



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
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Final report ENCJ working group Performance Management 2006-2007

I.- Introduction and Analysis of responses.

The following document constitutes a well-reasoned synthesis of all the responses to the questionnaire written by a working group of the European Network of Councils of the Judiciary and entitled “Performance Management”. The High Council of Judiciary of Italy acted as the coordinator. This synthesis has been updated, modified and completed by the evaluations carried out by the participation of the representatives of Denmark, Estonia, Finland, England & Wales, Italy and Romania at a meeting of the Working Group that took place in Rome on 28th March 2007.

First of all it's important to observe that the responses to the questionnaire concerned have been provided by the Courts of the Judiciary, or similar bodies, from the following States: Belgium, Croatia, Denmark, Estonia, Finland, England & Wales, Ireland, the Netherlands, Romania, Spain and Italy; only two Countries: Malta and Hungary, didn't agree to this activity.

The complexity of the answers was such as to necessitate a summary of the data collected. Thus, in reference to each question, the various responses will be grouped so as to select, each time, sub-groups of States in which the interventions of the Councils of the Judiciary, for the purpose of guaranteeing the efficiency and functionality of the judicial system, are of a similar nature, from the standpoint of the organizational decisions adopted. In order to facilitate the interpretation of data, each question is reproduced below followed by a summary of the various answers provided.

QUESTIONNAIRE

- 1) An appraisal of the outcome of judicial activities carried out by individual judges requires the identification of exact criteria, on the basis of which information on each office may then be collected. Which of the following criteria are used in data collection: a) acquisition of information flow, including the analysis of pending files, contingencies and out-of-date files; b) comparative statistical data, organized by sector of activity, stating specifically the output of individual judges on the regular staff, giving due consideration to the type of order (judgement, injunction, decree or other), in addition to any minimum or maximum quantitative criteria of current liabilities for the judge's output; c) data separated into**

sectors of activity, in an anonymous form and merely indicating the *average value* of output, to be used in private, as a benchmark against which the output of individual judges can be measured; d) in evaluating the professional competence of judges, consideration is given to their participation in activities aimed at professional development; e) in evaluating the professional competence of judges, meetings are arranged with representatives of bodies within the legal profession; f) other data detection methods.

Denmark, Estonia, England & Wales, Finland, Ireland and the Netherlands do not carry out an evaluation of individual judges' output in terms of the individual judge's productivity. The statistical data collection system represents a gathering of data in the various court offices that constitutes a tool for the office's management and dissemination of human and financial resources.

It should be noted that in England & Wales there is no system under which each case is assigned to a specific judge for its entire duration. On the other hand, each judge must guarantee to sit a minimum number of working days each year.

While amongst the remaining States which do however periodically collate information flow, Italy amongst them, we would like to note the procedure adopted in Spain, whereby each type of trial is evaluated in terms of working hours, based on an annual working year amounting to 1760 hours; from this number of hours, the 160 hours which judges devote annually to training must be detracted. Each judge works to a pre-established objective, in terms of output. In the event that this target should not be reached, a specific justification is called for. Also in Romania the evaluation system is similar to the Italian and Spanish one and is considered for the promotion.

In the Netherlands, amongst a range of different methods used in the collection of data pertaining to the activities of individual judges, the so-called system of *Intervision* is noted: a judge, chosen at random from within the same section is asked to observe the hearing of a colleague and provide feedback on the colleague's participation in the hearing and his/her communication skills.

In Estonia, where judicial individual activity is not periodically evaluated, the output of the so-called junior-judges is pointed out at the end of their 3-year term of office, and secondly also in cases of a disciplinary failure of a judge.

2) Which bodies collect the materials needed to evaluate performance? What role does the Court of the Judiciary play in this?

In Romania, the Court of the Judiciary collects the statistical data; in Spain this task is carried out by the inspectorate of the Court of the Judiciary. In Italy the data is collected by administrative bodies within each judicial office; furthermore, a specific Commission has recently been set up at the Courts of the Judiciary offices, charged with analysing flow and cases pending.

Denmark, Estonia, England & Wales, Finland, Ireland and the Netherlands do not collect data on individual judges but only on the flow of cases through the individual court offices; in particular, in Estonia the data is generalised on whole courthouses or all the courts or for analysing the average period of time for proceeding cases.

In Belgium, Croatia and the Netherlands, it is the Head of the judiciary office who fulfils this task. In Finland there is not a body which corresponds with the Court of the Judiciary and the Ministry of Justice collects data on each office.

3) Do judges have the right to draw up reports on themselves, providing a profile of their professional activities and outlining the organizational criteria aimed at improving levels of efficiency, and subordinated to the functions of the judicial office?

In Estonia, Denmark, the Netherlands and Romania, judges do not have the possibility to draw up reports on themselves; in Ireland it is possible in an abstract sense, but in practice judges do not draw up such reports. In particular, in Finland judges can draw up reports / give statements on themselves in appointment procedure; otherwise there is no formal procedure in which judges have the right to draw up such reports; however, judges can express their opinions in the course of the annual objective and resource negotiations of the court, individual talks of evolution and other informal discussions. In particular, in Estonia, an electronic database automatically collects the statistical data and the judges can check if it is correct. Principally the head of the court is responsible for the correctness of the data.

In England & Wales individual judges do not draw up reports on themselves but they may consult colleagues, both of the same rank and of a higher seniority, in connection with the work they have undertaken.

Belgium, Croatia, Italy and Spain make provisions for judges to draw up a report on themselves in the course of the appraisal process.

4) In terms of the organization of judicial offices, which members of staff interact with each other and which instruments do they use (for example, two-year efficiency programmes and so on)? Heads of office, heads of administration, local consultative bodies, individual judges.

In Belgium, the heads of judicial offices, prior to their appointment, must draw up a management programme.

In Denmark, an annual action plan is approved.

In Finland each court negotiates on the objectives and resources with the Ministry of Justice annually. In order to reach the objectives the Chief Justice and the head of administration (in large courts) interact with the judges regularly (monthly meetings, annual talks of evolution and informal discussions). In addition, the heads of the district court divisions (in large courts) interact with the judges of the division regularly.

In Italy, in every judicial office, within the ambit of office organization, it is the head judge and the heads of administration that interact.

In Romania, judges interact on various levels (sections of the Board of Governors, General Assembly of judges) in connection with the activities carried out annually by the courts, even if the Head of the Office is responsible for the final report.

In Spain, decisions regarding the objectives which judges are requested to reach are approved by the plenary assembly of the Court of the Judiciary.

In England & Wales no formal system exists for discussion between the judges and the administrators of the courts but there is constant, almost daily, informal discussion between the judiciary and the local administrators.

In Estonia the Chief of the Court is responsible for the evaluation about the distribution of the affairs; the general assembly of the courthouse though sets the terms of an electronic case dissemination program, which will automatically and randomly appoint an incoming case to a certain judge.

5) In terms of organizational choices, are provisions made for certain interventions by individual judges which might be necessary in order for them to meet their work load?

The majority of States provide that the Heads of Judicial Offices manage and allocate work loads between individual judges.

In Finland the internal allocation of cases between judges is usually done according to a written working order / distribution instructions approved by the Chief Justice. Before the approval of the instructions the judges are heard in the cooperation procedure. The Chief Justice may make exceptions to the instructions or reallocate certain cases if there is a good cause..

In Italy, individual judges may point out, to the management, specific requirements which might arise in the effectiveness of the table procedures, the organizational plan within the Office which is approved once every two years by the Court of the Judiciary.

In England & Wales these processes are carried out by various judges who have certain administrative responsibilities. Each court office also has at least one “Listing Manager” who works subject to the supervision of the most senior judge at the court and whose task is to ensure that work within the court is allocated each day on the basis of judge availability. No provision is made for the allocation of specific hearings to particular judges.

In Romania, judges are consulted by both the Ministry of Justice and the Higher Court of the Judiciary in order that they might express their opinions in connection with the allocation of workload.

In Spain, in order to equalize the allocation of workload, in the event that a judge is assigned, by the Head of Office, proceedings of a particularly complex nature, he/she may then apply to the assembly of judges for total or partial exemption from the treatment of other cases.

In Estonia, either the head of the court or the judges themselves can suggest specialisation or a need for certain training. If the general assembly of the court approves the specialisation, it will be taken into account in the case dissemination program. The work load of courts is also taken into account in the appointment of new judges to the office and when drawing up the budget (and for example assisting personnel) of the court.

6) Within the framework of this appraisal, does the internal allocation of judicial business between the various judges of the office (the outcome of which, in organizational terms, is the principle of natural judge, according to which the law itself pre-establishes the criteria used to assign a judge to each individual lawsuit so as to avoid the phenomenon known as *choice of judge*) appear fixed or flexible? Can judges intervene in the allocation of judicial business, even merely in terms of advice, at the moment in which corrective measures are needed to guarantee the efficient running of the judicial office?

Belgium, Croatia, Italy, Romania and Spain adopt a rigid criterion of allocation for the judicial business of individual judges. In particular, in Finland, in the big offices is possible to adopt a specialization per subject, in the other cases the affairs are assigned to the individual judges with a chance criterion, as it happens in Denmark.

in Romania and Spain, in particular, make use of computer programs which carry out a sort of electronic drawing of lots, so as to avoid the involvement of any other professional either internal or external to the judicial organization, at the moment at which judicial business is allocated.

England & Wales and the Netherlands leave the decision regarding the assignment of files to the Listing Manager / Head of the Office.

For Estonia, case dividing system is described above in answers 5 and 6 (automatic allocation, based on the criteria determined by the court's general assembly).

7) Does each judge have the right/duty to organize his or her own agenda, setting out the court calendar in advance in addition to the times of plaintiff and witness court appearances in order to avoid lengthy waiting periods between the discharge of various duties and to ensure that the hearing is run in an orderly fashion?

In all States having provided answers to this question – except the Netherlands - individual judges are responsible for drawing up their own court calendar. England & Wales uses a system of specific *case management* of each case designed to ensure the resolution of preliminary questions and to set the timetable for the case through to the final hearing as quickly and as fairly as is possible. In more complex trials, the judge also sets out a specific calendar for the trial itself, setting out the order in which, and when, each witness is to be called to give evidence.

In the Netherlands, it is the Coordinator of the various sections who sets out a table for all the judges; what is more, in the civil sector, the judges themselves may decide which proceedings to introduce into each individual, pre-arranged hearing.

Denmark and Italy provide that the judge may set the time for the treatment of each individual case; in Spain this specification of time for the treatment of a case constitutes a duty which the judge must fulfil.

In Estonia each judge is individually responsible for the agenda of the case.

8) In appraising the judicial activities undertaken by judges, is consideration given to the way in which investigative bodies are managed, to the judges' participation in the hearing and to the investigative techniques used in specific sectors of criminal activity, to the speed with which the hearing is conducted, to skills of mediation and consequent deflationary effects as a result of the injured party not bringing penal action?

Croatia, Denmark, the Netherlands and Spain stated that in evaluating the judicial activities undertaken by individual judges, also in relation to the objectives of each sector of activity, particular attention is paid to the various criteria stated under question n. 8).

In Italy, the Higher Court of the Judiciary administrates both judges and public magistrates, since all magistrates, judges and investigating judges belong to the Judicial Order.

Romania highlighted that investigative activity is the competence of the investigative police and the public prosecutors don't have the task to be in charge of the police having the task of analysing the investigative acts, in the evaluation similar criteria for both judges and public prosecutors are adopted.

This question did not apply to England & Wales where the judiciary have no responsibility for the investigative bodies.

In Estonia there is no investigation phase at the courts, it is a pre-trial procedure conducted by the police and prosecution office. Statistical data provides also information on the outcomes of the proceedings (percentage of the agreements of the parties, appeals against decisions etc). The judges' behaviour is generally not assessed (exceptionally possible under a disciplinary procedure or in case of so-called junior-judges). Practical trainings are regularly held for improving the judges' communicational and meditative skills.

9) In appraising the outcome of the professional activities carried out by individual judges, is consideration given to the *merit* of judicial orders, both in relation to the specific content of the ruling and to the outcome of the same on subsequent levels of judgement?

Belgium, Finland, Italy, the Netherlands and Spain exclude from their appraisals of professional activities an examination of the merit of judicial orders.

In particular, In Finland appraising is not been systematically done from that point of view. However, if a judge's decisions are frequently overturned because of defects in his/her professional skills, it may have an influence in appointment procedures.

In Romania the merit of judicial measures is considered important for the evaluation of the judge's professional skills.

In England & Wales the quality of an individual judge's judgments are taken into account when deciding whether to assign a particularly complex case to a particular judge. If the decisions of a judge are frequently reversed on appeal then it is possible that a more senior judge would informally discuss with the judge the quality of the judgments given by him/her. There is, however, no formal system of appraisal or of performance management of individual judges.

In Estonia there is also possible the same informal control system. General yearly statistics (collected from the electronic Court Information System) provides *quantitative* information on the outcomes of the courts. Furthermore, diverse criteria for assessing the *quality* of judgements are being elaborated.

In Denmark there is an evaluation system about the validity of the office's organization and the efficiency of each judge and, court by court, a cooperation – forum where lawyers and resident citizens give their contribution.

10) In appraising the work and efforts of judges, is reference made to statistical tables on the overall number of cases dealt with by the judicial office to which they belong? Or in terms of similar geographical areas?

Croatia, Estonia, Finland, Italy, Romania and Spain all make reference to statistical tables on the overall number of cases dealt with.

Belgium, Denmark, Ireland, England & Wales and the Netherlands do not carry out any form of analysis of flow nor of statistical tables in appraising the work of judges.

11) To what degree are the various Courts of the Judiciary competent for the organization of judicial geography, namely the distribution of inferior and appeal courts across the nation, or is this exclusively the competence of the Ministry of Justice?

In Belgium and Denmark the organization of judicial geography is established by law, in collaboration with the Ministry of Justice.

In Finland exclusive competence belongs to the Council of State. Thus, the organization of judicial geography is established by legislation.

Croatia, England & Wales, Italy, Ireland, the Netherlands and Spain all make provision for the bodies which represent the judiciary to play a consultative role (opinion).

Romania, on the contrary, assigns deliberative tasks in matters of judicial geography respectively to the Council of Court Administration and the Commission for judges in the Court of the Judiciary.

In Estonia, the number of judges in the courts is determined with the regulation of the Minister of Justice, but the Minister needs an approval of the Council for the Judiciary, which consists of judges in majority. Therefore the biggest discussions about a need to make changes in the judicial geography (indicated by the analysis of the workload of the courts) take place in the Council. Of course no judge can be moved into another court area against his/her will, so if there are no volunteers, changes usually take place after some judge's retirement.

12) Are provisions made for specific appraisal criteria to be used in the appointment of judges called to fulfil executive functions, such as their organizational skills, willingness to cooperate with managerial choices within the organization of the judicial office and so on?

In Belgium, it is the Higher Court of the Judiciary which selects executives for judicial offices. Candidates must present a “management plan” for the judicial office where the position is available and undergo a specific examination. In Italy, the appointment of executives is the competence of the Higher Council of the Judiciary, which proceeds with its selection according to the following criteria: independence, prestige and organizational abilities.

In Denmark, in connection with the selection of heads of office, recourse is made to external consultancy firms and a psycho-behavioural test is provided; such an alternative, on the contrary, is explicitly ruled out in Spain where the Court of the Judiciary proceeds by means of a system known as “free nomination”.

In Romania, considering that for the career of the magistrate the only body responsible is the High Council for the Judiciary, the candidate for the executive office must present an organizational plan and sit a psycho-behavioural test.

England & Wales provide that administrative court managers are selected on the basis of their managerial and organizational skills. Judges, however, are not appointed because of any managerial skills which they might have (save for some really exceptional cases) because the manager of the particular court carries out the major share of the managerial work. Some judges may be requested to carry out administrative roles for a short period of time (on average about four years) but this work is usually conducted outside of the court sitting day. A few very senior judges have administrative duties which mean they do not sit in court for the full five days of each week. Estonia and Finland give due consideration, primarily, to the qualities and personal aptitudes of the candidate.

In Estonia, though, there are no formal criteria on personal skills or abilities for choosing the Heads of the courts. The candidates are chosen from among the judges of that particular court. They are first discussed at the Full Session of the same court, and nominated by the Minister of Justice - after it has received the binding approval of the Council for the Judiciary.

In Finland when appointing executives (for instance Chief Justices) consideration is given to his/her abilities as a judge (professional skills, competence, effectiveness) and also to his/her abilities as an executive (managerial and organizational skills). Psychological testing has been used especially when appointing executives to large courts.

In the Netherlands, the Court of the Judiciary provides that candidates for positions in executive offices undertake specific training courses (Management Development Training); the manager must be respected by his/her colleagues and must be willing to manage an office for a court other than that where he/she is employed.

In England & Wales, Estonia and Romania the executive tasks are carried out for a temporary period, usually 4 years (5 in Estonia) but extendible for another 4 years in England & Wales (for other 5 in Estonia) and 3 years, subject to extension, in Romania. In Denmark, Finland and Italy these tasks are with no time limit.

No evaluations on the management of the offices are provided in a formal way; in all Countries, in real terms, informal evaluations on leadership are carried out.

II.- Comments on the summary.

The analysis of collated data highlights the diverse cultural profiles underlying the judicial systems of the States taking part in the initiative. Indeed, the means adopted by the various Courts of the Judiciary or analogous bodies, aimed at guaranteeing the efficiency of judicial organization, represent a direct reflection of the basic decision-making processes underpinning each national judicial system for the purpose of guaranteeing autonomy, impartiality and the independence of the judicial body.

We now turn to some of the issues addressed in the questionnaire which, following their close examination, appeared typical.

1. Means of allocating judicial business within the offices.

In Belgium, Croatia, Estonia, Finland, Italy, Romania and Spain, the allocation of judicial business amongst the various judges working in the Office is carried out in response to a series of strict criteria; Estonia, Romania and Spain, in particular, make use of computer programs which carry out a sort of electronic drawing of lots, so as to avoid the involvement of any other professional either internal or external to the judicial organization, at the moment at which judicial business is allocated..

Quite different are the judicial systems in Denmark, England & Wales and the Netherlands where the assignment of files is the task of the Listing Manager / Head of Office, who does this on a case by case basis. In particular, it is noted that in England & Wales there is no provision for a proceeding to be dealt with by one judge only; furthermore the files are not assigned following pre-established criteria but rather on the basis of the “specific abilities” of the individual judge.

Furthermore a chance criterion in Denmark, Estonia and Finland for the smaller offices is provided.

2. Analyses of flow in connection with the activities of judicial offices and individual judges.

Denmark, Estonia, England & Wales and Ireland do not regularly carry out appraisals the activity of judicial offices and the proceedings of individual judges.

Furthermore, Estonia, England & Wales make provisions for checks to be carried out on the “quality” of judicial decisions; checks which encompass an analysis of the *merit* of judicial decisions; in England & Wales, in particular, the quality of the decisions of the judges in the courts of first instance are evaluated in the course of subsequent appeals.

Belgium, Finland, Italy, the Netherlands and Spain exclude from their appraisals of professional activities an examination of the merit of judicial orders.

3. Judges and magistrates of the public prosecutor’s office.

In Italy, judges of the public prosecutor’s office belong to the Order of Judges and enjoy the same guarantees of autonomy and independence as judges. This is not the case in other countries taking part in the questionnaire; in this regard, reference is made to the answers supplied in response to question 8). In this connection, Romania highlighted the fact that investigative activity is the competence of the public prosecutor's office and officers of the investigative police, whilst the activities of *judges* is that undertaken “*within the courtroom*”.

4. Appointment to executive positions.

The pragmatic approach adopted by *common law* countries is quite revealing: in England & Wales the non-judge managers of judicial offices are “selected on the basis of their managerial and organizational skills”, as stated in the answer to question n. 12).

On the opposite end of the scale are the systems adopted by Spain and Italy for appointments to executive positions, where competitive examinations are held prior to the appointment of office executives, tightly regulated by the Court of the Judiciary on the level of secondary rules of procedure.

In conclusion, it should also be noted that significant similarities between Italy, Spain and Romania also emerge in terms of: the organization of judicial offices, the systems used in evaluating output, training procedures, the guarantee of judges’ autonomy and independence, the consultative role played by the Court of the Judiciary, as compared to the choices of the Ministry of Justice in matters concerning the judicial system.

III. Shared Conclusions.

1. The evaluation of the amount of the judicial work is important in order to observe the productivity of judges, but it isn't a determining profile because it could clash with the more important needs than assure one qualitative performance of the judicial decision.
2. The systems of collections of the cases data regarding the definition of the judicial affairs are various. Case data processing is negative when it is used for the evaluation of the productivity of judges, rendering discussion and interpretation necessary with the person involved (for example, depending on the length and difficulty of the particular case).
3. It appears inopportune the connection between the quantity production and salary of judges.
4. In the various modalities of assignment of the single case to the judges it is necessary to assure the mechanisms, that would exclude a possibility that a choice is determined by reasons contradicting with the principle of the internal independence of the judges (for example the choice of the judge must not depend on the choice of one legal party, but, on the contrary, it must remain an independent choice.)
5. In the evaluation of the professional activity of judges it appears necessary to acquire information on the ability and on the balance in management of the cases, writing of decisions without that the evaluation is translated in a re-examination of the single judicial changeability given by the judge.
6. For the choice of the location of the courts, of the first and the second instance on the national territory, keep still the competence of the politic power, it is opportune that is a consult the councils of justice or even the judges (through organisms represented to them or to heads of the offices) take part, at least in an advisory way, in the decisional process, before every decision.
7. For the nomination of the leaders of the judicial offices it is always useful to proceed to an evaluation that involves, in the analysis of the various profiles of the candidates, the concrete ability in their office organization.