European Standards of Judicial Independence in Lithuania

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Abstract

The article examines the procedure for selection and appointment of judges in Lithuania in the light of the European standards of judicial independence. Both the Council of Europe and the European Union (EU) legal materials are relied on. The procedural role of different actors, the criteria for assessment of candidates, the question of judicial review of selection and appointment decisions as well as the problem of delays of judicial appointments are also examined. Even though the Lithuanian system for the selection and appointment of judges has been assessed favourably by European institutions, certain elements of the system are questionable. However, as long as these deficiencies are not systemic and do not raise issues of the rule of law in the sense of EU law, they would not negatively affect the operation of the EU law-based mutual trust instruments with respect to Lithuania. A suggestion is made that paying more attention to non-systemic deficiencies of judicial independence and the rule of law in EU member states could be beneficial for improving the protection of individual rights.

Keywords: judicial independence, selection of judges, appointment of judges, rule of law, mutual trust.

A Introduction

The article is devoted to the analysis of judicial independence in Lithuania. The article specifically examines the procedure for selection and appointment of judges in Lithuania in the light of the European standards of judicial independence. Both the Council of Europe and the European Union (EU) legal materials are relied on. The article examines the system foreseen under the Law on Courts and does not address issues of selection and appointment to the Constitutional Court or European and international courts. The research leading to this article was conducted within the framework of a broader Lithuanian-Polish research project aimed at examining the crisis of discourse in the EU, specifically in connection with

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the protection of values such as the rule of law.[1] The importance of the formation of a political, constitutional community in the EU for the protection of individual rights is one of the themes addressed by the project team. This article contributes to the examination of this theme by exploring the parallels and differences in the situation of EU member states regarding the issue of irregularities in the process of selection and appointment of judges. The situation of Lithuania is described and then analysed in the light of European standards and, where possible, compared and contrasted with the situation of Poland.

B General Assessment of Judicial Independence in Lithuania

The European Union Commission in its annual Rule of Law Reports, relying on a multitude of sources of information and its own analysis, presents a generally positive assessment of judicial independence in Lithuania. Where certain problematic issues are identified by international or supranational bodies, Lithuania takes steps to improve the situation. From an academic perspective, however, it is worth examining whether the reforms yield satisfactory results and whether there remain problematic issues that need to be further addressed.

In 2020 the Commission noted that reforms related to the appointment of judges, the structure of the Supreme Court and the judicial map had a positive impact on the efficiency and quality of the justice system. The perceived independence of the judiciary improved. The Constitutional Court clarified the scope of the functional immunity of judges. The case surrounding the dismissal of the chairperson of the Civil Division of the Supreme Court and a consequent lack of appointment to the post of president of that Court was submitted to the Constitutional Court, which ruled that the legal acts relating to the dismissal were in conflict with the Constitution and the Law on Courts.[2] Apparently, this ruling was seen as providing the required legal clarity and thus leading to improvement. In 2021 the Commission has observed that the Lithuanian justice system continues to present good results in terms of efficiency, and further measures to improve this are being implemented. It has, however, also mentioned that appointments to high judicial positions remain subject to delays. While appointments to the Constitutional Court have resumed, the president of the Supreme Court remains in

1 The research was conducted within the scope of the project "Constitutional Consciousness as a Remedy for the Crisis of Discourse and Democracy Deficit in the European Union", Lietuvos mokslo taryba. Narodowe Centrum Nauki. DAINA – Polish-Lithuanian Funding Initiative, contract no. S-LL-19-4 / LSS-220000-1395, 10 August 2018.

2 EU, Commission staff working document 2020 Rule of Law Report Country Chapter on the Rule of Law Situation in Lithuania, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report. The Rule of Law Situation in the European Union, SWD/2020/314 final, p. 1.

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function ad interim since September 2019.[3] This seems to imply that there remain unresolved issues regarding the situation addressed by the Constitutional Court in 2019. However, this does not seem to affect the generally favourable assessment of judicial independence in Lithuania. Relying on 2021 EU Justice Scoreboard, the Commission notes that the level of perceived judicial independence remains average to high among the general public and companies. In 2021, the level of perceived judicial independence among the general public has further improved for the third consecutive year. Among companies, the level of perceived judicial independence remains generally high, although it decreased in 2021, countering the steady increase registered in previous years. The Commission also notes that the competences of the Judicial Council have been strengthened and that its composition has been amended,[4] which is an improvement.

It is worth recalling that the Council of Europe Group of States against Corruption (GRECO) in 2014 had recommended (i) that the method for appointing the members of the Selection Commission of Candidates to Judicial Offices be reviewed in order to strengthen their independence and that the procedure for appealing against the Commission's decisions be consolidated and (ii) that the Judicial Council be given a more important role in the procedure for selecting judges.[5] In response to these recommendations, Lithuanian authorities reported that a working group (comprising representatives of the judiciary, representatives from the office of the president, the Parliament and the ministry of justice) prepared amendments to the Law on Courts that were ultimately adopted and that entered into force in 2020 introducing the changes described in what follows. At the time of the adoption of the latest report concerning Lithuania's compliance with the aforementioned recommendations, those amendments had not yet been adopted, and GRECO concluded that the recommendations had not yet been fully implemented. At the same time GRECO accepted that the proposed composition of the Selection Commission as well as the possibility to appeal a decision by a Selection Commission on procedural grounds were in line with the relevant Council of Europe recommendations but expressed doubt as to whether its concern that the president of the republic may choose to appoint a candidate who is not seen to be the most suitable without giving reasons would be fully addressed by the proposed amendments.[6]

3 EU, Commission staff working document 2021 Rule of Law Report Country Chapter on the Rule of Law Situation in Lithuania, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report. The Rule of Law Situation in the European Union. SWD/2021/717 final, p. 1.

4 *Ibid*., pp. 2-3.

5 Council of Europe, Group of States Against Corruption (GRECO), *Corruption prevention in respect of members of parliament, judges and prosecutors: Fourth Evaluation Round, Evaluation Report – Lithuania*, 12 December 2014, Greco Eval IV Rep (2014) 5E, § 116.

6 Council of Europe, Group of States Against Corruption (GRECO), *Corruption prevention in respect of members of parliament, judges and prosecutors: Fourth Evaluation Round, Second Compliance Report – Lithuania*, 21 June 2019, GrecoRC4(2019)18, § 41.

C Selection and Appointment of Judges in Lithuania

As the European Commission noted in its 2020 Rule of Law Report country chapter on Lithuania,

> The justice system is composed of courts of general jurisdiction (the Supreme Court, the Court of Appeal, regional courts and district courts) and courts of special jurisdiction (the Supreme Administrative Court and two regional administrative courts). District court judges are appointed by the President of the Republic, upon the advice of a Selection Commission, while Supreme Court judges are appointed by Parliament *(Seimas)*, on the nomination by the President of the Republic, following the advice of the Judicial Council. The Judicial Council, entirely composed of judges appointed by their peers, is the executive body of judicial self-governance, and ensures the independence of courts and judges.
>
> *In 2020, new legal provisions on appointments of the judiciary came into force*. The amendments to the Law on Courts strengthened the role of the Judicial Council in the Selection Commission of Candidates to Judicial Offices. This Selection Commission is now composed of three members who are judges selected by the Judicial Council, and four lay members selected by the President of the Republic. Previously, both judicial and lay members were selected by the President of the Republic. Furthermore, the criteria for the selection of candidates to judicial office are now approved by the Judicial Council. Nevertheless, the opinion of the Selection Commission remains non-binding. The amendments to the Law on Courts introduced the possibility for candidates to challenge the opinion of the Selection Commission before the Supreme Court. This is possible in case of a substantial procedural violation, where such violation could affect the objective assessment of candidates. In such cases, the Supreme Court is authorised to suspend the appointment of a judge to a court, and may instruct the selection panel to re-evaluate the applicant, or to revoke the findings. Although the judges elected by their peers continue to make up less than half of the members of the Selection Commission, and the possibility of review remains limited to procedural aspects, the increased role of the judiciary in the selection of new judges and in career advancement of judges is consistent with Council of Europe recommendations.[7]

In addition, the following information is relevant for the purposes of our article. The role of the Parliament is actually wider as under the Law on Courts the Parliament also approves candidates becoming judges of the Court of Appeal (Art. 72) as well as candidates becoming presidents and presidents of divisions of the Court of Appeal (Art. 77) prior to their appointment by the president of the republic. The Parliament also appoints the president of the Supreme Court and presidents of divisions of the Supreme Court upon the motion of the president of

7 EU, 2020 Rule of Law Report Country Chapter on the Rule of Law Situation in Lithuania, pp. 2-3.

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the republic who acts on the advice of the Judicial Council (Art. 79). As regards the appointment procedure, relying directly on Article 112 § 5 of the Constitution of the Republic of Lithuania,[8] the president seeks the advice of the Judicial Council prior to any judicial appointment. Under the Law on Courts,[9] having received an opinion of the Selection Commission on the most suitable candidates for particular positions of district judges, the president is obliged to submit, within 30 days, the nominated candidates to the Judicial Council seeking its advice (Art. 56 § 3). The president is not bound by the opinion of the Selection Commission (Art. 55^1 § 10). Importantly, the same procedure that is foreseen for the selection of district judges applies to the selection of judges seeking career (Arts. 69^1 § 3, 70 § 3, 71 § 3, 72 § 3, 73 § 3). As regards the limits of the role of the Selection Commission, it is also worth noting that the Law on Courts provides for a possibility to appoint former judges of the Constitutional Court of the Republic of Lithuania, the Court of Justice of the EU (CJEU) (including its General Court) and the European Court of Human Rights (ECtHR) as judges of Lithuanian courts (Art. 60), former judges of Lithuanian courts as judges of the same or lower level (Art. 61), and current judges as judges of lower level courts (Art. 64) without taking an examination and going through the selection procedure.

As regards the regular selection procedure conducted by the Selection Commission, its work is governed by the Law on Courts, procedural rules adopted by the president of the republic[10] and the criteria for the selection of candidates approved by the Judicial Council as required by the Law on Courts (Arts. 69^1 § 1, 70 § 1). The Law on Courts, *inter alia*, indicates the requirements that each category of judges have to meet and also the qualities of candidates to be assessed. These differ depending on the category of judicial positions applied for. In the case of district judges (Art. 55^1 § 7), they consist of professional knowledge and skills, ability to apply them in practice, experience of work as a judge or in another capacity as a law professional, other quantitative and qualitative indicators of professional legal activities, compliance with requirements of ethics in professional and other activities, academic and pedagogical activities and, optionally, an opinion of judges working in the court to which a candidate is applying. In the case of judges seeking career (69^1 §1) (i.e., applying for a position at a higher court), the requirements comprise quality of work as a judge, professional and personal qualities, organizational capacities and the category of further advantages. In the case of leadership positions at courts, the criteria are to be defined by the Judicial Council (Art. 70 § 1). Specific criteria are set out for law scholars, prosecutors and attorneys applying to higher courts (Art. 69^1 § 2). The criteria for the selection of candidates approved by the Judicial Council[11] consist of criteria assessing professional and

8 Constitution of the Republic of Lithuania (Lietuvos Respublikos Konstitucija), 25 October 1992.

9 Law on Courts of the Republic of Lithuania (Lietuvos Respublikos teismų įstatymas), 31 May 1994.

10 Description of the Procedure for Announcing and Organizing the Selection of Judges (Teisėjų atrankos skelbimo ir organizavimo tvarkos aprašas), approved by decree No. 1K-242 of 2 April 2020 of the President of the Republic of Lithuania; Description of the Rules of Procedure of the Commission for the Selection of Candidates to Judicial Office (Pretendentų į teisėjus atrankos komisijos darbo tvarkos aprašas), approved by decree No. 1K-243 of 2 April 2020 of the President of the Republic of Lithuania.

11 Resolutions No. 13P-160-(7.1.2) and No. 13P-161-(7.1.2) of the Judicial Council, 27 September 2019.

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personal competencies. A candidate evaluated according to all criteria can score up to 100 points. The candidate's personal competencies, namely personal style and cognitive characteristics as well as general abilities are assessed up to 50 points in the case of a candidate seeking the first appointment as a judge of a district court and up to 40 points in the case of a candidate seeking judicial career of a higher court. Interestingly, the Judicial Council adopted the criteria for assessment of candidates to district courts even though the Law on Courts does not mention either the need for such criteria or a role of the Judicial Council in defining them. It is also worth observing that the criteria defined by the Judicial Council do not reflect the general requirements for judges (set out in Arts. 51, 66, 67, 68 for judges of different courts) and that the criteria envisage checking a longer list of qualities than required by the Law on Courts (in particular, in the case of law scholars, prosecutors and attorneys applying to higher courts, their professional qualities are assessed[12] and in the case of applicants to district courts their personal qualities are assessed[13]). The requirement of applying the same selection procedure for candidates to district courts and candidates seeking judicial career is provided for in the Law on Courts (Art. 69[1] § 3), but it does not specify whether this requirement also covers the assessment criteria.

D Analysis

This section addresses specific issues of Lithuanian procedure for judicial appointments. Elements of this procedure are examined in the light of the Council of Europe and EU standards, including both the general rules contained in legal acts and specific findings of European bodies with regard to Lithuania and other states.

I Procedural Role of Different Actors

Selection of candidates to become judges or to be promoted in terms of judicial career is always performed by the Selection Commission, composed of three representatives of judges selected by the Judicial Council and four lay members selected by the president of the republic. The general rule enshrined in the Law on Courts is that judges are appointed by the president of the republic on the advice of the Selection Commission. However, in the appointment of judges to the highest judicial positions the Parliament and the Judicial Council have a statutory role too. The president of the republic appoints presidents of courts on the advice of the Judicial Council (Arts. 74, 75, 77, 79). The president of the Court of Appeal is appointed by the president of the republic on the advice of the Judicial Council and the approval of the Parliament (Art. 77 § 1). The president of the Supreme Court

12 Assessment criteria for persons seeking a career as judge and seeking to be transferred or appointed to another court (Teisėjų karjeros siekiančių, į kitą teismą perkeliamų ar skiriamų asmenų vertinimo kriterijai), approved by Resolution No. 13P-160-(7.1.2) of the Judicial Council, 27 September 2019, §§ 3.1, 3.2, 3.3.

13 Selection criteria for candidates to the judicial office at a district court (Pretendentų į apylinkės teismo teisėjus atrankos kriterijai), approved by Resolution No. 13P-161-(7.1.2) of the Judicial Council, 27 September 2019, §§ 3.5, 3.6.

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and presidents of divisions of the Supreme Court are appointed by the Parliament on the motion of the president of the republic who acts on the advice of the Judicial Council (Art. 79). However, the president and the deputy president of the Supreme Administrative Court are appointed by the president of the republic on the advice of the Judicial Council without the involvement of the Parliament (Art. 75).

The very fact of involvement of the executive (president of the republic, i.e., the head of state) and the legislative (Parliament) branches of power in the appointment of judges seems to be in line with existing European standards in this field. As the ECtHR recently summarized existing Council of Europe standards, there are a variety of systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case law, appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.[14] The ECtHR thus does not impose on the states parties to the European Convention on Human Rights (ECHR) any particular constitutional model,[15] and the matter of designing a system of judicial appointment is within the margin of appreciation of the states. The decisive role of an independent judicial council in the selection and appointment of judges is seen as the preferred model in many Council of Europe documents.[16] Dangers of the executive and the legislative branches are noted:

> Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation.[17]

At the same time, the dangers of reserving the process only for judges is also seen as deficient: "Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism."[18]

More problematic is the fact that the advice of the Selection Commission or the Judicial Council does not bind the president of the republic. The Council of Europe noted the existence of such systems where the appointing authority is not obliged to accept the recommendations of the independent authority in some member states but commented that it is desirable that its recommendations be followed in practice.[19] Although it seems to be the general practice that the

14 ECtHR, *Ástráðsson v. Iceland* [Grand Chamber], no. 26374/18, 1 December 2020, § 207.
15 ECtHR, *Kleyn v. Netherlands* [Grand Chamber], nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, § 193.
16 Council of Europe, European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, 18 March 2016, CDL-AD(2016)007rev, § 81.
17 *Ibid*., § 82.
18 *Ibid*.
19 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, § 47, Explanatory memorandum, § 52.

president follows the advice, there have been instances of delay to follow this advice and instances where new selection procedures were started without completing the appointment process of the selected candidates.[20] The problem of delays in the appointment of presidents of courts was noted by the EU Commission in its 2021 Rule of Law Report country chapter on Lithuania.[21] Although the situation has never been as acute as in the ECtHR case of *Xero Flor v. Poland*,[22] in which the president refused to swear in the judges elected by the previous term of Parliament, and where new judges were appointed to the Constitutional Court instead, Lithuanian law leaves room for similar deficient practices.

II Composition of the Judicial Council and the Selection Commission

The Venice Commission states that an appropriate method for guaranteeing the independence of the judiciary is that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Judicial councils should have a pluralistic composition, with a substantial part, if not the majority, of members being judges. That is the most effective way to ensure that decisions concerning the selection and career of judges are independent of the government and administration.[23] The body that has decisive influence on decisions on the appointment and career of judges must thus be independent of the government and administration, and its membership should, to a substantial extent, consist of judges. In the Lithuanian context, where the law envisages the role of the Selection Commission in selecting candidate judges as well as the role of the Judicial Council in providing advice to the president of the republic, both these bodies have to meet the requirement of independence. The Judicial Council, which is composed only of judges, evidently meets this criterion. However, the Judicial Council in Lithuania ex officio includes presidents of higher courts and, in practice, reflects the opinion of the leadership of the judiciary. It can be problematic as the Law on Courts entrusts the Judicial Council with defining criteria for the selection of court presidents where the Law itself does not indicate any qualities to be assessed (Art. 76 § 1). Essentially, the leadership of the judiciary is in control of whom to admit into its ranks. The latter criticism of the system may be nuanced by the existing data that despite wide powers the Judicial Council in Lithuania still obtains an acceptable assessment by national judges when asked how it affects their independence.[24]

The fact that the Selection Commission should also meet the criterion of independence was explicitly highlighted by GRECO,[25] where it ultimately[26] made an

20 Interview with a member of the Selection Commission, 2021.
21 2021 Rule of Law Report. The Rule of Law Situation in the European Union.
22 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.
23 Council of Europe, Venice Commission, Rule of Law Checklist, 2016, § 82.
24 P.J. Castillo Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe,' *Hague Journal on the Rule of Law*, Vol. 9, 2017, pp. 315-336, p. 333.
25 Council of Europe, Group of States Against Corruption (GRECO), *Corruption prevention in respect of members of parliament, judges and prosecutors: Fourth Evaluation Round, Evaluation Report – Lithuania*, 12 December 2014, Greco Eval IV Rep (2014) 5E, § 116.
26 Council of Europe, GRECO, *Fourth Evaluation Round, Second Compliance Report – Lithuania*, 21 June 2019, GrecoRC4(2019)18, § 41.

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assessment that the present Lithuanian system (at the time of GRECO reporting still at the stage of a draft law) of the composition of the Selection Commission meets the required standards even though GRECO would have preferred the majority rather than three out of seven members being judges. In this context, GRECO specifically noted the importance of the composition of the Judicial Council (it is fully composed of judges), apparently making the point that judge members should be elected by the community of judges. As in Lithuania these members are appointed by the Judicial Council composed only of judges, this requirement is met.

One could note a slight difference of approach of GRECO and the Venice Commission in respect of the composition of the body, which is decisive for selection and appointment of judges. Both GRECO and the Venice Commission rely on the Council of Europe Recommendation from 2010, which stipulates that

> not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.[27]

However, as previously shown, the Venice Commission explicitly notes the risk of involving only judges in the judicial selection and appointment process. According to the Venice Commission, as concerns the composition of the Judicial Council (and, by extension, of the Selection Commission), both politicization and corporatism must be avoided, and an appropriate balance should be found between judges and lay members.[28] The best safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists) on the relevant commission, whereas politicization can be avoided if Parliament is solely required to confirm appointments made by the judges.[29] Participation of lay members in the Selection Commission should thus be seen as an asset rather than as a shortcoming of its composition. The relevant recommendation of the Council of Europe makes it clear that while it is recommended that a substantial part of the members be drawn from the judiciary, states are free for the remaining seats to include, for instance, representatives of other legal professions, as well as the general public.[30] If the Venice Commission indeed sees such wider representation of legal profession and the general public beneficial, then having four seats on the Selection Commission for these representatives in addition to three seats for judges seems to be a well-balanced option despite an emphasis on the importance of the judges' participation by GRECO. It is worth recalling that the EU standards developed by the European Network of Councils for the Judiciary (ENCJ) do not require absolute majority of judges in a selection body either, because there is a perception in some states that

27 Council of Europe, Recommendation CM/Rec(2010)12, § 27.
28 Council of Europe, Venice Commission, Rule of Law Checklist, 2016, § 82.
29 Council of Europe, Venice Commission CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, § 22.
30 Council of Europe, Recommendation CM/Rec(2010)12, § 47, Explanatory memorandum, § 52.

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> a selection body on which the existing judiciary have a majority membership leaves itself open to the criticism that it is a self-serving body merely recruiting those prospective judges whom it favours and promoting favoured judges from within its own ranks.[31]

This, however, still leaves some room for questioning the system of appointing the lay members to the Selection Commission in Lithuania. Lay members do not have to meet any specific requirements apart from having an impeccable reputation, and there is no requirement or well-established practice that they should represent other legal professions in addition to the general public. As under the Law on Courts (Art. 55^1 § 1) the chairperson of the Selection Commission is appointed by the president of the republic, in practice this usually means that the chairperson is chosen from the members appointed as members of the Selection Commission by the president of the republic, i.e., lay members, which results in judge members not only being a minority but also having limited impact on the organization of the work of the Commission, including its discussions on how candidates meet the criteria for professional judicial competence. Similarly, it is not required by Lithuanian law to involve judicial associations in the process of selecting and appointing members of the Selection Commission, and there is no such practice, despite existing ENCJ standards that judicial associations should play a role in this.[32] The biggest practical problem related to lay members in Lithuania is that they do not necessarily possess either competences enabling them to evaluate candidates' legal professional qualities or other specific competences to evaluate candidates' general abilities. In practice, the Selection Commission has greatly benefited from the participation of professional psychologists and experts of the management of organizations in addition to lawyer experts, but the composition of the Commission is not always such that the non-lawyers possess the relevant specific expertise. At the same time, there have been instances when lay members asked inappropriate questions, notably, systematically asking female candidates questions regarding their procreation plans.[33] As the Selection Commission has not so far benefited from the help of experts in assessing the personal competencies (even though a system of expert advice on personal competencies was introduced by amending the Law on Courts in 2019,[34] its entry into force was postponed in 2020 until 2022[35]), the fact that the assessment of such qualities may have a decisive role in selecting the most appropriate candidates (e.g., under Art. 69^1 § 2 of the Law on Courts in the case of law PhDs and habilitated doctors as well as prosecutors and attorneys seeking to be appointed as judges of higher level courts, only personal competencies and general abilities shall be assessed) raises doubts

31 European Network of Councils for the Judiciary (ENCJ), Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary, 2012, Indicators of minimum standards in relation to the competent body to decide on the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary, indicator no. 2.

32 *Ibid*.

33 Interview with a member of the Selection Commission, 2021.

34 Law of the Republic of Lithuania no. XIII-2372 of 16 July 2019.

35 Law of the Republic of Lithuania no. XIV-114 of 22 December 2020.

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either of the suitability of the composition of the Selection Commission or of the criteria applied by it. The criteria are examined in the next subsection of this article in the context of a more general requirement to appoint judges based on merit.

III Appointment of Judges Based on Merit

The requirement that judges be appointed on the basis of merit has long been a well-established standard of the Council of Europe. In its 2010 recommendation the Council of Europe held that decisions concerning selection and career of judges should be based on objective pre-established criteria. Moreover, such decisions "should be based on merit, having regard to the qualification, skills and capacity required to adjudicate cases by applying the law while respecting human dignity".[36] The 'based on merit' criterion has been taken over by the ECtHR in *Ástráðsson v. Iceland*[37] stating that 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 of it in a state governed by the rule of law (§ 220). It also added that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be (§ 222).

As described previously, the Lithuanian law establishes criteria against which candidates applying for judicial positions are assessed. The system, however, suffers from a number of shortcomings or uncertainties.

First, as already mentioned, the criteria related to personal competencies are difficult to apply in practice as the system of seeking external expert advice on the matter is not yet in place and the rules on the composition of the Selection Commission do not ensure participation of persons possessing the relevant expertise. Also, the extent to which these criteria reveal the suitability of a candidate to perform judicial functions can be questioned. Even though the criterion of 'good character' has been included in standards developed by judges in the EU,[38] the criterion seems to be obscure and could benefit from being made more objective by requiring absence of serious mental pathologies and, from a positive perspective, a mindset reflecting internalization of rule of law values and professional judicial ethics. In this connection, it may be noted that an ECHR (Art. 21 § 1) requirement of a 'high moral character' for judges of the ECtHR, which is different because of its focus on judicial ethics but similar because of its reference to character, has been characterized as complex to interpret and having a potential to lead to non-homogeneous interpretation.[39] Even though our foregoing suggestions could also be considered as lacking precision, we consider it important to flag difficulties in applying the existing criteria and advocate the need to improve

36 Council of Europe, Recommendation CM/Rec(2010)12rec, § 44.

37 ECtHR, *Ástráðsson v. Iceland* [Grand Chamber].

38 ENCJ, Dublin Declaration, 2012, Indicators of minimum standards regarding the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary, indicator no. 7.

39 Council of Europe, Steering Committee for Human Rights (CDDH), Report on the process of selection and election of judges of the European Court of Human Rights, CDDH(2017)R88addI, 11 December 2017, § 102.

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them. Moreover, the criteria defined by the Judicial Council introduce the score system, which emphasizes the importance of the personal qualities criterion, thus diminishing the role of professional performance.

Second, the current legal framework does not make it clear which criteria are binding on whom at what stage of selection and appointment procedure. This lack of clarity is all the more acute because the qualities of candidates required to be assessed under the Law on Courts and criteria adopted by the Judicial Council as required by the Law on Courts are not identical. For example, whereas the Law on Courts explicitly (Art. 69^1 § 2) prescribes that in the case of law scholars, prosecutors and attorneys applying to higher courts only personal competencies and general abilities shall be evaluated, the criteria approved by the Judicial Council[40] in this situation requires assessment of both these and professional qualities. Although the opinion of judges working in the court the candidate is applying to is an optional criterion and also the one to be checked only in the case of applicants to district courts (Law on Courts, Art. 55^1 § 7), in practice it is also routinely applied in the case of other candidates. It is not clear whether the president of the republic who is certainly bound by the Law on Courts and criteria listed therein should also be bound by the Judicial Council criteria adopted as required by the Law on Courts but mainly for the purpose of being applied by the Selection Commission. It is worth recalling that the standards developed by the ENCJ require "a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process",[41] which means also at the stage of appointment by the president of the republic.

Third, the problem is exacerbated by the fact that the president of the republic is not required to provide reasons for his choice to either act on the recommendation of the Selection Commission or to disregard it. As mentioned previously, the problem of the president of the republic having a possibility to choose to appoint a candidate who is not seen to be the most suitable by the Selection Commission without giving reasons is a problem. The Description of the Rules of Procedure of the Commission for the Selection of Candidates to Judicial Office adopted by the president of the republic specifically foresees that the Selection Commission should provide the president not only with its opinion on who is the most suitable candidate but also with a full list of candidates, the ranking lists produced by individual members of the Selection Commission and the reasons for such ranking.[42] This, together with a rule that the president is not bound by the conclusions of the Selection Commission,[43] implies that the president has powers to select his own candidate, but there are no procedural rules the president should follow in making his own selection. In 2021 there was one case where the candidate

40 Assessment criteria for persons seeking to pursue a career as judge, to be transferred or appointed to another court, approved by Resolution No. 13P-160-(7.1.2) of the Judicial Council, 27 September 2019, § 3.

41 ENCJ, Dublin Declaration, 2012, Indicators of minimum standards regarding the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary, indicator no. 1.

42 Description of the Rules of Procedure of the Commission for the Selection of Candidates to Judicial Office, §§ 22, 23, 27.

43 *Ibid.*, § 31.

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who was not ranked first by the Selection Commission was nevertheless appointed by the president of the republic after receiving approval from the Judicial Council.[44] Approval by the Judicial Council seems to sufficiently ensure that the president does not disregard the judiciary. However, no regulation exists in regard to how the Judicial Council formulates its opinion in cases where its advice is sought and what criteria it applies. The only statutory requirements are that the Judicial Council is required to substantiate its resolutions in which it provides advice to the president of the republic regarding appointment (or non-appointment) to judicial positions (Law on Courts, Art. 121 § 7) and that open voting is to be used for adopting such resolutions (Art. 121 § 6). Whether the Judicial Council has to apply only the requirements for judges set out in the Law on Courts or whether it should also consider further considerations such as (but not necessarily limited to) the selection criteria it itself adopted for the Selection Commission to apply remains unclear. One could assume that a difference of opinion between the president of the republic, the Judicial Council and the Selection Commission in assessing the suitability of candidates could be caused by the difference in criteria they are (or consider themselves) bound by. If this is so, the system could still ensure respect for the 'based on merit' requirement. It does, however, in any case suffer from the lack of transparency because the criteria applied by different actors are not sufficiently defined and especially because the president of the republic is not obliged to provide reasons for his choices.

Fourth, the existing legal framework does not require the president of the republic to provide reasons for his decisions to appoint former judges or current judges to judicial positions where such a procedure is foreseen under the Law on Courts (Arts. 60, 61, 64) but where the Selection Commission is not involved even in those cases where there may be more than one judge applying to one position, thus producing a need to make selection. Moreover, even though the Law on Courts requires to decide on such priority candidates before instructing the Selection Commission to start a regular selection procedure, in practice there was at least one case where the selection procedure was conducted by the Selection Commission and the most suitable candidate selected but not adopted as a priority candidate (former judge of the Constitutional Court) was appointed by the president of the republic to that position.[45]

Fifth, the Description of the Procedure for Announcing and Organizing the Selection of Judges leaves a possibility for the office of the president of the republic to announce a new selection procedure if the applicants were previously found unsuitable for judicial positions by the president of the republic.[46] This provision is deficient as it leaves room for effectively disqualifying candidates who had applied for such positions much earlier and may have acquired the necessary competence (i.e., merit) in the meantime. The Selection Commission faces a similar problem as legal regulation governing its activities does not specify what time period should

44 Interview with a member of the Selection Commission, 2021.
45 Interview with a member of the Selection Commission, 2021.
46 Description of the Procedure for Announcing and Organizing the Selection of Judges, § 14.3.

be assessed and leaves it unclear whether unfavourable remarks regarding distant past should be taken into account.

Finally, some elements of the criteria applied for evaluation of candidates by the Selection Commission need to be considered. Notably, the assessment of judges' performance is essentially limited to quantitative criteria (number of cases, speed of examination) and does not reveal the complexity of cases. In the case of legal scholars, the use of quantitative criteria (number of publications) similarly does not fully disclose the quality of research conducted by the applicant. Where judges and legal scholars end up ranked in the same list, their respective strengths are not necessarily adequately reflected, especially because whereas professional judicial performance is assessed by a separate commission assisting the Selection Commission, there is no such assistant commission evaluating the academic performance of candidates. The category of 'further advantages' is undefined and in practice raises the question of which qualities make a person suitable for a judicial position, leaving candidates unsure how to answer questions about their expressive nature, hobbies or family planning.[47]

IV Judicial Review of Selection and Appointment Decisions

As shown previously, GRECO is of the opinion that substantive and procedural review is preferred to merely procedural review of decisions selecting the most appropriate candidates to be appointed as judges, but a review limited to procedural issues is nevertheless in line with the Council of Europe standards.[48] The ECtHR is examining a case, *Sobczyńska and Others v. Poland*, in which the absence of such review forms the subject matter of the complaint. The case specifically concerns the Polish president's refusal to appoint the applicants to vacant judicial posts in various courts in Poland. The applicants argue that they met the legal conditions in force at the relevant time and complain about the administrative courts' and the Constitutional Court's refusal to examine their appeals, declining jurisdiction in that sphere. The administrative courts argued that they had no jurisdiction to consider decisions taken by the president of the republic in the exercise of his discretionary powers as regards appointments of judges and prosecutors. The applicants to the ECtHR relied on Article 6 (right to a fair trial/right of access to a tribunal), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the ECHR.[49] As the case has not been decided yet, the position of the ECtHR remains unknown, but it can be observed even at this stage that absence of any judicial review of the refusal to appoint candidates who have successfully gone through the procedure of selection potentially raises issues of the right of access to a legal remedy even though the scope of this right in this context is yet to be defined. Whether the right to a remedy should be available at both the stage of selection and the stage of appointment to a judicial position or whether a remedy at one of these stages would suffice is not yet clear either.

47 Interview with a member of the Selection Commission, 2021.

48 Council of Europe, Group of States Against Corruption (GRECO), *Corruption prevention in respect of members of parliament, judges and prosecutors: Fourth Evaluation Round, Evaluation Report – Lithuania*, 12 December 2014, Greco Eval IV Rep (2014) 5E, § 116.

49 ECtHR, Press release issued by the Registrar of the Court, ECHR 156 (2020), 02 June 2020.

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The ECtHR case law shows that judges enjoy fair trial guarantees in the context of their removal. In the case of *Baka v. Hungary*,[50] where the mandate of the applicant as the president of the Supreme Court was terminated because he had expressed his views in his official capacity on various legislative reforms affecting the judiciary, the ECtHR held that Article 6 and its guarantee of the right of access to court was applicable. The ECtHR did so by explicitly extending the *Vilho Eskelinen* criteria to disputes concerning the career of judges. Although the Court had stated in its judgment in *Vilho Eskelinen and Others v. Finland*[51] that its reasoning was limited to the situation of civil servants, it held in *Baka* that the judiciary forms part of typical public service even if it is not part of the ordinary civil service.[52]

The principle is now that there will be a presumption that Article 6 applies, and it will be for the respondent government to demonstrate, firstly, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified on "objective grounds in the State's interest".[53] The two conditions of the *Vilho Eskelinen* test must be fulfilled in order for the protection of Article 6 § 1 to be legitimately excluded.[54] Moreover, the ECtHR stressed in *Baka* that any exclusion of the application of Article 6 has to be compatible with the rule of law. For this to be the case, it must be based on an instrument of general application and not a provision directed at a specific individual.[55] Jelić and Kapetanakis regard this requirement of compliance of national measures restricting access to court with the rule of law itself as a third condition in addition to the two well-established *Vilho Eskelinen* criteria.[56] Arguably, this new condition is not a separate criterion as its application has been limited to the interpretation of the first criterion, but it has the potential to become a separate and overarching criterion if in the future other dimensions of the rule of law, in addition to its requirement of general application of an instrument, are fleshed out.

Jelić and Kapetanakis also hold that the ECtHR in *Baka v. Hungary* affirmed a 'presumption of applicability' of Article 6 ECHR in cases concerning the career of judges[57] without limiting it to the context of removal of judges. If they are right in identifying the scope of cases in which fair trial guarantees are provided to judges under the ECHR, there is still a separate question of whether the same guarantees are provided for persons seeking their first appointment as a judge. The answer to this question seems to be in favour of the right to review of the first appointment. Indeed, the *Vilho Eskelinen* test has been applied to many types of disputes

50 ECtHR, *Baka v. Hungary* [Grand Chamber], no. 20261/12, 23 June 2016.
51 ECtHR, *Vilho Eskelinen and Others v. Finland* [Grand Chamber], no. 63235/00, 19 April 2007.
52 ECtHR, *Baka v. Hungary* [Grand Chamber], § 104.
53 ECtHR, *Vilho Eskelinen and Others v. Finland* [Grand Chamber], § 62.
54 ECtHR, *Baka v. Hungary* [Grand Chamber], § 118, *see also* ECtHR, ECtHR, *Kövesi v. Romania*, no. 3594/19, 5 May 2020, § 124.
55 ECtHR, *Baka v. Hungary* [Grand Chamber], § 117.
56 I. Jelić and D. Kapetanakis, 'European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR', *Hague Journal on the Rule of Law*, Vol. 13, 2021, pp. 45-77, p. 53.
57 *Ibid*.

concerning civil servants, including those relating to recruitment or appointment.[58] An analogy between judiciary and civil service is now established. By analogy with cases concerning ordinary civil servants, Article 6 should apply not only to cases of dismissal from the service but also to cases of recruitment or appointment. This approach is corroborated by the ECtHR case law. Notably, the ECtHR concluded that Article 6 was applicable in a case concerning judicial review of the appointment of a court president.[59] While recognizing that Article 6 did not guarantee the right to be promoted or to occupy a post in the civil service, the Court nevertheless observed that the right to a legal and fair recruitment or promotion procedure or to equal access to employment and to the civil service could arguably be regarded as rights recognized under domestic law, insofar as the domestic courts had recognized their existence and had examined the grounds submitted by the persons concerned in this regard.[60] It would, nevertheless, also be true that judges enjoy the guarantees inherent in carrying out judicial duties and can therefore be expected to benefit from more elaborate standards of protection than candidates to be appointed as judges.[61] In particular, this could then lead to the finding that an obligatory judicial review of the nomination process for judicial positions is not required under all circumstances.[62]

As regards the hitherto unclear question, in the ECtHR context, of whether the right to a remedy should be available at both the stage of selection and the stage of appointment to a judicial position, the case law of the CJEU highlights important elements to be considered in this respect.

Importantly, the CJEU considers that the absence of legal remedies in the process of appointments to a national supreme court could be justified.[63] However, in certain circumstances the absence of judicial review in the process of nomination to judicial positions cannot be justified. The absence of judicial review would not be justified if in the national context it could give rise to "systemic doubts in the minds of individuals" as to the independence of the judges appointed at the end of that process.[64] Such doubts could, for example, arise where previously existing judicial remedies are suddenly eliminated and the body nominating candidates to judicial positions whose decisions can no longer be reviewed has already been subject to doubts as to its independence (as in the example of the National Judicial Council, Krajowa Rada Sądownictwa (KRS), in Poland).[65] It seems that the independence of the nominating body is the most important element here. Indeed, the CJEU states that:

58 ECtHR, *Juričić v. Croatia*, no. 58222/09, 26 July 2011, §§ 54-58.
59 ECtHR, *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, 15 September 2015, §§ 84-85.
60 ECtHR, *Majski v. Croatia* (no. 2), no. 16924/08 19 July 2011, § 50; ECtHR, *Fiume v. Italy*, no. 20774/05, 30 June 2009, § 35.
61 CJEU, *European Commission v. Republic of Poland* [Grand Chamber], C-192/18, 5 November 2019, § 117.
62 P. Bogdanowicz and M. Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v Republic of Poland,' *European Constitutional Law Review*, Vol. 16, No. 2, 2020, pp. 306-327, p. 325.
63 CJEU, *A.B. and Others v. Krajowa Rada Sądownictwa* [Grand Chamber], C-824/18, 2 March 2021.
64 *Ibid*., § 129.
65 *Ibid*.; Jelić and Kapetanakis, 2021, p. 51.

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> If the referring court were to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates, albeit restricted to what was noted in paragraph 128 [i.e., covering, at the very least, an examination of whether there was no ultra vires or improper exercise of authority, error of law or manifest error of assessment] of this judgment, would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent legitimate doubts from arising, in the minds of individuals, as to the independence of the judges appointed at the end of that process (§ 136).

Some authors, however, highlight the importance of "you cannot change the rules in the middle of the game", alluding to the fact that the CJEU negatively assessed the elimination of previously existing judicial remedies.[66] The CJEU explicitly declared that legislative amendments were

> such as to suggest that, in this case, the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review of the appointments made on the basis of those resolutions of the KRS and likewise, moreover, of all other appointments made in the Sąd Najwyższy (Supreme Court) since the establishment of the KRS in its new composition.[67]

This finding could indeed be seen as expressing the expectation of legal certainty, predictability of the application of the law, a possibility of regulating one's behaviour on the basis of the law and requiring protection against fluctuation of the law of those to whom that law applies. This could be expressed as "you cannot change the rules in the middle of the game". We do, however, consider that the ulterior objectives of the law, i.e., its substance rather than form, were a problem. It was not just the suddenness of the change of law that was problematic, but also, and mainly, the intention of protecting judicial nomination decisions to be made by a body controlled by the politicians then in power. Although the new legislative amendments introduced general rules, their aim was to bar the paths to judicial career of those candidates who lack the support of the legislature. The politically disloyal candidates seemed to be the real addressee of the law as their prospects of becoming judges were effectively destroyed by excluding their right of access to court. The case is reminiscent of Hungarian amendments in the ECtHR *Baka* case, where a legislative change of court system included a non-advertised aim of removing an inconvenient president of the Supreme Court by foreseeing the termination of his mandate in a legislative act and thus eliminating his right of access to court to challenge such removal. Such elimination of access to court was

66 Ł. Bucki, M. Dębska, and M. Gajdus, 'You Cannot Change the Rules in the Middle of the Game – An Unconventional Chapter in the Rule of Law Saga (Case C-824/18 A.B. and others v the KRS),' *European Law Blog*, 22 April 2021, https://europeanlawblog.eu/2021/04/22/you-cannot-change-the-rules-in-the-middle-of-the-game-an-unconventional-chapter-in-the-rule-of-law-saga-case-c-824-18-a-b-and-others-v-the-krs/.

67 CJEU, C-824/18, 2 March 2021, § 138.

held to be not in line with the rule of law.[68] The CJEU in its case law against Poland has also been explicit in declaring that legislative measures "reinforce the impression that in fact their aim might be to exclude a pre-determined group of judges of the Sąd Najwyższy (Supreme Court)"[69] and the same problem could be discerned in the case at issue. The newly introduced Polish system eliminated access to court for all but ultimately harmed the politically independent. This tilted the balance of power, weakened the judiciary compared with the legislature, interfered with the independence of the judiciary and in that sense breached the rule of law. Essentially, the change of domestic law in this case was a problem because it threatened judicial independence and not because it modified the existing rules and harmed legal certainty. The criterion derived from the examination of the CJEU case law is thus how the absence of judicial review affects the independence of the nominating body and, ultimately, of judges appointed following the nomination.

The Lithuanian system currently does not provide any possibilities to appeal against the president's decisions related to judicial appointments or non-appointments. Even though Lithuanian courts admit for examination cases regarding dismissal by the president of the republic from judicial positions,[70] they do not admit cases regarding non-appointment to judicial positions. Notably, in a case in which the president of the republic refused to appoint as a judge a former judge who sought reappointment as a judge of district after the expiry of his term in a political position (as a minister of the interior), even though the Law on Courts envisages a possibility of such reappointment, Lithuanian courts refused to admit this case for examination.[71] The only remaining avenue, albeit one that has not yet been tested in practice, is to file an individual constitutional complaint to the Constitutional Court alleging incompatibility of legal acts governing the judicial appointment procedure with the Constitution. In the absence of any case law, the existence of this legal avenue does not change the foregoing finding that under Lithuanian law there is no judicial review of the acts of the president of the republic in this area. This is also in line with the legal doctrine prevailing in Lithuania that the president of the republic in the matter of the formation of judicial corps exercises a sovereign power protected by the Constitution[72] and has a broad constitutional mandate in this field.[73] The absence of judicial review of such acts of the president of the Republic, in itself, is not against EU law, but it heightens the importance of other elements of the procedure that could either provide judicial review at another stage (i.e., at the stage of involvement of other actors) or offer

68 ECtHR, *Baka v. Hungary* [Grand Chamber] §§ 115, 117.

69 CJEU, *European Commission v. Republic of Poland* [Grand Chamber], C-619/18, 24 June 2019, § 85.

70 *See, e.g.*, Court of Appeal of the Republic of Lithuania, ruling of 28 November 2012, case no. 2A-2154-2012.

71 Vilnius Region Administrative Court, 10 March 2021, case no. eI2-2410-1063/2021; Court of Appeal of the Republic of Lithuania, ruling of 1 July 2021, case no. e2-564-302/2021.

72 Vilnius Region Administrative Court, 10 March 2021, case no. eI2-2410-1063/2021.

73 L. Butkevičius, E. Kūris, and H. Šinkūnas, 'Teisėjų asmeninio nepriklausomumo garantijos (Safeguards of Personal Independence of Judges)', *in* E. Kūris (Ed.), *Lietuvos teisinės institucijos: Vilniaus universiteto vadovėlis (Legal Institutions of Lithuania: Vilnius University Textbook)*, Vilnius, Registrų centras, 2011, p. 161.

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other safeguards against arbitrariness (such as providing reasons and ensuring transparency).

An important criterion in assessing the need for judicial review is the decisive importance of a decision by a nominating body for the appointment of a judge. Where domestic constitutional arrangements are such that the act by which the nominating body (such as the National Judicial Council) puts forward a candidate for appointment to a position of judge at the Supreme Court is an essential condition for such a candidate to be appointed to such a position by the president of the republic, the role of the nominating body in that appointment process is decisive.[74] Here the independence of such a body may become relevant when ascertaining whether the judges it selects will be capable of meeting the requirements of independence and impartiality arising from EU law.[75] It is for the purpose of dispelling any possible doubts as to its independence that judicial review may become necessary. It follows that if the nominating body does not play a decisive role in the appointment of judges, judicial review of its decisions is not necessary. This view is also supported by some authors. Bogdanowicz and Taborowski[76] consider that where the acts of the National Judicial Council of Poland are non-binding (such as an opinion given to the president of the republic on the extension of the term of judicial activity of a given Supreme Court judge), judicial review of such acts would be 'somewhat irrelevant', which is probably why the Commission did not question the inability to challenge at court opinions of the National Judicial Council, whereas it found a violation of EU law because of the discretion of the president of the republic to extend the period of judicial activity of judges in the situation examined in the case at issue (i.e., beyond the newly fixed retirement age).[77] In assessing the Lithuanian system this would seem to suggest that the existing possibility of judicial review on procedural grounds of the non-binding decisions of the Selection Commission is irrelevant, at least in light of the requirements of judicial independence, because the Selection Commission does not play a decisive role in the process of appointment of judges. The existing dissonance between the non-binding status of the findings of the Selection Commission and the right of the candidate to appeal to the court against these findings in the case of substantial procedural violations thus needs to be given further thought by lawmakers in Lithuania. In doing so it is also necessary to have regard to the EU standard developed by the ENCJ that

> [t]he body in charge of judicial selection and appointment should guarantee the effectiveness of the independent complaints or challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process

and the body with jurisdiction to decide on the complaint or challenge by any unsuccessful candidate or interested person (whether or not that body is a court of

74 CJEU, C-824/18, 2 March 2021, § 126.
75 *Ibid*., § 127.
76 Bogdanowicz and Taborowski, 2020, p. 324.
77 CJEU, C-619/18, 24 June 2019, especially §§ 116-124.

law) should be able to examine the appointments process applied and to determine whether there was any unfairness shown to particular candidates, for example by having access to the files or asking for a report.[78]

Another aspect noted by the CJEU is of importance here. The judicial review of the decisions by a nominating body is particularly important where the appointment decisions by the President of the Republic of Poland are not amenable to judicial review.[79] The fact that the president of the republic has a discretionary and a non-reviewable power to appoint nominated judges is, in the absence of such review, also problematic. The CJEU has held that the decision of the president is

> discretionary inasmuch as its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons need not be stated. In addition, any such decision cannot be challenged in court proceedings[80]

and the CJEU found it to be in breach of EU law because it was such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them.[81]

This seems to send a signal that where judicial appointments are made by political bodies they must nevertheless be reasoned and governed by objective and verifiable criteria. The system, such as the Lithuanian one, where the president may choose to appoint a candidate who is not seen to be the most suitable without giving reasons then fails to conform not only with Council of Europe standards as applied by GRECO[82] but also with the EU law. By extension it should then also be assumed that non-reviewable and non-reasoned appointment or failure to appoint persons to certain judicial positions by the Parliament, such as the Lithuanian system in which the Parliament appoints the president of the Supreme Court and is required to approve the candidate to become the president of the Court of Appeal, is equally unacceptable. An important aspect to consider would also be the powers of the appointing body to depart from the decision of the nominating body. As the Council of Europe standards are such that the practice of the appointing body respecting the nominating body's decision is expected,[83] departure from such practice, at least on a systematic basis, could be cause for concern even in those states (such as Lithuania) where acts by the Selection Commission do not legally bind the president of the republic.

78 ENCJ, Dublin Declaration, 2012, Indicators of minimum standards in relation to the competent body to decide on the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary, indicator no. 10.
79 CJEU, C-824/18, 2 March 2021, § 128.
80 CJEU, C-619/18, 24 June 2019, § 114.
81 *Ibid*., § 117.
82 Council of Europe, Group of States Against Corruption (GRECO), *Corruption prevention in respect of members of parliament, judges and prosecutors: Fourth Evaluation Round, Evaluation Report – Lithuania*, 12 December 2014, Greco Eval IV Rep (2014) 5E, § 116.
83 Council of Europe, Recommendation CM/Rec(2010)12, § 47, Explanatory memorandum, § 52.

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In the same context, a possibility of the president of the republic to delay judicial appointments should be examined, as in practice delay is a way by which a certain person is not appointed (e.g., selected by the Selection Commission) to a certain judicial position.

V Delays as Irregularity of Judicial Appointments

The Commission has observed in its 2021 Rule of Law of Report country chapter on Lithuania that appointments to high judicial positions remain subject to delays.[84] Slight delays in the selection procedures were caused by the Covid-19 pandemic. The number of selection procedures for the judiciary was lower in 2020 than in 2019, but Selection Commission meetings have resumed according to the usual schedule, and also a larger number of selection procedures were planned in 2021 in order to compensate the decrease registered in 2020 and ensure the assignment to vacant positions.[85] However, further delays in the appointment of the Supreme Court are expected, as according to the Law on Courts, the procedure for the appointment of the president of the Supreme Court can take place only once the full composition of the Supreme Court is ensured, and one judicial position in the Supreme Court remains vacant owing to delays in the selection procedure.[86]

Moreover, in practice delays in appointment occur after the Selection Commission has submitted its opinion to the president of the republic. Lithuanian law sets a time limit within which the president must proceed with nominating a candidate and seeking the advice of the Judicial Council (Law on Courts, Art. 56 § 3) but does not specify when the ultimate appointment decision has to be adopted, and there have been instances when appointment procedures remained incomplete. The absence of time limits set in law is not necessarily problematic. The CJEU has neither accepted nor rejected the argument submitted by the Commission in a case concerning Poland that

> no time limit has been set within which the President of the Republic must consult the National Council of the Judiciary, which has the potential effect of increasing the period during which the President of the Republic effectively has discretion over the retaining of the judge concerned in his or her post.[87]

The argument of the government that

> even though that Law does not provide for any time limit in this connection, the President of the Republic will request the opinion of the National Council of the Judiciary as soon as he has received an application made by a judge of the Sąd Najwyższy (Supreme Court) for an extension to the period during which he or she may carry out his or her duties[88]

84 EU, 2021 Rule of Law Report Country Chapter on the Rule of Law Situation in Lithuania, p. 1.
85 *Ibid*., p. 5.
86 *Ibid*., p. 4.
87 CJEU, C-619/18, 24 June 2019, § 101.
88 *Ibid*., § 104.

has not been shown to be invalid. However, the practice where the President of the Republic of Lithuania exercises his prerogatives in a manner that makes the procedure unpredictable in terms of time is highly questionable. As regards the time it can take, there was a case where two years passed since the application was filed by a candidate to become deputy president of the Supreme Administrative Court until her ultimate appointment. In the process the applicant was not informed for longer than a year of any procedural steps before a hearing of the Selection Commission was actually scheduled. This was in line with the letter of domestic law because no time limits for scheduling such hearing existed (there are no such time limits at present either). In one case the person who applied for the position of the president of the Supreme Administrative Court waited for a year and a half before learning that he was not appointed. There have also been instances where a new selection procedure was started because the selected candidate had not been appointed within the 6 months' time frame during which the opinion of the Selection Commission is valid under Lithuanian law.[89] At the very least, such practices are hardly in line with any principle of good administration.

Delays in judicial appointment procedure can be seen as irregularity that might affect the overall assessment of judicial independence in the country at issue or fair trial guarantees in a concrete case. Notably, in those situations where delays in appointment would result in tacit extension of the term of office of other judges (or presidents of courts) until new judges are appointed, the ECtHR case law suggests that such extensions may violate Article 6, in particular its element of the 'tribunal established by law'. In particular, the ECtHR held that the practice of tacit extension of judges' terms of office for an indefinite period after the expiry of their statutory term of office until they were reappointed, in the absence of any law on the matter adopted by the Parliament, violated the requirement of a "tribunal established by law."[90] It also found that the situation in which a court president whose term had expired and where there was lack of clarity regarding the procedure for the appointment of court president, surrounded by serious controversy among authorities, determined personal composition of a chamber of judges to decide a particular case was in breach of the "tribunal established by law" requirement under Article 6.[91]

More generally and more recently, the ECtHR has defined the criteria on how irregularities in the appointment procedure of judges have to be assessed for the purpose of determining whether they breached the Article 6 ECHR (fair trial) requirement that the tribunal has to be "established by law".[92] In *Guðmundur Andri Ástráðsson v. Iceland*, it found that a person was criminally convicted by a tribunal not "established by law" owing to substantial defects in the appointment process of one of the judges of the bench. The ECtHR held that the process of appointing judges constitutes an inherent element of the 'established by law' requirement, as this provision reflects the rule of law, seeking "to protect the judiciary against

89 Interview with a member of the Selection Commission, 2021.
90 ECtHR, *Gurov v. Moldova*, no. 36455/02, 11 July 2006, §§ 37-39.
91 ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, §§ 150-156.
92 ECtHR, *Ástráðsson v. Iceland* [Grand Chamber].

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unlawful external influence".[93] A three-step test was formulated. The first step has to determine whether there was a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such (§ 244). The absence of a manifest breach of the domestic rules on judicial appointments, however, does not as such rule out the possibility of a violation of the right to a tribunal established by law (§ 245). The second step requires checking whether the appointment produced results incompatible with the object and purpose of the Convention right. Only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the essence of the right to a 'tribunal established by law' – are likely to result in a violation of that right (§ 247). The third step requires considering whether breaches were reviewed and remedied by domestic courts. Where the national courts have duly assessed the facts and the complaints in light of the Convention standards, have adequately weighed the competing interests at stake and have drawn the necessary conclusions, the Court would need strong reasons to substitute its assessment for that of the national courts (§§ 248-252).

If the Lithuanian practice of delaying appointments of selected candidates is assessed against the preceding criteria, it would appear that such practice is not a manifest breach of the domestic law as the president is not bound by the opinion of the Selection Commission. Moreover, under the Description of the Procedure for Announcing and Organizing the Selection of Judges, the office of the president of the republic has a right but not an obligation to proceed with either of the options open to him on receipt of the list of persons who have applied for a particular judicial position.[94] The procedure, however, does affect a fundamental rule that judicial appointment must be made on the basis of merit. Where the president of the republic abstains from appointing the candidate who has been determined by the Selection Commission to be the most suitable candidate according to the criteria established by law but takes the approach of selecting another candidate without giving reasons for this, starting a new selection procedure or simply abstaining from any action without informing the candidate selected by the Selection Commission of completion of the procedure in this regard, thus leaving him hanging, is technically a delay of the procedure in respect of the selected candidate. Such delay compromises the 'based on merit' requirement and, moreover, violates the principle of legal certainty by making the procedure unpredictable in terms of the time it could take as well as its outcome. As regards possibilities of judicial review, as shown previously, no possibility to appeal against the president's acts is foreseen under the Lithuanian law. The only avenue is that of filing an individual constitutional complaint to the Constitutional Court alleging incompatibility of legal acts governing the judicial appointment procedure with the Constitution. As the institution of individual constitutional complaint in Lithuania is a recent one, it is not possible to say how effective such remedy could be in this context. If it is not, the practice of delays in judicial appointment effectively amounting to failure to abide by the requirement of appointment based on merit

93 *Ibid*., §§ 226-227.

94 Description of the Procedure for Announcing and Organizing the Selection of Judges, § 14.

in Lithuania seems not to be in line with the ECHR standards. Because of this, it would also be in contravention of the EU law and its underlying values, namely the rule of law. It is worth considering further implications this would have under the EU law.

VI Implications for the Rule of Law and Mutual Trust in the EU

As we have seen, Lithuanian system of selecting and appointing judges is far from ideal. The practice of delays in judicial appointment effectively amounting to failure to abide by the requirement of appointment based on merit can in concrete instances amount to a violation of judicial independence and a requirement of a tribunal 'established by law' under the ECHR and also of the requirement of judicial independence as an element of effective judicial protection required by the rule of law standards enshrined in the EU law. So far neither the ECtHR nor the EU institutions (the CJEU or the Commission) have found any such breaches by Lithuania. However, it is worth considering whether such defects of the Lithuanian system might have any implications for the interpretation of the rule of law requirements under the EU law and an EU law notion of the mutual trust in the area of judicial cooperation.

The EU law

> is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[95]

Observance of the rule of law value foreseen in Article 2 TEU is thus necessary for application of instruments of judicial cooperation based on mutual trust, such as a European arrest warrant (EAW). In the *LM* case,[96] the CJEU acknowledged that the national court requested to execute an EAW coming from a member state with rule of law problems may be under a duty to refuse such an execution. However, before reaching such conclusions the executing court needs to ascertain whether the person requested runs a real risk of a violation of a right to a fair trial. Essentially, this judgment complemented the judicial test developed in the *Aranyosi* case[97] by indicating that it includes rule of law considerations with regard to judicial independence.[98] The importance of such an individual assessment has been recently reaffirmed by the Court of Justice in its judgment *L and P*[99] in a situation where a

95 CJEU, Opinion 2/13 [Full Court], 18 December 2014, § 68.
96 CJEU, *Minister for Justice and Equality* [Grand Chamber], C-216/18 PPU, 25 July 2018, §§ 73, 79.
97 CJEU, *Pal Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [Grand Chamber], C-404/15 and C-659/15 PPU, 5 April 2016.
98 P. Bárd and W. van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM', *New Journal of European Criminal Law*, Vol. 9, No. 3, 2018, pp. 353-365, pp. 359-360.
99 CJEU, *Openbaar Ministerie*, C-354/20 PPU and C-412/20 PPU, 17 December 2020.

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member state was notorious for its systemic rule of law deficiencies but where the Framework Decision on the EAW has not been suspended in respect of that particular member state by the Council of the EU following a decision by the European Council. In order to ensure the operation of the mutual trust system, the court that has received an EAW from a member state whose rule of law problems have been identified by the European Commission cannot automatically refuse to examine an EAW. Instead, the court has to carry out a specific and precise verification that takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities that are liable to interfere with how an individual case is handled (§ 69). Any presumption that there are substantial grounds for believing that that person will, if he or she is surrendered to that member state, run a real risk of breach of his or her fundamental right to a fair trial, would be wrong as it would entail a high risk of impunity for persons who attempt to flee from justice after having been convicted of, or suspected of, committing an offence (§ 64). The requirement for a state receiving an EAW and considering its refusal to assess the risk of impunity of the person (and a resulting violation of the rights of other persons) also stems from the ECtHR case law, namely *Romeo Castaño v. Belgium*.[100] Scholars have observed that EU instruments dealing with individual cases cannot adequately address systemic problems of the rule of law. Bonelli holds that

> [q]uestions of judicial independence and rule of law are in fact to be addressed in a systemic manner, as it can be done in Commission's infringement actions against violations of Article 19 TEU; on the other hand, it is harder for horizontal preliminary references, based on the protection of individual fundamental rights, to frame the case in the most appropriate manner.[101]

Arguably, the ECtHR and its findings of breaches of judicial independence would produce more concrete outcomes for the protection of the EU rule of law standards in a particular EU member state. However, as noted by some authors, the individual assessment of implications of systemic deficiencies of judicial independence and a resulting possibility to apply EU law where the misgivings regarding a particular court do not materialize is an important guarantee of individual rights under EU law,[102] which would seem to suggest that it is also an important guarantee against any possible breaches of the EU rule of law.

The CJEU case law on the interplay between judicial independence, rule of law and mutual trust prompts the following remarks. Systemic irregularities of judicial

100 ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019, §§ 85, 90.

101 M. Bonelli,'Intermezzo in the Rule of Law Play: The Court of Justice's LM Case', *in* A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski and M. Schmidt (Eds.), *Defending Checks and Balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht)*, 2021, Vol. 298, Berlin, Heidelberg, Springer,.

102 I. Jarukaitis and M. Morkūnaitė, 'Teismų nepriklausomumo principas Europos Sąjungos teisės raidos kontekste (The Principle of Judicial Independence in the Context of the Evolution of EU Law)', *Teisė*, Vol. 118, 2021, pp. 47-72, p. 65.

independence are obviously more likely to lead to a finding of an infringement of EU rule of law standards than isolated incidents. Violations of judicial independence specifically threaten the smooth operation of mutual trust arrangements. However, even systemic violations of judicial independence will not necessarily prevent operation of the instruments of mutual trust as long as there is no evidence that systemic violations lead to an individual violation in a specific case. Some scholars opine that the newly developed test of individual assessment being too burdensome on courts, its application can result in "both impunity for Member States violating the rule of law and the proliferation of violations of individual rights".[103] On the other hand, it is also possible to view a situation differently and focus more on rule of law implications of individual violations of judicial independence. If systemic deficiencies of the rule of law really matter only when they produce consequences in individual cases, is it not so that the individual cases of violations of judicial independence are a better indicator of the rule of law problems than the general assessment provided by the EU executive authorities? If it is so, then instances of delays in judicial appointments in Lithuania that compromise the requirement of appointment 'based on merit', if proven, would effectively amount to a finding of a violation of the rule of law that is relevant in any future procedure of applying EU instruments based on mutual trust in respect of requests issued by Lithuanian courts. In the process of application of mutual trust instruments, Lithuania, because of its isolated findings of breaches of judicial independence, would then have to be treated in a manner analogous to, e.g., Poland with its broadly recognized systemic deficiencies. From the perspective of the need to improve the protection of individual rights, this would not be an unwelcome development even if it could overemphasize the scope of rule of law problems in Lithuania. For the time being, however, such a scenario is not likely as the CJEU applies the *LM* case test only where there are systemic or generalized deficiencies concerning the independence of the issuing member state's judiciary,[104] which is not the case of Lithuania. Yet it should be kept in mind that parties raise arguments of individual rights in, e.g., EAW proceedings irrespective of the presence of systemic deficiencies, and domestic courts have ECHR-based obligations to ensure fair trial (including the requirement of judicial independence) irrespective of whether the question arises in the context of systemic or isolated threats to the person. The disconnection of the concept of threats to the rule of law from the concept of systemic deficiencies can actually serve a purpose if it leads to a broader use of rule of law arguments in the case of those countries where systemic nature of rule of law deficiencies has not been recognized by supranational authorities. If all EU member states are assessed for their compliance with the rule of law requirement of the independence of judges in the application of EU mutual trust instruments, ultimately it should provoke identification of existing problems of an individual nature and envisaging solutions, possibly of a systemic nature. While the EU Commission does exactly that in its country chapters of annual Rule of Law Reports, the same approach could also be given recognition in individual court cases at the domestic level. In judicial

103 Bárd and van Ballegooij, 2018, p. 364.
104 CJEU, C-216/18 PPU, 25 July 2018, § 79.

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cooperation cases, state A should not trust state B where state B does not ensure judicial independence, but state A should, at the same time, ensure that it can itself be trusted as it does ensure judicial independence.

E Conclusion

The Lithuanian system for the selection and appointment of judges has been generally assessed favourably by European institutions. However, certain elements of the system are questionable.

First, the regulation envisaged in the Law on Courts, the decrees of the president of the republic and the resolutions of the Judicial Council suffers either from inconsistencies or at least from lack of clarity, especially as regards the qualities of candidates that need to be assessed at different stages of the selection and appointment process. The criteria are so defined as to make it difficult to apply them objectively.

Second, it is not entirely clear whether the fact that the president of the republic acts as a counterbalance to the judiciary and, to a more limited extent, to the legislature, in the procedure of appointment of judges sufficiently justifies the limits of the powers of the Selection Commission in selecting candidates to become judges. Furthermore, it is doubtful whether the power of the Judicial Council, in which leadership of the judiciary is represented, to define criteria for assessment of candidates to leadership positions of the judiciary is sufficiently justified.

Third, the absence of judicial review or at least of a right to find substantive reasons for non-selection or non-appointment to a judicial position is problematic. The non-binding nature of the opinions of the Selection Commission makes the appeal on procedural points irrelevant.

Fourth, the practice of delays in judicial procedure that can in some cases lead to the appointment of another candidate can be seen as a violation of a requirement to appoint judges on the basis of merit. According to the criteria developed by the ECtHR, such irregularity of the procedure can amount to a violation of a requirement that a tribunal needs to be 'established by law'. Essentially, it would also amount to a violation of the rule of law under the EU law.

Finally, assessing implications of the preceding shortcomings of the Lithuanian system and, in particular, a hypothetical finding in an individual case of a violation of the 'established by law' criterion because of the delays compromising the requirement to appoint judges 'based on merit' for the operation of the EU law, the conclusion is that such irregularities would not negatively affect the operation of mutual trust instruments with respect to Lithuania. However, we suggest that paying more attention to non-systemic deficiencies of judicial independence and the rule of law in EU member states could be beneficial for improving the protection of individual rights.