Conference report

Rapport de la conférence

The European Network of Councils for the Judiciary (ENCJ)

General Assembly

Le Réseau Européen des Conseils de la Justice (RECJ)

Assemblée Générale

Brussels

6-8 June 2007

Bruxelles

6-8 juin 2007

Conference report

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I. Conference report – General Assembly of ENCJ Brussels, 6-8 June 2007

Introduction

The third annual meeting of the General Assembly of the European Network of Councils for the Judiciary (ENCJ) since its foundation in 2004 took place in the elegant Egmont Palace in Brussels on 6-8 June 2007, at the invitation of the High Council of Justice of Belgium.

More than 90 representatives from 30 countries participated to the 2007 conference, mostly from the various members (17) and observers (11) of the Network, but also from other European judiciaries and the European Commission, the CCJE and the CEPEJ, the EJTN and the International Association of Judges. The active input of all participants and the superb organisation of Belgium's High Council of Justice all contributed to a fruitful discussion on further co-operation in the future.

Program

The general theme of the conference was 'The separation of powers in the 21st century'. The two main objectives of the conference were, firstly, to exchange ideas on the best way to guarantee the separation of powers in a shifting society, and, secondly, to discuss the future structure of the Network.

There was also ample opportunity to exchange experiences and further strengthen contacts between ENCJ members and observers and other European networks and institutions.

On the **first day** of the conference, the mayor of Brussels hosted an opening reception in the spectacular Salle Gothique of the Town Hall in the very heart of Brussels.

On the **second day** of the conference, a small ceremony was held to welcome two new members to the Network: Bulgaria's Judicial Council and Romania's High Council for the Judiciary. The ceremony was followed by various presentations on the separation of powers and a debate on this topic. At the end of the morning session, two representatives of the European Commission took the floor and presented an overview of current developments of EU policy in the field of justice.

The afternoon session focused on the results of the 2006-2007 Working Groups Mission and Vision, Performance Management, Court funding and Mutual confidence. After voting on a number of statements relating to the subjects dealt with by the Working Groups, participants split up to meet in smaller subgroups in order to discuss current concerns in their respective judiciary organisations. These interactive sessions ultimately resulted in a list of topics for the 2007-2008 Working Groups.

On the **third day** of the conference, the Secretary General reported to the General Assembly on the Network's activities over the past year. Following the Secretary-General's report, participants were given the opportunity to present their views on the future structure of the Network. Thereafter, the General Assembly turned to the work topics for 2007-2008 and established the following working groups:

1. mutual confidence amongst the actors in justice in the European Union;
2. 'e-Justice';
3. judges' liability;
4. quality management of judicial organisation;
5. criminal law in the European Union;
6. public confidence and trust in justice.

The General Assembly concluded with a short film featuring the highlights of the city of Budapest - which will host the Network's next General Assembly in 2008 - and a reception in the Galerie des Glaces.

June 6 – Reception

After being welcomed by ***Mr. Freddy Thielemans, Mayor of Brussels***, the participants were welcomed by ***Mrs. Edith Van den Broeck, President of the ENCJ***. After briefly introducing the theme of the conference - the separation of powers in the 21st century - Mrs. Van den Broeck looked back on the inspiring presidency of Professor Luigi Berlinguer and praised him for his deep commitment to the Network since its creation. Professor Berlinguer's touching farewell speech was greeted with a warm applause. Following Professor Berlinguer's speech, an opening speech was held by ***Mr. Lorenzo Salazar, representing Mr. Franco Frattini, Vice-President of the European Commission,***

Commissioner for Justice, Freedom and Security, who underlined the importance of this conference for future co-operation.

June 7 – Morning session

Mrs. Edith Van den Broeck, President of the ENCJ, thanked the Network for its confidence in electing her President and confirmed her will to sustain the excellent co-operation with the Steering Committee and the Secretariat. She insisted on the absolute necessity of improving the degree of concrete participation in the Network's activities by all members and expressed her wish to support the rightful place of the Network's observers. She also thanked the Spanish Council for leading the important working group on internal organisation. Now that the judicial area has become an issue of great significance for the European Union, it is more necessary than ever to define the specificity of the ENCJ in relation to other forums. Through its co-operation, the ENCJ is not only instrumental in increasing the independency of the judiciary in the different Member States and vis-à-vis the European Commission, but also in ensuring that justice operates effectively and efficiently, thus serving the citizens. Mrs. Van den Broeck announced that increasing the citizen's confidence in justice and in the judicial system will be the overarching theme of her term of office, and invited everyone to ensure that this always remains a core concern, at the heart of the Network's activities and proposals. Materialisation of the European judicial area will require an even greater harmonisation at the level of both Europe and the Member States and will also require judges to form a truly homogenous community, subscribing to the same principles and sharing the same values. A Europe of judges and prosecutors is therefore essential. It is the Network's responsibility to face up the task awaiting it and to lay the foundations which will enable those who succeed it to take up to this tremendous challenge.

Mr. Jacques Hamaide, President of the High Council of Justice of Belgium, welcomed all participants and proceeded to give a brief introduction of Belgium's High Council of Justice. The High Council was created as a consequence of the sad Dutroux affair and is primarily responsible for ensuring greater objectivity in the selection and nomination of magistrates and to exert external control over the workings of justice. It is a constitutional body which is independent of the three

powers. The High Council is committed to the development of the Network and to the furtherance of its operation, a commitment that is also reflected personally in the presidency of Mrs. Edith Van den Broeck. The discussions to be held on the 8th of June will be especially important for the future of the Network.

The signing of the ENCJ Charter by ***Bulgaria's Judicial Council*** and ***Romania's High Council for the Judiciary*** was followed by insightful **presentations on the separation of powers in the 21st century** by various experts in this field.

According to ***Mr. Frederic Vroman, representative of Mrs. Laurette Onkelinx, Madame Deputy Prime Minister and Minister of Justice of Belgium***, the separation of powers is a strong principle, but it is also a constantly evolving principle, capable of adapting to changes in society. In the 19th century, judicial practice unanimously regarded the courts as being unable to serve injunctions on other powers; in the 20th century, it became accepted that the courts can serve orders and defence submissions on the public administration with a view to protecting citizens against unlawful acts committed by public authorities. In Belgium, it became accepted that the application of laws could be dismissed by the courts if they were contrary to international law. A further development was that the Court of Cassation accepted that the State could be held liable for errors committed by the judicial powers and by the lawmaker. This latest trend is positive, but it does not mean that there is no room for reflection, with regard to the question which court would be best able to deal with such a dispute, or indeed whether all the principles of tort law are readily transposable to the liability of the State for errors committed by the lawmaker. To have this debate in Parliament, and to enact measures if a consensus emerges on this matter, is in full keeping with the principle of the separation of powers.

The modernisation of Belgium's judicial system in terms which remain compatible with the separation of powers is another key challenge. Over the past years, the High Council of Justice has become a key player in the reform of Justice. The Minister is in favour of strengthening the High Council's powers of control over the courts and tribunals. For this to happen, it needs to be guaranteed a certain distance from activities on the ground.

Another important vehicle of modernisation is represented by the new demands placed on the magistracy in the sphere of the administration of the courts and

tribunals. One of these demands - the assessment of primary magistrates - is subject to much criticism and concern. However, these assessment mechanisms are essential to help guarantee sound management skills and to reconcile the indispensable judicial independence with the demonstrable efficiency required of judicial power. The exercise may be perilous, but remains nonetheless inescapable.

Mr Yves Bot, Advocate-General at the Court of Justice of the European Communities, is of the opinion that the conditions for exercising judicial authority have clearly changed in the 20th and 21st century, inasmuch as a fourth power has emerged: the press, which can be a blessing and a curse. It is clear that the independence or dealings of the judicial system with other powers must also be envisaged in relation to dealings with the press. Globalization, with its territorial variations that could be called ' regionalisation', also contribute to radical and fundamental changes in the responsibilities with which the justice system is vested, resulting in new trials and new risks which the justice system must today deal with. In our era, legitimacy, independence and objectivity are no longer decreed, but must be constantly demonstrated. The demonstration of this principle is in actual fact 'transparency'. The calling into question of excessive responsibility or excessive calling into question of responsibility is effectively a means of destroying or compromising independence. But conversely, a judicial authority without control or without control other than that which it complacently exercises over itself would result in its legitimacy being removed and a breach with the citizens who are alone the source of it. Today, particularly in the European Union, where borders are disappearing, it is this new moral doctrine, not geographic borders, that we must clearly overcome.

Professor Van Orshoven, Dean of the Faculty of Law of the Catholic University of Leuven, discussed the question whether the separation of powers in the 21st century is a fiction or a reality. According to Montesquieu, the three functions in the state have to be separated organically, that is, entrusted to three different, mutually and strictly equal and independent organs: the legislative, the executive and the judicial power. Although many modern constitutions have been inspired by Montesquieu's theory, his theory has seldom been applied dogmatically, let alone literally, which, moreover, would hardly be possible.

In essence, the present state of the separation of powers can be summarised as the prohibition of each authority, in the exercise of its assigned function, to usurp the judgment that pertains to another authority. Thus, one can speak of a 'separation of functions', because it concerns not so much the organs as the executed tasks. The separation of powers hinders this judgment of opportuneness from being criticized by another authority, which, by so doing, would be arrogating to itself the function of another. The trias politica does not keep some powers from escaping their classification. In this sense, the Belgian High Council of Justice may be considered as a curiosum. Functionally, it is situated in the executive power, but it also shows the closest bonds with the judiciary. The (constitutional) legislator however repeatedly stated that the High Council is an institution sui generis that cannot be brought under any of the three powers.

The separation of powers may safely be a fiction only if the independence of the judges is protected. The core of the independence is the requirement that the judge has to base his decision on his own, personal, free judgment, with no external influence. Precisely to avoid interference from the legislative and executive power, the judges are placed in a separate state power. The judge must also be independent with respect to public opinion, the press, pressure groups and other social actors.

Like the separation of powers, the independence of the judge, however important, is not an end in itself, but merely a means to enable judges to rule as much in accordance to the law. The administration of justice has only to be done properly so that its result - the judgment - is proper. If the separation of powers is a purely functional question, the rule is likely sufficient that legislators, administrators and other outsiders, may not put themselves in the place of judges when they exercise their judicial authority - the settlement of disputes. All the rest - from organic to logistical independence - seem merely to be policy questions that, with a view to quality and efficiency - have to be resolved. This tolerates in some respects somewhat more, but in other respects probably less independence and primarily less separation of powers.

Mrs. Edith Van den Broeck, President of the ENCJ, discussed the issue of the separation of powers from a perspective specific to Councils for the Judiciary. The independence of the judiciary can only be guaranteed if its organs discharge their responsibilities in a branch of power separate from the political branch. In our

modern democracies, the existence of a High Council for the Judiciary has become an essential element in ensuring the legitimacy of the judiciary and its organs. By conferring on it decisive powers with respect to the selection and appointment of judges, and frequently also with respect to disciplinary matters, the Council for the Judiciary successfully fulfils its task of contributing to the independence of the judiciary. By allowing it to contribute to definition and control of the (budgetary) resources allotted to the judiciary, the Council for the Judiciary is instrumental in bringing about a High degree of self-government by the judiciary.

But independence does not mean non-accountability. Accounting for one's acts and one's management is more than ever intimately connected with independence. It is undoubtedly a role to which Councils for the Judiciary and other similar organs should attach far greater importance. Without calling into question the principle of independence, it is important to take into consideration the following three interlinked principles: no power without responsibility, no responsibility without justification and no justification without control. In its mission as a mediator between the national Councils, the national judiciaries and the European institutions, the Network should act concretely to reinforce this overall vision of respect for the principle of the separation of powers, of the independence, subject to accountability, of the judiciary and of the new and changed role for Councils for the Judiciary, aimed at increasing citizens' confidence and trust in effective justice and an effective judicial system, not subject to other pressures.

At the end of the morning session, the General Assembly listened to two ***representatives of the European Commission, Mrs. Isabelle Jegouzo and Mrs. Caroline Morgan.***

Mrs. Isabelle Jegouzo, ***Directorate-General of Justice, Freedom and Security of the European Commission,*** underlined the European Commission's commitment to creating a European area of Security and Justice. It is therefore important for the European Commission to be present at conferences as these, which are an essential means for creating a European Judicial Community.

Over the past seven years, a lot has been achieved within the European area of justice, especially in the criminal sector. A striking example is the European Arrest Warrant, which has reduced the length of proceedings considerably. A

number of other initiatives are currently being reflected upon, such as the interconnection of judicial records and the abolition of the exequatur to speed up proceedings. However, such instruments can only function if there is mutual trust and confidence.

Even though there are significant differences between the various judicial systems, all European judiciaries deal with the same questions. Exchange of information and comparison makes it possible to deal with these common problems in a more effective way. In this regard, the ENCJ is an important nexus. The European Commission therefore wishes to support the ENCJ financially, by means of a permanent subvention (NB: this offer was received with great enthusiasm). However, to achieve this, legal personality is essential.

As a final remark, Mrs. Jegouzo pointed out that the European Commission is currently reflecting upon creating a European jurisprudence portal. In the process of its creation, the ENCJ's ideas on the portal's content would be greatly valued. The ENCJ is invited to take an active role in the discussion on e-justice.

Mrs. Caroline Morgan, Directorate-General of Justice, Freedom and Security of the European Commission, focused on two projects within the area of justice: the Evaluation of Justice Forum and the Commission's Mutual Recognition study. The Evaluation of Justice Forum is a Forum of professionals (lawyers, victims, interpreters, etc), who come together four times a year in order to identify needs within the area of justice. The aim of this project is to foster mutual trust and a greater trust in justice by citizens in general. Mutual Recognition is a study within the Commission aimed at identifying the legislation that has not yet been implemented. The ENCJ's feed-back on both projects would be greatly valued by the European Commission.

June 7 – Afternoon session

The afternoon session concentrated on past and future Working Groups. The session started with a series of interviews by ***Sir John Thomas, member of the Judges' Council of England and Wales*** of the leads of the different 2006-2007 Working Groups: ***Mr. Geert Vervaeke (Mission and Vision), Mrs. Teresa Fleming (Court Funding), Mr. Mauro Volpi (Performance Management) and Mrs. Susan Denham (Mutual Confidence)***. During these interviews, the leads

were invited to elaborate on the scope, aim, method and most important findings of their respective Working Groups.

After each interview, participants were asked to vote on a number of statements relating to the subject of that particular Working Group. Within the context of the Working Group Mission and Vision – for example – participants were asked to vote on the following statement: 'Courts themselves are responsible for the management of quality. Processing times, confirmation in appeal, client satisfaction, and time spent on training and education are important indicators of quality'. Two interesting questions raised within the context of the Working Group on Funding and accountability were whether transparency and independence imply that judges should give an overview of their income and assets, and whether individual courts should be responsible for paying financial compensation if a delay occurs or an unlawful decision has been taken. An example of a statement participants were asked to vote on within the scope of the Working Group on Performance management, was: 'It is dangerous to evaluate the performance of judges because it poses a threat to judicial independence'. As for the Working Group on Mutual Confidence, participants were invited to vote on the statements 'The lack of communication between national judiciaries and the institutions of the EU could hamper the prosperous development of the EU' and 'Mutual confidence does not only regard the application of European legislation but also the functioning of the different national judicial systems in general'. Both statements prompted a massive 'yes'.
The debate on the statements was lead by ***Mr. Bert van Delden, Secretary-General of the ENCJ,*** and ***Mrs. Gracieuse Lacoste, member of the Superior Council for the Magistracy of France***.

After having reflected on the results of the 2006-2007 Working Groups, the participants split up to meet in smaller subgroups in order to discuss issues currently important to their respective judiciary organisations. Each subgroup selected a number of concerns common to all members and observers. These interactive sessions resulted in a list of topics for the 2007-2008 Working Groups.

June 8 – Morning session

The morning session started with a brief presentation of the main conclusions of the Working Group on Internal Organisation by Mr. Celso Rodriguez Padrom, Secretrary-General of the Spanish Council.

Mr. Bert van Delden, Secretary-General of the ENCJ, then proceeded to give a brief summary of the Network's activities over the past year. In short: five working groups were established and did a great job; the ENCJ obtained observer status with the CEPEJ; a major conference was co-organised with the CCJE in Rome on the topic 'Which Council for the judiciary'; Spain, Italy and France participated in the Eurosocial project, enhancing social cohesion in Latin America; an evaluation of the ENCJ website was carried out by the Standing Committee, under co-ordination of Spain; and, last but not least, an exchange programme for Councils for the Judiciary was launched in co-operation with the EJTN, funded by the European Commission. Altogether, the ENCJ did a good job the past year.

Nevertheless, it is necessary to strengthen the Network. One important way of doing this is by creating a permanent office, based in Brussels, with legal personality in order to enter obligations and contracts and in order to obtain funding from the EU. Indeed, the Netherlands has been responsible for the secretariat for almost 4 years, and though quite some effort and staff has been put into it, it has proven to be a rather time-consuming and difficult job to achieve the objectives of the ENCJ. Acting as a knowledge broker to the members and observers takes far more time and expertise than envisaged on the outset. The same applies to organizing meetings and supporting the activities of the working groups. Also the provision of expertise, experience and proposals to European Union institutions has proven to be very complex and time-consuming. Not being present where it all happens (Brussels) has proven to be a serious disadvantage. Other disadvantages to the present setup are lack of continuity (moving the secretariat once every few years is a waste of the expertise gained) and national bias of a secretariat attached to one member.

In short, the Permanent Office would be responsible for administrative support of the Network, internal information and communication alongside external communication and advocacy. In order to minimise the risk of such an office becoming an autonomous body, making its own decisions and being hard to

control by the ENCJ members, the Steering Committee would also like to propose an altered administrative structure, better equipped to oversee this office. More details on the altered structure were provided later on by Mrs. Edith Van den Broeck.

The Secretary-General concluded his report with a rough sketch of the financial consequences of the creation of a Permanent Office, and - ending on a positive note - announced that the European Commission has indicated its willingness to subsidize the ENCJ providing the Network has legal personality.

Sir John Thomas, member of the Judges' Council of England and Wales, addressed the General Assembly and presented the Judges' Council of England and Wales' proposal to hold an extraordinary meeting of the General Assembly in Autumn 2007.

Edith Van den Broeck, President of the ENCJ and member of Belgium's High Council of Justice subsequently took the floor to explain the motion tabled by Belgium's High Council of Justice, which amounts to the following.

1. There is a need to enhance the ENCJ's effectiveness by clarifying the role of its different organs and by giving them a permanent secretariat which is not attached to one of the members of the ENCJ.
2. According to the Draft Statutes, the ENCJ's structure should be as follows:

- a General Assembly, the sovereign organ, competent for statutory questions, for admission of new members, for election of the President and the other organs, for adoption of the Programme of Activities and for decision-making on financial questions;
- a Steering Committee, competent to take all measures required to ensure the operation of the ENCJ between the meetings of the General Assembly and to oversee implementation of the ENCJ's Programme of Activities;
- an Executive Bureau, composed of members of the Steering Committee, competent to ensure the proper operation of the permanent secretariat.

3. In order to clarify its members' legal liability and to guarantee the ENCJ's independence in relation to the members, the ENCJ needs to have legal personality under the national law allowing the greatest effectiveness and the greatest flexibility.

4. The statutes conferring legal personality on the ENCJ need to guarantee respect for each member's national constitutional independence, including in discharge of the member's national constitutional and legal responsibilities. To that end, there is a need for express recognition of each member's right to state that it does not consider itself bound by a decision, other than one concerning solely the ENCJ's administration, when it considers that the decision undermines its independence and its powers.
Belgium's High Council of Justice therefore requests members to examine the draft statutes at this General Assembly with a view to their adoption at a forthcoming Extraordinary General Assembly to be convened at the end of the year 2007.

The General Assembly adopted the Judges' Council of England and Wales' proposition to hold an Extraordinary General Assembly in the Autumn of 2007 and adopted the motion presented by Belgium's High Council of Justice. The General Assembly agreed to hold the Extraordinary General Assembly in The Hague (The Netherlands), on 1-2 November 2007.

After the adoption of both proposals, ***Edith Van den Broeck, President of the ENCJ and member of Belgium's High Council of Justice,*** proceeded to describe the draft statutes and gave a compact analysis of the most important provisions.

The Secretary-General then moved on to discuss the time-frame, and insisted on the necessity of it being tight so as to realise the goals agreed upon.
The General Assembly adopted the following time-frame:

September 8:	amendments to the Statutes from Members submitted to the Secretariat
September 15:	Drafting Committee prepares proposal
September 27:	meeting Steering Committee to finalize the Statutes
September 30:	final Statutes sent to all Members
October 22:	confirmation by e-mail from the Members, accepting the proposal and confirming that they will sign the Statutes
November 1-2:	Extraordinary General Assembly by mandated delegates of the ENCJ Members

Program of activities

The General Assembly established the following Working Groups for 2007-2008:

1. mutual confidence amongst the actors in justice in the European Union;
2. 'e-Justice';
3. judges' liability;
4. quality management of judicial organisation;
5. criminal law in the European Union;
6. public confidence and trust in justice.

An Extraordinary General Assembly will be held on 1-2 November 2007 in The Hague (The Netherlands) in order to sign the statutes for the altered administrative structure of the ENCJ.

The 2008 General Assembly will be hosted by the city of Budapest (Hungary).

The full text of the speeches and reports are included in Chapters II and III of this report.

II. Speeches

Mrs Edith Van den Broeck - President of the ENCJ

Mr Mayor,
Ladies and Gentlemen,
Dear Colleagues,

May I first of all thank you, Mr Mayor, for your reception in this magnificent Gothic Hall and for the kind words which you have just spoken.

I am convinced that this wonderful setting, here in Brussels City Hall, in this historic building, at the heart of the 'capital of Europe' and on what is considered by many to be the world's most beautiful square, will be instrumental in creating a very special atmosphere, itself a guarantee of success for our proceedings over the next two days.

On behalf of my colleagues who are members of the High Council of Justice and of its President, Jacques Hamaïde, I would also like to welcome you to Brussels on the occasion of the General Assembly of our European Network of Councils for the Judiciary.

As from tomorrow morning we will have the opportunity to hold exchanges and discussions on the theme of our General Assembly, namely the separation of powers in the twenty-first century, with particular reference to the place and the necessary role of our institutions, Councils of Judges, Councils for the Judiciary or other bodies responsible for management of the judiciary, as guarantors of the independence of the judiciary in relation to the other branches of government.

But this evening, I would like to say a few words in honour of a person who is dear to us, a friend who is particularly precious to me!

Dear Colleagues,

I would like to take advantage of this welcome reception to pay tribute to the person who has given a face and a soul to our undertaking, namely our colleague and friend Luigi Berlinguer.

Dear Luigi,

It is now almost four years since we met, in The Hague, for the first time.

It was already clearly apparent there, not only from the tenor of what you had to say and your words, so full of depth and commitment, but also from your whole personality, that you had a strong desire to be directly involved in this undertaking, to which you immediately gave your wholehearted support.

Your academic and political fight to defend fundamental rights and democratic principles in a State subject to the rule of law already pointed to the fact that you were set to play a major role in this burgeoning European network.

And the following year, in Rome, it was only natural that you should be unanimously elected President of this Network, which had just adopted its statutes.

You have been and will remain the very first President in the history of our Network. You might even be called the founding President.

During the three years of your presidency you will have personalised cooperation between our Councils, you will have given it a face.

Over these years we have very frequently and rightfully addressed the question of the independence of the judiciary.

You have regularly emphasised the need to examine the question of the very existence and the competence of our Councils from that angle, as you are convinced that to guarantee this independence, the Councils need to call themselves into question on a regular basis.

Only last March, at the Conference of European Judges organised in Rome by the Consultative Council of European Judges, you told us: *"taken for granted that Councils are necessary to guarantee judicial independence, and therefore the rule of law and an effective protection of human rights, what improvements are there to be made as to the functioning of such bodies? In other words, do the experiences of countries that have set up Councils show us new needs making necessary to "fine-tune" the institutional setting of Councils, if we consider that – together with judicial independence – also citizens' expectations of a fair and effective justice delivered within a reasonable time should be protected?"*

And in that connection you always emphasise the need to conceive of this independence not as being for the purpose of protecting special interests but because there is a need to increase citizens' confidence and trust in justice and in the judicial system, which will only be the case if justice is delivered promptly. During that recent Conference you drew our attention to the following points:
"If distrust mounts, democracy is at risk; authoritarian drifts may be produced. Negative social emotions may induce political actors to reduce judicial independence, so as to also avoid public criticism of malfunctioning of justice and to unjustly blame it on the judiciary. Not always are judges aware of these phenomena."

Which brings us back to the heart of the debate on the separation of powers, the necessary collaboration between their organs and their responsibilities…. All the questions about which we will talk tomorrow. We wish to thank you for having highlighted this pressing democratic necessity over the last four years.

Dear Luigi,

I would mention your personal commitment, your finely honed diplomatic skills, your constant concern to reach decisions at the meetings which you chair, your unfailing courtesy and all the other qualities which each of has experienced tangibly in our meetings with you. For all this we thank you most sincerely and warmly.

The presidency of the Network has naturally been part and parcel of your lengthy and distinguished career at the service of your Italian compatriots, students, teachers, politicians, judges and, quite simply, citizens.

Your European commitment alongside the Councils for the Judiciary is indeed only a part of your commitment to European integration in general and to a Europe of freedom and justice in particular.

But we, assembled here today, coming from the new Europe in the process of construction, wish to say “thank you” to you and would ask you to accept this souvenir of the four fantastic years which we have just spent.

Mrs. Edith Van den Broeck - President of the ENCJ

Mr President,
Dear Jacques,
Ladies and Gentlemen,
Dear Colleagues,

Since I have not yet had the opportunity to do so, may I first of all thank you most sincerely for the confidence which you showed in me last year by electing me to the presidency of our Network from 1 May 2007.

I wish to assure you that I will make every effort over the coming two years to represent both the Network and you to the best of my ability, showing the commitment required to increase cooperation amongst us and to enhance our credibility vis-à-vis all our partners, and first and foremost, the European Commission.

I also wish to confirm to our colleagues on the Steering Committee that I will make it a point of honour to sustain the excellent cooperation which we have enjoyed and which we will continue to enjoy in the coming years. I consider the Steering Committee's role to be of fundamental importance for the development of our Network. Together we will make it our business to continue, build on and further develop the work started.

Nor have I forgotten the absolute necessity of improving the degree of concrete participation in the Network's activities by all members. I would say to the observers in our Network that I also wish to support the place which should rightfully be theirs.

I am convinced that the Presidency and the General Secretariat will enjoy excellent cooperative relations. And I would like to take this opportunity to thank our colleagues from *Raad voor de Rechtspraak* (Netherlands Council for the Judiciary) and first and foremost, its President, Bert Van Delden, for their efficiency and availability, qualities which they have unfailingly shown, thus ensuring the Network's smooth operation. I am sure that the work done by the General Secretariat over the past four years will enable sound foundations to be laid for the Network's expansion.

Tomorrow the General Assembly will be required to discuss important options for the ENCJ's future. Thanks to the commitment of our Spanish Colleagues, who have steered the work of an important working group on our organisation and our operation, we are ready to open a new chapter in our recent history.

Dear Colleagues,

Cooperation in the judicial area has become an issue of great significance for the European Union.

In this framework, it is more necessary than ever to clearly define the specificity of our Network in relation to other forums for cooperation between the parties involved in matters judicial.

Through this concrete cooperation, we are instrumental not only in increasing the independence of the judiciary in our different countries and vis-à-vis the European Union, but also in ensuring that justice operates effectively and efficiently, thus serving our citizens.

In this connection, I would like the overarching theme of my term of office to be increasing citizens' confidence in justice and the judicial system. And I invite you to ensure that this always remains a core concern, at the heart of our activities and of our proposals.

Dear Colleagues,

Materialisation of the European judicial area to whose establishment our Network is contributing will result one day in a system where all courts in all EU Member States will apply harmonised law and where courts will take decisions which will be recognised and applied throughout Europe.

This will require even greater harmonisation at the level of both Europe and the Member States.

It will also require judges, charged with applying this law, to form a truly homogeneous community, subscribing to the same principles and sharing the same values. A Europe of judges and public prosecutors is therefore essential.

And let us look even further into the future: a true common European legal system will also become essential once the 500 million European citizens share the same kind of society, with similar economic and social situations, shared moral values, unified public freedoms and so on.

The existence and the role of our Network will then be considered an absolute necessity, as was the case a few years ago in the new democracies of Central and Eastern Europe.

It is our responsibility to face up to the task awaiting us and to lay the foundations which will enable those who succeed us to take on this tremendous challenge.

In conclusion to this short statement, I would like to quote what was said in 1999 by Mrs Elisabeth Guigou, France's former Minister of Justice, at a symposium organised by members of the European Judiciary on the theme of the crisis in the effectiveness of the judiciary in Europe:

"J'ai la ferme conviction qu'aujourd'hui, après l'euro – dont chacun s'accorde à dire qu'il constitue une grande réalisation de l'Union -, la création d'un véritable espace judiciaire européen doit être le nouveau moteur qui doit désormais animer la construction européenne. Est-ce une utopie ? Peut-être, mais l'euro l'était aussi !"

["I firmly believe that today, after the euro – which everyone agrees is one of the EU's great achievements – the creation of a true European judicial area must be the new engine driving European integration in future. Is it wishful thinking? Maybe, but so was the euro!"]

It is on this note of hope that I would thank you again for having listened so attentively to what I have had to say and that I formally open the proceedings of our General Assembly.

Mr. Jacques Hamaide - President of the Higher Council of Justice of Belgium

Madame Deputy Prime Minister,
Madame President,
Dear Edith,
Ladies,
Gentlemen,
Dear Colleagues,

It is with great pleasure that I have the honour of welcoming, on behalf of the Higher Council of Justice of Belgium, the members of the General Assembly of the European Network of Councils for the Judiciary.

We welcome you here to Brussels, seat of most of the institutions of the European Union, as well as numerous other European governmental and non-governmental institutions and organisations.

Brussels, the capital of Belgium, but also a constitutional Region within our federal State.

Brussels, the capital of our country's two great communities; the Flemish community and the French community.

I do not wish to “overwhelm” you with explanations about the organisation and the workings of Belgium's institutions. I am keen to stress, however, that the radical transformation of our country's structures has always occurred within a democratic dialogue.

We are here in Egmont Palace, which has been placed at our disposal by the Ministry of Foreign Affairs.

It is in this building that visiting heads of state and of government are generally received.

Among your documents, you will find a brochure introducing you to the history of this prestigious building. Unfortunately, the text is only available in French and Dutch.
Dear Colleagues,

Allow me to say a few words on the Higher Council of Justice of Belgium.

As you know, it is a very young institution, which came about in 2000 in the wake of events connected with the sad Dutroux Affair, during which the police and judiciary were called into question and underwent profound transformations.

One of these reforms was the creation of the Higher Council of Justice charged with two key tasks: to ensure greater objectivity in the selection and nomination of magistrates and the appointment of presidents of courts and tribunals, attorney generals and crown prosecutors, and to exert external control over the workings of justice.

These tasks were entrusted to a constitutional body which is independent of the three powers and comprises 44 members, 22 of whom magistrates elected by their peers and 22 non-magistrates including university professors, lawyers and representatives from civil society, appointed by the Senate by a majority of two thirds.

Today, the Higher Council is fully integrated into the Belgian institutional landscape. We are also developing a genuine strategy towards civil society by organising theme-based roundtables in order to further our core task of restoring public trust in justice.

Ladies,
Gentlemen,

As you know, the Higher Council of Justice of Belgium has been involved in the European Network of Councils for the Judiciary from the very outset since it was following a discussion between Edith Van den Broeck and Bert van Delden that contacts were forged with Irish partners.

The Network began its great adventure with an initial meeting in the Hague in November 2003, followed by general assemblies in Rome, Barcelona and Wroclaw.

We wish to make a concrete contribution to the development of the Network and to the furtherance of its operation, and tomorrow's discussions will be especially important for its future.

The commitment of the Higher Council of Justice is also reflected personally in the presidency of Edith Van den Broeck.

Madame President,
Dear Edith,

You have been elected to preside over the European Network at an important moment in its fledgling history.

Now that solid foundations have been laid by Luigi Berlinguer, Bert van Delden and the members of the Steering Committee, the responsibility lies with you to introduce, along with all the members, the reforms necessary to optimise the internal workings of the Network, to develop participation by all members in its activities, and to consolidate the credibility of our thoughts and proposals among European institutions.

We know you well, and your strong personality guarantees that your presidency will rise to all these challenges.

Therefore, I speak undoubtedly on behalf of all participants in wishing you every success in this undertaking and in assuring you that you will always be able to count on everyone’s support, especially that of the Higher Council of Justice.

Mr. Frederic Vroman – Representative of Mrs. Laurette Onkelinx, Deputy Prime Minister and Minister of Justice of Belgium

The Separation of Powers

Ladies and Gentlemen,

The separation of powers is the cardinal virtue of our democratic system. Its objective is to safeguard and preserve individual liberties. History has shown that these liberties can only be truly guaranteed in a system where power, instead of being concentrated in the hands of a single individual, is distributed, shared among several institutions, each of which with a certain power of control over the others, so that, according to the well-known dictum, "power may curb power". This principle is the core, the keystone of our social and political organisation. All would be lost if this principle ceased to prevail over the organisation of our institutions.

Judicial power, ever since the establishment of our State, has been one of the major players in the separation of powers. It plays an essential implementational role the protection of individual liberties. This power is organised in such a way as to be independent of political authorities. The objective is twofold: to shield magistrates from pressure exerted by other powers in the exercise of their judicial tasks. Furthermore, to ensure that the competence of the courts does not stop at disputes between private individuals but extends to actions brought by an individual against a public power concerning an unlawful act committed by that power which infringes a right or a legitimate interest of the individual.

The separation of powers is a strong principle, but it is also a constantly evolving principle, capable of adapting to changes in society. The separation of powers as understood today is very different from the separation of powers as it was understood in the 19th century.

In the 19th century, it is recalled that judicial power adopted a highly cautious approach towards executive power. The ordinary courts refused to oversee the public power activities of the State in the name of the separation of powers. This absence of control became socially intolerable. And it was this that led the Court of Cassation, in 1920, to redefine the contours of the principle of the separation of powers, by

asserting, most pertinently, that the Constitution does not exempt the State from the control exercised by the courts but that, on the contrary, the State is subject to orders by the ordinary courts to make reparation for the damage it causes, where it wrongly infringes the civil rights of a citizen.

In the 20th century, it was realised and accepted that the courts can serve orders and defence submissions on the public administration with a view to protecting citizens against unlawful acts committed by public authorities. In the 19th century, on the other hand, judicial practice unanimously regarded the courts as being unable to serve injunctions on other powers.

It also came to be accepted in the ‘70s that the laws could be tested and their application dismissed by the courts where they are contrary to the rules of international law. And again in the 1980s it was accepted that a judicial body - the Court of Arbitration, subsequently renamed the Constitutional Court - could repeal laws contrary to provisions enshrined by special laws or by the Constitution.

A further development came about at the end of the 20th century: the Court of Cassation accepted that the State could be held liable for errors committed by the judicial powers.

Finally, in the 21st century, the Court of Cassation sanctioned, in keeping with the logic of its principle, the possibility of holding the State to account for errors committed by the lawmaker. A logical principle because there is no justifiable reason for denying citizens the right to reparation when the lawmaker commits an error by disregarding a higher law and thus causes harm to the subjective rights or legitimate interests of individuals.

This latest trend is positive, but it does not mean that this judicial doctrine leaves no room for reflection, with regard for example to the question of which court would be best able to deal with such a dispute, or indeed whether all the principles of tort law - oversight of compliance with the general obligation of a duty of care, orders to compensate in kind for the damage caused – are readily transposable to the liability of the State for errors committed by the lawmaker. To have this debate in Parliament, and to enact measures if a consensus emerges on this matter, is by no means abnormal

in terms of separation of powers. On the contrary, it is in full keeping with this principle. It is normal for the Constitution framer, the lawmaker to turn their attentions to such an issue and to decide, possibly, to introduce amendments if they think that these will help to achieve a better balance between the powers. It is in order to usefully engage in such a discussion that the pre-constituent authority has decided to submit article 144 of the Constitution for review.

The modernisation of our judicial system in terms which remain compatible with the separation of powers is another key challenge.
Judicial power is faced with huge responsibilities and a mammoth task, from the standpoint of both civil and criminal law, forcing us to strive towards maximum efficiency. In order to improve this efficiency, the nomination procedure for judges was reviewed in such a way as to provide maximum guarantees of quality and objectivity in the recruitment process. Since the adoption of the law of 22 December 1998 which established the Higher Council of Justice, the procedure for the nomination and appointment of magistrates has been completely overhauled, focusing on greater objectivity and greater transparency in their selection.

The Higher Council has become, over the years, a key player in the reform of Justice. Of course, the institution is always open to improvement; to that end, I am convinced that after operating for seven years, the time has now come to take stock. I believe that thinking should centre on the external control of the Courts and Tribunals by the Higher Council of Justice. I am an advocate of strengthening the Council's powers of control and, in order for this to happen, it needs to be guaranteed a certain distance from activities on the ground.

My point can be illustrated by two recent examples. The first is the law of 31 January 2007 on judicial training, leading to the creation of the Institute of Legal Training which releases the Higher Council from the practical organisation of training programmes while allowing it to retain powers to issue directives to the new Institute. Moreover, the presence of two members of the Higher Council on the board of administration of the Institute allows for effective and regular oversight.

The second example relates to the modernisation of the Judiciary, a vast undertaking, responsibility for which has been entrusted to the Judicial Modernisation Commission,

made up of people with a practical background, which will put its reform proposals to the executive and legislative powers as well as to the Higher Council of Justice. It is good that the Council has no responsibility in its actual implementation, thus allowing it to fully retain its constitutional oversight and advisory role.

Another important vehicle of modernisation is represented by the new demands placed on the magistracy, especially in the sphere of administration of the courts and tribunals: foremost among which is the management plan demanded of court managers, the absorption plan designed to combat the backlog of cases; the undertakings expected as part of the conclusion of the collaboration protocols between the executive power and court managers; but also the assessment of primary magistrates and of commanding officers. This assessment, which has existed since the adoption of the law of 18 December 2006, still arouses much criticism and concern. The independence of judicial power has been regularly invoked to challenge the assessment of holders of a commanding officer mandate. I am not going to enter into the details of these new provisions which alone deserve a full day's study.

I would like to say though that I believe it is necessary to preserve the existence of these assessment mechanisms as they help to guarantee sound management skills, ensuring “the right man in the right place”, and that the indispensable judicial independence of magistrates is reconciled with the demonstrable efficiency required of judicial power.

The exercise may of course prove perilous but remains nonetheless inescapable.
This Sunday, in Belgium, we will know the outcome of the legislative elections which will give rise to a new legislature during which the continued modernisation of justice will remain a priority. And I do not doubt for one moment that the separation of powers will, once again, be central to the debate.

Thank you for your attention.

Mr. Yves Bot, Advocate General of the Court of Justice of the European Communities

Madame President,

Allow me to thank you for giving me the opportunity of this meeting and exchange.

I will therefore try to keep to the time I have been given, and get straight to the point, whilst nonetheless exercising the caution which I consider to be essential:
dealing with this kind of subject in what is clearly a short space of time, is to try to achieve the impossible. I will therefore have to leave out some aspects and merely touch upon others so as not to bore my listeners and to avoid "wrecking" if I may describe it thus, this morning's schedule.

The separation of power in the 21st century is a subject which initially prompted me to ask "why should we think about the separation of powers in the 21st century?" But on reflection, to question the separation of powers is in fact to question the independence of the justice system, and to question the independence of the justice system is always a useful exercise, for to do so, is to be ever vigilant.

And it is surprising to note that where reference is made to the other two powers, this question of their separation is raised above all in terms of reciprocal power, not so much in terms of the protection of their territory, as though it were taken for granted that the exercise of political power were in fact a continuous border crusade, each attempting to conquer land from the other, as if that somehow formed part of the life of the institutions, thereby irresistibly calling to mind the phrase that Nietzsche had Zarathoustra say, "Wherever I found a living thing, there found I Will to Power".

And yet, the mission of the judicial system is clearly to resolve conflict, meaning conflict between the various powers in opposition to each other, and who want to conquer territory which is not necessarily theirs by right. The judicial system essentially represents the notion of balance, and it is because the notion is one of balance that its territory must obviously be preserved.

The judicial authority or judicial power (as far as I am concerned, they are one and the same thing) in effect constitutes a counter power. A counter power, and thus, a power which is itself separated from the other two previously united under the same system, i.e. the absolute monarch. Ever since the theorists of the Age of Enlightenment, we have known that the separation of these powers is, to an extent, one of the essential conditions for a political regime to have the right to call itself a democracy.

What has changed or what is in danger of changing in the 21st century in this balance between the three powers? Has its usefulness ceased to be, or rather, is it under greater threat?

Above all, is it more essential still? In the end, can it not also be envisaged (I was going to say on the contrary) insofar as today, the separation of powers may perhaps sometimes (in all cases in some areas), be understood to mean the separation i.e. limitation, of the powers of a judicial system often or sometimes felt to encroach too much upon areas of life from which it was previously excluded.

Where we are concerned, clearly the answer lies, to an extent, in each of these questions, with the exception of the first question.

The conditions for exercising judicial authority and judicial power have, to my mind, clearly changed with the end of the 20th century and the advent of the 21st, inasmuch as first of all, a fourth power was established, a power that is both a blessing and a curse i.e. information - the protection of democracy, as defined by the European Court of Strasbourg - but which can also be an extraordinary means of bringing pressure to bear on minds and consciences, a means which is sometimes difficult to control, and also of manipulating these consciences. I would like to talk about the press. And it is clear (and I believe this should be said) that the independence or dealings of the judicial system with other powers at the start of this, the 21st century, must also be envisaged in relation to dealings with the press.

World change (and by that I mean what is known as "globalization") with its territorial variations that could be called "regionalization", some incidentally, organized legally and structured judicially (as is the case in the [European] Union), but also, much greater upheaval felt by societies, and also by those who are its

members and who live in them, and by the same token, radical and fundamental changes in the responsibilities with which the justice system is vested, and thus new territories, new trials and new risks which the justice system must today deal with.

It is rather interesting to note that this movement towards new missions is in fact carried out in two totally different directions. It could only be said that what characterizes the modern development of powers and the areas of activity of the judicial system, are in fact two extremes. On the one hand a *concentration*, and on the other, an *atomization* of activity.

First of all, *concentration*. Throughout history, and increasingly today, each State has felt the need, in the light of specific crimes, to concentrate, at territorial points in jurisdictions with a particularly widespread area of remit, the legal skills and knowledge of but a few. The first example which springs to mind, in particular, in the case of France, is clearly the problem of terrorism. But well before that, the same concentration techniques were adopted to tackle issues which were particularly dangerous to society, i.e. serious fraud, the trafficking of toxic substances, namely drugs, and trafficking and trading in human beings.

Modern times have again highlighted this need. Globalization also means a globalization of crime, so it was necessary to fight or attempt to fight more effectively, cross-border networks which immediately and highly effectively adopted the notion of globalization or a world without frontiers. Clearly, there was a need to facilitate a dialogue of cooperation between states and to make the dialogue more effective, there obviously needed to be fewer players. Thus, each country needs to act to ensure that countries communicate with each other in the area of their common interest, i.e. in the case in point, the fight against crime.

To my mind, these important facts illustrate the need to improve cooperation in the fight against international trafficking and to standardize the interpretation of common rules. This means that the systems required to cooperate with each other should be judicially compatible and recognized as such.
This is an essential condition for mutual trust on the basis of which to establish mutual recognition which is the sole guarantee of the success of cross-border judicial cooperation.

We are well aware of the extent to which this is necessary today. And we are also aware of how much work needs to be done in this area. And while we are on the subject, and to expand upon it still further, how not to evoke this other contemporary scenario which is the emergence of international criminal courts establishing another way of resolving conflict, i.e. political conflict.

The link between these international courts and war, whether pursued or avoided, must make us wonder whether the justice system has or will become a method of resolving, or in any case, eliminating, certain international conflicts, i.e. national situations considered to be unacceptable by the international community and thus a means of action other than the traditional means provided by the armed forces. When we think about it, we are currently witnessing a plethora of these jurisdictions; obviously everyone can recall the Nuremberg trials, a consequence of the London agreement, but equally, the very contemporary international criminal court for the former Yugoslavia and Rwanda, the International Criminal Court, the special tribunal for Sierra Leone and the one the UN is currently setting up in response to the assassination of Rafic Hariri.

This is undeniably a situation which in fact reflects a globalization of the judicial treatment given to a number of conflicts, all of which prevails over other jurisdictions which at present remain regional, i.e. the European Court of Human Rights, but which applies notions which form part of a broader international canvass, in particular, the UN international conventions; obviously, I couldn't leave out the one to which I have the honour of belonging which, in the construction of the [European] Union based on the fundamental rights it acknowledges and to which it refers - fundamental rights moreover, assumed from the point of view of the Court, the European convention of Human Rights. The linking of legal, judicial and procedural rules which attempt to fulfil the fundamental mission of the justice system is also a factor i.e. resolving conflict, separating the victim from the perpetrator, giving due where it is due.

And then after *concentration* comes *atomization*. In stark contrast to all this, there exists what in France for example we call the '*politique de la ville*' [urban policy], i.e. daily involvement of the judicial authorities in areas which are in fact truly relevant to the family unit, not only from the traditional viewpoint of a crackdown on the crimes

or offences which may be committed, but also from the point of view of its inextricable activity in this area of prevention.

And the action now called for by the judicial authorities in fact involves giving instructive support prior to criminally reprehensible behaviour which can in any way be apprehended at the very least, thereby putting in place support measures designed to avoid turning to criminal activity. And here we have a situation which requires daily involvement 'in the field' resulting in a "restructuring", meaning something very specific: magistrates in direct contact with mayors and prefects, i.e. the representatives of central political power or local political power.

And in this mutual cooperation, in this "restructuring" for the good of all, it goes without saying, as we all know, that there is nonetheless a bridging of the two powers, in all instances, the central or local political power and the judicial power, who need to work together.

Have the barriers become less defined? Are they as clear cut as they were previously? How will things develop? What powers, rules, regulations, and transparency will there be? How will we be able to ensure the future of all of this, whilst retaining our independence and values?

This profound change in the nature of the missions will obviously alter the state of balance. This will require a rethink of the conditions for separating the powers, both in terms of the standard approach taken by the constitutionalists, and in the new directions, some of which might perhaps, specifically in relation to the standard approach, now be considered as potentially rash or even dangerous to the independence of the institution.

In terms of the traditional approach, to my mind, it would appear from the above that not only should the standard formulae for the separation of power be maintained, but they should also be strengthened. This is because it is no longer enough for the judge to be independent, appointed by an independent process of political power, but this safeguard must be extended - forgive me, I am being rather forceful, I say 'must' when I ought to say 'might have to', but for the sake of the clarity of opinion, I have used a

somewhat abrupt form - this safeguard must be extended to magistrates who do not judge.

Since, as we have seen, namely, when speaking of urban policy, they carry out, in the daily contact of the political authorities, quasi-judicial tasks; these do not constitute judicial authority in name, but have the nature of one, involving the actions of a judicial authority with respect to compensation vis-à-vis an identical reality, the actual safeguards which must be given being identical.

I would even go as far as saying that this would also preserve (and I am adopting an approach which is perhaps a little less national), and improve cooperation and dialogue internationally between the various prosecution authorities.

And there again, mutual trust would be strengthened, and mutual acknowledgement might at this point, freely and unreservedly, be truly applied, coming into its own in the delayed establishment, currently, of a judicial Europe. But it should also be considered that the new conditions likewise result in perhaps having a somewhat more innovative approach and that perhaps at this point, it is with respect to the conduct not only of the institution, but also of those who comprise it, themselves magistrates, to which reference should be made.

Nowadays, it is not sufficient merely to decree a principle for it to be accepted, and the fact that it is written down in a text is not enough for it to be acknowledged nor for it to be effective. By that I mean that our era, i.e. the end of absolute power, which the judicial authorities were perfectly able to reiterate to the other powers, and which it is today time that it accepts as a principle for itself perhaps. Legitimacy, independence, and objectivity is something which not only is no longer decreed, but which must be constantly demonstrated in the eyes of the public. That is to say, the citizens over which we exercise the legitimacy of our action and our powers, demand that this should be demonstrated. The demonstration of this principle is in actual fact "transparency".

The manifestation in judicial matters of a separation of powers is called "independence" and its effectiveness must always be demonstrated. Thus, its activities must, where necessary, be transparent. This presupposes that in the daily life of the

institution and obviously ideally speaking, a number of principles should be applied such as quality control in the broadest sense and also the mastery of a certain number of techniques and the spirit too of certain techniques, and I am thinking distinctly of the media/communications.

This also presupposes, and this has been said before, transparency in the choice of the individuals and their career progression. This also presupposes the absence of corporatism and in this respect, the problem of the responsibility of the courts must be faced in a dispassionate, clear and objective way. The calling into question of excessive responsibility or excessive calling into question of responsibility is effectively a means of destroying or compromising independence and of bringing pressure to bear on the judicial authorities. But conversely, a judicial authority without control or without control other than that which it complacently exercises over itself would result in its legitimacy being removed and a breach with the citizens who are alone the source of it.

The justice system today must see the light. I would say, if you will allow this moment of somewhat dark humour, that at the end of the day, often our reputation in the eyes of the public is such that we can only benefit by being known. Thus, we must take advantage of the opportunities given to us. But in this sense, it can be seen that this may result in upheaval in terms of ideas and methods. Today, particularly in the European Union, where borders are disappearing, it is this new moral doctrine, not geographic borders, that we must clearly overcome. What is always exciting when exercising judicial authority is that the work is never finished. There are always opportunities for improvement open to us. We sometimes need to be bold and sometimes to see things through, but in all instances, only the dream is reasonable.

Prof. Dr. Paul Van Orshoven - Ordinary Professor, K.U. Leuven and Dean of the Faculty of Law

The separation of powers in the 21st century: fiction or reality?

I. Separation of powers?

1. The "separation of powers" is part of the western peaceful solution of the ancient dilemma articulated by Jean-Jacques ROUSSEAU as "*man is born free, and everywhere he is in chains"*, the conflict between freedom and authority, between the individual and the collectivity, between the particular and the general interest, in short, between the citizen and the government. For where ever people come together for a purpose, one or another form of authority is instituted in order to lead the society in – preferably good – paths, if need be against the liking of those reluctant to be subordinate to that authority. History teaches that a *police or authoritarian state* then generally arises, i.e., a regime in which the rulers have all the power and are able to impose, if need be with violence, their will on the citizens, who can assert no rights against this "arbitrariness".

Gradually, checks are placed on it. To begin with, the exercise of governmental authority was encased in rules of law, that is, it was established in advance in which cases the government could act and how it had to behave in those circumstances. For what is typical about a rule of law is the general binding character of the governmental order it encases, which means that it is applicable to an indefinite number of abstractly described cases, thus to all similar cases and not just to one single concrete situation. The consequences of this are the equal treatment of everyone in the same situation and also legal security because it allows everyone to gauge the consequences of his actions beforehand.

This objective, however, is only achieved when the government cannot apply or ignore the rules of law in which its action is described as it sees fit. The next step to protect the citizen against arbitrariness is thus the subjection of the authority itself to rules of law, which is the core of the *constitutional state*, at least in the statutory sense: a political regime in which the authorities are bound by the law, the application of which they must assure with their power being restricted by the individual rights of the

citizens. Thus, an attempt was made to reconcile the necessary authority with *civil freedom*, which is the freedom to decide undisturbed over one's own affairs.

The constitutional state then evolved into a *democratic constitutional state* in which the governmental authority is exercised by the citizens themselves, albeit rarely personally or directly. Collaterally, democracy reconciles authority with *political freedom*, which is the freedom to participate in the decisions over the common good, in short, in the exercise of authority itself. In our eyes, the constitutional state and democracy have now become inseparable, although the constitutional state can exist without democracy. The inverse, however, is difficult to conceive because democracy, which necessarily has to be established and guaranteed by rules of law, assumes a constitutional state.

2. Nobody would want to have anything to do with a "paper" constitutional state, one that is not maintained. This requires that it must be determined whether the government does, indeed, comply with the rules of law imposed upon it and that, should it violate the rights of the citizens, intentionally or unintentionally, it can be called to order and the unlawful governmental administration be annulled or restored. In this respect, the original constitutional states generally failed because all of the governmental authority was united in one hand – the hand of the prince. The government had to monitor itself, which made new forms of arbitrariness possible. One who first makes the rule that he then himself applies and, finally, also determines determine if he has done this correctly can, in both the second and the third instance, be tempted to scorn this rule when it suits him because there is no remedy: "The boss is not always right, but he's always the boss."

On this observation rests the original doctrine of the *trias politica* or the *separation of powers* developed by John LOCKE (1632-1704) and primarily by MONTESQUIEU (Charles DE SECONDAT, Baron de MONTESQUIEU, 1689-1755) in his famous work *De l'esprit des loix* (in which, however, he never used the concept of "separation of powers "). MONTESQUIEU started from the English system of *checks and balances*, which restrained the power of the government by dividing it over different organs that mutually monitored and restricted each other. First of all, a careful distinction must be made between the three functions that are exercised in the state ("powers" in a functional sense): *the legislative function*, i.e., the determination of the general rules of the life of the society; the executive or *administrative function,* i.e. the

application of these laws in concrete cases or the "everyday management" of the society; and the *judicial function* or the administration of justice, i.e., the settlement of the disputes that arise on when the laws are applied. Subsequently, according to MONTESQUIEU, these functions have to be separated organically, that is, entrusted to three different, mutually and strictly equal and independent organs ("powers", in an organic sense), the *legislative*, the *executive*, and the *judicial power*, respectively. For when these organs are charged exclusively with similar functions, the share of each in the power of the state would be exercised in an objective, non-arbitrary manner because it would be in no-one's interest to ignore the rights of the citizen.

In practice, the theory requires the removal of the roles of legislation and the administration of justice from the previously autocratic administration, which the primary and all-embracing state power was, and the entrusting of these tasks to legislative and judicial powers to be newly established. Because he does not have to apply his rules of law, the legislator would have himself guided in their formulation only by the common good. Because they could expect no personal advantage or disadvantage from the application of the rules in individual cases, the judges would only concern themselves with whether the administration did this in a lawful manner.

II. Collaboration of the powers!

3. Many modern constitutions have, indeed, been inspired by the doctrine and particularly the intentions of MONTESQUIEU. However, the three-power theory has seldom been applied dogmatically, let alone literally, which, moreover, would hardly be possible. Thus, also in Belgium, while the three powers were established, they are, first and foremost, anything but separate. The legislative power consists of three "branches", which act together: the Chamber of Representatives, the Senate, as well as the King (in the concrete, the King and his ministers), in which the King plays a central role. But this King is also assigned the executive power. The ministers of the King are subject to the Chamber of Representatives, which has the "government making power". The judiciary, for its part, consists of the courts, but their members are appointed by the King, that is, the (federal) executive power, which also executes the judgments and decrees.

The tasks ("powers" in the functional sense) entrusted to the legislative, executive, and judicial "powers" (in the organic sense) are not exclusive, i.e., restricted to legislation, execution, and administration of justice, respectively, for each of them has

still other tasks. Of course, the function to which they owe their name is their most important task. Thus, the legislative power, in addition to the issuing of rules of law, also performs what are called "acts of high administration", such as the approval of budgets and accounts and of international treaties. The executive power also issues – as do the local administrations – rules of law that are called *ordinances* or *regulations*. Elements of the (federal) executive power are also sometimes involved in the settlement of disputes. Finally, the judiciary also fulfills administrative functions apart from any dispute settlement. Moreover, the central and, at the same time, coordinating role of the executive power as regards all governmental functions shows that the powers necessarily work together. This was already actually desired by MONTESQUIEU: "But as there is a necessity for movement in the course of human affairs, (the powers) are forced to move, but still in concert. [Mais comme, par le mouvement nécessaire des choses, (les pouvoirs) sont contraintes d'aller, elles seront forcées d'aller de concert.]"

Finally, the state powers are anything but perfectly and in the same degree sovereign: the constitution is the highest norm, and, among the constituted powers, the legislative power has legal precedence and at least the last word because of its direct democratic legitimacy. This explains the political responsibility of the ministers with respect to the directly elected chamber of representatives as well as many *principles of legality.* These are cases in which the constitution has reserved exclusively to the legislative power the making of certain arrangements – generally restrictions of the fundamental rights and freedoms of the citizens, such as house searches, deprivations of freedom, seizures or expropriations, and taxation – in spite of the rule-giving authority of the executive power whereby the legal subordination of the executive power to the legislative power is confirmed.

4. In the light of the above, the present state of the separation of powers can be summarized as the prohibition of each authority, in the exercise of its assigned function, to usurp the judgment that pertains to another authority because of the exercise of another function. Thus, one can speak of a "separation of functions", as it were, because it concerns not so much the organs as the executed tasks.

Its application, however, is restricted to cases in which a *discretionary power* is assigned to an authority. This means that the authority, on the grounds of its own appreciation, can act or not or has the choice of the measure that appears to it to be the most suitable to achieve the stated objective so that it disposes of a certain "policy

freedom" and has to have itself led only by the opportuneness or expediency of the decision to be taken. When the legal conditions for this are met and within their limits – which must be emphasized – theoretically every possible decision is equally lawful so that, in the constitutional state, which is concerned exclusively with compliance with rules of law, it is the end of the matter. In concrete then, the separation of powers hinders this judgment of opportuneness or expediency from being criticized by another authority, which, by so doing, would be arrogating to itself the function of another.

However, the separation of powers cannot be cited when the authority exercises a *circumscribed authority.* This means that the authority, by virtue of its legal task and without the least freedom of choice, must make a very specific decision if the conditions indicated in its task are fulfilled or must refrain from deciding if the conditions for its acting are not fulfilled. The latter implies that the conditions of application – not the content – of a discretionary authority are also bound by law. In the exercise of a circumscribed authority, there is nothing to judge so that the separation of powers cannot be appealed to here.

5. The result of all this, therefore, is that there is now no talk anymore of immunity of the executive power, which had occasionally already been claimed on the basis of the separation of powers. Reduced to its true proportions, it means exclusively that the judges may investigate only the correspondence with the law – the lawfulness – of the decisions of the administration, but then in the widest sense. However, they may not monitor them for their opportuneness, effectiveness, or "compatibility with the common good ", which pertains to the sovereign policy freedom of the administration.

Policy freedom, however, has reasonableness as its limit: when the, in principle, free appreciation of the administration is apparently unreasonable, then this appreciation is unlawful for then the *principle of reasonableness* is violated and the decision is arbitrary. This unreasonableness, therefore, in the framework of the judicial determination of legality, can only be sanctioned when, according to a generally shared legal conviction, it is not conceivable that any authority deciding in reasonableness could state such an appreciation. This is called *marginal testing.* In such a case, the judges can act, for apparent inopportuneness is unlawful. Here, however, it must be noted that judges are sometimes particularly stringent so that this testing does not always appear to be equally marginal.

6. Legislators, too, no longer escape judicial determination of legality, and this applies both for the legislative power and for the executive power when it proceeds to legislation – the issuing of ordinances or regulations. Thus, the judges, since an epoch-making decree was issued by the Court of Cassation on 27 May 1971 – concerning the State of Belgium versus the N.V. Franco Suisse-Le Ski, which gave the decree the nickname of the *cheese fondue decree* – determine without scruples whether the decisions of the legislative power are not in conflict with one or another stipulation of an international treaty or a supranational rule of, for example, the European Communities. If the occasion arises, they will not hesitate to refuse the application of a law that is, internationally seen, unlawful. From the outset, the same has been the case for legislation issued by the administration. Moreover, since 1946, ordinances can also be nullified, more specifically by the Council of State.

Decisions of the legislative power can be nullified only since 1985, more specifically by the Constitutional Court (formerly known as the Court of Arbitration), but exclusively for the misjudgment of the distribution of authority between the federal state and its component states or because of violation of the constitutional rights and freedoms.

In any event, the judicial supervision of legislators is also limited to determination of legality for the separation of powers also prevents judicial determination of opportuneness. The common good or welfare that is striven for by laws and ordinances, therefore, may not be judged by the judge, let alone whether this objective is achieved.

For the same reason, a judge may not himself issue rules of law, i.e. "administer justice as a general order that applies as rule". However, this does not prevent judicial decisions from very often having an effect in other cases than the case about which a ruling is made and thus fulfill the role of rules of law. Indeed, on penalty of *denial of justice,* a judge may not refuse to settle the disputes submitted to him, even though there is, at first sight, no rule of law applicable or if this rule is obscure or incomplete. To apply the abstract and, in general, imperfect laws in concrete cases, therefore, judges not rarely have to specify the content of these rule or explain their significance in the light of evolving social conceptions. Moreover, it is obvious that the judges will generally give the same or similar answers to the same legal questions, even though they arise in different cases. The prohibition of the denial of justice, the repetitive nature of most disputes, the requirement of legal security, as well as a goodly dose of commonsense thus have the result that judicial decisions, certainly when they come from the highest courts or when they point in sufficient numbers in the same direction – the "established

case law" – generally apply as guidelines for identical or similar situations, which, in practice, is at least as important as the rule of law that is explained in it.

At the same time, it is said that the meaning of the law is actually found in case law, which makes it an important source of law. The separation of powers, however, prevents it from having to be obeyed as such (except, of course, by the individual person convicted), like the laws, the common law, and the general legal principles, which are binding sources of law. Therefore, case law has no *binding force* but only the *persuasive force of precedent*.

III. *Trias politica* and powers *sui generis*

7. The *trias politica* does not keep some powers from escaping their classification. Thus, it is self-evident that whoever organizes the separation of powers stands above it, and that is the case for the constitutional power and its possible "watchdog", the Constitutional Court.

Here and there we sometimes encounter– at least in that respect! – a curiosum. Thus, in the founding of the Belgian *High Council of Justice*, much attention was devoted to its place in the *trias politica*. Functionally, the *High Council* is quite easy to situate: absolutely no case law, a small amount of issuing of rules, and much administration. MONTESQUIEU would thus most likely have placed it in the executive power. The organic classification of the *High Council*, however, is not a sinecure since it shows the closest organic bonds with the judiciary. At the creation of the *High Council of Justice*, however, it was explicitly denied that it would belong to the judiciary because it consists in part of non-magistrates and also because it exercises no jurisdictional functions. Neither of the two arguments convinces, the latter because the organic qualification with a non-dogmatically conceived separation of powers cannot occur on the basis of function, the former, in the same line of thought, because the judicial order does not or need not consist exclusively of magistrates.

However that may be, both the constitutional legislator and the legislator repeatedly and explicitly stated that the *High Council of Justice* is an institution *sui generis* that cannot be brought under any of the three powers. This tells us nothing about the *High Council* – in the words of F. DELPÉRÉE, "Ça fait savant, mais ça ne veut rien dire" – but it teaches something about the context in which it is established. Since the *High Council of Justice* has to guarantee the *external* control of the judicial order, it

could not be a part of it. However, it was also not opportune to include the *High Council* in the executive power in view of the, as it were, unabating stream of memoranda from the highest magistrates of the country not so much about the independence of the judiciary as such but over its independence with respect to the executive and also, albeit to a lesser degree, the legislative power.

IV. The separation of the powers and the exercise of the judicial function

8. One of the most important aspects of the separation of powers is the protection of the judge against interference by the other powers in the exercise of his judicial function, i.e., the settlement of disputes that arise on the occasion of the application of the law. Precisely because the constitutional state should not be a dead letter, this is reserved exclusively to the judge.

This implies in the first instance the independence of the courts with respect to the other authorities, which cannot give instructions about the settlement of legal disputes. Nor can judicial decisions be annulled by the other powers (apart from the limited case of the granting of pardons, but this is not a reversal of a judgment but an act of mercy) also not by the legislative power.

Administrative law courts also have to be independent. Just like the executive power as a whole, of which they are a part, they sometimes have found it hard to cope with this: for it is not easy – apart from the case of administrative law courts, which have exclusive jurisdictional competence – to be independent and impartial in one single capacity while this is not necessary and even wrong in the exercise of their other, administrative functions. This observation underlines the acuteness of the doctrine of MONTESQUIEU, for it is precisely for this reason that he rejected administrative case law.

The independence of the judges, however, does not imply that they enjoy immunity or are not responsible. Errors in judgments, however, can only be corrected by the judges themselves after recourse to legal remedies – objection, higher appeal, appeal to the court of cassation, etc. – if need be, by a claim for compensation of the damages caused by an erroneous judgment.

V. Judicial independence *sensu stricto*, *sensu lato*, and *sensu latissimo*

9. The separation of powers is, like a guard rail or a no-parking post, a structural solution to replace *sollen* by *sein* – not being able to do something is easier than not being allowed to do something – and thus completely superfluous if everyone keeps to the agreements. The separation of powers may thus safely be a fiction only if the independence of the judge is protected. An example, organically, the administrative judicial division (until 1 June 2007, the administrative division) of the Belgian Council of State is part of the executive power, which does not keep it, as an administrative law court, from keeping a close eye on that same executive power precisely because it is completely independent. In other words, there is also independence without the separation of powers.

This time more is at stake than a statutory constitutional state as opposed to a police state: there is also a private-law constitutional state as opposite to the state of nature. As noted, the constitutional state must be maintained in every possible respect, which occurs, in principle, by the government in general and ultimately, in the event of a legal dispute, by the judge in particular. Finally, this judicial legal protection must offer a number of guarantees so that the well-understood justice – the application of law – can be expected from the judgment.

The confidence in the judge himself is guaranteed by his independence and impartiality, two closely related but still different qualities: independence is autonomy in decision making; impartiality is not being biased with respect to the outcome of the proceedings. But judicial independence is also not a univocal concept, for autonomy exists in degrees so several distinctions emerge that obscure the precise scope of judicial independence. The oppositions of functional-organic and subjective-objective independence appear to be the most important of them because it is precisely these distinctions that explain the many differences of opinion: it is not always the same concept of independence that is being applied. Nevertheless, it is obvious that one may not weigh before one has agreed upon the scale.

10. The core of the independence is the requirement that the judge has to base his decision on his personal, free judgment, with no external influence. By definition, this independence applies *sensu strictu* in the exercise of the judicial function, i.e., the settlement of legal disputes. It can, therefore, be called "functional independence". It

applies in the first place with respect to the legislative and – probably primarily – to the executive power. Precisely to avoid influence from this quarter, the judges are for the most part placed in a separate state power. It applies also with respect to their fellow judges, although the nuance of legal remedies has to be introduced here. Although the higher judges do not have a right of injunction, their *review* is without doubt a tempering of the independence of the lower judges. For no judge rules with the intention of being overruled, and the correction of judicial errors as well as uniformity in case law also have their rights (of legal security).

The judge must also be independent with respect to public opinion, the press, all sorts of pressure groups, political parties, and other social actors. A consequence of this is what is called – and it is apparently the always less well known – *sub iudice* principle, which obliges outsiders and *a fortiori* authoritative outsiders to manifest appropriate reserve when commenting on legal and other questions that have arisen in pending court cases. In this regard, one can refer to Art. 10, 2 of the European Convention on Human Rights and Fundamental Freedoms, *in fine*, about the restrictions on the freedom of speech in order to maintain "the authority and impartiality of the judiciary."

The independence of the judge applies – remarkably enough – also with respect to himself, which means that he, in the exercise of his office, must abstract from his own ideological or other private convictions and prejudices, which is symbolized by the robe. In the words of KORTMANN: "The suit makes the person a functionary. The functionary, as such, has no religion or philosophy of life."

11. The non-influencing of the judge in the making of a concrete decision is a one thing, another is his autonomy in general – independence *sensu lato* – or, more precisely, in his comings and goings *apart from* the settlement of a specific legal dispute, that is, in the exercise of his other tasks or in the exercise of his office *in abstracto*, at once the autonomy of the judiciary in its entirety. Nevertheless, an expansion from the functional to what may be called for convenience sake "organic independence" is obvious because the latter can and probably must create the preconditions for the former and is much more objective and thus easier to comprise in rules. Naturally, the organic independence is even more instrumental than the functional and thus even less essential. Complete organic autonomy, both of the judge *ut singuli* and of the judiciary in its entirety – "a state within a state" – is, for that matter, inconceivable, and *fortiori* so in a

parliamentary democracy. In any event, the judiciary has to be appointed externally, to be provided with operational funding, and so on.

Controversy, therefore, arose as regards organic independence for nobody disputes that a judge has to make his decisions himself and alone, collegial bodies being, of course, collegial.

12. Related, but not identical, to the difference between what we have called above the "functional" and "organic" forms of independence seems to be the difference between what we have called the concrete, "subjective" dependence or independence and the doctrine of "objective" dependence and independence, developed in correspondence with the adage *"justice must not only be done, but also be seen to be done"*, that consists only of external appearance and from the outset has been taken up by the European Court of Human Rights in the concept of the "independent court" of Article 6 of the ECHR. So, too, the independence we have called "functional' above seems rather subjective in nature while the organic independence consists of preconditions, which are more easily determined for the former, and thus is objective or is a more objective question. Both of these distinctions, however, may not be identified with each other, which does not alter the fact that they both point to the same difficulty: the actual influencing of the judge in the taking of a concrete decision is virtually impossible to establish if he does not expressly admit that he has made his decision "under influence".

Perhaps for this reason, the European Court identifies subjective independence quite easily with *protection* against external pressure, for example in the COËME decree of 22 June 2000: " The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the existence of safeguards against outside pressures and the question whether it presents an appearance of independence …" Upon closer inspection, however, this is already a derivation from the autonomy *sensu stricto*, for "protection against" is not the same as "absence of". Actual presence of external pressure, by the way, also does not imply actual influencing: there are judges who resist pressure.

13. From the proceeding, we may conclude that judicial independence can be conceived as three, as it were, concentric sets. In "the eye of the hurricane" is situated his independence *sensu stricto*, the complete prohibition of influencing of the individual

judge when making a decision *in concreto*. For the constitutional state, this is the heart of the matter. Then there is the broader, objective independence or independence *sensu lato*, which consists of all sorts of guarantees or protection against external pressure and thus also manifests organic aspects to remove any appearance of influencing, but still in the making of individual jurisdictional decisions, thus to the advantage of the judge *ut singuli*. Finally, there is the independence *sensu latissimo* on the basis of which judges and at the same time the judiciary in its entirety can be subject to no-one. That this last conception goes further than the requirement of "objective" independence appears from the ruling of the European Court of Human Rights, which, for example, recognizes that objective independence does not mean that the judge must be appointed for life and must be completely irremovable or that he may not be appointed by the executive power or chosen by the citizens or by lot or that he may not be a lay judge.

14. As noted, complete independence is impossible, *a fortiori* in a constitutional state that also wants to be democratic. Judges are thus appointed by others than themselves, generally by the executive power. Here, too, caution is required. As the Court of Human Rights stated in its decrees LAUKO and KADUBEC of 2 September 1998: "In order to determine whether a body can be considered to be "independent" of the executive it is necessary to have regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."

A fine example of how this independence can be organized is provided by the Belgian situation, whereby the judges of the judiciary are appointed by the King but upon nomination with justification and also with a two-thirds majority of the appointment commission of the *High Council of Justice* for one single candidate, whereby a number of checks and balances can be involved. In no case, can a non-nominated candidate be appointed.

VI. Judicial independence – old and new applications

15. The importance of judicial independence can hardly be overestimated. In any case, this is the reason why the rule already exists in a modern constitutional state even though it may not be legally or constitutionally ratified. Thus, the independence of the judge was articulated as such in the Belgian constitution only in 1998. Nevertheless, it

was never doubted that the rule was part of the constitution from the outset, albeit not in its formal but in its material sense. These are the fundamental rules concerning the organization of the state and its relationship to the citizens. Under Belgian law, the independence of the judge, like impartiality, which is generally mentioned in one breath with it, is one of those typical, material constitutional, unwritten rules – "*non scripta sed nata lex*" – that are called a "general principle of law", the existence of which can be derived with certainty from legal and constitutional applications.

16. In the original formal constitution, there was no question of the independence of the judge as such and *a fortiori* no mention in the "functional" sense. It did contain and still contains various rather "organic" applications of it that show immediately that the constitutional legislator was well aware of the requirement of judicial independence.

To begin with, there is the "separation of powers" in general and the organization of the judiciary as a separate state power in particular. Further, the constitution specifies that the judges are appointed for life, which implies that they cannot be removed by the appointing authority, that they retire at the age set by law, and that they enjoy the pension set by law, that a judge can be removed or suspended from his office only by a judgment – thus only by the judiciary itself – and that he can be transferred only to a new appointment and with his consent.

Financially, too, the judges are largely independent of the executive power: the establishment of their salary is reserved to the legislative power. Finally, the judges in Belgium may not be appointed to administrative offices. In the words of BELTJENS: "La magistrature doit être préservée des séductions du pouvoir".

A fine, also legal, confirmation of the independence of the judge, this time primarily with respect to the parties in a procedure, is the limitation of his personal liability to the exceptional cases, to be brought before the Court of Cassation, of "redress from the judge", i.e., for "fraud or deception", either during the investigation or upon his judgment, and refusal to exercise the powers of the court. This restriction does not alter the fact that the Belgian state guarantees indemnification of the damage caused by an erroneous judgment, more specifically when the judge has violated a rule that is applicable to himself in a judgment that has, in the meantime, been overruled.

17. Until before the 1998 reforms, which established, among other things, the *Hoge Raad voor de Justitie*, the independence of the Belgian judiciary did not cause a

great deal of controversy. The discussion seems now rather anecdotal about the compatibility with independence in general and the appointment "for life" in particular of the superannuation of judges, which had been introduced in 1867 and finally was replaced in 1981 by the constitutional legislator for a retirement pension. So, too, the dispute about the possibility of charging judges with a temporary task – for which no salary but expense reimbursement would be paid – or to allow or not allow judges to exercise another activity for payment.

18. As stated, the independence of the judge ended up as such in the Belgian Constitution (Article 151) only in 1998. At first sight, this was superfluous in view of the undisputed existence of the rule, either as a general principle of law or as part of Art. 6 of the European Convention on Human Rights or Art. 14 of the International Covenant on Civil and Political Rights. Still, this constitutional anchoring was intended not just to comfort the magistracy, on the contrary. In the constitution, henceforth, one reads not only that the judges are independent but also that they are independent "in the exercise of their jurisprudential powers". On closer consideration, the constitutional legislator appears to have settled the controversy described above about the scope of judicial independence and to have knowingly reduced it to its functional aspect. The constitutional legislator did not want to have anything (more) to do with the special organic conception defended by the magistrates of the Court of Cassation and others. In short, the judges are independent in the exercise of their jurisprudential function and no longer and certainly not necessarily outside of it.

19. On the European level, there is just as little new as regards the independence of the judge. Recent decrees of the European Court for Human Rights confirm, for instance, that the appointment of a judge in the weeks after the judgment to a high governmental position suffices to raise objectively justified doubt about the independence and impartiality of the court of which he is a part, certainly when it appears that the negotiations in view of the disputed appointment were already in progress when the case was under deliberation (Court of Human Rights, 9 November 2006, SACILOR-LORMINES / France). The Court, too, was able to confirm a few times that military judges in principle may not adjudicate over ordinary citizens (9 November 2006, DUZGOREN / Turkey; 6 July 2006, ERBAKAN / Turkey; 4 May 2006, ERGIN / Turkey). And on 19 May 2005, the Court could pronounce (STECK-RISCH Decree/

Liechtenstein) on the independence of a part-time judge who was an attorney in ordinary life, which is not unusual in a small country like Lichtenstein. The Court saw no reason for concern about the judge-attorney sharing only office space but not income with his colleague who defended a party in a suit, and there was no question of professional, financial, or hierarchical dependence. *A contrario*, the question would have appeared much differently.

20. "Contempt of court", to which reference is directly made in Article 10, § 1, first paragraph, *in fine*, of the European Convention on Human Rights, as a legitimate objective for the restriction of free speech, albeit that independence is there identified with "authority" ("for maintaining the authority and impartiality of the judiciary"), was discussed at length in the SUNDAY TIMES case of 1979 in which the Court took account of the degree in which the judge could or could not have let himself be influenced by journalistic revelations. That brings us again to the *sub iudice* principle, which makes intelligent people refrain from commenting on how a judge should decide a legal dispute and this reserve has to be directly proportional to the social, scientific, or political authority of the party involved. Here are two Belgian applications or non-applications.

A few years ago, cattle dealers were prosecuted for cruelty to animals, and the civil parties tried to be able to use the declarations of a state inspector, who had later considerably qualified his initial severe observations. I cite the judgment of the court (14 January 2002): "Moreover, a member of parliament found it appropriate, not at all disturbed by the fact that the case was pending before the court, to ask, on 16 July 2001, a parliamentary question to the minister of consumer affairs, public health and the environment with the unmistakable intention of eliciting a response in which the witness would be repudiated by the minister. The official response was that the minister, in view of the absence of the officials who were competent in the matter, could not answer the question within the time period set. On 18 September 2001, the [parliamentarian], however, actually did receive an answer *in extenso* in which the following remarkable sentence can be read: "From the discussion of my services with the inspector involved, it has emerged that he never had the intention to contradict or undermine the conclusions written in his reports that, in the judgment of my services, can be supported by other experts". Although this reply was never published, it was brought up by the civil party in the debates; apparently there was a special bond between the civil party and the one who had placed the parliamentary question. The

technique here used by the civil party, namely the involvement of a minister to make it appear with respect to the court that a witness would have intended something other than what he said, is grossly unfair with respect to the defense and offensive with respect to the court."

A second, more innocent and likely unexpected example is offered by the recent compulsory evacuation of the Brussels courthouse because of a bomb alarm, which prevented a number of attorneys from performing one or another procedural action on time. Indeed, the courthouse was inaccessible for rest of the day and the offices of the clerks re-opened only the next day. I cite the official communiqué of the Chairman of the Bar: "Upon dispute, it is for the law courts to pronounce regarding the question of whether the expiration period that ended on 15 March 2007 be extended to 16 March 2007. In my opinion, the evacuation of the Courthouse on 15 March 2007 indisputably constituted *force majeure* as a result of which the due dates for procedural documents to be presented at the Courthouse is extended up to today. Deontologically, care shall be taken not to argue that briefs that, because of the situation of *force majeure*, could be deposed only today instead of 15 March 2007, should be barred from the debates. In general, one will act sincerely and confraternally on the basis of a situation of *force majeure* on 15 March 2007."

VII. Separation of powers, judicial independence and proper justice

21. Like the separation of powers, the independence of the judge, however important it may be, is not an end in itself, but, like all principles of proper administration of justice, it is nothing more than a means to enable judges to rule as much as possible in accordance with the law. The administration of justice has only to be done properly so that its result – the judgment – is proper. This, however, the independence of the judge alone cannot guarantee. On the contrary, today I hardly see any problems as regards the independence of the judge. We really do no longer live in a banana republic. Could it be that judges themselves place disproportionally much importance on their independence, not so much because they fear that their judgments would be influenced but much more because they want to keep their doings out of the hands of somebody else?

The question arises, therefore, whether judicial independence may reach so far that judges cannot be called to account for the way in which they, *in globo*, assure the

public service of the administration of justice. If the separation of powers is a purely functional question, the rule is likely sufficient that legislators and administrators, as well as other outsiders, may not put themselves in the place of judges when they exercise their judicial authority – the settlement of disputes All the rest – from organic to logistical independence – seem merely to be policy questions that, with a view to quality and efficiency – proper administration of justice in the broadest possible sense – have to be resolved. This tolerates in some respects perhaps somewhat more, but in other respects probably less independence and primarily less separation of powers. That half of the Belgian *High Council of Justice*, which exercises the general supervision of the operation of the judicial order, consists of magistrates can only sweeten that pill.

Mrs. Edith Van den Broeck - President of the ENCJ

Dear Colleagues,

We have just listened very attentively to some particularly interesting and gripping presentations.

Each of this morning's papers is an important contribution to the reflection in which we will have to engage, either within our Councils, or here, as part of our European cooperation within the Network.

It is now my turn to present to you some 'food for thought' on the issue of the separation of powers, from a perspective specific to Councils for the Judiciary and to our European Network of Councils for the Judiciary.

I would like the rule of law to be the focal point of these reflections on the separation of powers.

The reason for this is that rule of law and separation of powers are intimately connected and this link involves the judiciary first and foremost.

In a State subject to the rule of law, all the organs of the State which have been granted sovereign decision-making power are required to abide by and submit to the law.

This concept is a reality in all European States since, moreover, through membership of the Council of Europe, an institution dedicated to the defence of European values and to respect for the principles of democracy and human rights, these States undertake by treaty to abide by the rule of law.

Today, the law to which the State is subject is established not only by the competent national organs but also within the framework of the European institutions and international courts. That is the case with respect to the binding decisions of the Court of Justice of the European Communities and to those of the European Court of Human Rights.

Domestically within our States, the sovereignty of the State amounts in fact to the obligation to respect fundamental freedoms and rights. These are the freedoms which must be respected by all the organs of the State, that is to say by legislators, by government and by judges alike.

The purpose of the rule of law lies, therefore, in the guarantees recognised by law which citizens enjoy vis-à-vis the powers of the State.

And it is specifically from this that the judiciary's mission derives its *raison d'être*, its very existence being intimately connected with the rule of law.

Judges must ensure that fundamental rights are respected by both legislators and government. The rule of law therefore implies both submission to the law and the sanction of independent judges.

This demonstrates the absolute necessity of the judiciary's independence in relation to the other powers of the State, both the political power and the other 'powers' and pressure groups of all kinds.

It is important for the independence of the actual organs of the judiciary, judges and members of the public prosecution service, also to be recognised – even though this extension to the latter is not present in all European countries.

The independence of the judiciary can be guaranteed only if its organs discharge their responsibilities in a branch of power separate from the political branch.

As Montesquieu said – something of which we were reminded several times this morning – and I quote:

"In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law. […] When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; […] Again, there is no liberty if the power of judging be not separated from the legislative and executive powers."

Thus, in Montesquieu's mind, only the power of judging must be separated from the other powers, as justice must be independent. This allows the ever-present risk of a return to despotism (royal absolutism) to be avoided, given that as he sees matters, the executive and the legislative are not separate but simply distributed between the king and the chambers.

But our modern democracies, whilst guaranteeing the independence of the judiciary, both functional (the function of judging is independent of the function of legislating and of the function of governing) and organic (the independence of judges and of organisation of the judiciary in relation to legislators and government is guaranteed), considered that this guarantee of independence should be consolidated through the creation of Councils of Judges or of Justice or for the Judiciary.

Admittedly, the independence of justice and the judicial system is not restricted to the question of the existence of a High Council.

But the existence of a High Council has become an essential element in ensuring the legitimacy of the judiciary and of its organs.

Because the composition of a Council for the Judiciary is twofold, some of its members being judges elected by their peers, its other members being democratically designated non-judges, such a Council appears, in citizens' eyes, more transparent and deserving of their confidence and trust.

By conferring on it decisive powers with respect to the selection and appointment of judges, and frequently also with respect to disciplinary matters, the Council for the Judiciary successfully fulfils its task of contributing to the independence of the judiciary.

By also allowing it to contribute, to a greater or lesser extent, to definition and control of the resources, budgetary in particular, allocated to the judiciary, the Council for the Judiciary is instrumental in bringing about a higher degree of self-government by the judiciary.

But independence does not mean non-accountability.

Nowadays, accounting for one's acts and one's management is more than ever intimately connected with independence. Citizens have confidence in an effective and

independent judicial system, but they also expect a form of accountability, as expected of any public authority.

In performing their function of judging, judges have fundamental guarantees of independence. But in their organisation and their 'self-organisation', in cases where a Council for the Judiciary has powers of organisation and funding of the judicial system, the judiciary needs to be accountable to society for the way in which it operates.

Professor Van Orshoven told us: *"Absolute organic autonomy, of both judges and the judiciary as a whole – "A State within a State" – is, moreover, unthinkable. The judiciary should indeed, and in any event, be appointed from outside and have operating resources allocated by the legislative power."*

He added: *"The independence of judges does not, however, imply enjoying immunity or non-accountability."*

It is undoubtedly a role to which Councils for the Judiciary and other similar organs should attach far greater importance. Without calling into question the principle of independence, it is important to take into consideration the following three interlinked principles: no power without responsibility, no responsibility without justification and no justification without control.

Is there not a role here for our Network of Councils for the Judiciary?

In its mission as a mediator between the national Councils, the national judiciaries and the European institutions, the Network should act concretely to reinforce this overall vision of respect for the principle of the separation of powers, of the independence, subject to accountability, of the judiciary and of the new and changed role for Councils for the Judiciary, aimed at increasing citizens' confidence and trust in effective justice and an effective judicial system, not subject to outside pressures.

Dear Colleagues,

I would like to end this short response by quoting the words spoken by Mrs Laffranque, Judge at Estonia's Supreme Court and Vice-President of the Consultative Council of European Judges, in conclusion to the proceedings of the recent European Conference of Judges in Rome:

"To paraphrase Jean Monnet, one of the founding fathers of the European Communities, who declared more than half a century ago: "Nous ne coalisons pas des Etats, nous unissons des hommes" *(We are not forming a coalition of States, we are uniting people), I would say, for my part, that we are not forming a coalition of Councils for Judges or similar bodies using a common European template, but we are uniting judges, ideas and democratic principles in order to enhance the independence, the impartiality, the effectiveness and the accountability of justice and of the judicial system."*

Mr. Bert van Delden - Secretary General of the ENCJ

Dear Colleagues,

In this morning session we are going to address a few matters that are very important to the ENCJ. As we do not have a lot of time to deal with these issues, I will limit my presentation to some extent in order to leave enough time for debate.
What is up this morning?

1. Results of the Working Group on Internal Organisation (Presentation by Spain)
2. The functioning of the ENCJ in the past year and in the near future
3. Letter from the Judges' Council of England and Wales
4. Motion from the Belgian High Council of Justice
5. Draft Statutes for the ENCJ

You will find all documents relating to these topics in your conference folder and I hope you had an opportunity to read them before this session
These issues are all related to each other and we have tried to put them into a more or less logical order for this morning, but sometimes we may not be able to avoid cross-references. Hopefully this will not complicate matters too much.

The past year has been an active year once again for the ENCJ. A few highlights:

- Four working groups were established and did a great job as we all agreed upon yesterday afternoon
- The ENCJ obtained observer status with the CEPEJ (Commission for the efficiency of justice, Council of Europe)
- As a co-production with the CCJE (Consultative Council of European Judges, Council of Europe) a major conference was organized in Rome in March on the topic "Which Council for the judiciary?'. I have seen quite a few of you at that conference and I am sure that you will agree that this was a very meaningful event.
- Spain, Italy and France participated in the Eurosocial project of the European Union, enhancing social cohesion in Latin America.
- Also coordinated by Spain, an evaluation was carried out by the Standing Committee of the ENCJ website. This evaluation has provided us with some very relevant observations and findings that will help us to improve the web

site, being one of the important instruments we have to strengthen the knowledge about each others systems.

- Cooperation with the EJTN: establishing a exchange programme for Councils for the judiciary, funded by the European Commission (and I would like to urge you to take part in this programme!)

Altogether, you might say that we did a good job the past year!
Nevertheless, we think it is time to strengthen our Network.
Let me remind you of the objectives of the ENCJ:

> Within the framework of the creation of the European Area of freedom, security and justice, the objectives of the ENCJ are co-operation between members on the following:
>
> - analysis of and information on the structures and competencies of members;
> - exchange of experience in relation to how the judiciary is organised and how it functions;
> - issues pertaining to the independence of the Judiciary and other issues of common interest; and
> - provision of expertise, experience and proposals to European Union institutions and other national and international organisations.

One important way of strengthening the network is by creating a permanent office. Why?
The Netherlands has been responsible for the secretariat now for almost 4 years and I can assure you that even though we have put in quite some effort and staff, it has proven to be a rather time consuming and difficult job to achieve the objectives mentioned before. Acting as a knowledge broker to the members and observers takes far more time and expertise than all of us envisaged. The same applies to organizing meetings and supporting the activities of the working groups.
Also the provision of expertise, experience and proposals to European Union institutions has proven to be very complex and time-consuming. Not being present where it all happens (Brussels) has also proven to be a serious disadvantage.

I could give numerous reasons why it is so important to be involved in the EU.
One example:

The EU is presently finalizing directives on certain environmental offences and offences relating to Intellectual Property. These directives appear to contain specific penalties to be imposed by a judge if one has committed such offences. This has been made possible by a decision of the European Court of Justice in Luxemburg. Also, the minimum maximum sentence is specified in these directives. (for example the maximum prison sentence should at least be 4 years).
I am sure that this is an issue many judges would like to be informed about in advance, in order to assess the consequences on the national judicial sentencing policies.

Returning to the secretariat. Of course we could hand over the secretariat to another ENCJ member organisation, but that organisation would undoubtedly be confronted with similar problems and the additional problem that no one is as close to Brussels as we are. Also, placing the burden on one organisation does not seem to be fair in the long run either. In addition we have come to acknowledge that there are other disadvantages connected to the present setup: **lack of continuity** (moving the secretariat once every few years is a waste of the expertise gained) and secondly the **national bias** of a secretariat attached to one member.

In short, we like to propose the establishment of a permanent office, based in Brussels. If we would create this office, we would naturally need a legal personality, firstly in order to enter into obligations and contracts (employment, lease, obtaining property) and secondly in order to obtain funding from the EU.

The major risk as we see it, would be that such a permanent office would become an autonomous body, in effect making its own decisions and being hard to control by the ENCJ members. It is for that reason that the Steering Committee would also like to propose an altered administrative structure, better equipped to oversee this office.

What would this office be doing? We have enclosed a plan of operations; let me quote a few points**:**

I. Administrative support

- the convocation of meetings
- the administrative support of
  - the President,
  - meetings of the General Assembly,

- meetings of the Steering Committee,
- meetings of the Executive Board,
- meetings of the various working groups and commissions;

- supporting the monitoring of the activities of the working groups and committees;
- supporting the coordination of the activities of the various working groups and committees;
- assisting the Executive Board in developing the annual program of activities

II. Internal information and communication

- information on:
  - the functioning of the ENCJ and its bodies,
  - the structures and competencies of the members and the observers of the ENCJ,
  - the organisation and functioning of the judiciary in the country of the different members and observers;
- information using internet applications;
- information on: the results of the different working groups and committees to the members, observers and formal bodies of the ENCJ;
- information on: forthcoming EU-legislation and EU-policies expected to have an impact on judicial practice.

III. External communication and advocacy

- the recognition of the ENCJ as the representative of the judiciary on a European level;
- the accessibility of the Network by stimulating the visibility of the Permanent Office;
- the presentation of a joint position of the ENCJ (or groups of members) or of results of ENCJ working groups to third parties, such as the European Institutions and the Press;
- the establishment and maintenance of relations between the ENCJ (and its members) on the one side and EU-institutions (the European Court

of Justice included) and other international organisations and tribunals on the other side.

Of course this has quite some implications for the ENCJ.

One issue should be mentioned expressly: the financial consequences. We have added with the papers a very tentative budget for this Office. The amount mentioned will be quite staggering to most of you, it certainly was for me!
I would like to stress however, that this kind of budget would only become relevant once we have started and have been busy for a while. In the first phase of this project the Steering Committee thinks that a budget of approximately half of the amount mentioned would suffice. (200.000). In addition, I would like to remind you that the EC has indicated its willingness to subsidize the ENCJ. Informally we have understood that an amount of 150.000 from the Commission would be realistic.

I suggest we move on to the next part of this session: the proposals of the Judges' Council of England and Wales and Motion from the Belgian High Council of Justice.

TIME FRAME

September 8:	amendments to the statutes from members submitted to the secretariat:
September 15:	drafting committee prepares proposal
September 27:	meeting Steering Committee to finalize Statutes
September 30:	Final statutes sent to all Members
October 22:	Confirmation by e-mail from members, accepting proposal and confirming signing the Statutes
November 1-2	Extraordinary General Assembly meeting in The Hague, signing the Statutes by mandated delegates of the ENCJ Members

III. Annexes

Working Group Mission and Vision III - Report on Managing and assessing the performance of a Council or Judicial System

‘If you can’t recognize failure you can’t correct it’

1. Aim of the working group

During the annual conference of the ENCJ held in Wroclaw on 25-26 May 2006, the General Assembly decided to establish for the third successive time a working group on Mission and Vision. As was the case the preceding years, the Belgian High Council of Justice coordinated[1] this working group.

The working group, Mission and Vision III, received as task the development of a framework for the performance assessment of a council and/or judicial system. In addition, the working group was requested to pursue the following two objectives:

1. Discussion of the initiatives that members and observers have taken or plan to take with respect to the development of a mission, vision and strategy, and in so doing, how to pay attention to the later performance assessment;
2. Provide methodological support and advice at the request of a member or observer that wishes to take or has taken an initiative at the level of strategic management.

This report is the realization of the working group’s main objective, the clarification of the process of assessing the performance of an organisation (i.e. a council or the judiciary) and throwing light upon its context.

What follows will provide councils and judiciaries with basic concepts and insights to become a performance driven organisation.

Section 2 explains that putting up activities to ensure that goals are consistently being met in an effective and efficient manner is a matter of performance management and its core component – performance assessment. It makes clear that performance

[1] The first working group on Mission and Vision was coordinated together with Italy.

management is generic for all kinds of management deployed by an organization to pursue results. It further describes the types of performance assessment and the role it plays in the different phases of strategic management. In section 3 the beneficial effects performance management brings along are expounded. Section 4 shows the components that must be filled in to set up an organization's concrete performance management system. It describes the activities that must be undertaken to install the performance management system as well as the assessment activities necessary to maintain or correct planned action. Section 5 shows that there are different things you must bare in mind when trying to aim to effective results and enumerates a number of organizational conditions that when being met facilitate good performing. In section 6 three countries summarize some initiatives they have taken with respect to the assessment of the performance of their council or judicial system or parts of it. The conclusion in section 7 sums up the main proposals developed in the previous sections.

The working group gives notice that especially the exchange of knowledge and information between countries, an opportunity created by ENCJ, has been very enlightening and motivating to reflect on and improve their practice.

2. Performance management: managing a council or judicial system for results

Goals and Focuses of Performance Management

Since a few decades the judiciary like any other public organization in society is faced with challenges like never before: problems with quality of products and services, timeliness and limited resources (personnel, budget) are key factors that deserve attention to maintain authority and legitimacy.

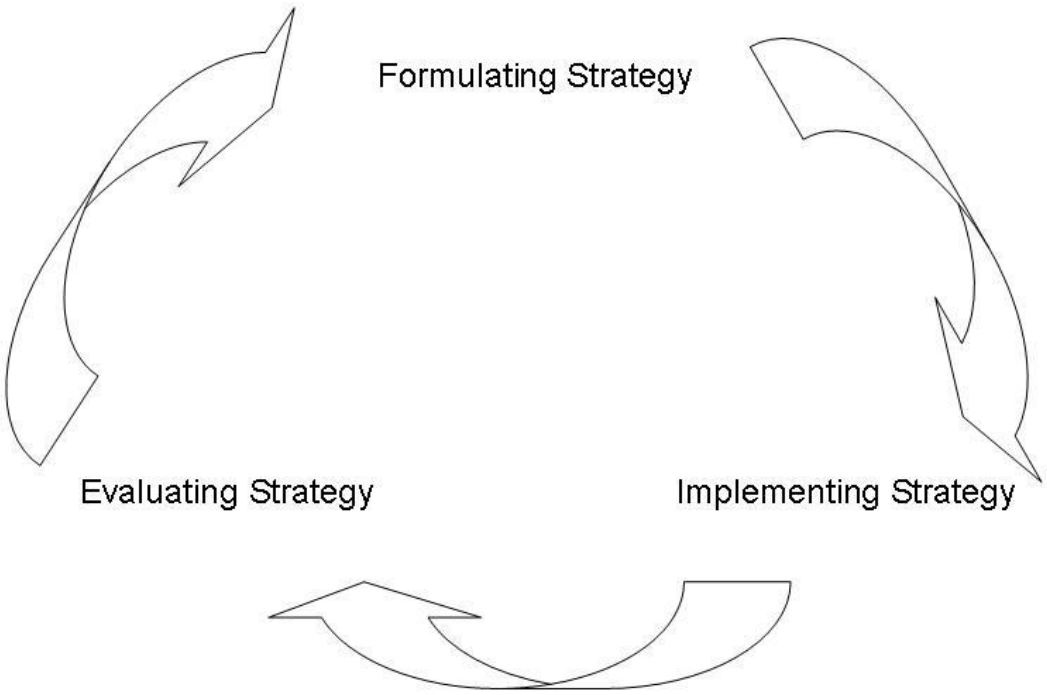
This situation has put more focus on effectiveness (that systems and processes in the organization be applied in the right way to the right things) and on efficiency (that an organization works better and costs less).

To address these problems and meet the challenges of the 21st century, councils and judiciaries should be:

- Accountable and accessible to the people;
- Strategically oriented and focused on performance and productivity;
- Reflective of the priorities and values of the citizens
- Efficient users of taxpayer's money.

Therefore, councils and judicial systems are invited to analyze carefully the choice of strategies to ensure good societal and citizen service.

With this perspective in mind, the working group Mission and Vision II defined an action framework for strategic management of councils and judiciaries[2]. It consists of three basic phases in an ongoing process: (A) formulating, (B) implementing and (C)



evaluating a strategy.

During and after implementation, people who are responsible for an organisation are confronted to the results. They want to know the answer to four basic questions:

What has happened?
Why has it happened?
Is it going to continue?
What are we going to do about it?

To answer these questions management makes use of performance assessment. Management's job is to establish goals in measurable terms, develop appropriate

[2] For detailed information, see the report " Mission and Vision – developing a strategy for the council", May 5, 2006.

measures, measuring performance, analyze performance (comparing performance with the goals), appraise and interpret the results, take appropriate action and communicate the meaning of measurements and results to the organization's sections and personnel that need the information. This process is management control for continuous performance improvement.

Assessment and measurement also play a role in self control and improvement. This is especially relevant for judges, because of their independency. Self control provides strong motivation for people to do their best rather than just enough to get by. For self control managers and staff must know what their goals are and be able to measure their performance against those goals. Concerned personnel should receive the information soon enough to make any changes necessary for the desired results.

Also for budgeting measurement usually involves use of past and future workload trends, unit costs and productivity indices, and timeliness measures to determine financial resource needs.

Another use of performance management is accountability. To keep score on how well managers are meeting their responsibility for achieving operating performance and results.
Also performance assessment provides a source of information for telling others outside the entity how well management is doing.

Globally speaking the usual performance aspects of importance are purpose achievement, customer satisfaction, quality, timeliness, costs, efficiency, economy and the organization's financial condition.

The overall goal of performance management is to ensure that the organization and all of its subsystems or domains (e.g. departments, processes, products or services to internal or external customers, projects, teams, personnel)[3] are working together in an optimum fashion to achieve the results desired by the organization. All of the results across the organization must continue to be aligned to achieve the overall

[3] Note that many books on performance management written by consultants cut down the subject to the personnel domain and merely deal with individual performance evaluation ("performance appraisal").

results desired by the organization for it to thrive. Only then can it be said that the organization and its various parts are really performing.

Performance assessment – a core component

Performance assessment is intended to inject objective, results-oriented information into decision making processes. This is why performance assessment is a very critical component of performance management.

Two types of performance assessment can be distinguished: performance measurement and performance evaluation[4].

Performance measurement

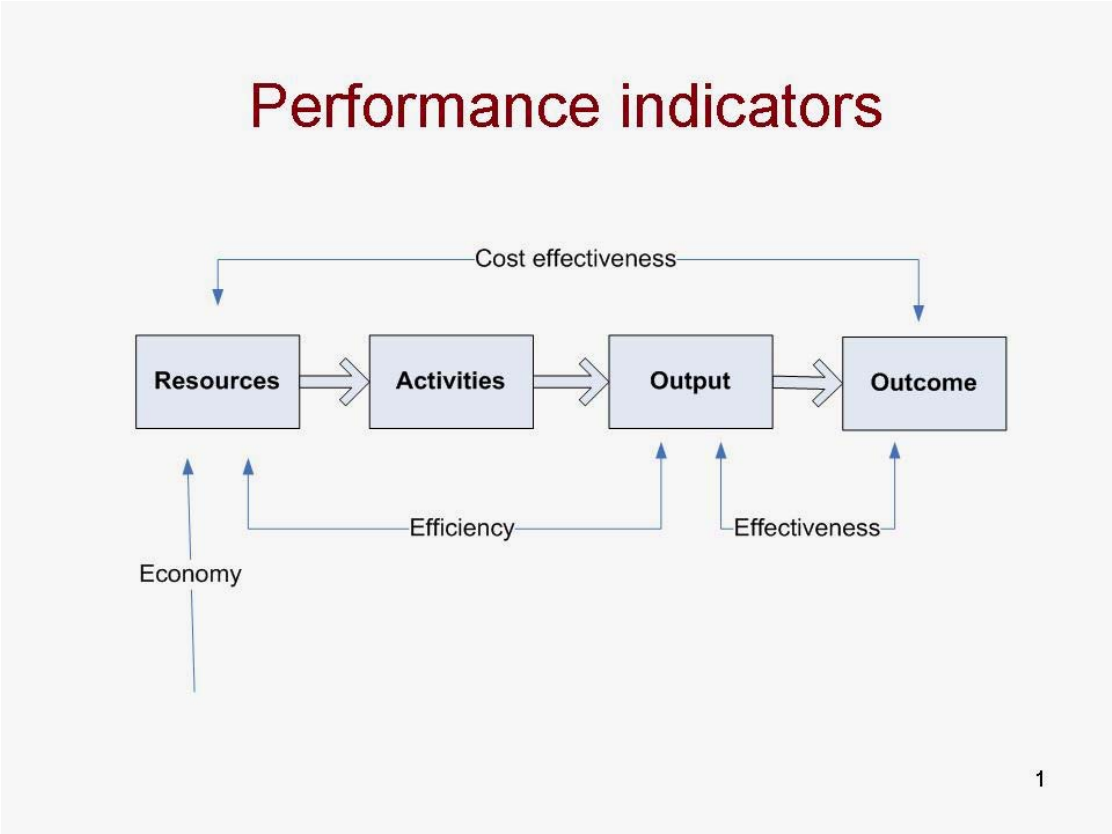
Performance measurement refers to the process of defining, observing and using measures. It describes the putting in place of measurement points that are important to the entire strategic management process. Measures of output, productivity, efficiency, effectiveness, service quality and customer satisfaction provide information that can be used by organizations to manage their plans and operations more effectively.

Performance measurement is the ongoing monitoring and reporting of strategy accomplishments, particularly progress toward pre-established goals. It is conducted by management. Performance measures are essential for letting managers know "how things stand" along the way so that they can act accordingly to maintain or improve performance.

Performance measurement is also essential to support decision making processes, such as planning, budgeting, process change and comparative benchmarking.

The following scheme shows the elements and indicators[5] in the performance process.

[4] The distinction between these two concepts is based on the GAO paper "Performance measurement and evaluation. Definitions and relationships." May 2005.
[5] See section 4 for more information on the concept of indicator.



Performance evaluation

Performance evaluation[6] are individual systematic studies conducted periodically or on an ad hoc basis tot assess how well a management plan (or particular program) is working. They are often conducted by experts external to the organization's departments and services responsible for the (execution of the) management plan or program, either inside or outside the organisation, as well as by managers.

A performance evaluation examines achievement of planned objectives. Four main types can be identified, all of which use measures of performance, along with other information to learn the benefits of a strategy and how to improve it.

Such evaluations typically examine a broader range of information on performance and its context than is feasible to monitor on an ongoing basis. Depending on their focus they may examine aspects of management plan operations or factors in the environment that may impede or contribute to its success, to help explain the linkages between plan (program) inputs, activities, outputs and outcomes.

Evaluations may assess the program's effects beyond its intended objectives, or estimate what would have occurred in the absence of the program, in order to assess

[6] It is also called "program evaluation", particularly when an organization aims to realize one or more programs.

the programs net impact. Additionally, program evaluations may systematically compare the effectiveness of alternative programs aimed at the same objective.

Both forms of assessment aim to support resource allocation and other policy decisions to improve service delivery and program effectiveness. But performance measurement, because of its ongoing nature, can serve as an early warning system to management and as a vehicle for improving accountability tot the public.
A program evaluation's typically more in-depth examination of program performance and context allows for an overall assessment of whether the program works and identification of adjustments that may improve its results.

1. Process (or implementation) evaluation

This form of evaluation assesses the extent to which a strategic plan is operating as it was intended. It assesses program activities'conformance to statutory and regulatory requirements, program design, and professional standards or customer expectations.

2.Outcome evaluation[7]

This form of evaluation assesses the extent to which a program achieves its outcome-oriented objectives. It focuses on outputs and outcomes (including unintended effects) to judge program effectiveness but may also assess program process to understand how outcomes are produced.

3. Cost-benefit and Cost-effectiveness analyses

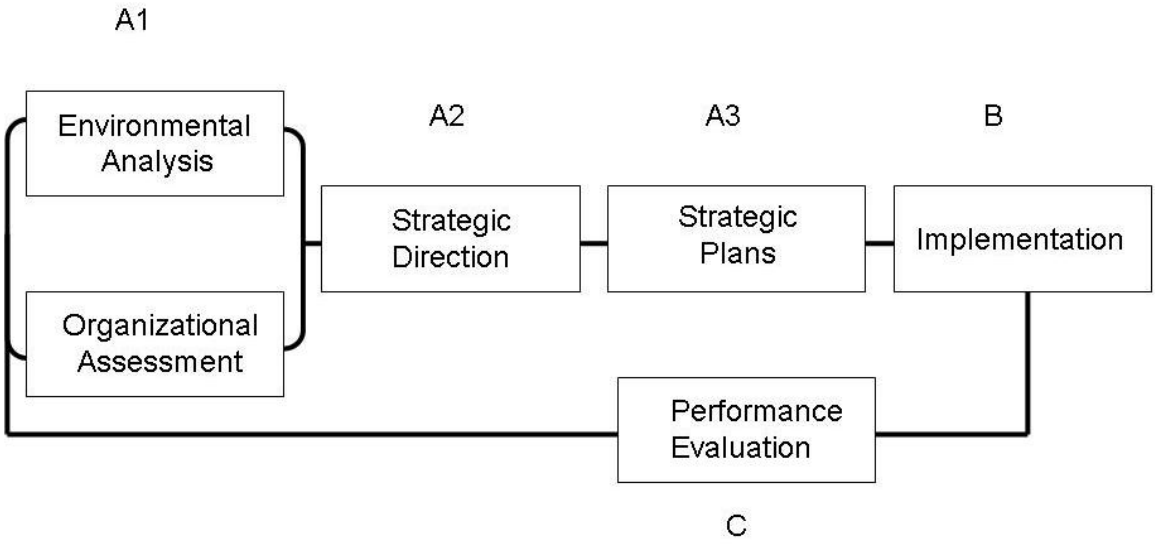
These analyses compare a program's outputs or outcomes with the costs (resources expended) to produce them. When applied to existing programs, they are considered a form of program evaluation. Cost –effectiveness analysis assesses the cost of meeting a single goal or objective and can be used to identify the least costly alternative for meeting that goal. Cost-benefit analysis aims to identify all relevant costs and benefits, usually expressed in money terms.

[7] Impact evaluation is a special form of outcome evaluation that is hardly to use in a judicial context. It assesses the net effect of a program by comparing program outcomes with an estimate of what would have happened in the absence of the program. This form of evaluation is employed when external factors are known to influence the program's outcomes, in order to isolate the program's contribution to achievement of its objectives. It is difficult to use this kind of evaluation in a judicial context.

Interaction of performance assessment with the phases of the strategic management process

Strategic performance management is a systematic approach to performance improvement through an ongoing process of establishing strategic performance objectives; measuring performance; collecting, analyzing, reviewing and reporting performance data and using that data to drive performance improvement.

Performance management is the continuous use of all these practices so that they are integrated into the organization's core operations.



In phase A - Formulating strategy: performance measurement is used for translating objectives into quantifiable measurement points and establishing targets.
What do we want to attain? (effects, results); What are we going to do to achieve this? (products, services); What initiatives must we take in order to achieve our objectives? Who is responsible for its realisation? How much may this cost?
In phase B - Implementing strategy: ongoing performance measurement is carried out during implementation, the present situation is evaluated for tracking and monitoring. Are we realising that which we intended?

In phase C - Evaluating strategy: performance assessment (performance measurement and performance evaluation) are used during gap analysis. In the above

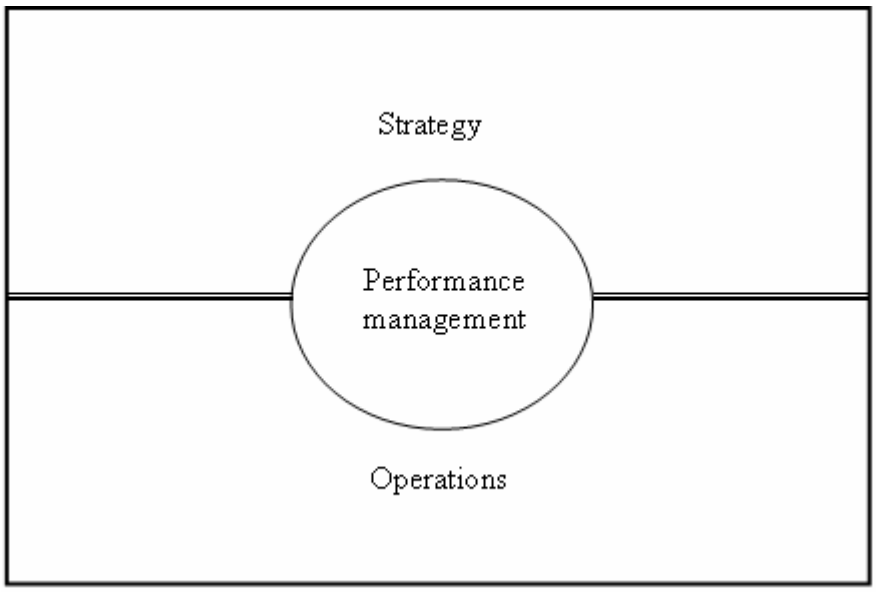
figure that phase is called performance evaluation because it t is done periodically, e.g. management reports quarterly on strategic performance and uses a combination of different assessment approaches. Performance evaluations can also be done on an ad hoc basis. They can be very time-consuming studies needing very special preparation and competencies (e.g. performance auditing of outcomes done by an independent auditor).

Beside performance measurement and performance evaluation, a third kind of performance assessment can be distinguished, namely organizational assessments intended to estimate the organization's performance capacity (it's used in step A1). Strategic plans must be based on accurate, timely and complete information. Current and future client requirements are the driving force behind the creation of strategic direction. As such, performance management begins by first identifying potential sources of data that can impact operations, both from outside and inside the organisation; gathering the data; and analyzing the data to provide insight into customers, society, the organisation, and its future. Gather external and internal data continuously and use that data as input to all facets of the planning process is important[8].

Performance management and performance assessment are topics that are not limited to a single specific phase in strategic management[9]. Moreover, they are also relevant to other forms of management like operations management.

[8] The "organizational assessment" concept is not further developed in this report. See the report on "Mission and vision – developing a strategy for a council" for more information on organizational assessment.

[9] See the report on "Mission and vision – developing a strategy for a council" for more detailed information on strategic management.



3. Benefits of performance management

4 Key benefits

Performance management (PM):

1. **Focuses on results, rather than behaviors and activities**

PM cultivates a change in perspective from activities to results.

2. **Aligns organizational activities and processes to the goals of the organization**

PM identifies organizational goals, results needed to achieve those goals, measures of effectiveness or efficiency (outcomes) toward the goals, and means (drivers) to achieve the goals. This chain of measurements is examined to ensure alignment with overall results of the organization.

3. **Cultivates a system-wide, long-term view of the organization.**

An effective performance improvement process must follow a systems-based approach while looking at outcomes and drivers[10]. Otherwise, the effort produces a flawed picture.

4. **Produces meaningful measurements**

Agreed upon definitions and registration systems lead to accepted meaningful measurements. These measurements have a wide variety of useful applications. They

[10] Richard A. Swanson, The foundations of performance improvement and implications for practice, in Richard Torraco (Ed.), *Performance improvement theory and practice*. San Francisco: Berrett-Koehler. 1999.

are useful in benchmarking, or setting standards for comparison with best practices in other organizations. They provide consistent basis for comparison during internal change efforts. They indicate results during improvement efforts, such as employee training, management development, quality programs, etc. They help ensure equitable and fair treatment to the personnel based on performance.

Additional benefits of performance management

Performance management (PM):

1. Helps you think about what results you really want. You're forced to be accountable.

2. Depersonalizes issues. Supervisors focus on behaviors and results, rather than personalities.

3. Validates expectations. Having measurable results can help verify whether grand visions are realistic or not.

4. Helps ensure equitable treatment of employees because appraisals are based on results.

5. Optimizes operations in the organization because goals and results are more closely aligned.

6. Performance reviews are focused on contributions to the organizational goals.("What organizational goals were contributed to and how?")

7. Supports ongoing communication, feedback and dialogue about organizational goals. Also supports communication between personnel.

8. Performance is seen as an ongoing process, rather than a one-time event.

9. Provokes focus on the needs of customers, whether internal or external.

10. Cultivates a systems perspective, that is, focus on the relationships and exchanges between subsystems, e.g., departments, processes, teams and individuals. Accordingly, personnel focus on patterns and themes in the organization, rather than specific events.

11. Continuing focus and analysis on results helps to correct several myths, e.g., "learning means results", "job satisfaction produces productivity", etc.

12. Produces specificity in commitments and resources.

13. Provides specificity for comparisons, direction and planning.

14. Redirects attention from bottom-up approaches (e.g., doing job descriptions, performance appraisals, etc., first and then "rolling up" results to the top of the organization) to top-down approaches (e.g., ensuring all subsystem goals and results are aligned first with the organization's overall goals and results).

4. Performance management components

Four performance management components (performance standards, performance measures, assessing performance and reporting of progress, and performance improvement system) will form the organization's performance management system and forms the core part to be included in the performance plan.

The performance plan describes the domain's preferred results, how results tie back to the organization's results, weighting of results, how results will be measured and what standards are used to evaluate results. Developing the plan is often the responsibility of the head of the organization or domain. However, the plan should be developed as much as possible with participants in the domain. Further, does the domain have the necessary resources to achieve preferred results, e.g., necessary funding, training, input from other subsystems, etc? Are the standards realistic? Can the domain realistically achieve the results within the preferred time frame? Does everyone involved in the measures really understand how to recognize the measures? Do they know their role in the performance management process?

(1) Performance standards - establishment of organizational or system performance standards, targets and goals and relevant indicators to improve organizational practice.
Organizational goals are established during strategic planning. Performance

management translates these goals to results[11] .These are the final and specific outputs desired from the organization or domain. Examples are a percentage increase in cases done, extent of impact on society or a part of society, etc. For example, the judges' decisions are well considered and in time for citizens and enterprises.

The intended results are often expressed as products or services for an internal or external customer (e.g. impact on a community) and are expressed in terms of cost, quality, quantity and/or time. For example, a goal may be to increase the organization's judicial decisions by 10% by the end of the next year. A subgoal, may be to increase the output of a particular kind of civil cases of that jurisdiction by 30% over the next year. Aligning results with organizational results is another unique aspect of performance management process. Do the magistrates' results directly contribute to the results of the organization? Is there anything else the magistrate could be doing that would be more productive for this goal? Should a job analysis be done to verify efficiency?

A weight, or prioritization, is often in the form of percentage-time-spent, or a numeric ranking with "1" as the highest. For example, the magistrates' results might be weighted as follows:
a) 85% of his time over an 8-hour period, Monday through Friday over the next year, to be spent on cases
b)10% of this time in training
c)5% of this time in a evaluation.

Standards specify how well a result should be achieved in time. They are used for evaluating how well the domain's desired results were achieved.

While working to improve the effectiveness of organizations, people often refer to various performance standards as conveyed in "best practices" and "standards of excellence." These performance standards correspond to the levels of quality in certain organizations that are viewed by them (or others) as being high performing organizations. Some people often use the standards to assess the quality of practices in an organization and then determine what must be done to improve that quality. Good

[11] i.e. goals should be "SMART" (an acronym), that is, specific, measurable, acceptable, realistic to achieve and time-bound with a deadline.

use of those practices for an organization depends on a variety of factors, including the culture of the organization, nature of the products and services that the organization provides, expectations of major stakeholders, and effects of change in the environments of the organization. There is no one best practice, for leading, managing or guiding organizations and change.

(2) Performance measures - application and use of performance measures and indicators.

Measures provide specific information used to assess the extent of accomplishment of results. Measurements are typically expressed in terms of time, quantity, quality or cost. Results are a form of measure.

Identifying which measures to take is often the toughest part of the performance management process. Identify more specific measures for each measure if necessary.

Indicators render measures concrete values. They indicate progress (or lack of) toward a result. For example, some indicators of an employee's progress toward achieving preferred results might be some measure of an employee's learning (usually expressed in terms of areas of knowledge or specific skills) and productivity (usually measured in terms of some number of outputs per time interval). It is impossible to establish meaningful performance indicators without having a clear strategy.

In what follows performance measures and indicators are explained on the basis of the performance process elements.

4 performance process elements (see the illustration in section 2)

Resources (input)

All human, material and immaterial contributions (finances, personnel, materials,…) required for starting up and performing an activity

Activities (throughput)

Activities executed by an organization in order to measure certain performances

Output

Products or services provided that arise from the executed activities; outputs are delivered with the aim of realising certain effects.

Outcome (Effects)

Refer to situational changes in a policy field by certain target groups or with respect to a specific phenomenon (e.g. client satisfaction)

Examples of outputs and outcomes

Outputs represent what a program actually does, whereas outcomes are the results it produces.

* e.g. the outputs and outcomes of Crime control (police and prosecutors office chain).

- Outputs:

Hours of patrol

Responses to calls for service

Crimes investigated

Arrests made

Crimes solved

- Outcomes:

Reduction in crimes committed

Reduction in deaths and injuries resulting from crimes

Less property damaged or lost due to crime;

* e.g. the outputs (judicial decisions) and the outcomes (e.g. contribution to a growing economy) of the judiciary (judges).

<u>Performance indicators defined for each of the elements separately:</u>

The following performance indicators are defined for each of the elements separately:

Indicators targeted at resources

- are leading indicators for activity indicators
- describe the typical quantity and quality of the input

Indicators targeted at activities

Are typically efficiency and efficacy measurements (duration, expense, capacity utilisation, workload)

Indicators targeted at performance

Are lagging indicators for activity indicators (process performance)
Are leading indicators for the long-term performance of the organisation
(e.g. number of inspections performed)

Indicators targeted at effects

Is also made up of perception indicators and expectation indicators (establishing satisfaction)

Performance indicators defined for the relationship between the elements:

The following performance indicators are defined for each of the relationship between the elements:

Economy

Refers to resource usage or the minimisation of resources necessary for the realisation of an activity (is expressed by an economy indicator)

Efficiency

Relationship between the performance and the resources (expressed by an efficiency indicator)

Effectiveness

Relationship between the performance and the effects (expressed by an effectiveness indicator)

Resource effectiveness

Relationship between effects and the resources (resource effectiveness indicator)

Performance indicators can be conceived of broadly:

- direct measurement

- if not direct measurement, a measurement of elements that can approximate the performance indicator being sought
- not always tangible or elements that can be expressed in figures (selection from categories, checklists): questioning, interview, assessment in order to establish the value of the performance indicator being sought

Criteria for a good performance indicator

Measuring the realisation of the objective
Validity (performance indicator measures what it claims to measure)
Reliability (the measurement is repeatable)
Does not measure the performance of an individual, but rather of an organisation, a team
Is translatable into action (and therefore able to be influenced)
Unambiguous polarity
Mix of leading and lagging indicators
Ensures that perverse effects and manipulation are avoided
The effort to collect the measurement information is feasible (measurable, the cost of the measurement is justifiable).

When defining a performance indicator, one must examine:

The object of the measurement
The unit of measurement
The approach for determining the value (measurement, questioning,…)
The person or section responsible for determining the value
The frequency of the measurement or the moment the measurement is taken

Scorecards

A number of indicators together can constitute a scorecard:

For example, the BSC (Balanced Score Card, grouping of indicators in 4 perspectives)
Indicators are selected from strategic objectives
Indicators are selected with the support of management
In so doing, an attempt is made to indicate the cause-effect relationship
Hierarchy between perspectives (what perspective is at the top?)

(3) Assessing performance and reporting of progress (in meeting standards and targets and sharing of such information through feedback)

If performance does not meet desired performance standards, develop or update a performance development plan to address the performance gap.

The performance development plan conveys how the conclusion was made that there was inadequate performance, what actions are to be taken and by whom and when, when performance will be reviewed again and how. If a domain was not performing to standards, then some forms of help (or interventions) should be provided (reengineering the organization's processes; coaching, mentoring, training for magistrates; more resources, etc).

(4) Performance improvement system - establishment of a program or process to manage change and achieve quality improvement in judicial policies, programs or infrastructure based on performance standards, measurements and reports. Combinations are possible and most of the time necessary. Examples are:

Balanced Scorecard: Focuses on four indicators, including customer perspective, internal-business processes, learning and growth and financials, to monitor progress toward organization's strategic goals.

Benchmarking: Using standard measurements in a service or industry for comparison to other organizations in order to gain perspective on organizational performance. In and of itself, this is not an overall comprehensive process assured to improve performance, rather the results from benchmark comparisons can be used in more overall processes.

Total Quality Management (TQM): Set of management practices throughout the organization to ensure the organization consistently meets or exceeds customer requirements. Examples of TQM and continuous improvement are EFQM and the Baldridge Award.

5. Organizational capacities for performance

Here follows what some consultants are suggesting that it takes for organizations to be performant.

Capacities for organizational effectiveness

Letts, Ryan and Grossman[12] suggest the following key capacities for organizational effectiveness.

1. Adaptive capacity
is the ability of an organization to maintain focus on the external environment of the organization, particularly on "performing" (meeting the needs of customers), while continually adjusting and aligning itself to respond to those needs and influences. Adaptive
capacity is cultivated through attention to collaborating and networking[13], assessments and planning.

2. Leadership capacity
is the ability to set direction for the organization and its resources and also guide activities to
follow that direction. Leadership capacity is cultivated through attention to visioning, establishing goals, directing, motivating, making decisions and solving problems.

3. Management capacity
is the ability to ensure effective and efficient use of the resources in the organization. Management capacity is accomplished through careful development and coordination of
resources, including people (their time and expertise), money and facilities.

4. Technical capacity

[12] Christine W. Letts, William P. Ryan, Allen Grossman, *High Performance Nonprofit Organizations: Managing Upstream for Greater Impact.* Jossey-Bas 1998.
[13] For example the judicial chain. Organizations increasingly operate as part of networks of service delivery. Therefore, it can be necessary to assess network effectiveness. Robert D. Herman and David O. Renz, *Nonprofit organizational effectiveness: practical implications of research on an elusive concept*. Occasional paper. The Midwest Center for Nonprofit Leadership, UMKC, 2002.

is the ability to design and operate products and services to effectively and efficiently deliver
services to customers. The nature of that technical capacity depends on the particular type of
products and services provided by the organization.

5. Generative capacity
is the ability of the organization to positively change its external environment. This capacity
is exercised by engaging in activities to inform, educate and persuade policy makers, community leaders and other stakeholders.

Capacity components of effectiveness

Defining capacity building as "actions that improve effectiveness", Barbara Blumenthal[14]
identifies four components of effectiveness:

1. Organizational stability
is in regard to whether services are consistently delivered.
2. Financial stability
is based especially on short-term survival, for example, the ability to pay its bills. Financial
stability is often ignored as an area of importance during capacity building. It is linked to good budgeting.

3. Program quality (products and services)
is based on indicators of impact, including adequate research about effective programs and
an outcomes management system.

4. Organizational growth
is based on attracting resources and providing more services. Blumenthal adds that growth

[14] Barbara Blumenthal, *Investing in Capacity Building: A Guide to High-Impact Approaches*. New York, NY: Foundation Center, 2003.

alone is not an indicator of performance. For a public organization it could be interpreted as growing to the right scale to manage for performance.

Performance readiness

Improvement in each of the following conditions is a guarantee for increasing performance:

The competences of the organisation are clearly demarcated by the policy.
The formal responsibilities of the organisation reflect the present priorities contained in the policy.
The organisation has a strategic plan.
The organisation can deduce its operational planning from its strategic plan.
Personnel contributes to the strategic planning process.
Upper management uses the more strategic planning to delineate the future direction.
Upper management promotes and supports performance measurements.
Upper management is trained in performance measurement techniques.
The organisation has assigned personnel to coordinate the introduction of performance measurement.
Personnel are trained in quality improvement techniques.
The organisation requests its clients to evaluate and guide its activities.
The organisation knows what level of service and level of efficiency its clients and the policy expect of it.
Personnel already monitors (its) performance via routine actions.
The organisation has insight into the way in which external circumstances influence the effects it wishes to achieve.
The organisation has basic measurements at its disposal with which it can measure its present level of performance.
The organisation has an accurate, reliable system for data collection, follow-up and evaluation.

6. Lessons learned

6.1. Finland: The Project of Judicial Policy's Societal Effectiveness and Cost-Effectiveness

1. Effectiveness as a benchmark of the public organisation's result

According to section 12 of the Budget Act, the Ministry of Justice (MOJ), as well as the other ministries in Finland, is obligated to plan the purview's long-term societal effectiveness and cost-efficiency. The matter is of the effectiveness of the policies of the Ministry, that is, the degree of success in the achievement of desired outcomes. The objective is to concretise and clarify the societal impact and effectiveness of Judicial Policy, the courts and the legal aid service, that is, the outcomes that the society and the taxpayers get in return for the money spent on the judicial system

At the level of the operating authorities the effectiveness reflects the added value that the public authority produces for the society and the taxpayers. The agencies and organisations should concentrate their efforts and resources to the effective work and cut down the administrative duties that don't support it. According to the Budget Act the state agencies and organisations are obligated to plan their operations and finance for a long-term, too.

Effectiveness: ”Achievement of effects that meet the needs of the society”:

- What is the value for the money that the taxpayers and the society get from the judicial system?
- Who needs the services of the judicial system?
- What would happen, if there were no judicial system?
- What is the value added by the judicial system to the customers and the society?

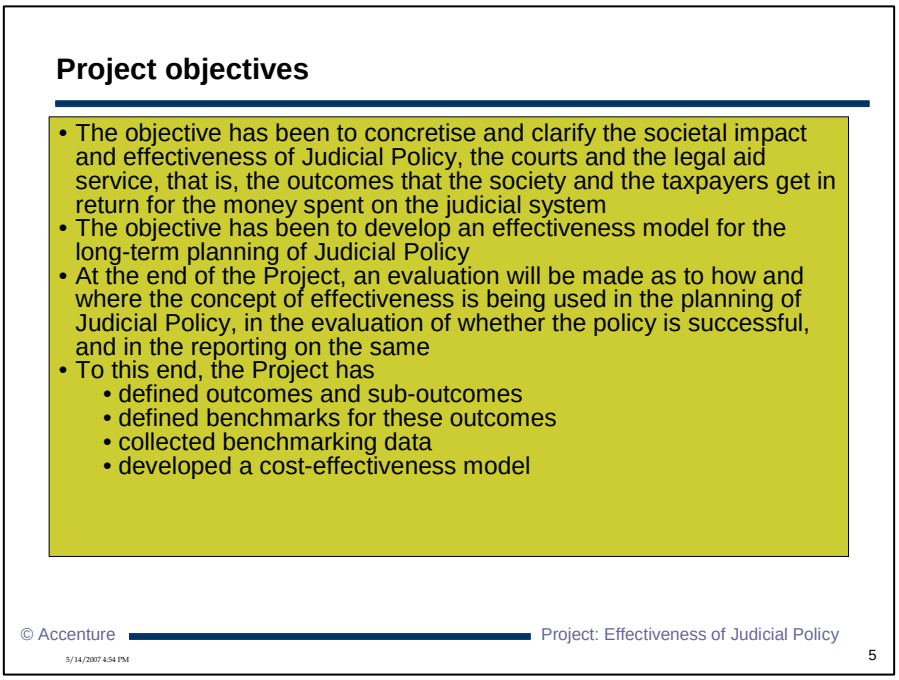
Effectiveness can be approached from at least three viewpoints:

1. The judicial system has an effect on the society through the *services* it provides. For the courts, the mechanism is the fair trial, where the effects of the service correspond to the law and the expectations of the society. The point here is *the supply of services in accordance with the demand*, constituting one major aspect of effectiveness, that of “direct outcomes”.

2. The judicial system is also a significant provider of welfare services. The judicial system safeguards the interests of the citizens, so that the *risk* of their rights being violated is low and their *welfare as rightsholders* remains high. Effectiveness of this kind can be assessed by asking what would happen if there were no judicial system and by comparing Finland to other countries where people's welfare as rightsholders is not at the same high standard as it is in Finland. Effectiveness of this kind does not depend on the productivity numbers of the judicial system, but rather from it having a functioning network of services and a viable organisation.
3. In addition, there are certain "non-judicial" expectations of the judicial system. Trials are being followed and reported on, the courts are seen as providers of entertainment and thrills and as disclosers of social wrongs. Responding to these expectations is also a form of influence and may improve effectiveness. These latter two points are a special kind of effect on society, one that has so far been hardly discussed at all within the judicial system.

2. The Evaluation of the Judicial Policy's societal effectiveness

In the autumn 2006 the Finnish MOJ carried out a project for evaluating the societal effectiveness and the cost effectiveness of the Judicial Policy. The definition, measurement and evaluation of the societal effectiveness and cost effectiveness of the Judicial Policy based on the Public Value Model, created by the consultant Accenture. The courts, the legal aid offices and the Consumer Complaint Board were involved in this project and the definition and description of the outcomes of their services was the main focus of the project.



The project began with the interviews. The chancellor of justice, presidents of the supreme courts and some other chief judges, heads of the legal aid offices and experts were interviewed to chart and concretise the role and the function of the judiciary and judicial policy. The project continued in three workshops participated by the representatives of courts, legal aid offices and other branches of the MOJ's purview.

The most important societal outcomes of the judicial policy were defined as follows:

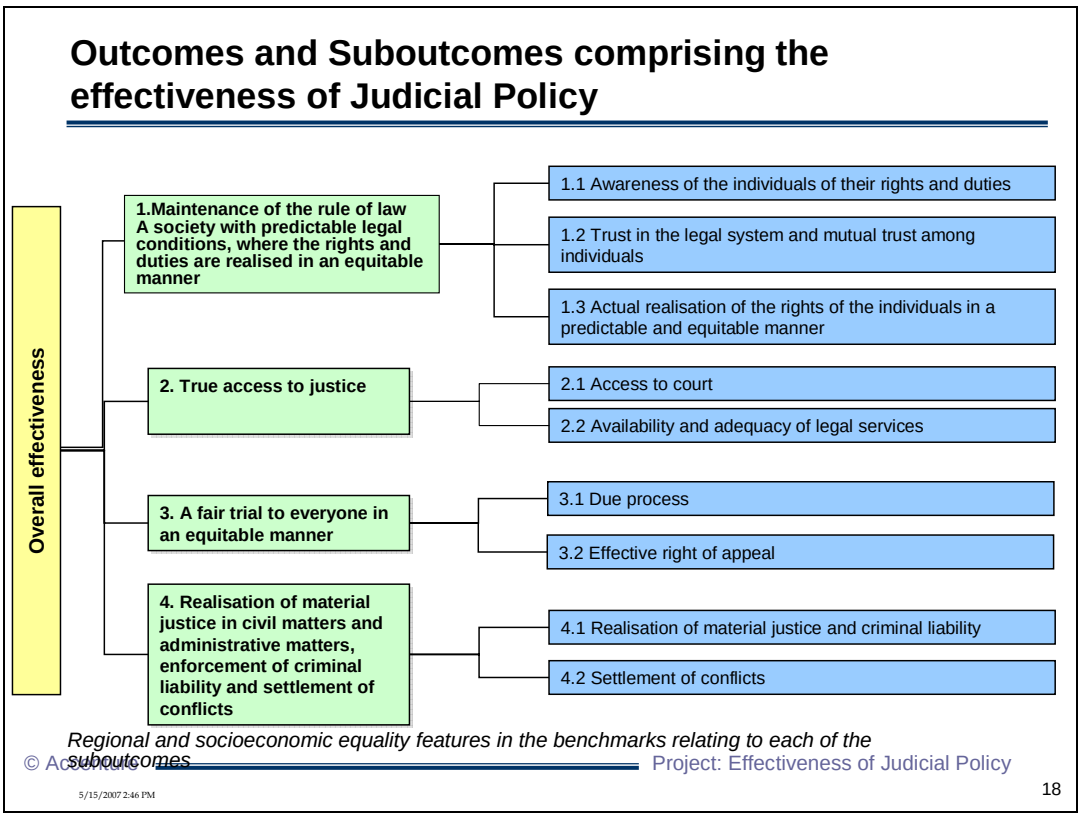
- Maintenance of public peace and the rule of law
- Reinforcement of the senses of justice and morality
- Realisation of regional and socioeconomic equality

These outcomes are not produced only by the judiciary, but they depend on many public and private authorities and organisations outside the Judicial Policy or MOJ's purview, too.

The direct outcomes (outcomes for the customers) were defined as follows:

- Equal access to justice
- Equal due process
- Equal material justice

During the workshops the outcomes of the judicial policy were defined in details:



3. The lack of information about the Judicial Policy's Societal Effectiveness

During the project appeared that there is not enough empirical data of Judicial Policy available to be able to evaluate the degree of success in achievement of the most important societal outcome, maintenance of public peace and rule of law (Outcome number 1). There if lack of information about

- the awareness of the individuals of their rights and duties;

- the judicial information, advice and education, if it is sufficient or not;
- the trust in the legal system and mutual trust among individuals;
- the regional and socioeconomical differences in equity.

Judicial Policy makes its main impact on the rule of law. From the point of view of the individual, the rule of law means cognizance of the rights and duties in effect, trust in the realisation of the rights in a regionally and socioeconomically equitable manner and in a reasonable time (in relation to the other social actors, including the public authorities), as well as trust in the judicial system as a guarantor of these rights and in the enforcement of the rights and duties of the individuals. The reason for the lack of information is lack of resources in the scientific research concerning Judicial Policy. In this sector of administration, there is only one research institute in the MOJ's purview, namely the National Research Institute of Legal Policy. It makes a good job, but when consisting only about 22 researcher, it's resources are too narrow to cover the whole Judicial Policy. In the Finland's universities, there is no tradition of empirical Judicial research.

On the other hand, the statistical information about the caseloads, handling times and different steps of procedures of courts and other agencies is collected via the automated case handling programs of the different authorities, and this information is sufficient and in real time. The problem is that this information describes and measures more the efficiency of the organization than the societal effectiveness.

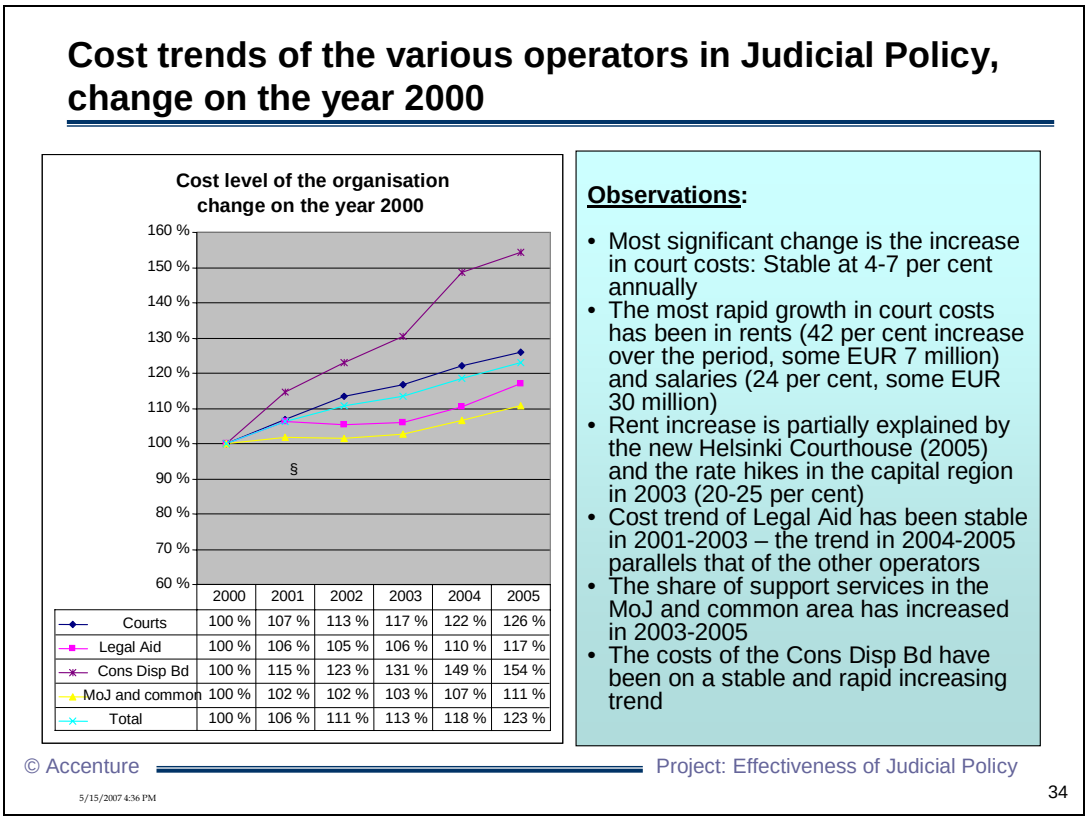
To develop the information about the societal effectiveness of the Judicial Policy a regular and repetitive survey or questionnaire study is needed. This a challenge for the development of the sector research of Judicial Policy, when taking into consideration the narrow resources of existing research and almost a total absence of this research in the universities.

4. The cost analysis

The costs of the administrative sector of the Judicial Policy were examined in order to specify the cost-effectiveness. The cost analysis covered the operating costs of the courts, the Legal Aid Offices and the Consumer Dispute Board, the payments made to private providers of legal aid and selected common costs of the MoJ and its purview.

These selected common costs included the costs of the department of Judicial Administration, witness fees and the costs of common financial and human resources services, the costs of the Information Technology Centre of Judicial Administration and the IT costs of the courts proportionately to personnel numbers. All costs were normalised to the cost-of-living index and adjusted to population figures and to the number of incoming cases.

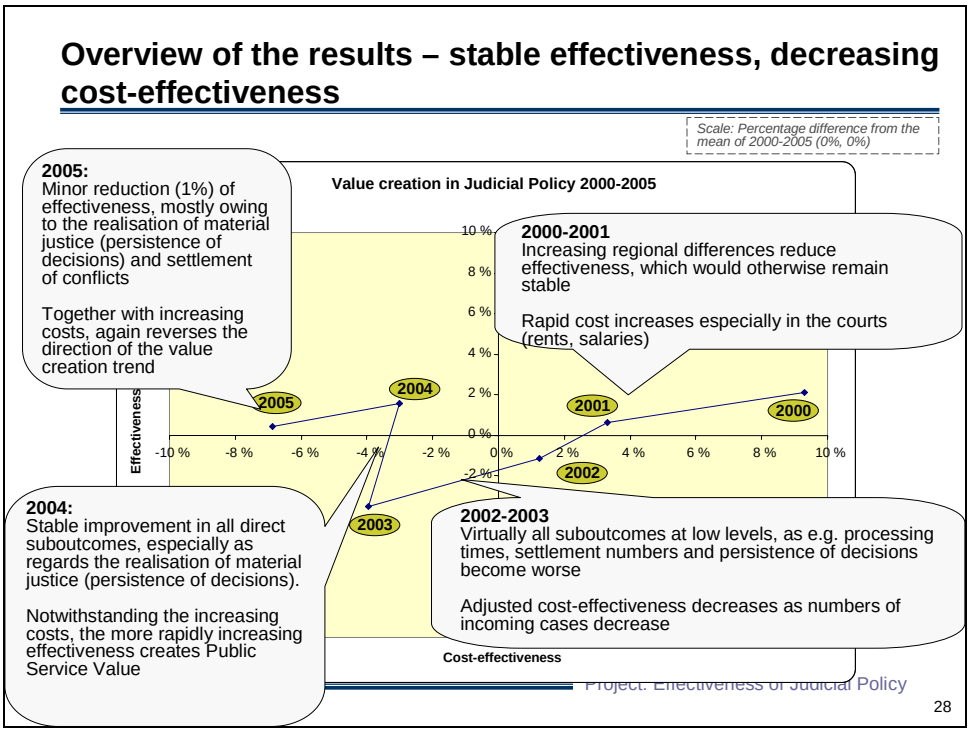
The cost analysis demonstrated that the costs of the Judicial Policy have increased an average of 25 per cent over the period from the year 2000 to the year 2005. Most significant change is the increase in court costs, which results from the most rapid growth in the costs of rents (42 per cent increase over the period, some EUR 7 million) and salaries (24 per cent, some EUR 30 million). Relatively the most extensive increase of the costs relates to the costs of the Consumer Dispute Board, but the absolute effectiveness of the increase is insignificant (about 500 000 eur).



5. Stable effectiveness, decreasing cost-effectiveness

Over the examination period there has not been significant variation concerning the outputs of the judiciary, therefore it may be assumed that both the efficiency and the effectiveness have remained stable. Instead the costs have increased an average of 25

per cent. Therefore the challenge to judicial policy is to reverse the cost-effectiveness to positive so that if the costs are increasing also the effectiveness should increase.



6.2. Romania: Evaluation in the Judicial System

A. SHORT PRESENTATION OF THE JUDICIAL SYSTEM IN ROMANIA

In Romania, Justice is carried out in the name of the law, is unique, impartial and equal for all.

Justice is carried out through the following courts:

a) The High Court of Cassation and Justice;

b) The courts of appeal;

c) The tribunals;

d) The specialized tribunals;

e) The first instance courts.

f) The military courts.

The courts of first instance are courts with no legal capacity, established in counties and in the sectors of the city of Bucharest. In Romania there are **178 first instance courts.** Within the first instance courts, there is a total number of 1866

judges, out of the total number of 2155 judges provided by law. In 2006, a workload of 1.346.829 files was registered at the level of first instance courts.

Tribunals are courts with legal capacity, organised at the level of each county and the city of Bucharest and as a rule have their premises in the city-residence of the county. In Romania there are **41 tribunals.** The tribunals are **tertiary credits accountant**. Within the tribunals there is a total number of 1244 judges, out of the number of 1416 judges provided by the law. In 2006, a workload of 584.428 files was registered at the level of tribunals.

The courts of appeal are courts with legal capacity. There are **16 courts of appeal**. The courts of appeal are **secondary chief accountants.** Within the courts of appeal there are 689 judges, out of the total number of 748 judges provided by the law. In 2006, the courts of appeal registered a number of **158.090 files**.

In Romania, there is only one Supreme Court, with legal capacity, the **High Court of Cassation and Justice**, with the headquarters in Bucharest. The High Court of Cassation and Justice ensures the **consistent interpretation and application of the law by the other law courts**, according to its competence. The High Court of Cassation and Justice has the quality of **main chief credit accountant**. **It has a civil and intellectual property section, a criminal section, a commercial section, an administrative and fiscal section and a criminal section.**

Military courts are the following:

a) Military tribunals - 4 are operating at Bucharest, Cluj-Napoca, Timişoara, Iaşi
b) The Military Territorial Tribunal of Bucharest;
c) The Military Court of Appeal in Bucharest.

Each court is lead by a **president,** who can be assisted by **one up to four vice-presidents,** according to the level of jurisdiction. Presidents of first instance courts also exercise attributions of court administration.

The Public Ministry exercises its prerogatives according to the law and it is run by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice. Prosecutors carry out their activity according to the principles

of legality, impartiality and hierarchic control, under the authority of the minister of justice, according to the law.

The prosecutor's offices operate attached to each court of appeal, tribunal, juvenile and family tribunal. The prosecutor's offices have the premises in the same towns where the courts they are attached operate and have the same jurisdiction as those courts.

The prosecutor's offices attached to the courts of appeal and those attached to tribunals have legal capacity. The prosecutor's offices attached to juvenile and family tribunals and prosecutor' offices attached to first instance courts have no legal capacity.

B. THE ROLE AND THE STRUCTURE OF THE SUPERIOR COUNCIL OF MAGISTRACY

The Superior Council of the Magistracy represents, according to the Romanian Constitution, the **guarantor of the independence of the judicial system**. In its current structure, the Council started to function on January 11th, 2005. The Superior Council of Magistracy is independent and is submitted in its activity only to the law. The members of the Council answers before judges and prosecutors for the activity they perform in the exercise of the term of office. On a yearly basis, the Council presents two reports before the Parliament, one for its own activity, the other for the state of justice.

In its quality of „government of justice", the Council exerts mainly **administrative competences**. Amongst its prerogatives there is also a **legislative component** (drafts secondary legislation), as well as a **judicial component** (solves disciplinary actions exerted against judges and prosecutors).

The Council comprises **19 members**, out of which 14 are magistrates (judges and prosecutors, elected by the general assembles of magistrates from each court or prosecutors office), 2 representatives of civil society, elected by the Senate and three members *de jure* (the minister of justice, the general prosecutor and the president of the High Court). The members of the Superior Council of Magistracy are elected for a non-renewable **term of office of 6 years.** They usually meet in sessions once a week, in Plenum sessions and in section sessions (one section for judges, the other for prosecutors). The works for sessions are prepared with the support of an administrative staff of 260 persons.

C. **THE EVALUATION OF THE LEVEL OF PERFORMANCE OF THE JUDICIAL SYSTEM**

The evaluation of the level of performance of the judicial system is not unknown to the courts and prosecutors offices in Romania, though is not stated by the law.

In Romania, in the past years, on the basis of the statistical data, a comparative analysis of courts and prosecutors offices was drafted, without its results be explicitly used in order to improve the performance of the judicial system.

At the present, along with the individual evaluation of the magistrates, the concept of evaluation of the juridical system is used, trying to provide for this method of evaluation explicitly in the law.

The proposals drafted by the working group constituted at the level of the SCM refer to the use of criteria and standard of performance for courts and prosecutors offices, which must be unitary and similar to the ones used for the individual evaluation.

The main objectives of the evaluation- both the individual evaluation and the evaluation of the system- consist of increasing the performance, reducing the duration for solving the cases, increasing the degree of public confidence regarding the efficiency and the fairness of the system, drafting a realistic plan concerning the human resources, increasing the need of the magistrates to acquire performances.

A possible problem identified in this stage of elaborating an evaluation plan for the judicial system is the method of collecting the statistical data, in order to provide for the necessary data for the quantification of performance criteria for courts and prosecutors offices – the efficiency, the quality of the activity, the integrity and the professional training.

Taking into consideration that at the present the ECRIS programme is used, the collecting of useful data will no longer represent a problem, if the statisticians from courts and prosecutors offices are well trained.

On the other hand, in order to evaluate it, the performance must be compared to a standard, which is being drafted by the SCM, taking into consideration the optimal duration for solving a case, optimal workload per judge and prosecutor, optimal workload per complexity degrees, the celerity and the quality of the activity (expressed in the number of solutions revised for each court and prosecutor office – global standard adopted in order not to affect the independence of magistrates).

Concerning the criterion of efficiency, the evaluation will focus on the following indicators- the number of delivered judgments (related to the workload of the court), the average duration for the solving of cases/ efficiency, the backlog, the number of files solved in first instance and in appeal, delivery of judgments in legal term, execution of judgments in legal term.

The quality of the activity will be appreciated taking into consideration the number of decisions revised, the perception of the public on the unfolding of procedures and their duration, the organization method of courts and prosecutors offices, the cost of the procedures, the public character of debates and the transparence of the act of justice, the observance of the rights to defense, the convincing and accessible character of decisions rendered, the treatment of the public and of the parties.

The integrity (professional behavior) will be appreciated on the basis of questionnaires completed by the public, lawyers and other stakeholders.

The professional training of magistrates will be evaluated by the degree of involvement in continuous training activities in different fields of the law, as participants or experts.

The quality of the management of courts and prosecutors offices will be also evaluated on the basis of questionnaires.

At the present, after the completion of the procedure for individual evaluation of magistrates in order to acquire an objective data base for promoting magistrates in leading or executive positions, the working group constituted at the level of the SCM will elaborate the procedure for the evaluation of courts and prosecutors offices on the performance criteria and standards mentioned before.

The meetings of the working groups take place at least once a week, by inviting an important number of specialists in the field of judicial statistics, and by consulting the magistrates in order to successfully complete the project.

In the near future, a determined number of magistrates will be trained as evaluation trainers, who will disseminate the knowledge acquired to the members of the commission for individual evaluation of magistrates, as well as to the SCM staff who will draft the annual evaluation of the judicial system.

If the individual evaluation of magistrates is made in order to ensure their promotion on objective bases, the evaluation of the judicial system is made in order to create a fair imagine of the way to unfold the act of justice, by using the appropriate human and financial resources and by improving the quality of the activity.

D. EVALUATION OF ROMANIAN JUDGES AND PROSECUTORS' PROFESSIONAL PERFORMANCE

The Romanian judicial system is facing a process of reform. An important part of the reform process concerns the individual evaluation of judges and prosecutors and the evaluation of performance at the level of the judicial system.

Law no. 303/2004 on the statute of judges and prosecutors provides in art. 39-42 the basic principles for evaluation process, as follows: the organization and the appointment of the evaluation commissions, marks, the consequences of the evaluation, the appeal procedures against the marks granted at the evaluation, etc. The criteria stated by Law no. 303/2004 for measuring judges and prosecutors' competences and performance are the following:

- Efficiency
- Integrity
- Continuous professional training
- Quality of the activity

Judges and prosecutors shall be evaluated every 3 years (the first evaluation shall be made after 2 years from their appointment in the position of judge or prosecutor), with the following grades: *Very good*, *Good*, *Satisfactory* and *Unsatisfactory.*

The periodical evaluation has consequences as follows:

- Only the magistrates who obtained the grade "very good" can be admitted to the contest for promotion in executive positions at higher courts and prosecutors' offices;
- The magistrates who obtained the grade "unsatisfactory" at one evaluation or the grade "satisfactory" after two consecutive evaluations have to follow 3 to 6 months of special courses held by the National Institute of Magistracy;
- The magistrates who obtained the grade "unsatisfactory" after two consecutive evaluations or who have not passed the exam organized at the graduation of NIM courses shall be dismissed from office for professional incapacity.

The aim of the periodical evaluation refers to:

- increasing the efficiency of the judiciary and the level of the public confidence in the judicial system
- continuous development of the evaluated competences
- sustaining judge's legitimacy

In order to implement the legal provisions, the Superior Council of the Magistracy adopted by Decision no. 342/2005, the Regulation on the Evaluation of judges and prosecutors, normative act which details the objectives and the evaluation procedure. Also, the Decision provides for the SCM to draft the *Evaluation Guide,* describing the criteria and the evaluation indicators of the professional performance.

In April 2005, a **working group** was constituted at the level of the SCM on the drafting of a socio-professional profile of the magistrate, in order to establish the admittance conditions to the magistracy. Within the working group, it was established the necessity to draft a profile of the magistrate, containing the competences and the basic requirements of this position, professional competence criteria and performance criteria which must be assessed trough the evaluation procedure provided for by the law.

Following the adoption of the *Profile of the magistrate in the Romanian judicial system,* in order to establish a unitary, coherent and objective evaluation system, **the Superior Council of the Magistracy implemented the following programmes**:

- During October 2005 - February 2006, **a World Bank programme was implemented, analyzing the present system of measuring and monitoring of the judicial performance**. The final report comprised of a comparative analysis on the evaluation of performance in Romania and in other EU countries and recommendations for improving the present system. The report is available on the SCM website www.csm1909.ro.

- During February - June 2006 the ***Guide for the evaluation of the quality of judicial decision*** was finalized. For the drafting the Guide, judges from all over the country were consulted.

- During October - December 2006, **two working groups were constituted at the level of the SCM**, one for judges and one for prosecutors, with the objective of determining the evaluation indicators to measure the professional performance of judges and prosecutors, according to the criteria provided for by the law.

- During August 2006 - February 2007, the SCM implemented, in cooperation with the World Bank and the National Institute of Magistracy, the project "**Creating a network of trainers for the training of members of the evaluation committees**". The training network comprises of 18 judges and 14 prosecutors, selected out of 100 judges and prosecutors involved in the project.

- The SCM sections adopted the **criteria and indicators for the performance evaluation of judges and prosecutors**, by Decision no. 446/13.12.2006 of the Section for judges and by Decision 19/21.02.2007 of the Section for prosecutors.

According to the above mentioned decisions, an indicator must fulfill the following requirements:

- Not to affect the independence of the magistrate,
- To have an educative role (to stimulate the development and the self professional development)
- To differentiate the magistrates' performances
- To be measurable (to be defined trough specific indicators, that can be controlled)

As stated above, the **criteria** stated by Law no. 303/2004 for measuring judges and prosecutors' competences and performance are the following:

- Efficiency
- Integrity
- Continuous professional training
- Quality of the activity

Specific indicators have been developed for each criteria established by the law, as follows.

For ***the criterion of efficiency,*** specific indicators refer to:

- Promptness in solving cases, which is defined as: the number of the solved cases divided to the number of the cases distributed to the judge (through direct distribution or indirect distribution after procedural incidents). The result is to be

compared to the medium efficiency per section/court and then to the medium national efficiency of the court/section at the corresponding level of jurisdiction.

- Optimum timeframe for solving cases. The number of solved cases and of the pending cases are compared to the total of the cases distributed to the judge and the optimum time frame for solving cases that is to be established by the SCM.

For ***the criterion of integrity,*** specific indicators[15] refer to:

- Compliance with the norms of the Deontological Code;
- Disciplinary sanctions suffered by the judge;
- Conduct during courtroom sessions in relation to the plaintiffs, the lawyers and other participants to the courtroom proceedings judicial process, as well as in relation to his colleagues (judges and prosecutors) and the auxiliary personnel (neutrality, impartiality).

For ***the criterion of continuous professional development***, specific indicators[16] refer to:

[15] **Examples of specific indicators**:
1. Observing the provisions of the Code of Ethics
1.1. Evident adhesion to standards of ethics (doesn't tolerate lie, avoids conflict of interest, reacts publicly to the unfair treatment of a colleague).
2. Disciplinary sanctions applied to the judge
3. The conduct during the trial session and in court in relation to the parties, advocates, other persons involved in the process, as well as in relation to the auxiliary personnel and the judges and prosecutors.
3.1. Shows perseverance in finding the information for the grounds of his/her juridical opinion.
3.2. Registers carefully the claims of the parties for ensuring an equal treatment during the trial.
3.3. Manifests evident inconsistency in expressing his/her juridical opinion.
3.4. Maintains an equidistant attitude towards all the parties involved in the trial during the trial session.
3.5. The reasoning of the decisions show concern for a reasonable equivalent argumentation between the two parties.
3.6. Has personal initiative for improving the quality of his/her performance within the court.
3.7. Discusses with the persons responsible for perpetuating incorrect procedures, without being intimidated by possible consequences and unwanted implications.
3.8. Doesn't react to issues said by the collective with the evident purpose to hide the truth.
3.9. Objects to the existence of deficient procedures of managing the judicial service in court.
3.10. Gives his/her opinion in cases when a magistrates has a conflict of interests.
4. Respectable conduct in society
4.1. Moral reflection and self-reflection **(**fulfills honorably his/her moral and material obligations, closely analyses the consequences of the magistrate's participation at various public events, doesn't avail oneself in the society of his/her professional position a.o.)
5. Challenge claims admitted

[16] **Examples of specific indicators**:
- Availability for professional continuous training,
- Concentrating attention and effort resourced for professional activities; inner satisfaction of professional activities.
a. Is able to demonstrate personal contributions to clarifying and developing juridical institutions, as a result of thorough study of cases.
b. Is able to describe the complex cases who's solution was mainly the attribute of his/her

- Participation at seminars, conferences and continuous training courses;

- Postgraduate courses (this indicator is taken into consideration for the complete evaluation of the judge, without constituting a disadvantage for those who did not pursue post graduate education);

- Published articles in law periodicals or journals, published law papers, contribution to publishing law brochures or jurisprudence materials (this indicator is taken into consideration for the complete evaluation of the judge, without constituting a disadvantage for those who did not undertake such activities).

- Literacy in foreign languages(attended courses);

- Literacy in IT (attended courses);

- Training activities (this indicator is taken into consideration for the complete evaluation of the judge, without constituting a disadvantage for those who did not undertake such activities).

For ***the criterion of the quality of the activity***, specific indicators[17] refer to:

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competences of finding and synthesizing the information.
c. Doesn't rely on the management of the impression of his/her superiors, on manipulating other in order to create oneself a positive image.
- Abilities for and appraisal of the teamwork.

[17] **Examples of specific indicators**:
II.1 The activity as a judge:
1. The quality of the decisions drafted –it can be substantiated by the following specific indicators:
1.1. Independent/critical thinking-has an independent/critic thinking over the professional, juridical aspects:
1.1.1. Approves or overrules with arguments the requests of parties referring to evidence, principles and the rule of law.
1.1.2. The reasoning doesn't contain both relevant and irrelevant aspects.
1.1.3. Is able to offer details concerning the evolution of the way he/she understood certain juridical institutions, law, procedure.
1.1.4. Gives coherent and correct arguments from the juridical logic point of view when making decisions during the session.
1.1.5. Has the ability to demonstrate that he/she contributed to the modification of the court's jurisprudence.
1.1.6. Drafts the judgment in a clear, concise manner, able to be applied.
1.1.7. Gives juridical arguments, according to the state of affaires of the case.
1.1.8. The reasoning contains relevant fragments of the depositions of witnesses, analyzed and synthesized.
1.1.9.Has the ability to give examples of the manner in which he/she applied the jurisprudence of ECHR and ECJ.
1.1.10. Analyses and interprets the evidence given.
1.1.11. Gives logical and coherent argument when motivating the decision.
2. The conduct during the trial session- it can be substantiated by the following indicators:
2.1. Clear and logical communication, negotiation skills and self-control – clear and correct message:
2.1.1. Registers clearly and exactly the depositions of witnesses and the of the parties.
2.1.2. Communicates clearly and logical during the trial session and is receptive to the request which completes or changes the claims of the parties.
2.1.3. Has the ability to listen the parties.
2.1.4. Interrupts the speech of the parties in cases which are evidently inadequate or doesn't interrupts it

- Courtroom abilities: quality of pronounced judgments (decisions), conduct during court sessions
- Leadership abilities: organizational and managerial abilities, control abilities, decisional capacity, objectivity and impartiality, communication abilities, fulfillment of special attributions as established by laws and regulations.

For the implementation of the new system of evaluation of the individual performances, the following instruments are used:

a. **The Regulation concerning the evaluation of the professional activity of judges and prosecutors**, pending for adoption. The draft Regulation was send to courts and prosecutors offices for debate, and provides for the following: the method of functioning for the commissions, the procedure for solving disputes, the method to unfold the courses/examinations for the magistrates who have received the "satisfactory" or "unsatisfactory".

b. **The Profile of the magistrate in the Romanian judicial system**, adopted by the SCM .

In March 2006, the SCM Plenum adopted the ***Profile of the magistrate in the Romanian judicial system.*** The profile represents the following: a mechanism meant to ensure an unitary vision upon the role of justice, which must be shared by all the

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in the same cases.
2.1.5. Manifests arrogance, disrespectful attitude.
2.1.6. Has the ability to manage crisis situations in the court room.
2.1.7. Creates a favorable environment for the litigating parties.
2.1.8. Perceives advocates as partners in delivering the act of justice.
2.2. Self-control-the professionalism of the social interaction of the magistrate („judicial temperament")
2.2.1. Rises his/her voice frequently.
2.2.2. Has a polite attitude when addressing the parties.
2.2.3. Restores the calm of a person who's emotionally troubled, ensuring a proper treatment in the court room.
2.2.4. Respects the dignity of all persons.
2.3. Social awareness as a person who has the power to decide the faith of his/her kind: empathy towards the beneficiaries of the act of justice.
2.3.1. Plays an active role in cases which require juridical assistance.
II.3. Other activities undergone by judges based on the provisions of laws and regulations (judges seconded to the Chamber of Commerce, at the offices for enforcing criminal decisions etc.)
The quality of the procedural acts drafted by judges (coherent structure, clear reasoning, juridical logic, precise style of communication, capacity of synthesis, clear and concise style);
The number of controls made at the respective department/institution;
The proper manner of solving the underlined deficiencies;

ones involved; a control mechanism that monitor the implementation and the sustainability of such a vision until other competences are needed; and a mechanism of professional and moral education of magistrates, as from the correct application of the profile benefits the ones that correspond the provided competencies, and consequently the vision upon the role and the functions of justice.

According to the Profile, the magistrate must to:

- be able to think independently in juridical matters
- recognize the inner factors that might cloud its judgment
- understand the society
- manifest moral integrity; to have the capacity and the courage to improve his working environment
- communicate clearly and logically and to be receptive to the information that might improve his message
- be credible and worth trusty
- be efficient in the management of his own duties and to contribute to the improvement of the court's administration.

The personality profile connects to: independent/ critical thought; moral- cognitive integrity/consistency, Social awareness and commitments, Being inclined for hard work and continuous professional training; authenticity; clear and logical communication, receptivity toward any information that might improve his message; self control; conscientiousness, diligence, collegial respect.

c. **The Evaluation Guide**, pending for adoption. The Guide comprises of indicators for the practical application of the legal provisions. It represents a reference framework which defines the specific indicators, relevant for the evaluation criteria provided by the law, describing the *good practices* in the evaluation procedure.

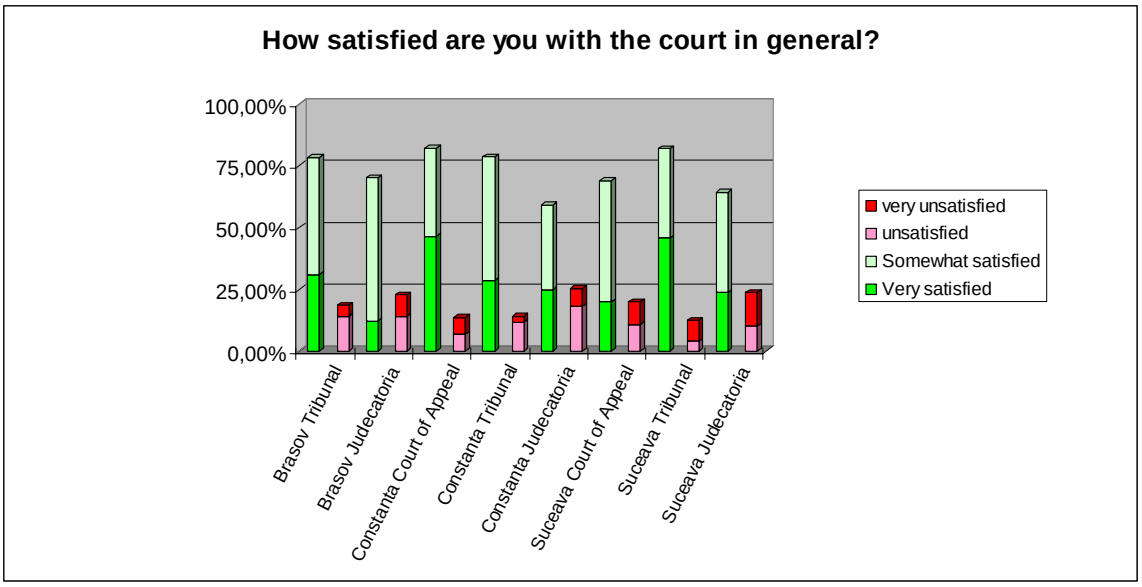
Its main purposes are as follows:

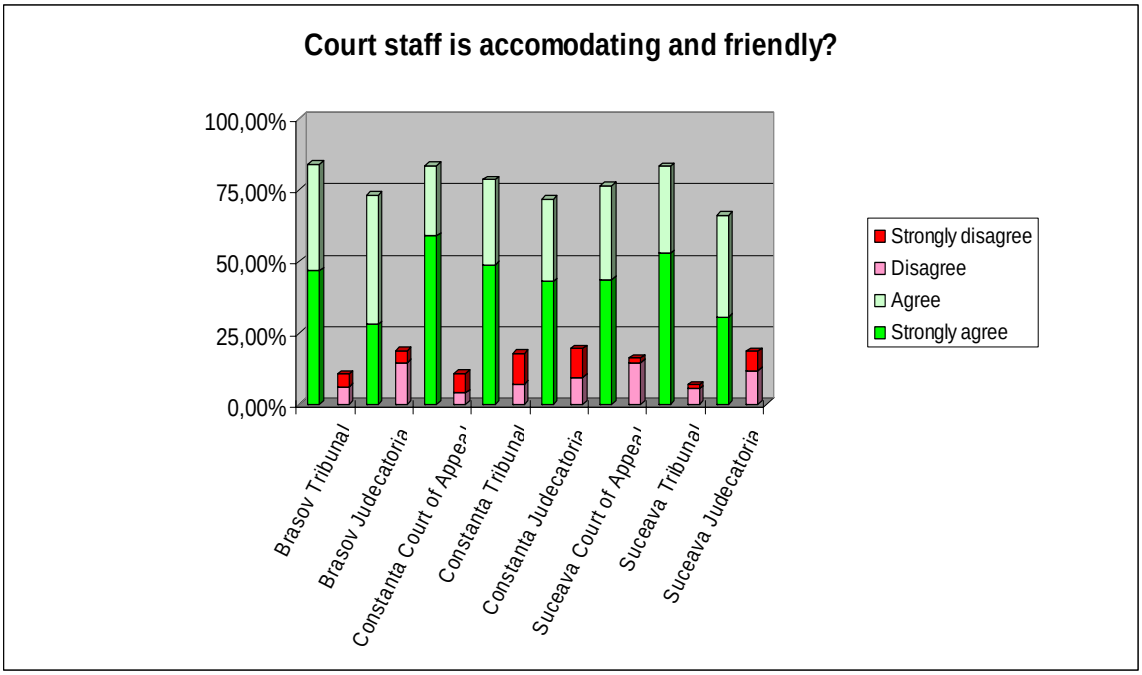
- Increasing the relevance of the indicators for the measurement of each criteria of professional performance
- Increasing the transparency of the evaluation process and improving all forms of communication
- Standardizing the procedures/methods used in the evaluation process

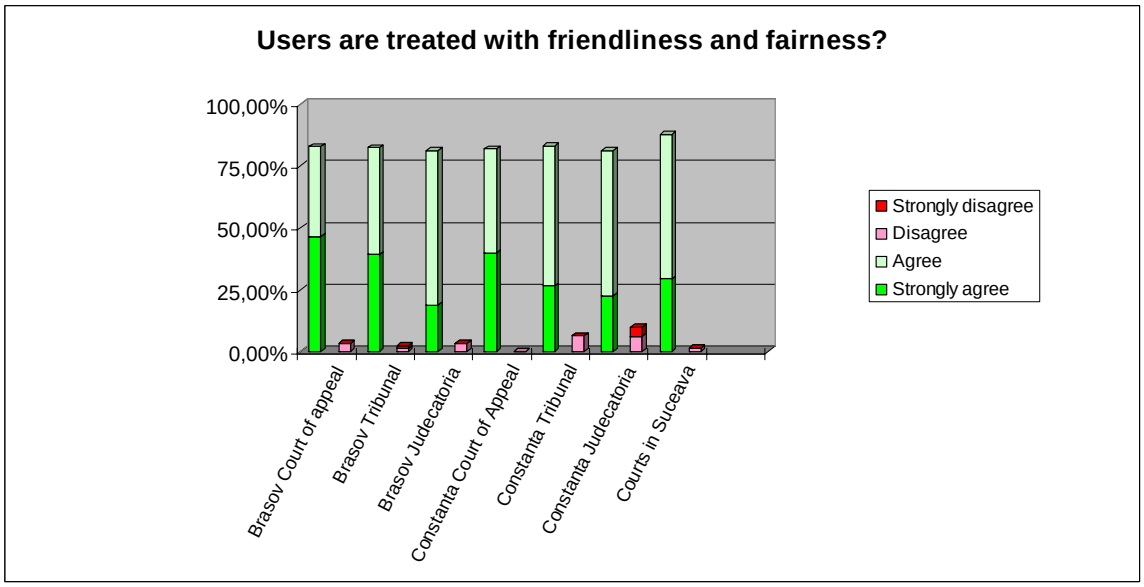
The SCM's objectives regarding the measuring and monitoring of the performance of the judiciary in Romania comprise of the following:

- Revision of the statistical system
- Reducing the number of basic statistical categories for different types of cases
- Improvement of the ECRIS system in order to allow introduction of detailed information regarding important aspects of certain cases
- Creation and development of a statistical module of the ECRIS to include all the standards of statistical reporting in order for the courts to use and transmit
- Specific guidelines elaboration in order to emphasize the distinction between the different types and categories of cases, at the moment of recording statistical data

In order to collect the opinions of the persons using justice as a pubic service from outside the judiciary system regarding performance, opinion surveys and questionnaires were used in 3 courts. The following charts resulted.







The conclusions of the surveys on the evaluation of the performance were as follows:

- At individual level:

- Problems arise regarding the respect of the independence and data difficult to interpret may appear

- At the level of the entire system

- Oftn times the measurement means are not very useful for specific actions

- At the level of the court (or prosecutor's office)

- This is the ideal measurement unit
- They can be easily compared

- A balance can be established between the quantitative/ objective indicators and the qualitative ones

As a result of their work, t**he working groups** constituted at the level of the SCM determined that **it is necessary to make proposals for the amending of the legislative framework on the evaluation and promoting procedures.**

The members of the working groups have determined that within the present legislative framework and bearing in mind the problem of vacant positions within the judicial system, the evaluation system provided for by Law no. 303/2004 on the statute of judges and prosecutors is not feasible.

The reasons for the amending of the law are the following:

- the evaluation procedure as stated by the law could heavily infringe on the activity of courts and prosecutors offices, due to the fact that the law provides for a large number of evaluators (half of the number of magistrates at the national level),
- the workload required by the evaluation procedure is extremely high, not taking into consideration realities of Romanian courts and prosecutors offices as the vacant positions, the workload, etc,
- the lack of unitary application of evaluation criteria and indicators, due to the large number of evaluation commissions,
- internal conflicts within courts and prosecutors offices due to the fact that the evaluation could be made by magistrate colleagues with no proper training,
- the appeals on the evaluation marks could heavily infringe on the activity of the SCM
- the promotion procedure could be blocked, due to the fact that only magistrates marked "very well" can be promoted.

Conclusions:

The evaluation of magistrates will be made according to the present law, starting with September 2007. If the legislation will not be amended in due time, the evaluation will be made with the instruments and procedures.

6.3. The Netherlands: The experiences in the Netherlands with performance measurement as part of strategic management[18]

Introduction

In studying the potential benefits of applying strategic management within the judicial system, the mission/vision working group applies a simple schedule that is known in the literature in several variants. Strategic management is defined here in three steps: formulate policy, implement policy, and evaluate policy in order to (re)formulate new policy.

Within the judicial system, strategic management can be given shape from various perspectives or at different levels. An individual court is the smallest scale on which structured strategic management can take place. But strategic management can also be applied to the entire judicial system, namely all courts jointly, and either with or without the Council for the Judiciary. The domain can be extended even further to view the system from the perspective of the Minister for Justice where the judiciary is only part of a wider system that also includes the Public Prosecutor, Legal Aid and the prison system.

One central question in evaluating policy is: how can we measure the effects of policy in order to adjust that policy on the basis of the outcomes of these measurements? Regarding the measurements, a distinction is made between the internal process and the actual results. As for the results, a further distinction can be made between the concrete results and the effects in the longer term[19]. A simple example will illustrate the differences. Suppose the objective (the policy) is to accelerate the handling of court cases. The evaluation of the internal process may indicate that more judges were used in a given year, leading to a faster handling of cases (the actual result). The longer-term effect, presumably, is more satisfaction with and trust in the justice system among litigants and professional partners.

In the Dutch situation the Council for the Judiciary, together with the courts, pursues strategic management in the following manner. The basis is formed by a multi-annual

[18] This paper is based on two presentations given during the meetings of the working group on 27 October 2006 in Brussels (Belgium) and on 30 March 2007 in Rovaniemi (Finland).
[19] Often referred to in the literature as: throughput, output and outcome.

strategic agenda, three of which have appeared since the Council for the Judiciary was launched on 1 January 2002[20]. The strategic agenda states the most important objectives for the coming years in abstract terms. This multi-annual strategic agenda is concretized in successive year plans by the Council for the Judiciary as well as the separate courts. The results are published annually in annual reports. The Council for the Judiciary and the courts have developed a planning and accountability system for the implementation of the plans. Process-based project management is an important instrument for translating policy proposals into concrete activities at both national and local level[21].

Forms of policy evaluation and performance measurement

Policy evaluation and performance measurement are an essential part of strategic management. They provide a solid basis for formulating and adjusting policy. Ideally, methods for measuring the realization of an objective are already devised during the formulation of the objective. In the real world, however, this usually does not happen. Consequently, a form of measurement (and hence substantiation) must be constructed retrospectively, preferably based on 'hard' quantifiable data and research results to achieve maximum credibility. Lots of existing information can be used for this part of strategic management.

In the Dutch situation the following types of information are relevant:

- Existing management information (available via national standardized instruments and reports).
- The extensive benchmark surveys that are presented three times a year and that enable performance comparisons between the various courts.
- Audits by independent auditors as part of the annual reporting process.
- The judicial performance measurement system (part of the RechtspraaQ quality system[22])

[20] Agenda voor de rechtspraak 2002-2005, Continuïteit en vernieuwing; Agenda van de Rechtspraak 2005-2008; Agenda van de Rechtspraak 2008-2011, Onafhankelijk en betrokken.
[21] There are many methods for structuring process-based project management to make projects a success. In the Netherlands the Council for the Judiciary used Prince-2 that was developed within the government of the United Kingdom.
[22] Extensive information about the RechtspraaQ quality system is available at the Council for the Judiciary.

- The customer satisfaction surveys and employee satisfaction surveys that all courts carry out as part of the RechtspraaQ quality system. The surveys are carried out per individual court. The available studies have been analysed and translated into national patterns and trends in preparation for the strategic agenda for the period 2008-2011.
- The court visits for the purposes of the RechtspraaQ quality system. In 2006 all 26 courts were visited for the first time by an independent committee that included non-judiciary experts.
- The results of ad hoc evaluations (e.g. after completion of large projects). At the end of 2006 the final report of a substantial evaluation programme appeared where the introduction of integrated management at the courts and the establishment of the Council for the Judiciary was evaluated by an independent committee on behalf of the Minister for Justice[23]. This evaluation report was an important building block for the Agenda of the Judiciary 2008 – 2011 and actually constituted the reason for publishing this strategic agenda a year earlier than originally intended.
- Scientific research forming part of the scientific research programme of the Council for the Judiciary. In the past years, for instance, research was carried out on behalf of the Council for the Judiciary into the trust in the judicial system, the productivity and forms of civic participation.

Key indicators

One important new development in policy evaluation and performance measurement is the use of key indicators. Key indicators are designed to provide reliable insight into the performance of an organization with the aid of a limited set of data. The Dutch Parliament requested the development of such key indicators to improve the accountability of the judicial system. The judiciary made the further demand that these key indicators needed to be suitable for strategic management as well as for accountability purposes, which meant that the key indicators had to meet additional requirements. The development of key indicators is basically an attempt to arrange the huge amount of available information in an orderly manner and to make it accessible for users.

[23] The Committee for the Evaluation of the Modernization of the Judicial Organization. The final report "Rechtspraak is kwaliteit" appeared in December 2006 and has meanwhile been translated into English.

To formulate key indicators, two crucial questions need to be answered:

1) What do I want/need to know to obtain an accurate picture of the organization?
2) How can I select a limited number of key indicators and still obtain a complete picture?

At the start of the process in 2005 the following additional demands were made in 2005:

- The key indicators must be usable at all levels (individual courts, Council for the Judiciary and Minister for Justice).
- The key indicators must be recognizable and usable for the users inside and outside the judicial system (which necessitates extensive consultations).
- Each key indicator must have significance for a longer period of time.
- The key indicator system must be low-maintenance in terms of costs and staffing (which implies the use of ICT).
- The development of key indicators is a growth model, starting with the limited input available at the outset and only gradually developing into a fully-fledged set of usable key indicators after a number of years.

After selecting the key indicators, several further steps must be made, each of which demands special attention. First of all, the key indicator must be clearly and accurately defined; next standards must be set in line with the level of ambition. To be able to measure the key indicator, it is necessary to develop a measurement instrument (this is mostly derived from existing measurement systems, but sometimes an entirely new instrument needs to be developed, in which case a separate cost-benefit analysis is required). This development phase (selection, definition, standard setting and development of measurement instrument) is followed by the actual measurement and the presentation of the results.

The current set of key indicators in the Netherlands breaks down into five focal areas[24]:

- Quality
- Production and finance
- People and organization

[24] The key indicators for each focal area are given in the appendix. Some key indicators speak for themselves, others are specifically related to the Netherlands and therefore probably less evident for other countries.

- Development
- General

Key indicators per court were presented for the first time in the annual report for 2006.

Additional remarks

Theory and practice are worlds apart. If strategic management and policy evaluations or performance measurements were expected to live up to ideal theory, nobody would even give it a try.
Because practice happens to be a lot more complex than theory and is hard to capture in models and paradigms. Fortunately, what matters here is not so much the system but the way of thinking. The formulation of objectives provides direction and a handle for dealing with reality. Attention for implementation ensures that the impressive-sounding words can actually lead to concrete results and hard figures legitimize important administrative decisions which, as a result, will also be more easily accepted. Strategic management offers the opportunity to transcend momentary fads and trends, but should naturally not result in rigid plan-based thinking. It is an instrument for administrators and managers. Even if the theory is not followed to the letter, strategic management has the tendency to generate growing piles of paper, eventually resulting in a paper world that is completely divorced from both actual reality in the courtroom and the needs of administrators and managers. Practical application and hands-on engagement are more important than bureaucratic perfection. Over the past years a lot of time and energy has been invested in the Netherlands in obtaining, analysing and understanding hard information on all facets of the judicial system. This has given an enormous impulse to a more strategic way of administrative thinking and decision-making. For it permits an approach which is more objective and distanced from the ever-present conflicts of interest (let the facts speak for themselves), whilst also sometimes leading to surprising insights!

7. Conclusions

Central to performance management is the practice of actively using performance data to improve the results for the client or user of the service (improve justice in society, satisfaction for the justice customer). This practice involves strategic use of

performance measures and standards to establish performance targets and goals, to prioritize and allocate resources, to inform managers about needed adjustments or changes in policy or program directions to meet goals, to frame reports on the success in meeting performance goals, and to improve the quality of justice.

The major contribution of performance management is its focus on achieving results. Results are defined as useful products and services for clients inside and outside the organization. Everyone (and everything) in the organization must be doing what they're supposed to be doing to ensure strategies are implemented effectively.

Performance management essentially uses performance measurement information to manage and improve performance and to demonstrate what has been accomplished.

Excellence depends on delivering quality services; building organizational capacity is the key to consistent success.

If you can't recognize failure you can't correct it[25]

[25] Osborne, David, and Ted Gaebler. *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*. Reading, MA: Addison-Wesley, 1992.

APPENDIX : Working group participants

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APPENDIX: Summary of key indicators in the Netherlands

Quality:

Substance

1) Percentage of litigants and professional clients satisfied with expertise, consistency of justice and motivation
2) Single Judge/Full Court ratio

Impartiality and integrity

3) Percentage of individuals and professional clients satisfied with impartiality and integrity

Treatment

4) Percentage of individuals and professional clients satisfied with treatment
5) Waiting times

Throughput time

6) Percentage of individuals and professional clients satisfied with throughput times
7) Actual throughput times

Production and finances

8) Actual production versus plan
9) Actual production versus new cases
10) Labour productivity per court
11) Productivity per product group
12) Actual product group price
13) Actual weighted production
14) Own funds (long-term)

People and organization

15) Percentage of satisfied employees
16) Perceived workload
17) Absenteeism percentage
18) Demographic ratios

    Judicial officials/court officials ratio

    Male/female ratio

    Staff age structure

    Use of deputy judges

Trainee Court Officers/Trainee Judges ratio

19) Satisfaction of chain partners with policy arrangements

Development

20) Percentage of referrals to mediation

21) Percentage of electronically received cases

22) Number of court decisions supplied to the judiciary website: rechtspraak.nl

General

23) Percentage of appeals and further appeals

24) Number of upheld objections

25) Number of complaints and percentage of well-founded complaints

Working Group 'Courts' funding and accountability' – The report

1. The role of judicial, legislative and executive bodies in the funding of courts

a/ Does your Constitution set out a system for the funding of your courts? If so, please quote the applicable constitutional regulation.

There is no special constitutional regulation in any of the countries concerning the funding of courts. Even though in England and Wales there is not a written constitution the Lord Chancellor and Secretary of State for Constitutional Affairs (Minister of Justice) is under a statutory to ensure that there is an efficient and effective system to support the carrying on of business of the courts of the Supreme Court, county courts and magistrates courts. In Germany there is no organisational autonomy on the part of the third power. Court administration is a matter for the responsible Ministries who also administer relevant budgetary resources. The only exception is the Federal Constitutional Court, which has been granted organisational autonomy as an independent constitutional organ.

b/ Is the budget of your courts a separate part of the state budget?

The budgets of Bulgaria, Cyprus, Ireland, Estonia, Lithuania, Poland and Sweden are separate parts of the state budgets. In the other countries which responded to the questionnaire including: Austria, Belgium, Croatia, the Czech Republic, Denmark, England and Wales, Finland, Germany, the Netherlands and Romania the budgets of courts are not independent. In Denmark, the budget is under the Ministry of Justice, whereas in Belgium and the Netherlands it is a part of the budget for the Justice Department. In Romania the budgets of all the courts apart from the High Court of Cassation and Justice are separate parts of the state budget. In Romania the budgets of the Ministry of Justice and of the High Court of Cassation and Justice are annexes to the law of the state budget that establishes the duties of the main chief credit accountants, i.e. the Ministry of Justice and the president of the High Court of Cassation and Justice.

c/ Is the budget of your courts an independent part of the state budget?
If so, how is its independence guaranteed? (please, quote the appropriate regulation)

Only the budgets of Bulgaria, Cyprus, Finland, Lithuania and Poland are independent parts of the state budgets. Pursuant to Article 117, paragraph 3 of the

Constitution of the Republic of Bulgaria the judiciary shall have an independent budget. In Finland the budget line items are defined by law (the State Budget Act and accompanying decree). The appropriations for courts are specified as an independent part in the budget of the Ministry of Justice.

d/ Who draws up the budget?

In Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, Finland and Poland the budgets are drawn up by the Ministers of Justice (in Finland also in cooperation with courts). In the Czech Republic, it is drawn up in cooperation with courts. In Denmark, Germany and Ireland the Ministers of Finance draw up the budget. In Austria, it is done by Parliament. In Lithuania the budgets of courts are drawn up by the budget appropriation managers - the courts in accordance with the needs of courts. There is a separate sum of budget appropriations for courts and a separate line for each court in the State budget, which is approved by Parliament of the Republic of Lithuania each year. In Cyprus, the budget for the Courts is prepared by the Accounting Department of the Supreme Court. In Romania the Leading Boards of the courts of appeal lays down the foundations and proposes the draft budgets for the courts of appeal within their jurisdiction and submits it to the Superior Council of Magistracy for endorsement, and to the Ministry of Justice. England and Wales Regional administrators (known as Regional Directors, who are both employed by, and solely responsible to, the Lord Chancellor) are responsible for budgetary preparation and allocation at the local level. The Swedish National Courts Administration presents a budget request to the Ministry of Justice. In the Netherlands the Judicial Organisation Act prescribes that a first draft for the budget for the judiciary is to be made by the Council for the Judiciary. The Minister of Justice has limited authority to change the first draft, which is then incorporated into the proposed Act of Parliament containing the annual State Budget.

e/ To whom is the budget submitted?

In Belgium, Bulgaria, Croatia, Estonia, Lithuania, Poland and Romania the budget draft are submitted to the Councils of Ministers. In addition in Bulgaria and Lithuania the budget is also submitted to the National Councils for the Judiciary and in Ireland and Estonia to the Minister of Finance, and in Belgium to the Minister of Budget..

The budget of the Danish Courts Administration (on behalf of all courts in Denmark) is submitted to the Ministry of Finance which is aligned with the Ministry of Justice. Negotiations between the Courts' Administration and the Ministry of Finance determines what the input will be in the overall budget draft of the state presented to Parliament.

In Romania the budget of the High Court of Cassation and Justice is approved by the General Assembly of that court with the consultative endorsement of the Ministry of Public Finances. Then, the president of this Court submits the draft annual budget to the Ministry of Public Finance. The courts of appeal, submit the draft annual budgets for the courts of appeal and for the courts within their jurisdiction to the Ministry of Justice and to the Superior Council of Magistracy for the necessary endorsement. After receiving the endorsement from the competent organs, the main chief credit accountants, i.e. the Minister of Justice and the President of the High Court of Cassation and Justice have the obligation to submit to the Ministry of Public Finances until the 15th of July of every year the draft budget for the next financial year.

In the Czech Republic, England and Wales, Finland it is submitted solely to the Minister of Finance. In Estonia the Minister of Justice submits the draft total budget for the courts of the first and the second instance to the Minister of Finance who after negotiations with all the ministers submits it to the Government, which approves the draft of the state budget. The President of the Supreme Court presents the draft budget of the Supreme Court to the Minister of Finance.

In Austria, and Germany they are submitted directly to Parliament.

In Sweden the Ministry of Justice reviews and analyses the budget request submitted by the National Courts Administration. The Ministry of Finance analyses the overall economic situation and calculates the scope for expenditure increases or the requirement for expenditure decreases. Negotiations then take place between the Ministry of Justice and the Ministry of Finance about the financial resources to the judicial system. The final decision of the budget proposal is taken by the Council of Ministers. (The decisions of the Council of Ministers are collective, so all members of The Council of Ministers, including the Minister of Justice, must agree about the decisions. In the Netherlands the courts' budget is approved by the legislature (Parliament and government together).

f/ Who approves the budget?

The organs which approve the Budgets for the courts in most countries are their Parliaments.

In Bulgaria the Supreme Judicial Council (National Council for Judiciary) adopts the draft budget of the judiciary. Then, the National Assembly adopts the budget of the judiciary according to organs of the judiciary as an independent part of the state budget. In England and Wales, the budget is prepared by the Lord Chancellor's ministry, the Department for Constitutional Affairs, and submitted as part of the Department's overall budget to HM Treasury (i.e. the Ministry of Finance) which is headed by the Chancellor of the Exchequer. Discussions will then take place between DCA and HM Treasury but the final decision on the Department's overall budget is taken by the Treasury. The overall budget for the government is then presented to Parliament; after debate, the convention is that the government's budget is approved. In Germany the legislative organs approve the budget at the federal level, the Bundestag and Bundesrat the organ through which the Länder participate in the legislation of the Federation. In the Netherlands the courts' budget is approved by the legislature (Parliament and government together) and in Ireland the budget is approved only by the Council of Ministers.

g/ Do the judiciary (heads of courts, presidents, representatives of judges) participate in the preparation of the budgets of local courts? If so what is their role?

In Austria, Belgium, Cyprus, Denmark, and England and Wales the judiciary does not participate in the preparation of the budgets of the local courts.

In Bulgaria while drawing up a budget draft of the judiciary the Minister of Justice may request information and proposals from the administrative heads of the organs of the judiciary.

In Croatia courts participate in two ways: The presidents of the courts negotiate directly with the Ministry of Justice concerning their annual budget and their needs. Settlement, if reached, is not mandatory for the Ministry of Justice. A proposal of the Budget has to be sent for previous opinion to the General Assembly of the Supreme Court (all judges of the Court) but that opinion is not binding to the Ministry or Government.

In the Czech Republic the heads of the courts make a list of their requirements, they submit a draft version of the budget for their local court. In Denmark, the drafts that are sent to the local courts from the Danish Courts Administration are based on objective criteria, which is the number of court cases dealt with, square meters of the

courts, etc. In Estonia, annual negotiations are held between the Ministry of Justice and the representatives of each court, where participants discuss the court`s performance and the needs for the next year.

In Finland, the main hearing of courts takes place in the negotiations between the presidents of courts and the representatives of the Ministry of Justice annually, in spring, when the budget is drafted. The courts through their representatives express their wishes as to budget appropriations required to run the court. After submitting the budget to Parliament the Ministry of Justice negotiates in October – November with every court head for the budget implementation and the financial needs of each court. In these negotiations the performance targets for the following year for every court are also confirmed.

In Germany, court budgeting is a matter for the responsible Ministries, who also administer relevant budgetary resources. The only exception is the Federal Constitutional Court, which has been granted organisational autonomy as an independent constitutional organ. Within the state budget (of the Federation or the respective Länder), parts of the entire budget are allocated to the Ministries which are responsible for the Judiciary. The budget for one or more fiscal years is set forth in a law that is enacted before the beginning of the first year and that makes separate provision for each year. There are so-called "budgeting models" which represent an increasingly growing form of judicial self-governance, especially in the courts of the Länder. "Budgeting" here refers to the decentralised and independent management of budget funds by the courts. Each court is allocated a certain amount of funding to administer independently. While such funding is derived from the total justice budgets of the respective Länder, the courts may nevertheless dispose of the funds independently and without outside influence. This budgeting procedure enables courts to make independent decisions on personnel and materials budgets and especially on setting priorities for the expenditure of funds. Not least, available funds can therefore also be employed in a more targeted and economical manner. The concrete regulations (i.e. allocation, control etc.) of these budgeting models are different from Land to Land.

In Ireland the Courts Service Board which has a majority of Judges in its membership approves the budget for all courts.

In Lithuania, each court submits its proposal for its budget draft to the Judicial Council for consideration. Before the Judicial Council, the draft budgets of all courts are analyzed and negotiated in the working group initiated by the Judicial Council and

consisting of 12 judges from different courts and the head of the National Courts Administration.

In the Netherlands, each court Board provides the Council for the Judiciary with a production plan, based on the prospective number of cases to be handled, and a draft budget for the court. The Council considers the local input and allows for costs that are not handled locally.

In Poland, the Appeal Courts' Directors with the Appeal Courts' Presidents prepare the budget draft of the respective Appeal Court territory.

In Romania, the budget of the courts of appeal and of the courts within their jurisdiction is drafted by the Leading Boards of the courts of appeal, which lays down the foundations and proposes the draft budget. Then, the economic manager who functions within every court of appeal and tribunal ensures the organization of the elaboration, substantiation and presentation to the competent bodies of the draft annual budget. Furthermore, the proper administering of the courts is the responsibility of the court presidents, who are also, members of the Leading Boards.

In Sweden, the courts send their 3 year plan to the National Courts Administration, including budget request, motivations etc, in September. The National Courts Administration analyses the budget request, makes comparisons between courts using key-ratios (measuring workload, the use of resources, performance etc) and statistical information. Then there are dialogues between National Courts Administration and the courts during September-November, and agreements between National Courts Administration and the courts are made. The formal budget decision is made in December.

h/ What is the role of the Council of Ministers or the Minister of Finance in the preparation of the courts' budget, if the budget is drawn up independently by the Minister of Justice, the National Council for the Judiciary or another body?

In Austria, the Minister of Finance provides the terms of reference. The Minister of Justice compiles their budget and debates the budget with the Minister of Finance. After conciliation the Council of Ministers agrees and then Parliament accepts the budget.

In Belgium an independent inspector (member of the federal financial inspection service) provides an opinion on the budget. The ministry of justice adapts the budget for the points on which they agree. Then, the Minister of Justice and the

Minister of Budget review the budget. Finally, the budget is discussed and approved by the Council of Ministers. The council's meeting is called " the conclave".

In Bulgaria, the Minister of Justice draws up a draft budget of the judiciary and submits it for review to the Supreme Judicial Council. The draft budget adopted by the Supreme Judicial Council shall be submitted to the Council of Ministers. The role of the Council of Ministers is expressed in the drawing up of an opinion on budget which draft it submits to the National Assembly.

In the Czech Republic, the Ministry of Finance gives general rules for the creation of the budget and approves the amount requested. The Ministry of Justice prepares, in cooperation with the courts, a budget draft of the courts, which is a part of the Ministry of Justice's total budget.

In Denmark, the Ministry of Finance following negotiations with the Danish Courts Administration sets the budget limit. The Administration then decides the budget within the limit. The final (overall) budget of the state – presented as a draft of the fiscal law of the state of Denmark for the next coming year – is per definition the draft of the fiscal law of the whole government, not the draft of the Minister of Finance. Therefore, the Minister of Finance of course must negotiate the overall draft within the government before it is presented to Parliament. It would be natural it the government has negotiated with the most important cooperation partners in Parliament even if they are NOT part of the government before the result is presented to Parliament. Negotiations then follow with the different political parties. It is a tradition that the government – any government – tries to obtain consensus or at least to obtain that the vast majority of the government votes in favor of the fiscal law.

In Estonia, the Ministry of Finance has negotiations with the Ministry of Justice on the size of the total budget for the Ministry of Justice as well as other ministries. The size of the budget for the courts is also discussed there, but the decision on how much money will be spent on courts will be determined by the Ministry of Justice and the Government.. The Courts Service submits budgetary proposals to the Minister of Justice, who in turn submits budget proposals to the Minister of Finance. Draft financial indicators of the State budget are prepared by the Ministry of Finance. The Government approves preliminary financial indicators of the State budget drafted for the period for the next three budget years and the maximum state budget appropriation amounts for the courts that could be allocated to the courts during the next three budget years. The budget appropriation managers – the courts – draw up the programmes and draft estimates of expenditure (budget drafts) on the

basis of the Methodology of the Strategic Planning established by the Government and within the limits of the maximum authorized State budget appropriation amounts that could be allocated to the courts. In deciding whether or not to use their authority to change the Council's draft budget and in negotiating product prices with the Council, the Minister of Justice takes into account the budgetary guidelines that are issued by the Minister of Finance.

In Poland The Minister of Finance accepts the draft of courts' budget prepared by the Minister of Justice as a separate part of the country budget.

In Romania after receiving the endorsement from the competent organs the SCM and the General Assembly of the HCCJ the main chief credit accountants, i.e. the Minister of Justice and the President of the High Court of Cassation and Justice have the obligation to submit to the Ministry of Public Finances until the 15 July of every year, the budget draft for the next financial year. The Ministry of Public Finances examines the draft budget and holds debates regarding them with the Minister of Justice and the President of the highest court. In conflicting views regarding the budget the Government is called upon to settle the dispute. Then, after the draft budgets are finalized, the Ministry of Public Finances reviews the drafts of the budgetary laws and of the budgets and submits them to the Government by the 30 of September of every year. After approving the draft budgets, the Government submits them to parliament for adoption by means of budgetary laws.

In deciding whether or not to use his authority to change the Council's draft budget and in negotiating product prices with the Council, in the Netherlands the Minister of Justice takes into account the budgetary guidelines that are issued by the Minister of Finance.

i/ Is the Council of Ministers or the Minister of Finance empowered independently to introduce changes to the draft of the budget accepted by those bodies or are such changes introduced by Parliament only?).

In most of the countries solely their Parliaments are empowered to introduce independently any changes to the draft of the budget.

In Bulgaria the Council of Ministers does not have the right to make changes in the draft budget of the judiciary but it can draw up an opinion on it which it includes in the general parameters of the state budget draft which it submits to the National Assembly.

In England and Wales once the overall budget for the Department for Constitutional Affairs (DCA) has been set it can only be changed with HM Treasury consent.

In Finland both the Council of Ministers and the Ministry of Finance are empowered to introduce changes. However, only after negotiations with th Ministry of Justice. Once the budget has been adopted by the Parliament, it may be modified only by the Parliament.

In the Netherlands the Council of Ministers (or the Minister of Finance) can try to exert pressure on the Minister of Justice and influence him into using his authority to change the draft budget as proposed by the Council for the Judiciary. It must be noted, though, that the Minister of Justice is obliged to report to Parliament if he changed the Judiciary's proposal, why he did so and to what extent. He also has to submit to Parliament the original draft budget by the Council for the Judiciary.

In Sweden the Council of Ministers has the power to independently introduce changes in the budget.

2. The management of the budget of the courts

a/ Who is the main manager of the courts' budget at national level

- the Minister of Finance *yes/no*

- the Minister of Justice *yes/no*

- the National Council for the Judiciary *yes/no*

- another independent body (if so what is its name and constitutional position)

In a vast majority of the responding countries the Minister of Justice is the main manager of courts' budget at national level. In case of Sweden the Minister of Justice, being responsible for the appropriation for the courts, shares the responsibility with the National Courts Administration, in the case of Ireland the Minister of Finance is responsible for judges' salaries while the Courts Service - for the rest of the courts' budget. In the Netherlands it is the National Council for the Judiciary only who manages the budget. Five Members indicated another independent body managing the budget, namely: Cyprus – the Chief Registrar together with the Accounting department of the Supreme Court, Denmark – Danish Courts Administration, Germany – the respective responsible Federal Ministries
except for the Federal Constitutional Court having a budgetary autonomy, Lithuania – the courts themselves.

b / Is the management of the courts' national budget in the hands of judges only? yes/no

In none of the responding countries the courts' national budget is in the hands of judges. The only exception to this rule is Romania where the management of the budget of the High Court of Cassation and Justice is in the hands of judges (the president or the vice-president of this court).

c/ Do the presidents of courts manage the courts' national budgets?

yes/no

Only in three countries (Bulgaria, Lithuania and Romania) the presidents of courts manage the courts' national budgets, although in Romania the management is limited to the budget of the High Court of Cassation and Justice.

d/ In case of the negative answers to the two previous questions - which body manages the budget at national level and how is this body chosen?

In Austria it is the President of the Higher Regional Court and the Minister of Justice who manage the budget at national level.

In Belgium - Ministry of Justice - Directorate General for Administration of Justice.

In Croatia the Ministry of Justice.

In Cyprus - the Chief Registrar together with the Accounting department of the Supreme Court.

In The Czech Republic the Ministry of Justice.

In Denmark - the Danish Courts Administration (in cooperation with and following the guidelines of an independent board).

In England and Wales the management of the budget falls within the competence of the Lord Chancellor who decides how much of the DCA (the Ministry of Justice) budget is to be spent on the courts, and that budget is then delegated to Her Majesty's Courts Service ("HMCS"). HMCS is an executive agency within the DCA; its Chief Executive reports to the Lord Chancellor and HMCS carries out the instructions of the Lord Chancellor (one senior judge is a non-executive member of the main board of HMCS. However, that judge has no influence or power over the budget which is solely within the control of the executive branch of government).

In Estonia the Minister of Justice allocates the budget between the courts and then Court Managers manage the budget on a daily basis but they need the approval of Court Presidents on deciding the staff and salaries of judges secretaries and

consultants as well as they need to assure; the Supreme Court is an exception – the President has all the powers there.

In Finland - The Ministry of Justice allocates the budget between the courts.

In Germany the respective responsible Federal Ministry, chaired by a Federal Minister appointed by the Federal President upon the proposal of the Federal Chancellor except for the Federal Constitutional Court being independent in that regard.

In Ireland - the Courts Service, established by the Courts Service Act 1998.

In the Netherlands - the Council for the Judiciary, where the 5 members of the Council, 3 of them having to be judges, are appointed by the Crown for a six year term.

In Poland - the Appeal and Circuit Courts Directors who are appointed by the Minister of Justice.

In Romania - the president and the vice - president of the HCCJ appointed by the President of Romania, at the proposal of the SCM amongst the sitting judges of this court with a minimum 2 years of activity at the HCCJ; the appointment to these positions is limited for a period of 3 years with the possibility of reappointment only once; the economic manager is appointed by the president of the HCCJ or the presidents of the courts of appeal after passing the exam organized for this purpose by the respective institutions.

In Sweden - the National Courts Administration; the members of the board represent the courts, the authorities and Parliament. The chairperson of the board is the Director General of the National Courts Administration, appointed by the Council of Ministers.

e/ Who is the main manager of the courts' budget at local level

- *the Minister of Finance* *yes/no*
- *the Minister of Justice* *yes/no*
- *the National Council for the Judiciary* *yes/no*
- *another independent body (if so what is its name and constitutional position)*

The management of courts' budget at local level falls within the competence the Minister of Justice alone in the case of Belgium. In England and Wales the management at local level is delegated by DCA (the Ministry of Justice) to Her Majesty's Courts Service (HMCS).. The Minister of Justice shares the competence with another body in case of Austria (the presidents of the higher regional courts), Croatia (the presidents of courts), Germany (in some Länder - Minister of Labour or

Minister of Finance according to the specialization of courts). Other bodies responsible for the management of courts' budget at local level are:
- courts (presidents, boards, courts' administration) - Bulgaria, Cyprus (the Chief Registrar together with the Accounting department of the Supreme Court), the Czech Republic (head of the court), Denmark (with the limits set for the presidents of courts in favour of the Danish Courts Administration staff), Finland (presidents of courts), Lithuania, the Netherlands (board), Poland (director of courts of each instance), Romania (presidents),
- the National Courts Administration and each individual court - in Sweden where each individual court is responsible for its own budget; the head of the court is the main manager for court's budget, including salaries and office supplies while the National Courts Administration is the main manager for resources for general purposes such as premises, education costs, Running costs (IT), interest and repayment of debt.

f / Is the management of the courts' local budget in the hands of judges only? yes/no

Only in four countries (the Czech Republic, Denmark, Finland and Romania) the management of the courts' local budget is the hands of judges only. In Germany judicial self-governance "budgeting models" build an increasingly growing form of judicial self-governance, especially at the level of Länder courts.

g/ Do the presidents of courts manage the courts' local budgets? yes/no

In six responding countries the presidents of courts do not manage the courts' local budget. Croatia has given two contradictory answers – and thus is not taken into account.

h/ In case of the negative answers to the two previous questions - which body manages the budget at local level and how is this body chosen?

The body managing the budget at a local level in the responding countries is:
- the Minister of Justice - in Belgium, Croatia;
- the President of the Higher Regional Court, chosen by an independent senate for personal and the Minister of Justice and the Federal President - in Austria;
- the Chief Registrar together with the Accounting department of the Supreme Court - in Cyprus;

- Court Managers appointed by the Minister Of Justice (with the exception of the Supreme Court) - in Estonia;
- the Courts Service - in Ireland;
- a Court's Board, whose members are appointed by the Crown after nomination by the Council for the Judiciary, with the exception of the Director of operations, who must be judges of the court;
- in Romania the presidents and vice-presidents of the courts of appeal and tribunals are appointed after passing the exam organized to this end by the Supreme Council for Magistracy, through the National Institute of Magistracy; the exam presupposes the presentation of a project regarding specific attributions of leading positions within courts and consists in written tests regarding management, communication, human resources the candidates' capacity to make decisions to assume responsibility, stress resistance and a psychological test; the Supreme Council for Magistracy, after validating the results of the exam, appoints the judges in the leading positions of president or vice-president of the court; the appointment in leading positions is limited for a period of 3 years with the possibility of reappointment only once; the economic manager is appointed by the president of the courts of appeal after passing the exam organized to this end by the courts of appeal.
- in England and Wales within HMCS there is a system for delegating the budget first to regional, then to area and finally to local court level with the relevant court manager at each court (s/he being an employee of HMCS) responsible for budget management.

i/ On the basis of what criteria are financial resources allocated either to regions or to local courts? (e.g. the population living in the area of the court, the particular specialisms of the court, the average number of cases lodged at a certain court, the number of judges, efficiency of court proceedings)

Each of the responding countries has indicated a particular system of allocation of financial resources to regions or to local courts:

In Austria it is based on the quantity (judges, number of local Courts) of the Higher Regional Court;

In Belgium - the credit for representation costs and for small expenses : the number of judges;

In Bulgaria - the number of the staff approved by the SJC for the respective year, the particular specializations of the court, the execution of the expenditure part of the

budgetary account of the respective court for the preceding year, the statutorily established health insurance installments and other taxes due, the resources necessary for the repairs of the judicial buildings etc.;

In Cyprus - the resources are allocated according to the needs of each court, i.e number of cases;

In the Czech Republic - the number of cases at each court and their complexity (difficultness), the size of the court and the number of its judges (due to the population in its area) set by the Minister of Justice;

In Denmark - number of judges (determined by law!), number of other staff (that may be varied over the years depending on number of court cases and their complexity), renting costs and costs to otherwise run an office (papers, copy machines, computers, stamps, internet, telephones etc.).

In England and Wales - the workload (i.e. the number of cases), local circumstances, and performance measures. Particular courts, because of their specialisms, will be given individually-negotiated budgets (the budget for the High Court, for instance, is separately negotiated to take account of the length of cases being heard at that court);

In Estonia - there are no rules set out, the there are some factors being taken into account, namely: the average number of incoming cases, a possible specialisms of the court as well as a big backlog of a court together with objective reasons;

In Finland - i.e. workload (including quality/quantity of pending cases etc.);

In Germany - the respective workload arising from the number and scope of cases and proceedings;

In Ireland - a historical basis;

In Lithuania - the needs of courts, indicated in proposals for their draft budgets, submitted to the Judicial Council for consideration, depending on each court's powers (court level) in the court system of the Republic of Lithuania as well as on the number of judges in the court and the court powers (court level) in the court system where the salaries of judges and the judicial personnel is concerned;

In the Netherlands - the 'Price times Quantity' basis; only the financing of the Trade and Industry Appeals Tribunal is on a lump sum basis. The Supreme Court obtains it's budget directly from the Minister of Justice.

In Poland - the last year expenses, courts size, the number of cases, expenses to be made;

In Romania - personnel schemes within the court (judges, clerks, auxiliary personnel, including the probation services); the average number of cases registered to that court

(according to previous years estimates); the evolution of prices prognosis, elaborated by the Prognosis National Commission (prices regarding electricity, postal services etc.); the fees of the pro bono lawyers (established by the Ministry of Justice in agreement with the Association of the Romanian National Bars); the level of the experts' fees, etc.;

In Sweden - the average number of receiving cases during the last two years where different categories of cases have different weights in the calculation of the budget, local conditions in the courts are taken into account.

j/ Who decides these criteria?

These criteria are decided either by the Minister of Justice alone (Belgium), the Minister of Justice in cooperation with courts (the Czech Republic, Finland, Poland, Romania), the Minister of Finance (Croatia) or the respective responsible Minister (Germany), the Supreme Judicial Council (Bulgaria), National Courts Administration (Sweden), Parliament (Lithuania, the Netherlands), the Chief Registrar together with the Accounting Department of the Supreme Court (Cyprus), partly by Parliament (the number of judges) partly by the Danish Courts Administration together with the courts (Denmark) or Her Majesty's Courts Service (England and Wales). In Estonia these criteria are not fixed and the needs are negotiated over with the representatives of the court who have to explain the needs based on these criteria.

k/ If resources are allocated at a regional level, who decides how these resources should be allocated to local courts?

In Austria, the Czech Republic it is the regional courts (the presidents), the courts' administration (Denmark, Ireland, Poland, England and Wales), the Supreme Judicial Council (Bulgaria) or the Minister of Justice alone or together with the Minister of Public Finances (the HMCS - a body linked with the executive power in England and Wales) or a court of appeal depending the level of the jurisdiction.

l/ Who may change the allocation of financial resources to a given court during the financial year and what is the role of the judges and / or the administrators of that court in allocating the resources and changing their allocation?

In Austria the President of the Higher Regional Court manages the budget of the local courts.

In Belgium the Minister of Justice without changing the global budget of the ministry

of justice (e.g. between the personnel allocations of the ministry of Justice budget), while global changes of the budget can only be done by Parliament (by voting a modifying law).

In Bulgaria - the Supreme Judicial Council.

In Croatia - the Ministry of Justice.

In the Czech Republic the Ministry of Justice may change the allocations for regional or higher courts, regional courts can do this with regard to district courts in their area; role of judges is significant, a change in allocation is always done after a consultation with heads of the courts and more often on their request.

In Denmark - Danish Courts Administration.

In England and Wales budgets are delegated from the Chief Executive of HMCS to the geographic regions (headed by the Regional Directors) and downwards within the regions to the Area Directors; the Regional and Area Directors are all employees of HMCS; any decision to alter the budget of a local court during the financial year would be taken by the Regional and Area Directors of HMCS.

In Estonia the Minister of Justice can, but he has to hear the opinion of the Court President and the Court Manager; in addition it has to be in accordance set by the Court Administration Council (a body consisting on 11 members, 6 of the judges, whose consent is needed on some of the most important decisions concerning the judiciary, it is not an institution – not a proper council). The budget of the Supreme Court can be changed only by Parliament.

In Finland - basically, the funding is being granted for the whole fiscal year at a time; if an increase in funding is needed in a court the Ministry of Justice can change the sum of money on the basis of a proposal by the President of that court.

In Ireland - the CEO and the Courts Service Board

In Lithuania the allocation of financial resources can be changed by Parliament of the Republic of Lithuania only.

In the Netherlands changes to the allocation of financial resources are made in cooperation between the court's Board and the Council of the Judiciary.

In Poland the change the allocation of financial resources is the competence - depending on the kind and the size of the resources – of the Minister of Justice or the Appeal Court Director.

In Romania the Minister of Justice, the president of the HCCJ, the presidents of courts of appeal and of the tribunals are empowered to introduce changes to the allocation of the financial resources allocated primarily to their courts and secondly to the courts

within their jurisdiction (in the case of the presidents of courts of appeal).
In Sweden the National Courts Administration may change the allocation of financial resources to a given court during the financial year (the court presents basic data about its financial situation; the court adjusts its expenditures; the court can affect the number of employees (not the judges) and to some extent the office supplies).

m/ Who is responsible for the budget at local court level?
The president of courts (Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Sweden (for the Supreme Court), Lithuania, Romania), a board of a court (the Netherlands) the administrators of the courts (Cyprus, England and Wales, Estonia, Ireland, Poland) or the Minister of Justice/respective responsible Minister (Belgium, Germany).

3/ Responsibility of the judiciary and courts for the budget.

a/ Who draws up court financial reports and to whom are they submitted? (eg. the Minister of Justice, the Minister of Finance, the National Council for the Judiciary, or another body – if so, what body?)
In the majority of cases they are the bodies managing the courts' budgets who draw up the court financial reports apart form Cyprus where it is the Auditor General. Where the reporting body is not the Minister of Justice, it is the Minister to whom the reports are submitted at the last stage. The exception to this rule are:
- Bulgaria where the report is submitted to the National Audit Office,
- Cyprus where the report is submitted to the President of the Republic and then to the House of the Representatives.
In some cases the financial reports are submitted to the Minister of Justice and the Minister of Finances (Ireland) or the audit body (Bulgaria - the National Audit Office, Croatia) or all three of the mentioned bodies (Denmark). In Lithuania the court financial reports are submitted to the Minister of Finance and the National Courts Administration. Only Romania reported that the final destination of the court financial report is the Government.
b / What is the system of financial audit in courts? Is the Minister of Finance or any other body responsible for financial control and audit regarding courts?
Among the answers given there can be four systems of financial auditing the courts distinguished:

1. involving the state audit authorities alone such as the federal financial inspection service and the supreme audit court (Belgium), the Auditor General (Cyprus), Department for Constitutional Affairs and the National Audit Office (England and Wales), the Comptroller and the Auditor General (Estonia), German Federal Court of Audit or the National Audit Board (Sweden)
2. the competence being shared by minister of the government, a judiciary body and/or a judiciary administration body, namely:
    - the Minister of Justice, President of the Higher Regional Court and an audit court (Austria);
    - the Ministry of Justice and the audit units of regional courts (the Czech Republic);
    - the Danish Courts Administration together with the National Audit Office;
    - the Ministry of Justice and the National Audit Office of Finland;
    - the State Control, National Courts Administration and other state institutions within the limits of their competence (Lithuania);
    - the Minister of Finance and the Supreme Chamber of Control (Poland);
    - the Minister of Justice and the Minister of Public Finances, and as for the High Court of Cassation and Justice – the Court of Accountants (Romania);
    - the Supreme Judicial Council (Bulgaria);
3. involving a private financial auditor approving the financial reports of courts and the National Council for the Judiciary (the Netherlands).

c/ What is the responsibility of the judiciary (heads of courts, presidents of courts) for any departure from the budget? Before what body is a judge (heads of courts, presidents of courts) responsible for any departure from the budget?

In seven of the responding countries (Austria, Belgium, Cyprus, England and Wales, Estonia, Ireland and Poland) judges or judiciary bodies bear no responsibility for the departure from the budget because the judges are not competent in the budgetary matters.

In Bulgaria the heads of courts bear disciplinary responsibility before the Supreme Judicial Council as well as administrative penalty liability before the National Audit Office and the State Inspection Agency. In case of a damage caused intentionally or by shortages or caused not during or on occasion of the performance of official duties

the guilty persons bear financial responsibility before the State Inspection Agency. For intentional crime of general character criminal responsibility is borne according to the general procedure.

In Croatia the Presidents of Courts are in all respects regarding management of courts responsible before the Minister of Justice who has authority according to Law on Courts to dismiss president of court from his presidential duty before and of his/hers mandate, but that do not effects his/hers role as a judge.

In the Czech Republic a head of the court is responsible for the budget of his court before the Minister of Justice.

In Denmark a President of a court is responsible before Danish Courts Administration.

In Finland the Chief Judge (President) of each Court is responsible for spending the budget appropriations before the Ministry of Justice. If a departure is the consequence of a criminal act criminal charges can be brought against a Chief Judge..

In Lithuania the courts are responsible before the State Control.

In the Netherlands the Board as a whole is responsible for a (severe) mismanagement before the Council for the Judiciary, being authorized to intervene and give binding directions or even suspend a Board member.

In Romania the presidents of Courts are evaluated by the Superior Council for Magistracy during the periodical evaluation of the professional activity of the judges. If it is found that the presidents of the courts have not properly exercised their management responsibilities regarding the efficient organization of the court, they can be revoked from their position by the Superior Council of Magistracy, on its own initiative or at the proposal of the General Assembly of the judges within the respective court.

The president of the High Court of Cassation and Justice can be revoked from his position in case of mismanagement of the court by the president of Romania, at the request of the Superior Council for Magistracy on its own initiative or at the request of 1/3 of the members of the SCM or at the request of the General Assembly of the court.

d/ What should be the role of the judiciary in managing the financial resources of their court?

All but three (Austria, Cyprus and Poland) of the responding countries have given an opinion on the role of the judiciary in managing the financial resources of their courts. Apart form the statements of the present situation in financial management of courts

there are some program declarations. Belgium the government presented a project (called "Themis project") designed to decentralize the budget and responsibilize judges and prosecutors for the management of the judiciary. In England and Wales the issue is the subject of much debate. The judiciary takes the view that their independence cannot be guaranteed unless the courts have a ring-fenced budget protected from government interference. Ideally, the judiciary would like to see HMCS run by a main board comprising judicial and non-judicial directors, with the judiciary forming a majority. In Romanian judicial system after debates with the judges, it was decided that it is necessary to transfer from the judges the task of managing the financial resources of the courts where they perform their activity. The institution of the economic manager was introduced in order to transfer these attributions to a person outside the corpus of judges. In order to facilitate the administrative and economic tasks of the presidents of the HCCJ, of the courts of appeal and of tribunals, lex specialia has expressly established the possibility of transferring these attributions to the vice- president of the courts. In practice, however, the economic manager is responsible for the financial administration of the HCCJ, of the courts of appeal, tribunals and of the courts within their jurisdiction.

Others opinions indicate that the role of the judiciary managing the financial resources of their court should be "independent"(Bulgaria), autonomous in governing the budget within the State judiciary (Croatia), essential (the Czech Republic). Only Estonian and Finnish answers point out that the role of the judges in managing their courts' budgets should be minimal or limited to awareness and avoiding of unnecessary costs.

4. Judicial salaries as a part of court budgets.

a/ How is a judge's salary guaranteed? (please quote the applicable regulation)

In most of the cases, countries pointed out that the judge's salary is guaranteed in legally binding acts. In Cyprus the Constitution makes express provision for the remuneration of judges. Additionally, the salary of the judges is set out in the Courts of Justice Law (14/60). Furthermore, salaries of the judges of the Supreme Constitutional Court and of the High Court shall be charged on the Consolidated Fund. A similar solution is to be found in England & Wales. The salaries of High Court and circuit judges are also paid out of the Consolidated Fund rather than out of the budget voted by Parliament to DCA. The salaries of all full-time members of the judiciary are

protected by legislation (the legislation is to be found in various statutes: the Courts Act 1971, the Supreme Court Act 1981 and the County Courts Act 1984).
In Ireland the salary of judges is paid from the central fund (Exchequer) and the independence of judges are guaranteed by the Constitution.

In Austria the judge's salary is guaranteed in law regulating the judges' rights and tasks (Richterdienstgesetz). In Belgium the judge's salary is regulated by the Code of the Judiciary. In Bulgaria the judge's salary is guaranteed in the Judicial System Act. In Croatia salaries for judges are regulated by law in the Act on Salaries of Judges and other Judicial Officials. In the Czech Rep. the judge's salary is guaranteed in the Act No. 236/1995 Coll. on salaries and remunerations of judges. In Lithuania judges' salaries are established by the Law on Courts. In Estonia the judge's salary is guaranteed by law.

In Poland the judge's salary is guaranteed and regulated in the Order of the President of the Republic of Poland of 06.05.2003 on the basic salary for judges (Rozporządzenie Prezydenta Rzeczypospolitej Polski z dnia 6 maja 2003 r. w sprawie stawek podstawowych wynagrodzenia zasadniczego sędziów sądów powszechnych, asesorów i aplikantów sądowych oraz stawek dodatku funkcyjnego sędziów, Dz. U. z dnia 13 maja 2006 r.)

In Romania the system of salaries for the judiciary is established by special regulations (special law) by Parliament and cannot be modified (except by law or Emergency Government Ordinances). In Germany the remuneration of judges at the Federal level is dealt with in the Federal Remuneration Act (sections 37 and 38 as well as in the schedules to the Act – particularly in Schedule III: "Federal Remuneration Regulations R" [Bundesbesoldungsordnung R]). Judges serving at the Land level were subject to the framework legislative powers of the Federation. Since 1 September 2006 pursuant to Article 74 para. 1 no. 27 of the Basic Law, the Federation possesses concurrent legislative powers with respect to the status rights and obligations of judges serving at the Land level, with the exception of career structure, remuneration and pensions and related benefits. Specifically, this means that the Länder may adopt their own regulations with respect to the remuneration, pensions and related benefits of judges as well as areas outside of status rights and obligations (for example, co-determination and advanced training).

The very mixed formula of guaranteeing the judge's salary is to be found in Finland, where the salaries of the highest courts justices are determined by law. Salaries of other judges are determined in the uniform salary scheme as a part of

normally two-year collective bargaining agreement. These second way of establishing the salaries of judiciary is to be found in Denmark. There only an agreement has to be achieved via negotiations between the state (government) represented by the Ministry of Finance and The Association of Danish Lawyers and Economists (Danish abbreviation is DJØF). In Sweden judge's salary is guaranteed also by the agreement between National Courts Administration and the trade unions. In Sweden judges' salaries are financed by the courts budgets. In the Netherlands salaries of judges are part of courts budgets. The height of the judges' salaries are determined by Act of Parliament (Wet rechtspositie rechterlijke ambtenaren, i.e. Law on the legal status of judges and state prosecutors).

b/ On what basis are judges' salaries varied? Does a judge's salary depend solely on the post the judge holds, length of service, or on the number and sort of cases considered by a judge? yes/no

The answer to this question was the same in most of the cases. It means that in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Rep., Denmark, Estonia, Finland, Ireland, Lithuania, the Netherlands, Poland the judge's salary depends on the post the judge holds, length of service but not on the number and sort of cases considered by a judge. In Romania e.g. the judicial pay is established according to the level of jurisdiction, the position of judges and the period of time they worked as a magistrate. Differences in judges' salaries result from holding of doctoral degrees, hard or life threatening working conditions, work in rural areas, fidelity percentages, etc.

In Belgium there is also another factor which can influence the judge's salary; this is the number of inhabitants in the territory concerned - for some of the posts.

In Germany monthly remuneration payable to judges comprises the basic salary and the family allowance graded according to marital status and the number of children the judge has.

The judge's basic salary is primarily determined by the remuneration grades which are strictly linked to the functions the judge has been assigned. In other words, a judge will only be promoted to a higher remuneration grade if they have been given a higher function. At the 1-st and 2-nd salary grade the basic salary rates are graded according to the age. The judge's remuneration grows every two years.

As it was pointed out in question no. 4a, the Länder may adopt their own regulations with respect to the remuneration, pensions and related benefits of judges as well as areas outside of status rights and obligations (for example, co-determination

and advanced training).

In England & Wales judicial pay is organised into nine 'pay groups', and the general principle is that the judges' band will reflect the level of cases in terms of the seriousness and complexity of the cases they will be expected to hear.

In Sweden according to the new agreement between National Courts Administration and the trade unions (which introduced individual salaries) the judge's salary depends on responsibility, experience and difficulty of duties.

If so, who decides the criteria?

In most of the countries the criteria of differentiating Judiciary's salary are determined by national law which regulates also the judges' rights and tasks.

A modification to this principle exists in England & Wales where the government has created by statute the Senior Salaries Review Body ("SSRB"). The terms of reference of SSRB are to provide independent advice to the Prime Minister and the Lord Chancellor on the salary paid to judges (and others, including senior civil servants and senior officers of the armed forces).

In reaching its recommendations, SSRB has to have regard for numerous factors laid down by Parliament including the need to recruit, retain and properly motivate able and qualified judges, the funds available to departments as set out in the Government's departmental expenditure limits and the Government's inflation target. SSRB also has to have regard for the differences in terms and conditions of employment between the public and private and between the various ranks of judiciary, taking account of the job weight as between the various ranks of the judiciary.

Before deciding what salary to recommend each year for each of the ranks of the judiciary SSRB will take account of the evidence it receives, both oral and in writing, from the judiciary and from the Government. It will also look at wider economic considerations and the affordability of its recommendations.

The Government has never failed to implement the recommendations made by SSRB but occasionally (and most recently both in 2006 and 2007) the Government has decided to introduce (i.e. phase in) the increase in salary in two instalments spread over seven months.

In Sweden the criteria for setting judge's salary are established by the agreement between National Courts Administration and trade unions.

c/ Is the salary of a judge influenced by performance of the judge's duties? If yes, what are the criteria (e.g. the number of cases considered, the length and/or complexity of the proceedings, the results of appeals etc.) and who decides the criteria?

In general, most of the countries stated that there is no possibility (in their national laws) that the performance of judge's duties influences the judge's salary. But in Belgium (MB), the salary of the judge may be influenced by performance of judge's duties in case of the disciplinary sanction (there is a severe punishment of temporary reduction of the salary); in case of insufficient mark (within the individual assessment of judges); in case of delayed publication of the judgement (there is a possibility to impose financial sanctions as the disciplinary punishment).

Bulgaria stated that the judge's salary is indirectly influenced by the performance of judge's duties. In practice while re-examining the salaries of judges on a six month basis the administrative head of the court may propose a lower remuneration for judges who do not perform their duties satisfactorily.

In Romania in exceptional circumstances, there is a possibility of reducing judges' salaries by 15% at the most, for a period of 3 months at the most, in case of disciplinary action taken against the judge, for certain disciplinary offences provided by the law.

The only way of influencing the judge's salary in Austria and Poland is the disciplinary procedure.

d/ At the national level, which body decides on the framework for the salaries of judges?

Parliament, as a body which decides on the framework of the salaries of judges, was confirmed by Austria, the Czech Rep., Croatia (MM), Germany, Estonia and Lithuania.

In Belgium (MB) the changes to the system of judges' salaries are drafted by the Minister of Justice and then voted in Parliament. In the Netherlands the Minister of Justice's proposals are negotiated with the Netherlands Association of Judges and Public Prosecutors; the Minister's proposal is then voted in Parliament. In Finland the collective agreement is reached between the Judge Union and the Ministry of Justice. In Denmark we can find a similar solution, but instead of the Minister of Justice, the government is represented by the Minister of Finance. Negotiations are conducted

with DJØF (an organization representing academic labour). In Bulgaria the framework of the salaries of judges is established solely by the SJC. In Sweden the same framework is decided in an agreement between National Courts Administration and trade unions.

In Cyprus and Ireland the law granted to the Minister of Finance/Department of Finance the competence to decide about the framework of the salaries of judges.

In England & Wales the Lord Chancellor has overall responsibility for the pay, pensions and terms and conditions of the judiciary. He of course relies on the advice of the SSRB. Every five years, on average, SSRB will look at the nine pay groups for the judiciary and will recommend to the Government whether any particular group of judges should be in a higher or lower pay group.

In Poland the judge's salary is guaranteed and regulated in the Order of the President of the Republic of Poland of 06.05.2003 on the basic salary for judges.

At national level in Romania the salaries of the judges are established by the Parliament through legislative enactments or, in exceptional circumstances by the Government through Emergency Government Ordinances which are subject to approval by Parliament, through laws of approval. In all cases, payment of the salaries and of other pecuniary rights derived thereof to the judges is done by the Minister of Justice for the judges functioning at the courts of appeal and lower courts and by the president of the HCCJ for the judges of this court.

e/ At local level, does an individual judge's salary within this framework depend on discretionary decisions of a court or another body?

Answering this questions almost all countries have denied such a possibility and only Sweden stated that the heads of courts send proposals of the salary for each judge to the National Courts Administration. Then negotiations take place between the National Courts Administration and trade unions about the proposals; the salary for each judge is decided through an agreement between the National Courts Administration and trade unions.

5. The financial responsibility of courts.

a/ Who is responsible for paying financial compensation where there is delay in the finalization of cases? Or where there has been an unlawful decision? (e.g. The state, the court, the judge?)

If delay in adjudicating of cases in Belgium constitutes a breach in civil proceedings and the delay causes damages to the person under the court's jurisdiction, and the court finds the civil responsibility proved, it is the State which assures the payment of compensation decided by the court (MB). Exceptionally in case of an intentional impartial decision (JMS) it is the judge, but to the present day concrete cases didn't occur.

In Bulgaria the State is liable for the damages to citizens due to illegal judicial decisions taken in certain strictly defined cases (pursuant to Article 2 of the Law on the liability of the state and the municipalities for damages).

Croatia, Lithuania, Estonia, Finland, Sweden and Germany also answered that the State is responsible for paying financial compensation for damages which result from official conduct (or omissions) by a court. In Germany such a liability is based upon Article 34 of the Basic Law (Grundgesetz – GG), which shifts the personal liability of public officials (section 839 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) to the State. The liability of the State may be derived from the cases which deal with the omission by the court, if the omission results from work overload (deficient organisation or distribution of resources committed by judges or civil servants).

In the Czech Rep. also the State, or more precisely the Ministry of Justice is responsible for paying financial compensation (Act. No. 82/1998 Coll. on the responsibility for the damage caused by the exercise of state power, amended by Act. No. 160/2006 Coll. in force as of 27 April 2006).

In Poland the Court that heard the case is responsible for paying financial compensation where there is delay in adjudicating of cases. In the Netherlands it is the Court, too (although very large claims, after negotiation between the Council for the Judiciary and the Minister of Justice, will have to be carried by the state). In Austria it is the role of the President of the Higher Regional Court.

England &Wales stated that the payment of any ex-gratia compensation would be decided by the Department for Constitutional Affairs (DCA). Payment of compensation is uncommon and, when paid, is made without any acknowledgement of a legal duty on the DCA to pay it. The listing of cases is a judicial function; and losses which are caused by errors in the listing of cases cannot therefore be the subject of a claim for compensation.

Denmark answered that it is for the court to decide if compensation should be granted in case of errors. Delay will not in itself result in compensation. In a civil case

a delay may influence the compensation; one part should pay to the other part, i.e. the case where one part used unlawfully a patent and gained profit from doing so. If a patent has been unlawfully used for a longer period of time the compensation will be higher. Compensation would be in any case paid by the state.

Romania pointed out that in the event of delays in adjudicating of cases for reasons imputable to the judge, when the European Court of Human Rights have determined to pronounce a decision against Romania, the state has actio in regres against the judge, who, in bad faith or with grave negligence caused the decision impose reparations from the Romanian state. Also, according to the Penal Procedural Code (articles 504 - 507), persons that have been unlawfully condemned to a penal sentence, detained, arrested or had their liberty restricted in any way by a court of law, have the right to solicit reparations from the state, that will cover the damages through the Ministry of Public Finances. When the state has been condemned to pay reparations in any of the situations presented above, including the case of condemnation by the European Court on Human Rights, it has the right to recover the reparations paid from the judge prosecutors who, in bad faith or with grave negligence is responsible for the legal situation that resulted in damages to the victims of unlawful judicial decisions.

Only Cyprus stated that there is no provision in legal system for financial compensation in case of delay**.**

b/ Do judges bear any personal financial risk?

In its answer Bulgaria stated that pursuant to Article 9, paragraph 2 of the Law on the liability of the state and the municipalities for damages the judges bear financial responsibility before the State for the indemnities paid by it to citizens and legal entities who have incurred damages only when the actions or inactions of the judges are judicially recognized as crimes.

Finland pointed out that basically judges don't bear any personal financial risk. However, a judge can be held liable for damages caused by him according to the provisions of the Tort Liability Act (violation of law etc.). In Austria personal financial risk of judges is regulated in the public liability law.

Germany explains that as a rule, liability is excluded (by section 839 BGB) for official actions that are judicial decisions, unless the decision represents a criminal offence by the judge.

In Cyprus, Belgium, the Czech Rep., Denmark, England &Wales, Estonia,

Ireland, Lithuania, the Netherlands, Poland and Sweden judges do not bear any personal financial risk.

In Romania judges bear personal financial risk in some types of cases. For example, if the unlawful decision pronounced by a judge or the delays in solving a case are criminal acts, the judges are criminally liable, and in this case reparations may be asked from the judges by means of a civil action in damages. In the situation stipulated limitatively by art. 504-507 of the Criminal Procedural Code, the state, through the Ministry of Public Finance will pay the damages, with the possibility of recovering the reparations paid by the judge who, in bad faith or with grave negligence is responsible for the legal situation that resulted in damages.

It is hard to recognize what kind of rules govern judges personal financial risk in Croatia, because the answer given by (DS) is "no", but the answer given by (MM) is "yes, because the State has the right to recourse if judge's work was illegal".

6. The finances for training of judges and judge trainees.

a/ Who decides what financial resources should be spent on training?

In Austria and Poland the Minister of Justice decides about financial recourses for judicial training. In Finland the appropriation of funds for judicial training is allocated partly to the Training Unit of the Ministry of Justice and partly directly to the Courts**.** In Lithuania the appropriation of funds for training is managed by the Ministry of Justice as a separate programme. Also, the planned training of judges is partially financed from the budget of each court. The same solution is to be found in Croatia (DS), where the Ministry of Justice decides about training funds on the State level and presidents of courts within funds allocated for that purpose at the local level.

In Cyprus the Supreme Court decides what financial resources should be spent on training, in Estonia the President of the Supreme Court also decides if training is organized using the Supreme Court`s budget.

In Bulgaria the SJC decides what financial resources have to be spent on training. It decides what funds from the budget of the judiciary will be allocated for financing the National Institute of Justice, although the institute itself draws up the draft budget which it submits to the SJC. In Sweden National Courts Administration

decides generally what financial resources should be spent on training. In Ireland The Courts Service Board has the same entitlement.

In England & Wales the Lord Chancellor is responsible for the provision and allocation of resources for the administration of justice (paragraph 19 of the Concordat agreed between the Lord Chancellor and then the Lord Chief Justice). The Lord Chief Justice is then responsible for the provision and sponsorship of judicial training within the resources provided by the Lord Chancellor (Concordat: paragraph 66). The actual training of judges is in the hands of the Judicial Studies Board ("JSB").

Germany explained that for in-service training of judges and public prosecutors, there is a national training centre. Since 1973, the German Judicial Academy (Deutsche Richterakademie) has been working to promote inter-regional further training of judges from all branches of the justice system, as well as of public prosecutors. It is financed jointly by the Federation (Bundesministerium der Justiz – Federal Ministry of Justice) and the Länder. The Academy has no legal personality; the centre in Trier is subject to the budget regulations of Rhineland-Palatinate, the centre in Wustrau to those of Brandenburg. Nevertheless, there exists a joint budget committee for the Academy.

The costs are equally divided between the German Federation and the Länder, with the contribution of the latter calculated on the basis of the size and income of the Land in question. In addition, there is further training for judges provided by the Länder, but the decisions about the costs of these events are made within each Land by their ministry.

In the Czech Rep. The Judicial Academy which is responsible for training of judges has its own budget (part of the budget of the Ministry of Justice). In Denmark Danish Courts Administration has also its own budget for this. Besides, the individual courts have some possibilities – in addition to this – to spend money on courses for its staff.

In the Netherlands: The Court's Board decides about its own training budget (for judges and staff). The Council for the Judiciary decides about allocating resources to the National Study Centre for the Judiciary, which provides training for judges, Crown prosecutors and court and prosecution office staff.

At national level in Romania, the National Institute of Magistracy has the task of ensuring continuous professional development of the magistrates and of allocating necessary financial resources for this. The budget of the NIM is part of the budget of

the Superior Council of Magistracy, as the Institute is placed under the coordination of the SCM. At local level, the appropriations of funds for training are managed within each court.

In Belgium the Minister of Justice decides about training finances (which are part of the budget of the Ministry of Justice), In the near future, the recent legislation that created the Institute for Judicial Training, with a legal personality distinct from the State, will be implemented. Financial resources for the Institute are guaranteed by law.

b/ Who establishes the agenda for training?

In Belgium the Institute for Judicial Training will establish training programmes based on the criteria outlined by the High Council of Justice as far as training of judges is concerned and by the Minister of Justice where other posts in the judiciary are concerned.

In Bulgaria the agenda for training is prepared by the Director of the National Institute of Justice and is submitted for approval to the Governing Council of the institute, which consists of four representatives of the SJC and three representatives of the Ministry of Justice. A Program Council, which is a consultative organ of the institute, takes part in drawing up and updating the agenda for training. Its composition is determined by the Governing Council and consists of representatives of the legal science and practice. The qualificational programmes for a course for increasing the qualification at initial entry into the organs of the judiciary are adopted by the SJC.

In Croatia (DS) Judiciary Academy, Ministry of Justice and Presidents of Courts establish the agenda for judges training. In Denmark, the Danish Courts Administration has a department to deal with that. All deputy judges go through a training programme. The department has an educational committee with representatives from the courts to define what should be offered and the content of these courses.

England & Wales pointed out that the Judicial Studies Board is an independent body, reporting to the Lord Chief Justice, directly responsible for training full and part-time judges in England and Wales and for overseeing the training of lay magistrates and chairmen and members of Tribunals. An essential element of the philosophy of the JSB is that the training of judges and magistrates is both by judges and under judicial control and directions.

The Director of Studies is a Circuit Judge seconded to the Judicial Studies Board and the Board is chaired by Lord Justice Keene. Five committees, each chaired by a High Court Judge, look after different training requirements for civil, criminal and family jurisdictions, for the magistracy and for tribunals. The sixth committee considers equality, diversity and fair treatment issues.

In the Czech Republic there is a special, independent body - The Council of the Judicial Academy – composed of judges, attorneys and legal experts, which can establish agenda for judicial training. In Ireland, an independent body which can establish such agenda is Judicial Studies Institute, chaired by the Chief Justice.

The Council for Training Judges was created in Estonia to establish agenda for training. The Council comprised of 6 judges and a representative of the prosecution for the Ministry of Justice and of the oldest university in Estonia.

In Austria the Ministry of Justice through its training department coordinates the training activities offered by the 4 regional Courts of Appeal, the 4 Senior Public Prosecutors Offices, the Association of Austrian Judges and the Association of Austrian Prosecutors and draws up together with these partners a yearly agenda. The Ministry itself offers also courses for all judges and prosecutors, among them the largest yearly training event, the so-called "Judges' Week". In Finland we can find the similar solution, which means that the Training Unit of the Ministry of Justice has the main responsibility of training. The common agenda is established annually by the Training Unit together with judges. In addition to that the courts organize training also by themselves.

In Poland only the Minister of Justice has the authority to establish training agenda. In Lithuania the Judicial Council together with the Ministry of Justice establish the agenda for training. As a rule, the period between trainings for a judge cannot be longer than 5 years (the Law on Courts).

The outline of the programme offered by the German Judicial Academy is established by the programme conference, at which the Federation and each Land are represented by one vote each. The programme conference is composed of those experts of the Federation's and the federal states ministries of justice, who are in charge of the further training of judges and public prosecutors. The professional associations are involved in an advisory capacity. Responsibility for programme organisation is then assigned to the judicial administration systems of the Federation and the Länder in accordance with the guidelines laid down by the programme conference.

In the Netherlands The Court's Board establishes the agenda for training. Anyway the National Study Centre for the Judiciary is a service of the Council for the Judiciary and offers the main part of courses. The courses it offers are determined by its own Board, after consultation of its Client Council (consisting of representatives of courts and Public prosecution offices). The courts pay the Study Centre for the courses its personnel have followed, but they can also choose to buy training facilities elsewhere. Romanian process of establishing the agenda for training is as follows: The Teachers' Council of the NIM analyzes and proposes the areas for the program of the training activity. Then the Scientific Council of the NIM submits the program for the training of the magistrates to the SCM for approval. The NIM coordinates the professional training activities realized by the courts of appeal, by endorsing the training curricula, communicating necessary materials and by training the trainers from the courts of appeal.

In Sweden the basic agenda of training is established by the National Courts Administration, but the individual court also has great possibilities to demand special trainings according to the court's particular needs.

In Cyprus, an institution empowered to establish the agenda for training is The Supreme Court.

In Finland, the common agenda for training is established annually by the Training Unit of the Ministry of Justice together with judges. The courts organize training also by themselves.

We kindly request that you add your own comments on any connection between the way courts are financed and possible threats to courts' and judges' independence.

AUSTRIA: The funding of the courts is part of the public administration (law execution) and is separated from the independent jurisdiction regulated in the federal constitution.

BULGARIA: The question whether the competence of the Minister of Justice pursuant to Article 130a of the Constitution, introduced with its third amendment of March 2006, to propose a draft budget of the judiciary and to submit it for discussion to the SJC, as well as to manage the property of the judiciary, represent a threat to the independence of the courts and the judges is to find its answer in the practice of applying these provisions.

ESTONIA: Judges and representatives of the executive should be able to decide on the objective criteria for financing the courts and allocating resources between courts – then there is no threat to the independence of judges.

GERMANY: Pursuant to Article 97(1) of the Basic Law, judges are independent and subject only to the law. This is referred to as the **professional independence** of the judges. It means that a judge cannot be given any instructions by anyone – not even from the Ministry of Justice, for instance – prior to or while arriving at their judgements of disputes. Judges are also not bound to any sort of administrative regulations or directives, but rather exclusively and solely to the law.

This professional independence is flanked by the **personal independence** of judges, which is guaranteed by Article 97(2) of the Basic Law. This stipulates that, in principle, judges receive lifetime appointments. Generally, they practice their profession until they reach retirement age. Up to that point, under ordinary circumstances, they cannot be dismissed or transferred to another court or position. This is only possible in special cases, and even then, only once they have been ordered to do so by judicial verdict.

This constitutionally enshrined independence of the judges is not threatened by the way courts are financed.

LITHUANIA: The new projects for Law on Courts and the Law on Judicial Salaries are negotiated in the working groups of Parliament of the Republic of Lithuania.

ROMANIA: The periodical evaluation of the efficiency of the judicial system and the financial support for the programs regarding the activity of the courts impose, as a necessity, that the courts' funding belongs to the courts or to an independent body that will also be responsible for other activities regarding the judicial system (e.g. the Superior Council of Magistracy).

This last proposal is preferred since in this way the suspicions of political intervention in the elaboration and execution of the court' budgets are eliminated and the principle of the independence of justice is all the more guaranteed.

Working Group 'Performance Management' and shared conclusions

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 in 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.

Working Group on strengthening mutual confidence in the European Union - Report to The General Assembly on the 6th/7th June 2007

At the annual conference of the European Network of Councils for the Judiciary in Wroclaw on 25 - 26 May, 2006, the General Assembly decided to establish six Working Groups. The topics of the Working Groups resulted from the interactive sessions which were organised on the first day of the Conference.
The Working Group on Strengthening Mutual Confidence was established to consider methods of strengthening mutual confidence amongst the members of the European Network of Councils for the Judiciary. Membership of the Working Group is set out in **Appendix A**, attached to this document.

Terms of Reference

It was noted that the work of the group would include:

- Clarification of the meaning of the term 'mutual confidence'
- Meeting representatives of the European Commission
- Considering the reality of mutual confidence from the point of view of the judicial decision maker
- Considering methods of assisting the development of mutual confidence amongst the judiciary of the European Union

Objective

It was envisaged that the objective would be to advise on methods of developing information, contacts and systems to enable the growth of mutual confidence amongst the judiciary in the European Union.

Result

A result anticipated of this Working Group was to present to the next General Assembly:

1. Suggestions on methods of developing mutual confidence and mutual co-operation between members of the judiciary in the European Member States.
2. Suggestions on methods by which the ENCJ could provide relevant expertise to the EU institutions.

ENCJ

The ENCJ is a new organisation in the European Union and reflects key developments which have been taking place.

The objectives of the ENCJ, as stated in the charter, are:-

(1) Within the framework of the creation of the European Area of freedom, security and justice, the objectives of the ENCJ are co-operation between members on the following:-

- analysis of and information on the structures and competencies of members;
- exchange of experience in relation to how the judiciary is organised and how it functions;
- issues pertaining to the independence of the Judiciary and other issues of common interest; and
- provision of expertise, experience and proposals to European Union institutions and other national and international organisations.

(2) The ENCJ shall exclusively pursue objectives of a non-profit making character.

The Council of the European Union adopted the Hague Programme at their meeting in Brussels on Friday 5th November, 2004. In paragraph 3.2 it addressed the relevance of the work of judges and the position of the ENCJ. It states:

> "3.2 - Confidence - building and mutual trust
> Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European Judicial culture based on diversity of the legal systems of the member States and unity through European Law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality.
> In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established.
>
> Strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. In this regard, networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the

> European Network of Supreme Courts, and the European Judicial Training Network, should be supported by the Union."

This Working Group is the embodiment of the required effort. The Working Group illustrates this development in the European Union.

In 1970 Jean Monnet said[i]:

> "Our community is not a coal and steel producers association, it is the beginning of Europe."

This "beginning of Europe" rings true today in our arena, in that the cooperation between the Councils of the Judiciary in Europe is developing. What began as the European Coal and Steel Community became the European Economic Community and eventually the European Union. What began with coal and steel has become today's Union. The founding fathers of the European Union spoke of a "closer Europe" and in many respects Europeans are closer today than ever before. The judges and prosecutors of the European Union work with laws which are being harmonised, with Directives and Regulations enjoying similar application across the Union. We are here to discuss how we can create an environment where we can work together in order to enjoy a rapport with one another and facilitate a "closer Europe" with mutual confidence.

Silence

One important feature in the growth of the EU has been the silence of the Councils for the Judiciary. When we consider government structures - we think in the way of Montesquieu[ii] - the legislature, the executive and the judiciary. In the EU there is the parliament, where representatives from all the States meet and work. The heads of government meet and plan the future. The ECJ decides the cases which come before it. There has been a lacuna, there have not been effective avenues of communication between the National Councils for the Judiciary and between the Judicial Councils and the institutions of the EU.

As the EU expands in the Justice field this silence has become more obvious. Hence the ENCJ and its Working Groups have been established and flourished.

Meaning of term 'Mutual Confidence'

What is mutual confidence? It is difficult to conceptionalise and define. There may not be any conclusive abstract definition. A theoretical approach may not be the best. The preamble to the European Coal and Steel Community stated:

> "Recognising that Europe can be built only through practical achievements which will first of all create real solidarity. . . "

Perhaps the best approach is to consider practical achievements. Perhaps that is one of the best methods of moving forward?

Another approach is to analyse it from two perspectives - 'mutual' and 'confidence'.

Mutual

'Mutual' refers to the coming together of members from across the European Union, as in the ENCJ and this Working Group. This coming together leads to rapport, which is the key building block of mutual confidence. If we develop a rapport with one another, it will assist the development of confidence in each other.

'Mutual' may also refer to shared experiences. Thus, for example, perhaps we should consider how colleagues in other Member States apply European laws?

'Mutual' may refer to parties or persons being in agreement, having an understanding, a common goal which to be achieved. This concept of 'mutual' has brought us here, to this Conference, in agreement on developing ties between the National Councils for the Judiciary.

Confidence

To develop confidence it is required that we have more information on, and communication with, each other's Council for the Judiciary and legal systems. In Europe there are various models of Councils for the Judiciary and legal systems - some are closer aligned than others. Essentially there are twenty seven legal systems. The most important difference in relation to legal systems is between the civil law systems and the common law systems. However, each legal system is unique. And, as we stress in Europe, there is strength in diversity.

We are here as a group of jurists, working together on a project to develop mutual confidence. The more we work together, communicate and co-operate, the

more we will get to know about legal systems and Councils for the Judiciary, and the more likely it is that confidence in each other will grow.

Thus the concept of mutual confidence is broad. There are many aspects to mutual confidence. In **Appendix B** is attached a diagram which represents some of the relevant matters which may be considered.

European Judges

The Councils for the Judiciary represent judges, *inter alia*. However national judges are also judges of the European Union. It is vital that there be an exchange of information as to how the laws are being implemented by judicial colleagues across the Union. This is an important area which we may consider for the purpose of our recommendations, and for future work.

Number of Judges

A significant factor in considering the issue of mutual confidence amongst the Councils for the Judiciary, the judiciaries, and the public prosecutors, of the European Union, is the number of judges and prosecutors.

Figures relating to the number of judges in the European Union have been extracted from a number of sources[iii] [iv]. The figures for the number of professional judges on a full time basis are as follows[v]:

Austria	1,674
Belgium	1,567
Bulgaria	1,751
Croatia	1,907
Cyprus	98
Czech Republic	2,878
Denmark	380
Estonia	245
Finland	875
France	6,278
Germany	20,395
Greece	2,200
Hungary	2,757
Ireland	130
Italy	6,105
Latvia	384
Lithuania	693
Luxembourg	162
Malta	35
Netherlands	2,004
Poland	9,766

Portugal	1,754
Romania	4,315
Slovakia	1,208
Slovenia	780
Spain	4,201
Sweden	1,618
Turkey	5,304
UK: England and Wales	2,271
UK: Northern Ireland	63
UK: Scotland	250
	84,048

This does not include non-professional judges, lay judges or persons who are judges on an occasional basis. For example in England and Wales there are Magistrates, approximately 30,000, and part-time recorders number 1350 [vi]. Approximate numbers for the ENCJ member states are[vii viii ix]:

Austria	n/a[x]
Belgium	2,435
Bulgaria	0
Croatia	6,200*[xi]
Cyprus	0
Czech Republic	7,900*
Denmark	8,400*
Estonia	2,000*
Finland	3,700*
France	3,500*
Germany	100,000 (lay judges)
Greece	0
Hungary	400*
Ireland	0
Italy	9,000
Latvia	4,058
Lithuania	0
Luxembourg	130
Malta	0
Netherlands	0
Poland	44,000*
Portugal	670*
Romania	170*
Slovakia	2,747
Slovenia	4,065
Spain	8,800*
Sweden	7,500*
Turkey	0
UK: England and Wales	32,000*
UK: Northern Ireland	252
UK: Scotland	750*
	248,677

Extensive numbers

The numbers are quite extensive and indicate one difficulty in addressing the strengthening and developing of mutual confidence amongst this large number of judges of the European Union.

The number of judicial prosecutors is also high. Of course some countries do not have public prosecutors in the form taken in the civil law countries. In common law countries no such system exists. Figures on the numbers of such public prosecutors in many of the Member States are not available. We tried to contact Member States over the course of a month in late 2006, but only one country would furnish us with figures, Belgium, which has 830 such prosecutor-judges[xii]. Several member states do not have such prosecutor-judges, including Austria, Croatia, Cyprus, Denmark, Hungary, Ireland, Latvia, Lithuania, Netherlands, Slovakia, Slovenia, UK-England & Wales, UK-Northern Ireland and UK-Scotland[xiii].

Practical approach

Perhaps a good way to proceed is to take a practical approach. Robert Schuman[xiv], in his Schuman Declaration of May 9th, 1950, said:

> "Europe will not be built in a day, nor to an overall design;
> it will be built through practical achievements that first establish a sense of common achievement."

So let us seek practical achievements which may first establish a sense of strengthening mutual confidence.

Identify certain areas

Perhaps we should consider identifying certain areas where specific subjects could be addressed, and where we could make recommendations in the future in relation to such an issue? We could choose a topic of practical importance to Councils for the Judiciary, such as, for example, a harmonised application of EU law, including those laws of the Member States which have been most affected or influenced by the supranational level. Topics might be chosen, for example, from the areas of environmental law, competition law, agricultural law or criminal law.

Conference

The Working Group met on the 23rd day of November 2006 in Dublin. It had the benefit of the attendance of Ms. Caroline Morgan of the Criminal Justice Unit of the European Commission. Ms Morgan gave a presentation, covering the history of Mutual Recognition (Tampere, Hague, MR Programme), a summary of several measures (European Arrest Warrant, European Evidence Warrant, criminal records work, procedural rights, European Supervision Order and Transfer of Prisoners) and an account of the difficulties that are encountered (unanimity, discussions over proposals in which a small group of Member States has a position contrary to the majority e.g. European Evidence Warrant and procedural rights). The Working Group was informed that Commission will now focus less on proposals for legalisation, but rather on flanking measures that are designed to improve mutual trust and confidence. Therefore the Commission's aims and those of the ENCJ's aims are connected. The ENCJ could participate in the planned Evaluation of Justice Forum and in the annual review of mutual recognition planned by ERA (the European Law Academy in Trier), for instance, which would give the ENCJ a channel of communication not only with the Commission but also with other actors in the criminal justice process throughout the EU.

Institutions

Institutions have been at the heart of the development of the EU. Institutions were developed which were capable of growing and expanding with the great European project envisaged by the founding fathers. It was recognised that to achieve lasting success institutions are essential.

In relation to the National Councils of the European Judiciary it is also important that there be relevant institutions. One such is the ENCJ. A vital concept to be developed through such an institution is the strengthening of mutual confidence.

Recommendations

The Working Group was requested to make recommendations to the General Assembly in June, 2007. As an initial step on this most important topic of mutual confidence the Working Group makes some practical recommendations.

Key areas for the development of mutual confidence are identified as:

- Information.

- Communication.
- Training.
- Representation of the ENCJ at meetings of the European Commission.

1. On-going work.

The concept of strengthening mutual confidence amongst the members of the European network of Councils for the Judiciary is at the core of judicial co-operation in the European Union and should be continued to be addressed by the ENCJ, its national members, and observers. It is recommended that this be a topic for further, specific, consideration by the ENCJ in another Working Group.

2. Step-by-step

A step-by-step approach to the concept of strengthening mutual confidence is advised.

3. Institutions

Institutions have been at the core of the development of the E.U. The ENCJ was formally established in 2004. A charter was adopted. The ENCJ proposes to act as an intermediary between institutions of the European Union and the national judiciaries and has formulated a number of objectives within the framework of the creation of the European Area of Freedom, Security and Justice. The ENCJ itself is developing as an institution. In this growth, work should continue to advance and strengthen mutual confidence.

4. Information

The Working Group recommends that there be a development of sources of information which are easily accessible, on each Member State. There are many sources of such information existing already, but there is merit in an agreed format, which then enables ease of reference. The Working Group have drawn up a template which could be used; see **Appendix C.**

Such a template would provide in similar format basic information on the Member State and its legal system. To illustrate the use of the template, in **Appendix D** the template is completed with information on Ireland.

Such information could be put on the ENCJ website. It is acknowledged that there already is information of the Member States on the ENCJ website, but the Working Group suggests that there is merit in a system providing the information in a uniform format. This enables easy reference.

Website

The Working Group recommends the development of systems of easy reference to the many relevant justice websites in the EU.

At **Appendix E** are set out helpful justice links in Europe.

Appendix F sets out national websites of the Member States.

5. Communication

It is manifestly obvious that more communication between jurists (judges, prosecutors etc.) of the European Union, will assist the development of mutual confidence. There is an overlap between the topic of information and that of communication. The recommendations in relation to information are relevant and applicable.

However, in addition, perhaps a system could be set up in conjunction with the ENCJ in each State where queries from the members of Councils for the Judiciary could be addressed? This could be a judicial person/body to whom queries could be directed, and then redirected as relevant? This is a matter which may be taken up and developed in further work after the General Assembly. The ENCJ could also recommend and/or assist a greater number of conferences or meetings of judges on specific subjects, of particular interest to judges in particular areas, for example a conference of judges to discuss the European Arrest Warrant, for example. Associations of judges working in specific areas and fields already exist, but some areas remain untouched and the ENCJ could focus on identifying those areas and determining how best to adopt approaches to assist closer co-operation.

6. Training

Without straying into the field of the EJTN, we note the importance of judicial training and the work of EJTN. The European Judicial Training Network was

founded with the signing of the Charter of Bordeaux in October 2000. The objective's of the body fall within the scope of the Amsterdam Treaty, the Tampere European Council Meeting and the Hague Programme which set the EU's ambitious goal: to build a genuine European area of justice, to promote awareness of legal systems thus enhancing understanding, confidence and co-operation between the judges and prosecutors of the Member States. The EJTN strives for the promotion of training programmes with a genuine European dimension for members of the European judiciary. This addresses analysing and identifying training needs, designing programmes and methods for collaborative training, exchanging and disseminating experiences in the field of judicial training, co-ordinating programmes and providing training expertise and know-how.

Contact with EJTN is made as follows:

Square Marie Louise, 43
B-1000 Brussels
BELGIUM
E-mail: ejtn@ejtn.eu

Secretary General of the European Judicial Training Network

Gilles Charbonnier,	Secretariat
Quentin Balthazart	(*Policy Advisor and Assistant to the Secretary General*)
Monica Marti	(*Project and Communication Officer*)

Exchange Programme

Aude Magen	(*Coordinator of exchanges for judges and prosecutors*)
Benedetta Vermiglio	(*Coordinator of exchanges for trainers and between training institutions*)
Orla Sheehy	(*Programme Officer: research and documentation, feasibility study and newsletter coordination*)

Secretariat and Exchange Programme

Sophie Haversin	(*Budgetary and financial assistant*)

7. Representation of the ENCJ at meetings with the European Commission

It was suggested that the Working Group consider the issue of the representation of the ENCJ at meetings with the European Commission.

It must be first recognised that this is a complex issue. There is no manifestly clear answer. It is a matter requiring careful consideration. Owing to the diversity of

the National Councils for the Judiciary it may not be possible to find a solution on some topics. In many cases the ENCJ will have to refrain from expressing opinions and will have to leave that to the Member States.

An approach which may be followed on other occasions may be seen in the Report by Adrian Fulford, entitled **Report by the Representatives of the European Network of Councils for the Judiciary (ENCJ) who attended the meeting in Brussels on 17th - 18th July, 2006 "Fairness in Gathering and Handling Evidence."** At paragraph 42 it was reported:

> "The contribution by the ENCJ
>
> 42. The following statement was made:
>
> 'The European Network of Councils for the Judiciary (ENCJ) is a relatively young body (established in 2004) representing national Councils for judges in which are independent of the executive and the legislature. Thus far, Councils from 14 countries are members of the ENCJ. It will be unsurprising for us to indicate at present there is no EU wide consensus across the councils of judges on the difficult issues that fall for discussion over the next two days, particularly given this meeting was called at relatively short notice. We are therefore not delegated to express views on the questions asked (in the Commission documents circulated prior to the meeting.)) However, 7 representatives from National Judges' Councils are present today and although we are presently unable to make any positive contribution on behalf of all the members of the ENCJ, we will carefully consider whether, in due course, we are able to make written submissions and it is our hope that we will be able to contribute to this debate. It is in those circumstances and for those reasons that we will, remain highly interested, if rather silent observers."

This may be a useful precedent for a similar approach in the future. Another precedent exists in the way the ENCJ addressed the issue of the electronic form European Payment order. Under that approach Member States would be requested to nominate experts. From such a list the Steering Committee could establish a panel of experts on separate topics which are important to the ENCJ and upon which the ENCJ may wish to propose a view.

It may be appropriate to establish a specific sub-committee of the Steering Committee to address this issue and possibly to create any such panels. Work would have to be done establishing the panels, writing biographies of the panellists, and clearly stating the views of the experts so that the Steering Committee would be in a position to delegate an expert to attend a particular meeting, conference, working group etc. Such experts may be members of a Council for the Judiciary, a judge, a prosecutor, an academic, or such other person as the Steering Committee deems appropriate. The ultimate decision as to the provision of experts should be made by the Steering Committee. The Steering Committee would have discretion in the exercise of this decision.

The Working Group recommends that there be further discussion on this matter and, if appropriate, a sub-committee could be established to develop the concept further, or it could be part of the terms of reference of a new Working Group.

8. Diversity

In our analysis of the concept of mutual confidence we should not negate the strength to be found in the diversity within the European Union. The values of the European Union include respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. The proposed motto of the Union is 'United in diversity'.

We should find a way of respecting the diversities. Every Member State has a legal system which reflects its history and culture. In strengthening mutual confidence between the Councils for the Judiciary of our legal systems there is a need for a mutual respect of the diversity of our systems.

9. Conclusion

- This is a most important and complex topic.
- A practical approach is advised to develop and strengthen mutual confidence.
- A step by step approach is recommended.
- The ENCJ should consider establishing a further Working Group to advance a specific topic relevant to advancing and strengthening mutual confidence.

- Key areas for assisting the strengthening of mutual confidence are in the development of communication between the Councils for the Judiciary, in the exchange of information between the Councils for the Judiciary, and by training, conferences and seminars. In particular, web technology is an area which may be addressed further.
- The suggestion from Caroline Morgan, of the European Commission, that the ENCJ could participate in the planned Evaluation of Justice Forum and the annual review of mutual recognition planned by ERA (the European Law Academy in Trier) is welcomed and should be considered favourably by the ENCJ.

APPENDIX A

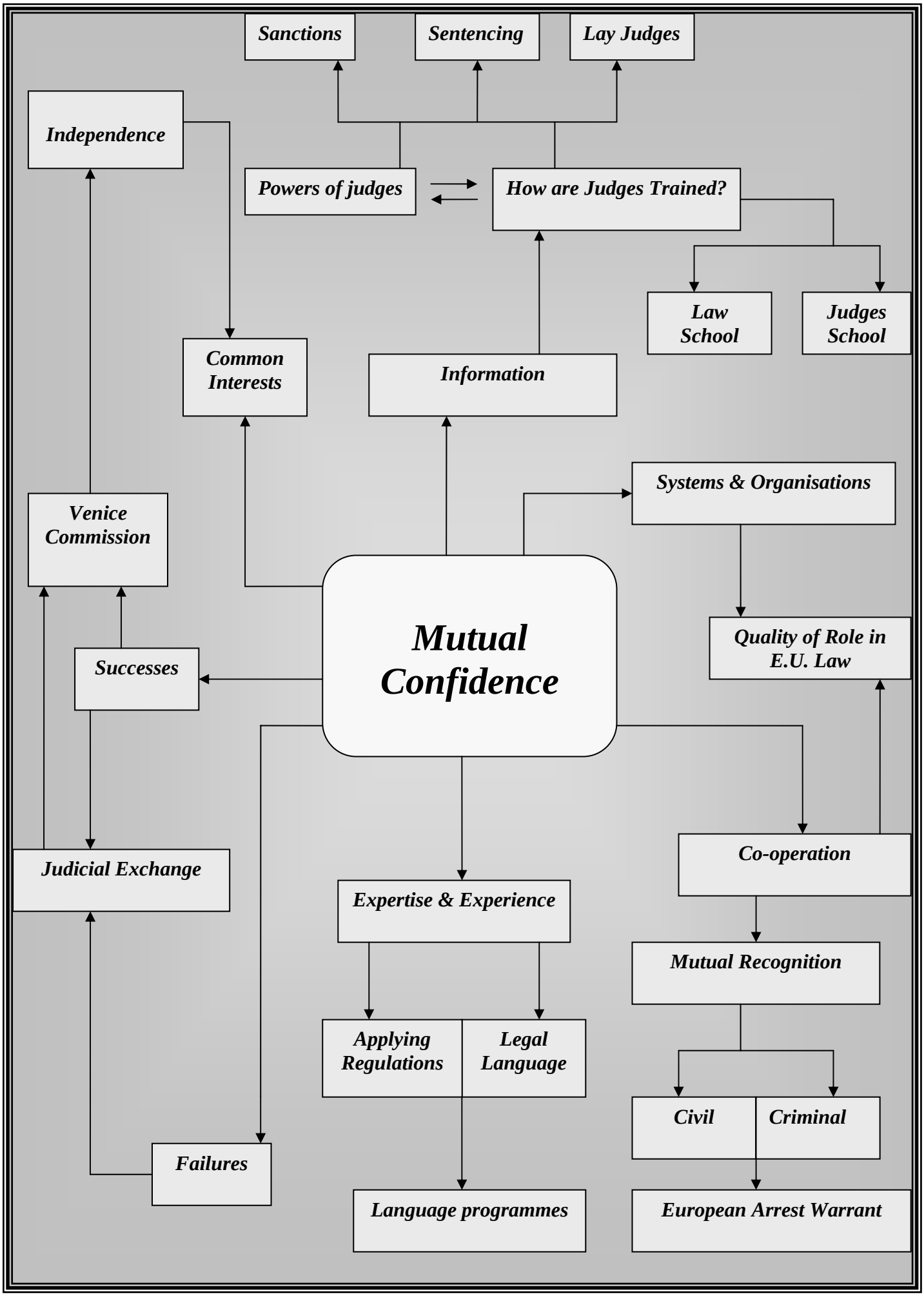
E N C J

Working Group

Strengthening Mutual Confidence in The European Union

Members

1	**Ireland. Co-ordinator**	**Susan Denham**
2	**Ireland**	**Brendan Ryan**
3	**Italy**	**Andrea Montagni**
4	**Belgium**	**Edith van den Broeck**
5	**Netherlands**	**Ruud Winter**
6	**Netherlands**	**Marlies Bouman**
7	**Germany**	**Martin Petrasch**
8	**Romania**	**Ana Cristina Labus**
9	**Romania**	**Alina Prelipcean**
10	**Scotland**	**Lord Kinclaven**
11	**England & Wales**	**Barbara Flaxman**


Sanctions
Sentencing
Lay Judges
Independence
Powers of judges
How are Judges Trained?
Law School
Judges School
Common Interests
Information
Systems & Organisations
Venice Commission
Mutual Confidence
Quality of Role in E.U. Law
Successes
Judicial Exchange
Co-operation
Expertise & Experience
Mutual Recognition
Applying Regulations
Legal Language
Civil
Criminal
Failures
Language programmes
European Arrest Warrant

APPENDIX C

Template for Country Profile

COUNTRY PROFILE – template

Flag	**Country** **Official Name**

INTRODUCTION/INITIATION

Population	
Capital	
National Holiday	
Religion	
Languages	
Independence	
Accession to the EU	

GOVERNMENT AND POLITICS

Government Type	
Head of State	
Head of Government	
Minister of Justice	
Elections	
Political Parties	
Bi-/uni- cameral Parliament	

ECONOMY

Currency	
GDP per capita	
Unemployment	

LEGAL SYSTEM

Constitution	
Chief Justice	
Courts Structure	
Court Level M: (municipal/local)	
Court Level R: (regional)	
Court Level F: (first instance)	
Court Level A: (administrative)	
Court Level C: (constitutional)	

APPENDIX C CONTINUED

Court Levels S: (supreme/final instance)	
Number of professional judges	
Number of prosecutorial judges	
Number of lay judges or magistrates	
Juries	
Judicial Mandate	
Judges' Salary	
Number of lawyers	

LEGAL EDUCATION

Judicial School	
Compulsory Initial Training	
In-service Training	
Law School	
Average Age of New Lawyer	

APPENDIX D

COUNTRY PROFILE - Template for Ireland

	**IRELAND/IRLANDE** **Ireland** **Éire**

INTRODUCTION

Population	4.3 million
Capital	Dublin/Baile Átha Cliath
National Holiday	March 17
Religions	Catholic 85%, Protestant 6%
Languages	Irish and English (both official)
Independence	1921
EU Membership	1973

GOVERNMENT AND POLITICS

Government Type	Parliamentary republic
Head of State	President Mrs Mary McAleese (non-executive)
Head of Government	Taoiseach Mr Bertie Ahern
Minister of Justice	Tánaiste Mr Michael McDowell
Elections	May run to every 5 years, next due by May 2007
Political Parties	Fianna Fáil (UEN), Fine Gael (EPP-ED), Labour Party (PES), Progressive Democrats (ALDE), Comhaontas Glas (Greens-EFA), Sinn Féin (GUE-NGL), Socialist Party
Bicameral Parliament	Seanad/Senate – 60 members elected by electoral college, university list or appointed by the Taoiseach Dáil/House – 166 members elected by proportional representation (Single Transferable Vote)

ECONOMY

Currency	Euro (€1 = 100 cent)
GDP per capita	€36,700
Unemployment	4.3%

LEGAL SYSTEM

Constitution	Bunreacht na hEireann; adopted by plebiscite 1937 – rigid, amendable only by referendum
Chief Justice	The Honourable Mr Justice John L. Murray
Courts Structure	4 tiers – Supreme, High, Circuit and District courts. All but District are appellate and all but Supreme are first instance. A Special Criminal Court deals with offences against the State and a Court of Criminal Appeal hears criminal appeal cases.

APPENDIX D CONTINUED

Court Level M: District Court	Organised on a local basis where the civil action does not exceed €6350. It handles licensing, family law, minor criminal law matters and initial hearings of serious offences. 1 judge presides over the court.
Court Level R: Circuit Court	Organised on a regional basis where the civil action does not exceed €38000. It handles family law and appeals from the District Court. 1 judge presides over the court, but in the case of criminal matters a jury determines questions of fact, guilt and innocence. It can try criminal matters except rape and murder.
Court Levels F: High Court/ Central Criminal Court	Court of first instance and hears all criminal matters that cannot be dealt with by the lower courts (known as the Central Criminal Court). It hears appeals from the Circuit Court and points of law from the District Court. It hears all civil actions over €38000.
Court Level F1: Special Criminal Court	Three judges sitting without a jury who try serious criminal and subversive offences ("scheduled offences"), mainly offences against the State and drugs.
Court Level F2: Court of Criminal Appeal	A court of appeal, it hears appeals relating to a criminal conviction or sentence from the Circuit, High or Special Criminal Courts.
Court Levels A/S: Supreme Court	A court of appeal and of final instance. It has the power of judicial review, may declare a statute unconstitutional and scrutinizes the constitutionality of legislation referred to it by the President.
Number of professional judges	130 (approx. 33000:1)
Number of prosecutorial judges	0
Number of lay judges or magistrates	0
Juries	Yes – criminal cases where the penalty is an imprisonment of more than 2 years and civil cases in defamation, assault and false imprisonment
Judicial Mandate	Judges serve until age 70 (age 65 in lower courts) – otherwise no fixed term
Judges' Salary	€127,600 - €225,300
Number of lawyers	1500 barristers (advocates) 9500 solicitors

LEGAL EDUCATION

Judicial School	No
Compulsory Initial Training	No
In-service Training	Judicial Studies Institute arranges conference and seminars.

APPENDIX D CONTINUED

Law School	3-4 years undergraduate study 1-2 years graduate study and training
Average Age of New Lawyer	23-24

APPENDIX E

JUSTICE LINKS IN EUROPE

Austria/Autriche	www.bmj.gv.at
Belgium/Belgique	www.scj.be / www.hrj.be
Bulgaria/La Bulgarie	www.justice.bg
Croatia/Cratie	
Cyprus/Chypre	
Czech Republic/Rép. Tcheque	www.justice.cz
Denmark/Danemark	www.domstol.dk
Estonia/Estonie	www.just.ee
Finland/Finlande	www.om.fi
France	www.conseil-superieur-magistrature.fr
Germany/Allemagne	www.bmj.bund.de
Hungary/Hongrie	www.justice.hu
Ireland/Irelande	www.courts.ie
Italy/Italie	www.csm.it
Latvia/Lettonie	www.tm.gov.lv
Lithuania/lithuanie	www.teismai.lt
Luxemburg/Luxembourg	www.mj.public.lu
Malta/Malte	www.justice.gov.mt
Netherlands/Pays-Bas	www.rechtspraak.nl
Poland/Pologne	www.krs.pl
Portugal	www.conselhosuperiordamagistratura.pt/ www.stj.pt
Romania/Roumanie	www.csm1909.ro

Slovakia/Slovaquie	
Slovenia/Slovénie	www.sodisce.si
Spain/Espagne	www.poderjudicial.es
Sweden/Suede	www.dom.se
Turkey/Turquie	
United Kingdom/Royaume Uni:-	
England and Wales	www.hmcourts-service.gov.uk
Northern Ireland	www.courtsni.gov.uk
Scotland	www.scotcourts.gov.uk
European Network of Councils for the Judiciary (ENCJ)/	www.encj.eu/
Réseau européen des Conseils de la Justice (RECJ)	www.encj.net

APPENDIX F

National Websites of Member States

COUNTRY Pays Land	INSTITUTION Institution Amt	WEBSITE Site-Web Webseite
AUSTRIA **Autriche** **Österreich**	Chancellor Parliament Ministry of Justice Constitutional Court Judges Council Judicial Academy Bar Council	www.austria.gv.at www.parlament.gv.at www.bmj.gv.at www.vfgh.gv.at www.rechtsanwaelte.at
BELGIUM **Belgique** **Belgien**	Prime Minister Parliament Ministry of Justice Court of Cassation Council of State Judges Council Judicial Academy Bar Council	 www.premier.fgov.be www.fed-parl.be www.just-fgov.be www.cass.be www.raadvst-consetat.be
BULGARIA **Bulgarie** **Bulgarien**	Prime Minister Parliament Ministry of Justice Court of Cassation Supreme Court Judges Council Judicial Academy Bar Council	 www.government.bg www.parliament.bg www.mjeli.government.bg www.bild.net/ccourt www.sac.government.bg
CROATIA **Croatie** **Kroatien**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Judges Council Judicial Academy Bar Council	www.vlada.hr www.sabor.hr www.pravosudje.hr www.vsrh.hr www.usud.hr www.odvj-komora.hr
CYPRUS **Chypre** **Zypern**	President Parliament Ministry of Justice Supreme Court Judges Council Bar Council	 www.cyprus.gov.cy www.parliament.cy www.moi.gov.cy
CZECH REP. **Rép. Tchéque** **Tschechien**	Prime Minister Parliament Ministry of Justice	www.vlada.cz www.psp.cz www.justice.cz

	Constitutional Court Bar Council Judges Council Judicial Academy	www.concourt.cz www.akademie.justice.cz
DENMARK **Danemark** **Dänemark**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Courts Admin.	www.stm.dk www.folketinget.dk www.jm.dk www.domstol.dk
ESTONIA **Estonie** **Estland**	Prime Minister Parliament Ministry of Justice Supreme Court Judges Council Bar Council	www.riik.ee/government www.riigokogu.ee www.just.ee www.nc.ee www.advokatuur.ee
FINLAND **Finlande** **Finnland**	President Prime Minister Parliament Ministry of Justice Supreme Court Judges Council Bar Council	www.tpk.fi www.vn.fi/vnk www.eduskunta.fi www.om.fi www.kko.fi www.asianajajat.fi
FRANCE **France** **Frankreich**	President Prime Minister Parliament Ministry of Justice Court of Cassation Constitutional Court Admin. Court Bar Council Judiciary School	www.elysee.fr www.premier-ministre.gouv.fr www.assemblee-nationale.fr www.justice.gouv.fr www.courdecassation.fr www.conseil-constitutionnel.fr www.conseil-etat.fr www.enm.justice.fr
GERMANY **Allemagne** **Deutschland**	Federal Chancellor Parliament Federal Ministry of Justice Federal Court of Justice Federal Constitutional Court Federal Labour Court Federal Administrative Court Federal Financial Court Federal Social Court Bar Council Judges Association Judicial Academy	www.bundeskanzlerin.de www.bundestag.de www.bmj.de www.bundesgerichtshof.de www.bundesverfassungsgericht.de www.bundesarbeitsgericht.de www.bverwg.de www.bundesfinanzhof.de www.bsg.bund.de www.brak.de www.drb.de www.deutsche-richterakademie.com
GREECE	Prime Minister	www.primeminister.gr

Grece **Griechenland**	Parliament Ministry of Justice Supreme Court Court of Cassation Bar Council Judges School	www.parliament.gr www.ministryofjustice.gr www.esdi.gr
HUNGARY **Hongrie** **Ungarn**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Judges Council	www.meh.hu www.mkogy.hu www.im.hu www.lb.hu www.mkab.hu
IRELAND **Irlande** **Irland**	President Prime Minister Parliament Ministry of Justice Courts Service Bar Council	www.irlgov.ie/aras www.irlgov.ie/taoiseach www.irlgov.ie/oireachtas www.irlgov.ie/justice www.courts.ie www.barcouncil.ie
ITALY **Italie** **Italien**	Prime Minister Parliament Ministry of Justice Court of Cassation Constitutional Court Bar Council Magistrate's Council	www.palazzochigi.it www.parlamento.it www.giustizia.it www.cortedicassazione.it www.cortecostituzionale.it www.csm.it
LATVIA **Lettonie** **Lettland**	Prime Minister Parliament Ministry of Justice Constitutional Court Bar Council Judicial Training Ce	www.mk.gov.lv www.saeima.lv www.tm.gov.lv www.satv.tiesa.gov.lv www.advokati.lv www.ltmc.lv
LITHUANIA **Lithuanie** **Litauen**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Judges Council Courts Service	www.lrvk.lt/anglu www.lrs.lt www.tm.lt www.lat.litlex.lt www.lrkt.lt www.advoco.lt www.lrta.lt www.teismai.lt
LUXEMBOURG **Luxembourg** **Luxemburg**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council	www.gouvernement.lu www.chd.lu www.etat.lu/mi
MALTA **Malte**	Prime Minister Parliament	www.gov.mt www.parliament.gov.mt

Malta	Ministry of Justice Supreme Court Bar Council	www.justice.gov.mt
NETHERLANDS **Pays-Bas** **Niederlande**	Prime Minister Parliament Ministry of Justice Supreme Court Courts Service Bar Council Judicial Training Ce	www.overheid.nl www.tweede-kamer.nl www.justitie.nl www.rechtspraak.nl www.openbaarministerie.nl www.advocatenorde.nl www.ssr.nl
POLAND **Pologne** **Polen**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Legal Server	www.kprm.gov.pl www.sejm.gov.pl www.ms.gov.pl www.sn.pl www.trybunal.pl www.adwokatura.org.pl www.prawo.lex.pl
PORTUGAL **Portugal** **Portugal**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Judicial Studies Cen	www.primeiro-ministero.pt www.parlamento.pt www.min-jus.pt www.stj.pt www.tribunalconstitucional.pt www.cej.pt
ROMANIA **Roumanie** **Rumänien**	President Parliament Prime Minister Ministry of Justice Supreme Court Constitutional Court Bar Council	www.presidency.ro www.cdep.ro www.guv.ro www.just.ro www.ccr.ro
SLOVAKIA **Slovaquie** **Slowakei**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council Judicial Academy	www.government.gov.sk www.nrsr.sk www.justice.gov.uk www.concourt.sk
SLOVENIA **Slovenie** **Slowenien**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council	 www.sigov.si www.dz-rs.si www.sigov.si/mp
SPAIN **Espagne** **Spanien**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court	www.la-moncloa.es www.congreso.es www.mju.es www.tribunalconstitucional.es

	Bar Council Judges Council Judicial School	www.cgae.es www.cgpj.es www.poderjudicial.es
SWEDEN **Suede** **Schweden**	Prime Minister Parliament Ministry of Justice Supreme Court Courts Service Bar Council	www.regeringen.se www.riksdagen.se www.justitie.regeringen.se www.hogstadomstolen.se www.dom.se www.advokatsamfundet.se
TURKEY **Turquie** **Türkei**	Prime Minister Parliament Ministry of Justice Supreme Court Constitutional Court Bar Council	www.basbakanlik.gov.tr www.tbmm.gov.tr www.adalet.gov.tr www.anayasa.gov.tr
UK: ENGLAND **Angleterre** **England**	Prime Minister Parliament Home Department Supreme Court Constitutional Court Courts Service Bar Council Judicial Studies Board (also Wales)	www.pm.gov.uk www.parliament.uk www.homeoffice.gov.uk www.courtsservice.gov.uk www.jsboard.co.uk
UK: NORTHERN IRELAND **Irlande du Nord** **Nordirland**	First Minister Parliament NI Office Supreme Court Bar Council Courts Service Judicial Studies Board	www.ofmdfmni.gov.uk www.ni-assembly.gov.uk www.nio.gov.uk www.courtsni.gov.uk www.jsbni.com
UK: SCOTLAND **Ecosse** **Schottland**	First Minister Parliament Ministry of Justice Supreme Court Judicial Studies Committee Bar Council	www.scotland.gov.uk www.scottish.parliament.gov.uk www.judicialstudies-scotland.org.uk
UK: WALES **Pays des Galles** **Wales**	First Minister Parliament Ministry of Justice	 www.senedd.org

Footnotes

[i] Jean Monnet (1888-1979) was regarded as one of the main founding fathers of European unity. A French businessman, he had previously served as deputy Secretary-General of the League of Nations, adviser to American President Roosevelt and British Prime Minister Churchill during the Second World War and member of the French government-in-exile in Algiers. He drafted the Monnet plan, which helped to pool French and German coal resources and set Europe on the road to integration, as well as the Schuman declaration which lead to the establishment of the European Coal and Steel Community, the forerunner of the European Union.

[ii] Charles-Louis de Secondat, Baron de la Brede et de Montesquieu (1689-1755), more commonly known as Montesquieu was a French social commentator and political thinker who lived during the Enlightenment period. He is famous for his articulation of the theory of the separation of powers, which can be found in the publication "The Spirit of the Laws" (De l'esprit des lois).

[iii] For Bulgaria, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Luxembourg, Malta, Poland, Portugal, Romania, Spain and Sweden – see generally the Answer to the Revised Scheme for Evaluating Judicial Systems (2004 data) by the European Commission for the Efficiency of Justice (CEPEJ) for the Council of Europe, 10/09/2005.

[iv] Figures for Austria, Belgium, Cyprus, Denmark, England & Wales, Hungary, Italy, Ireland, Latvia, Lithuania, Netherlands, Northern Ireland, Scotland, Slovakia and Slovenia were obtained from their national Ministries of Justice or Courts Service organisations via email or telephone in late 2006.

[v] Please note that Croatia and Turkey, candidate nations for EU status, are observer members of the ENCJ.

[vi] Source: Judiciary of England and Wales website, February 2007

[vii] Bulgaria, Cyprus, Greece, Ireland, Italy, Lithuania, Malta, Netherlands and Turkey do not have a system of part-time or lay judges.

[viii] For Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Luxembourg, Poland, Portugal, Romania, Scotland, Spain and Sweden – see generally the Answer to the Revised Scheme for Evaluating Judicial Systems (2004 data) by the European Commission for the Efficiency of Justice (CEPEJ) for the Council of Europe, 10/09/2005.

[ix] Figures for Belgium, Denmark, England & Wales, Hungary, Latvia, Northern Ireland, Slovakia and Slovenia were obtained from their national Ministries of Justice or Courts Service organisations via email or telephone in late 2006

[x] Figures for Austria unavailable

[xi] Figures marked with an asterisk are an approximated figure, based upon the most recent figures which can be found in the Answer to the Revised Scheme for Evaluating Judicial Systems (2004 data) by the European Commission for the Efficiency of Justice (CEPEJ) for the Council of Europe, 10/09/2005.

[xii] Belgian High Council for the Judiciary, email late 2006

[xiii] Confirmed via email/telephone in late 2006