

Questionnaire among ENCJ Members to feed the 2025 Rule of Law report of the European Commission. Please fill out the relevant part of the questionnaire for your organisation.

The reference period is 2024

Council: High Council for the Judiciary (Consiglio Superiore della Magistratura)

Country: Italy

1. Were there any relevant and significant developments or are any planned in relation to the Council for the Judiciary changes i.e:

- Structure / composition of the Council
- Competences of the Council
- Way of nomination of the members
- Independence of the Council
- General functioning and efficiency of the Council

If so please explain.

Important developments regarding the Italian High Council for the Judiciary are part of the draft constitutional law No. 1917, presented to the Chamber of Deputies on June 13, 2024 (*“Rules on the jurisdictional system and the establishment of the High Disciplinary Court”*). The draft constitutional law is currently being examined by Parliament.

The draft constitutional law envisages a separation of careers of judges and prosecutors. This reform aims at establishing two separate Councils of Justice: one for judges and one for prosecutors. According to the judicial system, these Councils are responsible for recruitment, appointments, transfers, professional assessments, assignments of judicial functions to magistrates.

The draft reform removes the disciplinary jurisdiction from the powers of the Council of Justice. A reform of the electoral system of the two High Councils for the Judiciary is also foreseen.

The draft reform provides that:

- the High Council for Judges and the High Council for Prosecutors are chaired by the President of the Republic;
- the first President and the Prosecutor General of the Court of Cassation would be *ex officio* members, respectively;
- One third of the members would be eligible to be drawn by lot, from a list of full university professors in legal subjects and lawyers with at least fifteen years of practice. A list election would be created by the Parliament, in joint session, within six months of taking office and, two-thirds would be eligible to be drawn from judges and prosecutors, according to the number and procedures established by law.

Members appointed by drawing lots remain in office for 4 years and cannot participate in the subsequent drawing procedure.

Regarding the disciplinary liability of judges and public prosecutors, it should be noted that the draft constitutional law, currently being studied by the Parliament, envisages a High Disciplinary Court, which would have disciplinary jurisdiction over professional magistrates, judges, and prosecutors.

The draft foresees that the High Court would be composed of 15 members, who will hold office for 4 years and their appointment is not renewable. The members will be chosen as follows:

- d) 3 members are appointed by the President of the Republic from amid full university professors in legal subjects and lawyers with at least twenty years of practice;
- e) 3 members drawn by lot from a list of individuals having the same requirements as indicated above, selected by Parliament in joint session, within six months from the opening session;
- f) 6 judges and 3 prosecutors, drawn by lot from amid those belonging to the respective categories, with at least twenty years of practice of judicial functions and who perform or have performed judicial functions as magistrates at the Court of Cassation.

It is foreseen that appeals against first-instance judgments delivered by the High Court, also for merits, would only be brought before the High Court itself.

Therefore, the law foresees only one single appeal against the decisions of the High Court, introducing a single level of appeal, both for facts and points of law. Thus, this law will eliminate an appeal to the Court of Cassation, whereas it is presently possible against the decisions of the Disciplinary Division of the High Council for the Judiciary, according to Art. 24 Legislative Decree No. 109 of 2006.

The draft constitutional reform foresees that ordinary legislation determines disciplinary offenses and sanctions, indicates the composition of the panels, and establishes the disciplinary procedure and rules necessary for the functioning of the High Court. Moreover, it ensures that judges or prosecutors be represented in the panel.

Within the High Council for the Judiciary, themes of the reform have also been subject of a wide debate.

On 8 January 2025, the High Council for the Judiciary discussed two opinions regarding the constitutional bill No. 1917 “*Rules on the jurisdictional system and the establishment of the Disciplinary Court*”: one was against the reform and one in favour. The contrary opinion was approved by a majority vote, with one abstention.

It should be noted, however, that some members of the High Council for the Judiciary, despite having voted for the contrary opinion, nevertheless expressed a positive opinion on some

aspects of the constitutional reform: for example, there were those who favoured drawing lots of the members of the CSM, some that considered the establishment of the High Disciplinary Court useful, and others who considered the fear of the public prosecutor's subjection to the executive power through the separation of careers to be unfounded.

Both opinions examined four profiles:

1. Separation of careers of judges and prosecutors.
2. Provision of a High Council for the Judiciary for judges and a High Council for the Judiciary for prosecutors.
3. Composition and electoral system of the two High Councils.
4. Establishment of a High Disciplinary Court.

1. The separation of careers of judges and prosecutors

Regarding this point, in Italy, both opinions affirm that over the last 20 years, the number of magistrates interested in changing their functions has progressively decreased: transitions from the function of judge to the function of prosecutor and vice versa in the last 5 years have been around 0.31%. This data shows that almost all Italian magistrates prefer to continue to exercise the functions chosen at the beginning of the career instead of changing them.

Over the last 13 years, out of approximately 9,660 magistrates, less than 53 magistrates, on average, have asked to change functions, and, over the last 5 years, less than 28 magistrates have done the same. Therefore, in the Italian judiciary there is a tendency to maintain the choice of functions made at the beginning of the career, that is, they have a preference for stability.

However, this statistic is considered in a different way:

- In the opinion against the reform, this statistic is interpreted as meaning that an intervention in this matter is useless since the incidence of the phenomenon compared to the total number of serving magistrates is extremely low.
- In the opinion supporting the reform, however, it is observed that precisely because careers are already *de facto* separated, thus, it is appropriate to separate them *formally* as well, for reasons of coherence and clarity. In order to guarantee

the efficiency of the judicial system, it is essential to consider the factual situation and enhance the needs for stability that emerge from the judiciary itself.

Regarding the effects of the separation of careers:

- The opinion against the reform states that the separation of careers would have no effect on the right to a fair trial or on the equality of the parties in a trial, it states that the reform would entail the need to rewrite the entire primary legislation on access to the judiciary, the activities and competences of the School for the Judiciary, the assignment of legitimacy functions for outstanding merits, secondment, assignment of executive and semi-executive positions, professional evaluations, composition of the Constitutional Court.

Furthermore, the risk of self-interest inherent to the creation of an autonomous order for prosecutors is highlighted. A risk that, at the present moment, would be countered by the common culture of jurisdiction that unites judges and public prosecutors.

- The opinion in favor of the reform states, instead, that the separation of careers can improve the quality of jurisdiction since it allows public prosecutors and judges to develop specific professional skills with respect to the different functions actually performed. In accordance with Art. 111 of the Constitution, the reform aims to guarantee third party status and impartiality of judges, as well as equality of the parties in a trial.

What must also be noted is that the model of the separation of careers, in countries where it has already been applied (e.g. France and Germany), has proven to be effective in guaranteeing a full independence of judges with respect to prosecutors. Furthermore, the Council of Europe in Recommendation REC (2000)¹⁹ also highlighted how the distinction between the duties of a public prosecutor and a judge can help guarantee independence and neutrality in a trial. With respect to the need to rewrite the entire primary legislation, indicated as an issue in the opinion against the reform, there would be no difficulties with respect to other reforms already implemented. Therefore, this cannot be a good reason to criticize the separation of careers.

Regarding the fear of possible “risks of self-interest” of the public prosecutors and judges arising from the separation of careers, what is worth noting is that these fears are completely unfounded, since the reform provides, for both prosecutors and judges, that they are part of the same autonomous and

independent order: all magistrates – judges and prosecutors – must, in fact, respect the Constitution and the laws and limits represented by the prerogatives of the other Powers of the State.

2. Foreseeing a High Council for the judiciary for Judges and a High Council for the judiciary for Prosecutors.

- The opinion against the reform points out as critical issues the mechanisms for identifying members, the relationship between the competencies of the two bodies, the resolution of possible conflicts, the lack of a unified vision of the functioning and organization of the justice system, and the need to organize new administrative structures for the two High Councils.
- According to the favorable proposal, what must be noted is that the reform foresees the establishment of two separate High Councils: one for judges and one for prosecutors. This, in order to strengthen the guarantees of independence, impartiality and third party. The creation of two separate High Councils, closely linked to the separation of careers , is an additional safeguard of the principles of due process since it enhances the peculiarities of each function. It also protects the High Councils from external interference. Both High Councils will continue to be chaired by the President of the Republic, thus ensuring, through a tried-and-true mechanism - so-called “hetero-presidency” - guarantees of autonomy and independence both internally and externally. The critical issues raised in the majority opinion - that is, the mechanisms for identifying members, the relationship between the competencies of the two bodies, the resolution of possible conflicts, the lack of a unified vision of the functioning and organization of the justice system and the need to organize new administrative structures for the two High Council - will be addressed in the implementation phase. Therefore, these concerns do not justify the opposition to the establishment of two separate High Councils.

3. Composition and election of the two Councils

- The opinion against the reform focuses on the electoral system by lot in order to select members of the two bodies. For those supporting the opinion against the reform, judicial members would face issues regarding the representativeness of several judicial functions and cultural pluralism within the self-governing bodies. Non-judicial members would also face issues regarding the identification of candidates eligible to be drawn by lot. What can be observed is that the lot system

wouldn't ensure cultural pluralism. Preparation and aptitudes of single magistrates would not be enhanced.

Furthermore, what must be pointed out is how the lot system could affect the nature and the functions of the self-governing body of the judiciary.

- The opinion supporting the reform highlights the need to select members by lot since concrete issues recently affected the High Council for the Judiciary. These problems arose from the electoral competition and from the related mechanisms that “*haven't proven their effectiveness, undermining the reliability of self-government inside and outside the judiciary*” (see the Explanatory Report on the draft constitutional reform No. 1917). According to the polls, public confidence in the judiciary also decreased because of difficulties affecting the High Council for the Judiciary. The selection of the Council's members drawn by lot aims at overcoming cronyism dynamics within the judiciary and at enhancing the self-government of the judiciary as a common heritage of every single judge. Regarding the concern to fail to enhance aptitudes and preparation of magistrates, they must ensure a high level of competence to the public due to the very important functions they perform. Furthermore, what must be emphasized is that the current election is not based on the candidates' preparation, but on the membership in several groups (trends) and on different mechanisms within electoral systems.

4. Establishment of the High Disciplinary Court

- After an extensive analysis of several requests to reform the disciplinary system, the majority opinion - foreseeing the removal of disciplinary competences from the High Council and entrusting them to a High Court with *ad hoc* competences - underscores that the creation of a High Court for ordinary magistrates results in the establishment of a special judge. This High Court would be placed among the constitutional rank bodies. Furthermore, this opinion examines issues regarding the composition of the body, the terms of office, the incompatibilities, the appeal against its decisions, the law reservation relating to the establishment of disciplinary offences, the disciplinary proceedings and the functioning of the High Court.
- The opinion supporting the reform underlines that the High Disciplinary Court would be made up of fifteen judges: six non-judicial members and nine judicial members, in order to guarantee a high degree of specialization and a strong guarantee of impartiality. This model was already adopted in other European

countries (e.g. Belgium, Germany, England, Austria), where disciplinary proceedings against magistrates are entrusted to external bodies compared to Councils that have competencies to protect the independence and autonomy of the judiciary.

2. How would you describe the relations of the Council with the other State powers (or specific government body or state organisation) in the reference period? Where there any challenges coming from them to the independence of the judiciary/judges?

There is full and fruitful institutional cooperation with the other State powers, in particular with the Ministry of Justice and the Ministry of Foreign Affairs and International Cooperation.

3. If there were any challenges concerning the Council for the Judiciary (its functioning/independence etc) identified or recommendations made in the 2024 Rule of Law report, have these been addressed by the other State Powers or by the Council?