure, which is administrative and written, only a reprimand may be imposed. If the president of the court deems that a more severe sanction should be handed down (fine, salary reduction, demotion or resignation),⁹¹ he or she refers the matter to the state service court, before which the procedure is jurisdictional and all fair trial guarantees apply. In addition, if a judge considers a supervision measure to be in conflict with his or her independence, he or she may refer to a state service court or the Federal Service Court,⁹² the latter being the legal jurisdiction for appeals against all supervisory sanctions.⁹³

3. *The discipline of prosecutors*

German public prosecutors are not granted independence.⁹⁴ They are appointed by the Federal or Regional Minister for Justice, who can also veto their actions.⁹⁵ Their disciplinary regime is set forth in Section 122 of the Federal Judges Act, which provides that service courts for judges, at federal and state level, render decisions in disciplinary proceedings against

⁸⁸ *Ibid.*, at Section 26.

⁸⁹ Supervision includes, for example, measures to ensure the orderly course of proceedings, like the timeliness of the setting of a court hearing or scheduling, see Seibert-Fohr, ‘Constitutional Guarantees of the Independence of the German Judiciary’, *SSRN* (2020), available at <http://ssrn.com/abstract=1706565>

⁹⁰ In a recent decision, the Federal Service Court rejected the appeal of a state judge who was reprimanded by the President of the state court for expressing a political opinion in his judgment. The judge refused to convict the defendants of the case in question (who discussed burning down accommodation for refugees on Facebook) for sedition, stating in his decision that “in this context, according to the court, the Chancellor's decision to let a previously unknown number of refugees into the country unchecked is much more likely to disturb the public peace than the defendants.” By rejecting the judge’s appeal, the Federal Service Court stated “the personal political opinion of a judge, which is irrelevant for the actual finding of the law, has no place in the grounds of a judgment.” See Dr. Markus Sehl, *Political opinion has no place in the judgment*, Legal Tribune Online (2020), available at <https://www.lto.de/>.

⁹¹ Sections 30 and 64 of Federal Judges Act.

⁹² *Ibid.*, at Sections 62 and 78.

⁹³ *Ibid.*, at Sections 26 and 79.

⁹⁴ Sections 146 and 147 of Courts Constitution Act of 12 September 1950.

⁹⁵ The ECJ holds that the German public prosecutor’s offices do not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European arrest warrant, as they are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, see Joined Cases C-508/18 and C-82/19 PPU (*Public Prosecutors’ Offices in Lübeck and Zwickau, Germany*) (ECLI:EU:C:2019:456), 27 May 2019.

prosecutors. In this case, the non-permanent associate judges of the service courts must be prosecutors. At the Federal Service Court, they are appointed by the Federal Minister for Justice. State laws regulate the appointment procedure of non-permanent associate judges of the state service courts. As with judges, the disciplinary acts valid for civil servants at federal and state level apply to prosecutors.

Germany presents a complex judicial accountability system characterized by the coexistence of federal and state disciplinary regimes. However, a common framework is set in federal laws, which ensures some uniformity.⁹⁶ Although most of the rules applicable to judges and prosecutors are identical to those of civil servants, their discipline remains a strictly judicial matter as the composition of the disciplinary bodies is always predominated by professional judges or prosecutors at federal level. At state level, despite some diversity, judges and prosecutors remain the majority. Grave encroachments upon judicial independence are isolated events in Germany. Disciplinary proceedings against judges are extremely rare. There is less interference by the other branches of government than by the judiciary itself, as judicial independence is most often raised as a defense against supervisory measures.⁹⁷

This study shows the diversity of existing disciplinary systems, which raises the question of the difficulty to build a unified system at European level. The Polish and Slovakian experiences demonstrate that importing a foreign system without taking into account local specificities can prove to be unsuitable. The same could be said for the German system, where judicial discipline is entirely dealt with by peers. To date, the model appears to work in Germany because of its history and culture: in addition to being protected by statute, judicial independence is respected by other state powers that avoid interfering in judicial activity. German citizens also show greater confidence in their institutions, especially the judiciary, which could explain why the disciplinary system is not called into question, despite the few proceedings initiated against judges and prosecutors.⁹⁸

⁹⁶ Similarly in the United States, which is also a federal state with a mixed judiciary, the Judicial Conduct and Disability Act was promulgated in 1980. It established a common procedure for complaints of misconduct against federal judges. In addition, in 2008, the Rules for Judicial Conduct and Judicial Disability Proceedings were adopted. They provide for mandatory and nationally uniform provisions governing misconduct proceedings. Despite these laws, the judicial disciplinary procedures of the various states remain diverse.

⁹⁷ Seibert-Fohr, *supra* note 89.

⁹⁸ Interview with Judge Müller (Germany), 9 June 2021.

3. The strengthening of common guarantees in the EU

While no system can be exported as such, none is immune to institutional and social evolutions, which would weaken the balance between judicial accountability and independence. This reinforces the need to develop common guarantees and good practices for judicial ethics and disciplinary proceedings at European level. Recommendations already exist but mostly focus on guarantees.⁹⁹ This paper rather proposes the implementation of institutional and procedural tools to combine independence with the appropriate sanction of judicial misconduct.

Such an approach appears all the more relevant, given that since June 1st 2021, the EPPO has been operative. The institution is built on two levels, one central, including the European Chief Prosecutor and 22 European Prosecutors, and one decentralized, composed of the European Delegated Prosecutors. The latter are located in the participating EU countries and remain active members of the prosecution service or judiciary of their states.¹⁰⁰ As a consequence of the discrepancies between the national disciplinary systems in the EU, distinct disciplinary proceedings will apply to them. This increases with even more acuity the necessity to develop stronger safeguards.¹⁰¹

A. Preventing judicial misconduct

Proposal No. 1 - Institutionalizing internal support and observation tools to offer opportunities for benevolent discussion on ethical difficulties between peers. For example, the French Judicial Council created a confidential hotline in 2016 which provides concrete assistance to magistrates facing personal ethical issues.¹⁰² Intervision, a kindly method of reciprocal observation and reflection on professional practices, takes place confidentially between a pair of magistrates, and away from any hierarchical link.¹⁰³ In the type of supervision

⁹⁹ For instance, rules on judicial liability, composition of disciplinary bodies, defendants' rights, legality principle, see *supra*, Part 1.

¹⁰⁰ Established by the EU Council Regulation 2017/1939 of 12 October 2017, the EPPO has jurisdiction to investigate, prosecute and bring to judgment crimes against the EU budget.

¹⁰¹ The same misconduct may therefore receive different legal classifications and give rise to dissimilar disciplinary sanctions. In addition, considering the imperfect configuration of the disciplinary regime of some States, the risk of political pressure on the EDP cannot be excluded, not to mention the situation of national judges who will then adjudicate on cases prosecuted and investigated by the EPPO.

¹⁰² This support service includes three individuals chosen by the Judicial Council amongst its former members, Conseil Supérieur de la Magistrature, Rapport d'activité 2019, La documentation française, at 71-72.

¹⁰³ Drawn up in the 1990s by the Dutch judiciary, it includes two phases. First, there is a period of observation of one member of the pair by his or her partner, and then a period of discussion about what has been observed. See

applied in Germany, judges with appropriate advanced training conduct meetings with fellow judges in which problems at work are discussed in groups.¹⁰⁴

B. Protecting judicial independence

Proposal No. 2 - Establishing an independent European regulator to oversee the respect of fundamental guarantees and encourage the circulation of good practices.¹⁰⁵ The example of Poland shows that the EU does not yet have the tools to rapidly take action against breaches of judicial independence. It is vital to improve the time-responsiveness of the Union,¹⁰⁶ hence the proposal for an independent regulator within the EU. To function properly, this body would need a separate budget and powers of supervision, inquiry and injunction. It would conduct inquiries in EU Member States with regard to the rules and guarantees of EU and international laws. These investigations would lead to evaluations that could include recommendations and injunctions in order to ensure the effectiveness of judicial independence and accountability in Europe. This body would act as a stepping stone for exchanges on good practices aiming at the progressive harmonization of judicial cultures and disciplinary regimes.

Proposal No. 3 - Implementing an appropriate individual remedy available to judges and prosecutors who consider their independence under threat. While in most democratic countries, the principle of the independence of the judiciary is constitutionally protected, only a few States provide for a specific remedy allowing members of the judiciary to point out situations in which their independence is endangered. Aside from Germany,¹⁰⁷ Article 14 of the 1985 Spanish Constitutional Law on the Judiciary permits judges who encounter such difficulties to refer to the Judicial Council, which can initiate investigations and refer to the State Prosecutor. While such a remedy is not infallible,¹⁰⁸ it does give judges a

Marshall, Etcheverry, 'L'intervision ou comment améliorer la pratique des magistrats', 2 *Les Cahiers de la Justice* (2010) 129, at 129-136; see also Charte d'intervision élaborée par l'Ecole Nationale de la Magistrature (2008).

¹⁰⁴ Legal Tribune Online, *Supervision in der Justiz: Erzähl' doch mal*, 20 May 2017, available at <https://www.lto.de/>

¹⁰⁵ This proposal is inspired by the ENCJ Sofia Declaration on Judicial Independence and Impartiality (2013) calling for 'an independent European rule of law mechanism, respecting the diversity of justice systems, which *inter alia* will assist in the protection of the independence of the judiciary and in ensuring the promotion of an effective justice system and growth for the benefit of all citizens.'

¹⁰⁶ Interview with Judge Mazur (Poland), 14 June 2021.

¹⁰⁷ See *supra*, at 15.

¹⁰⁸ Notably when the independence of the judicial council is called into question. In a letter sent to the European Commission, 2,500 Spanish judges denounced the recent project for reform of the Judicial Council which aims at lowering the parliamentary majority necessary to renew the composition of the latter, in order to reduce the

concrete way of protecting the exercise of their professional duties from undue influences. The integration of such a tool in national disciplinary regimes would usefully fill a void and protect magistrates who, due to their obligation of reserve and loyalty, are not permitted to express themselves as freely as any other citizen and thereby easily and publicly denounce interference.

Additionally, it would provide a solution against disguised sanctions, such as relocation or reposting regardless of the irremovability of members of the judiciary.¹⁰⁹ Such sanctions often come in the form of administrative measures imposed with the intention of destabilizing the magistrate concerned. These measures bypass fair trial guarantees, as administrative proceedings are less protective than judicial ones, and have a direct and detrimental impact on the judge or prosecutor's career path.¹¹⁰ While these sanctions may be contested¹¹¹ in some national legal systems, the Polish example demonstrates that they still threaten judicial independence in Europe.¹¹² The creation of an individual remedy before the independent European regulator could also be provided for national judges and prosecutors (including EPPO prosecutors) as an additional guarantee.

C. Sanctioning judicial misconduct adequately

Proposal No. 4 - Strengthening public monitoring tools for judicial misconduct.

Judicial disciplinary systems are mostly unknown by citizens, with a major impact on their perception of the judiciary. While 80% of European countries have implemented public complaint procedures against judicial misconduct¹¹³ in accordance with international standards,¹¹⁴ their efficiency may be called into question. For instance, in France, where such a mechanism has existed since 2010, less than 3% of complaints lead to actual disciplinary actions.¹¹⁵ While these mixed results may partially be explained by applicants confusing the complaint procedure with an appeal, they also show that there is room for improvement. Firstly, fair trial rules should apply to judicial complaints mechanisms. The complaints should also be

influence of professional judges and to increase its politicization. See Parliamentary Question E-001995/2021 to the European Parliament 14 April 2021.

¹⁰⁹ International Commission of Jurists, Practitioners' Guide No. 13: Judicial Accountability, June 2016, at 27.

¹¹⁰ Report of the Special Rapporteur, *supra* note 9, at 21.

¹¹¹ *Conseil d'État* (France), Arrêt no. 418061, 24 July 2019.

¹¹² In Poland, judicial human resources choices are made more and more according to political loyalty, Mazur, *supra* note 106.

¹¹³ ENCJ, Report 2019-2020, Independence, Accountability and Quality of the Judiciary, at 14.

¹¹⁴ UNODC, Global Judicial Integrity Network, Measure for the effective implementation of the Bangalore Principles of Judicial Conduct Implementation Measures, para. 15.2.

¹¹⁵ CSM Conference, *L'effectivité de la responsabilité...*, *supra* note 18 (Speech by J.-P. Sudre). For the United Kingdom, see Judicial Conduct Investigation Office, Annual Report 2019-2020, at 9.

treated within a reasonable time by an independent body, different from the disciplinary authority.¹¹⁶ Secondly, even though deleterious complaints should be rejected to protect judicial prerogatives, admissibility criteria should not be too restrictive, in order to ensure efficiency. Thus, the time-limit to file a complaint should be long enough, notably to allow people to seek legal advice. In addition, complaints against members of the judiciary still working on a plaintiff's case should be considered admissible in order to avoid loss of evidence.¹¹⁷ Thirdly, remedies allowing for reparation to victims, in addition to disciplinary proceedings, could be implemented. Finally, such complaints mechanisms should be more transparent, as international observers have underlined the lack of data thereupon.¹¹⁸ For this purpose, surveys on the satisfaction of users in court could be more widespread. Such procedures should also be assessed by international bodies like the European Commission for the Efficiency of Justice or the independent European regulator.

Proposal No. 5 - Improving transparency and communication in judicial disciplinary proceedings at European level. Transparency is a key tool to people's trust in justice. Public communication resources should therefore be mobilized to allow direct and concrete access to judicial disciplinary proceedings and decisions handed down in EU Member States. To this end, a European database on judicial discipline could be created.¹¹⁹

While the ECtHR¹²⁰ and ECJ¹²¹ have developed consistent case-law regarding disciplinary proceedings, information about their own disciplinary regime is relatively sparse. In both Courts, there is no record of initiated disciplinary proceedings. Their websites do not explicitly mention their disciplinary regime. Hence, in order to safeguard their image and to incentivize Member States to respect European case-law on disciplinary proceedings, these

¹¹⁶ International Commission of Jurists, *supra* note 108, at 39.

¹¹⁷ This is not the case in France, see Article 50-3 of Constitutional Law of 22 December 1958.

¹¹⁸ European Commission for the Efficiency of Justice (CEPEJ), Evaluation Report, 2020 Evaluation Cycle, at 91. It underlined that data on the outcome of such procedures are limited.

¹¹⁹ In the United States, where disciplinary proceedings and decisions are mostly private, the Reuters press agency created a national database recording cases of judicial misconduct. It noted 1,509 cases between 2008 and 2019, allowing a quantitative comparison of the disciplines of the various states, see Reuters Investigates, *The Teflon Robe, Exploring the misdeeds of judges across America* (2020), available at <https://www.reuters.com/investigates/special-report/usa-judges-data/>

¹²⁰ Judges' disciplinary obligations are defined in the European Convention, the Rules of the Court, and the 2008 Resolution on Judiciary Ethics. However, they remain broad and there is no sanction listed, except for dismissal from office. The proceedings are internal to the Court as only judges from the Court can initiate proceedings which are conducted by the Plenary Assembly.

¹²¹ There must be a unanimous judgment from the Court, composed of all the judges and advocates general. The sanctions can be dismissal from office, limitation of the right of pension or other advantages. In 2017, the Code of Conduct of the ECJ introduced a consultative committee to oversee its application.

Courts should improve communication, for instance by creating a specific section related to their disciplinary proceedings on their website.

Conclusion

In his opinion rendered in the Polish case pending before the ECJ, Advocate General Tanchev highlighted the importance of judicial discipline for the EU legal order: *‘a disciplinary regime (...) embodies a set of rules that permits judges to be held accountable for serious forms of misconduct and thus contributes to enhancing public confidence in the courts. Yet, there should be sufficient safeguards in place so as not to undermine judicial independence (...). Such a regime, therefore, is linked to the rule of law and, in turn, the functioning and the future of the Union judicial system predicated on the Court of Justice and the national courts.’*¹²² This quote illustrates the necessity to envision the future of disciplinary regimes (also) supra-nationally.

As demonstrated in this essay, despite the guarantees at international and regional levels, the disciplinary systems of the EU Member States are diverse, and do not always comply with these standards. This shows that there is still potential for improvement in order to secure the fragile equilibrium between the preservation of judicial independence and the sanction of judicial misconduct. In this regard, the ongoing construction of cooperation tools (like the EPPO) raises the question of our collective ability to find such a balance. Furthermore, the Polish case highlights that a strong and quick responsiveness at EU level is needed in order to counter potential shifts in disciplinary regimes.¹²³

Recognizing the existence of international safeguards, and the difficulty to impose a common model of judicial discipline, this essay modestly tries to propose innovative and practical solutions, which aim at ensuring the effective enforcement and respect of these guarantees. Nevertheless, it should be underlined that insofar as the EU currently faces a crossroads in its history, the concrete implementation of common safeguards and institutions mainly remains a matter of political will.

¹²² Case C-719/19, *European Commission v. Poland* (ECLI:EU:C:2021:366), at para. 6

¹²³ Mazur, *supra* note 106.