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Independence and Accountability of the Judiciary

ENCJ Report 2013-2014



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Executive Summary

At its General Assembly in 2013, the ENCJ instituted a project group on the independence and accountability of the Judiciary. The two main objectives were:

- 1) to develop and evaluate indicators for the independence and accountability of EU judicial systems, EU judiciaries, and Councils for the Judiciary, and
- 2) to present an ENCJ vision of the independence and accountability of the Judiciary.

The first objective was intended to include the development of guidelines for the proper application of the indicators, and collaboration with the European Commission on the further development of the EU Justice Scoreboard. The second objective was intended to include the identification and evaluation of the current risks to the independence of the Judiciary of Member States and Observers, as well as the means by which these risks could be ameliorated.

The project group has attempted to identify all relevant documentation in this field, and it has

A Judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society and will not achieve the independence for which it strives.

analysed the previous research into European and International standards for the independence and accountability of the Judiciary. This analysis as well as the varied experiences of the members and observers of the ENCJ has resulted in a framework of accountability and independence which can be summarized as follows. The independence of the Judiciary as a whole and that of individual judges lie at the heart of the rule of law. Without it the Judiciary cannot fulfil its functions. But independence does not stand on its own. It must be

recognized that independence is directly linked to accountability. A Judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society and will not achieve the independence for which it strives.

It is the vision of the ENCJ that independence must be earned. It is, by no means, automatic. The Judiciary achieves legitimacy and the respect of its citizens by excellent performance, resulting in impartial, well-reasoned, decisions. The best safeguard of independence is excellent and transparent performance. In that way, the Judiciary fulfils its mandate and demonstrates that it does so. Whilst mistakes will always occur and draw criticism, an independent and accountable Judiciary is open to justified criticism and learns from its mistakes. This mechanism provides a powerful link between independence and accountability.

Excellent performance cannot replace formal safeguards. Therefore, both objective and subjective independence of the Judiciary are important. Objective independence reflects the necessary formal safeguards, whilst subjective independence relates to the perceptions in society, including those of the judges themselves. Councils for the Judiciary should not focus solely on formal safeguards, but should work towards improving performance and informing the public about the functions and the functioning of the Judiciary. Each judge has a role to play in this respect.

On the basis of this framework, the project group has developed a set of indicators for the evaluation of the independence and accountability of a Judiciary and a state's judicial system. With respect of objective independence a distinction was made between the Judiciary as a whole and the individual judge. **The indicators of the objective independence of the Judiciary as a whole fall into the following categories:** (1) legal basis of independence, (2) organizational autonomy of the Judiciary, (3) funding of the Judiciary, and (4) management of the court system. The indicators of the objective independence of the individual judge concern: (1) human resource decisions about judges, (2) irremovability of judges, (3) procedures that are in place in the event of a threat to individual judicial independence, and (4) internal independence of the Judiciary. **The indicators of the subjective independence of the Judiciary and the individual judge are about:** (1) independence as perceived by society in general, (2) independence as perceived by court users at all levels, and (3) independence as perceived by judges themselves.

The objective accountability of the Judiciary must also be considered at both the structural level and at the level of the individual judge. It is not sufficient for the Judiciary as a whole to be accountable. Individual judges must also be accountable. Their decision-making must be transparent and undertaken in public. **The indicators of the objective accountability of the Judiciary fall into the following categories:** (1) allocation of cases, (2) complaints against judges, (3) periodic reporting by the Judiciary, (4) relations between the Judiciary and the press, and (5) external review of the Judiciary. The indicators of the objective accountability of the individual judge are: (1) applicable codes of judicial ethics, (2) the processes relating to the withdrawal and recusal of an individual judge, (3) whether judges are allowed to undertake external activities, and the disclosure of such activities and interests, and (4) the degree to which legal proceedings are readily accessible and understandable to citizens generally. Subjective accountability is not pursued in this report due to lack of data.

The indicators have been applied experimentally on 4 countries from different parts of Europe and legal traditions. It proved possible to measure the indicators. It is concluded that the set of indicators is a useful instrument to improve insight into actual independence and accountability of judicial systems, and to find aspects that require consideration. It would be of great value to have all members and, if possible, observers of the ENCJ, participate in the measurement of the indicators as a starting point for a more general debate.

It is therefore recommended:

- 1) The indicators of independence and accountability of the Judiciary should be applied to each member of the ENCJ and, if possible, to each observer country by means of a questionnaire.
- 2) The application of the indicators by the members and observers should be supported and the results evaluated by an expert group comprising 4 members, 3 from the ENCJ and an external expert will be sought to be part of the group. The expert group will ensure consistency and accuracy of the answers to the questionnaire being provided.

3) A survey should be undertaken of the views of judges in all member countries (and, so far as possible, observer countries) as to their own independence and accountability.

4) A number of dialogue groups should be established comprising 4 members of the ENCJ from different parts of Europe (and possibly observer countries if they wish to participate) aimed at discussing the results of the application of the indicators and identifying the real problems facing the independence and accountability of the Judiciary in each country, and identifying remedies. The dialogue groups will report to the executive board and annually to the ENCJ general assembly.

It is intended that the dialogue groups would continue to operate over a period of years. Moreover, the application of the indicators should be repeated every 2 years so as to ascertain improvements or deteriorations in independence and accountability over time.

It is also recommended that in addition to the current set of indicators that applies to the Judiciary, indicators should be developed next year so as to apply to prosecutors. Independence

The ENCJ has attempted to move beyond debating independence and accountability at a theoretical level to the development of a practical method to analyse the current state of affairs.

and accountability are also crucial for prosecutors to fulfil their role in the legal system.

To conclude, the ENCJ has attempted to move beyond debating independence and accountability at a theoretical level to the development of a practical method to

analyse the current state of affairs. While some issues require further discussion, this method can now be applied by the members and, if they wish, the observers of the ENCJ.

I. Introduction: Methodology and Goal of the Project

This is the final report of the ENCJ's project group on the independence and accountability of the Judiciary. The project group's two main objectives were:

- 1) to develop and evaluate indicators for the independence and accountability of judicial systems, Judiciaries, and Councils for the Judiciary within the European Union (EU), and
- 2) to present an ENCJ vision of the independence and accountability of the Judiciary.

The first objective was intended to include the development of guidelines for the proper application of the indicators, and collaboration with the European Commission on the further development of the EU Justice Scoreboard. The second objective was intended to include the identification and evaluation of the current risks to the independence of the Judiciary of Member States and Observers, as well as the means by which these risks could be ameliorated.

The members of the project group comprised representatives of 17 member Councils for the Judiciary and 5 Observers. The project group was chaired and co-ordinated by Mr. Frits Bakker of the Netherlands Council. The vice-chair was Mr. Frans van Dijk, Director of the Netherlands Council for the Judiciary. The Secretary was Ms. Merel Berling, Senior Policy Advisor for International Cooperation at the Netherlands Council.

The project group was divided into 3 sub-groups as follows:

- 1) *The Indicators sub-group*, chaired by Mr Frits Bakker;
- 2) *The Implementation sub-group*, chaired by Mr. Horatius Dumbrava, of the Romanian High Council (vice-chair: Mr. Florin-Răzvan Radu); and
- 3) *The Vision and Risks sub-group*, chaired by Mr. Geoffrey Vos of the Judges' Council of England & Wales (vice-chair: Mr. Michael Walker).

The project group met on the following six occasions:

- 1) A kick-off meeting in Brussels on 30th September and 1st October 2013;
- 2) A meeting of the Co-ordinators in London on 11th November 2013;
- 3) A first general meeting in Brussels on 9th and 10th December 2013;
- 4) A second general meeting in Brussels on 24th January 2014;
- 5) A third general meeting in Bucharest on 24th and 25th March 2014;
- 6) A final meeting of the Co-ordinators in The Hague on Friday 11th April 2014.

II. European and International Standards on Judicial Independence and Accountability

The project group has attempted to identify all relevant documentation in this field, so as to ensure that we have not been ‘re-inventing the wheel’. It has attempted to analyse those materials explaining previous research into European and International standards for the independence and accountability of the Judiciary.

The project group prepared a schedule of the applicable European and International standards of judicial independence and accountability. This schedule can be found on the ENCJ website. **Appendix B contains a summary of the contents of the existing materials setting out European and International standards of judicial independence and accountability.** We have attempted to extract the most important elements of the existing standards and guidelines from the listed materials, but the appendix is necessarily just a summary. It cannot be complete. It is, however, arranged in the same order as the indicators that we have developed under Chapters 4 and 5 of this report.

It is hoped, therefore, that the reader will be able to obtain a view of the relevant standards in relation to each of the indicators from the summary in Appendix B. The existing materials have, of course, formed the basis of the Framework that is contained in Chapter 3.

III. Framework of Independence and Accountability

3.1 Overview

Independence is the core value of the Judiciary. It allows judges to make impartial decisions and safeguards them from direct influence by the parties to a dispute and from direct and indirect influence or intervention from any other outside organisations or actors.

The Judiciary's independence exists to serve society and the citizen, not the interests of the judge. The independent adjudication of criminal, civil, administrative, indeed all cases is essential for a peaceful, prosperous and democratic society. Citizens do not need to take justice into their own hands, and economic decisions can be taken with confidence. Independence of the Judiciary, and the reliable and impartial dispute resolution to which it leads, are essential prerequisites for the existence of stable and secure property rights which are themselves prerequisites for long term investment.

The Judiciary's independence must be demonstrated in decision-making; it does not depend only on formal safeguards. To put the matter another way, whatever rules and regulations may safeguard independence, the behaviour of judges can still compromise it. Judges may, for example, routinely decide in favour of the government. On the other hand, in some states, there may be no formal safeguards, and yet the Judiciary may act in a way that is transparently independent.

Moreover, independence must be earned. It is, by no means, automatic. The Judiciary achieves legitimacy and the respect of its citizens by excellent performance, resulting in impartial, well-reasoned, decisions. Once this position is reached, attacks on the Judiciary's independence will achieve diminishing support from citizens and from the media. Thus, the best safeguard of independence is

Independence must be earned. It is, by no means, automatic. The best safeguard of independence is excellent and transparent performance.

excellent and transparent performance. In that way, the Judiciary fulfils its mandate and demonstrates that it has done so. Whilst mistakes will always occur and draw criticism, an independent Judiciary is open to justified criticism and learns from its mistakes. This mechanism provides a powerful link between independence and accountability.

Excellent performance cannot, of course, entirely replace formal safeguards. For example, objectively determined court budgets are required for high standards to be achieved. Inadequate human resources will deprive the Judiciary of the opportunity to achieve the standards required to gain the trust of society, whatever the quality of the inadequate complement of judges.

Therefore the project group looked at both objective and subjective independence of the Judiciary. **Objective independence focuses on formal safeguards, whilst subjective independence concentrates on the perception of both society and the judges themselves.**

3.2 Rationale of judicial independence

Judicial independence stems from the need for impartial adjudication of all cases, whether criminal, civil or administrative law cases. The judge should not be affected by differences of power between litigating parties. Protection of the citizen against the power of the government of the state is obviously central. But the issue is broader. The judge must be incorruptible and able, in a proper case, to decide cases in ways that contravenes both media and public opinion.

Impartial adjudication is an essential component of the rule of law. The citizens' ability to have confidence in impartial adjudication provides the certainty that their rights will be protected. This is a solid basis for all social and economic activity.

3.3 Key components of judicial independence

3.3.1 Objective judicial independence

A distinction needs to be made between the independence of the Judiciary as a whole and the independence of the judge. While the independence of the Judiciary as a whole is a necessary condition for the independence of the judge, it is not a sufficient condition. Individual independence can be affected by the external influence of state organisations and others, and by internal influences within the Judiciary.

Independence of the Judiciary as a whole

Legal framework

The independence of the Judiciary must either be regulated in the constitution of the state or by equivalent entrenched protections. These arrangements are designed to ensure that changes cannot be made without full democratic consideration and more than a simple majority of the legislature.

Governance structure

Judicial independence requires the Judiciary to govern itself. The preferred option is for that governance to be undertaken by a Council for the Judiciary composed predominantly of a judicial membership. A compliant Council should have a broad mandate. It should have primary responsibility for the organisation, finance and decision-making of the Judiciary. It should have a supervisory role in relation to the courts.

The majority of the members of the Council for the Judiciary should be judges elected by their peers, while other members represent society. In practice, however, Councils for the Judiciary across Europe have a wide variety of governance structures. Whilst the Minister of Justice and the executive should, in general, have no influence over the Council for the Judiciary (save for a formal role in relation to, for example, appointments), a hybrid structure is often found. In such situations, the President of the Court is often responsible for the Judiciary, whilst the Minister of

Justice is responsible for court management and staff. An intermediate position exists in states where there is a Court Service with judges predominating on oversight committees.

Finance

In recessionary times, it is perhaps unsurprising that few judiciaries are able entirely to determine their own budgets. But whatever budgetary arrangements are employed, there must always be adequate funding for the volume of cases that the Judiciary is required to handle. 'Adequacy' must in this context allow for the timely disposal of the case-load.

The Council of the Judiciary should have the right to propose a budget and to address Parliament if its budget is rejected or amended. Once a budget has been agreed, the Council should be free to allocate the funds to individual courts, and the courts should be free to use the funds allocated, always subject to the overall supervision of the Council.

Arrangements for selecting, appointing, evaluating and disciplining of judges

The ENCJ has prepared a detailed report on the mechanisms required for these processes.¹ Whilst influence from outside the Judiciary is not usually acceptable in this area, internal mechanisms require careful consideration.

Reform of the Judiciary

The ENCJ has considered the role of the Judiciary in judicial reform in its second report on this subject.² The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation. The Judiciary should be engaged in the creation of key performance indicators and success criteria to evaluate effective reform. The Judiciary and Councils for the Judiciary have a vital pro-active role to play in the entire reform process.

Independence of the individual judge

External independence

Pressure could be exerted on individual judges in relation to their individual decision-making in a number of different ways. For example, pressure may be applied, directly or indirectly by the executive, Parliament, the media, public opinion, and even by criminal organisations. In recent years, social media and the internet have become channels through which pressure can be exerted on judges.

In some situations, individual judges may willingly respond to some or all of these kinds of pressure, but, far more often, judges consciously resist them. There is, however, a question as to how far individual judges are sub-consciously influenced by such pressures.

¹ The Dublin Declaration of 11th May 2012.

² ENCJ (2013). Part II of the guidelines for effective justice delivery in the report on "Judicial reform in Europe".

Formal and informal rules may exist to eliminate or reduce such pressures. The *sub judice* rule is an example of such a formal rule. This prohibits the public or private discussion of the correct outcome of court cases that are in the course of decision.

Internal independence

This category of judicial independence has aspects that are peculiarly complex. It is the function of appellate judges to disagree, on occasions, with first instance judges. Judges will naturally express disagreement with their colleagues in some formal and some informal situations, if, for example, they believe these decisions to be ill considered or plainly erroneous, or if they breach standards with respect to productivity and timeliness.

Peer pressure is unavoidable. It has important benefits in that it enhances and upholds standards. Still, it has a potential impact on independence. Additionally, the leadership of a court will routinely exert influence on the judges working in that court. There have been occasions on which a court president has overruled the verdicts of judges in that court without due process. This is obviously unacceptable. Much more complicated situations arise, where the court management influences decision-making in an effort to uphold standards with respect to, for example, productivity and timeliness, or in order to promote the uniform application of the law in similar cases. What is and is not acceptable is hard to articulate.

We believe that it is necessary in this area to undertake surveys of judges to establish the external and internal pressures they experience, so as to assess the incidents of practical infringements of independence.

3.3.2 Subjective judicial independence

Judicial independence as perceived by groups in society

Meeting the formal objective requirements of independence does not necessarily mean that the Judiciary is subjectively perceived to be independent by society, let alone that the Judiciary is widely trusted. Moreover, perceptions frequently differ between societal groups. For example, different economic groups, status groups and ethnic groups will often see the Judiciary differently. In some cases, it will depend on the extent and nature of the exposure to the courts that members of these groups have had.

In these circumstances, surveys are required to evaluate the perceived independence of the Judiciary. The surveys in question include at least the following:

- a) Surveys of parties to litigation, criminal defendants and victims of crime;
- b) Surveys of legal representatives;
- c) Surveys of professional users of the courts, such as prosecutors and bailiffs;
- d) Surveys of the general public, divided into various groups, for example low income groups, ethnic groups, and the business sector.

For instance, the recent Eurobarometer survey provides valuable information about the opinions of European citizens in general.

It should be noted that surveys may not be able to ask specifically about judicial independence, because members of the public are often unable or unwilling to differentiate between judicial independence and other aspects of the performance of the courts. It is, therefore, likely that surveys will confine themselves to asking about the levels of trust in the Judiciary.

Independence as perceived by judges

It is also an open question as to how judges perceive their own independence. It would be possible to undertake surveys to ascertain the perception of judges as to the external and internal pressures they experience.

3.4 The empirical assessment of judicial independence

To gain an insight into the level of independence of the Judiciary in a particular state, it is necessary to assess objective as well subjective independence. Subjective independence is directly measurable by undertaking the kinds of opinion surveys already mentioned. Surveys have not, however, been undertaken in all countries and amongst all the groups mentioned. In order to assess formal and objective judicial independence, it is necessary first to define specific performance indicators. This will enable the key components listed above to be measured, analysed and evaluated.

Once appropriate performance indicators are defined, a normative position will need to be established: for example, is a high score 'good' or 'bad'? Even if it is inappropriate to rank justice systems in terms of either objective or subjective independence, the data will still identify the states in which particular performance indicators are less well met. It will be noted in this connection that the European Commission's latest Justice Scoreboard questionnaire does not specifically identify a set of performance indicators. Further conceptual development is necessary.

Finally, as to ranking, it is, as we have said, probably undesirable to seek to aggregate the performance indicators into an overall measure of judicial independence for individual states. The outcomes would be, to some extent, arbitrary, since the different components of judicial independence are unlikely to be of equal importance. Weighting individual performance indicators would undoubtedly be a subjective exercise.

3.5 Rationale of judicial accountability

Judicial independence and judicial accountability are intertwined. Independence brings with it the responsibility to demonstrate to society the use to which judicial independence has been put. In most European societies, authority is no longer accepted at face value as it once was. Similarly, judicial independence is not any longer likely to be accepted without clear judicial accountability. It should, however, be stressed in this context that judicial accountability does not encompass the civil liability of an individual judge.

3.6 Key components of judicial accountability

It is useful here also to distinguish (i) between the objective and subjective evaluation of judicial accountability, and (ii) between the Judiciary as a whole and the individual judge.

3.6.1 Objective judicial accountability

Accountability of the Judiciary as a whole

Existence of formal arrangements

Formal mechanisms should be in place to ensure that the Judiciary is accountable to society. For example, there must be systems by which complaints can be made about judges and the judicial system, and by which disciplinary sanctions can be applied.

Transparency

The performance of judges and the judicial system must be transparent. This means that there must be clear and formal reporting on issues such as case disposals, timeliness, case duration, appeal waiting times, and many other aspects of the quality of the judicial process. There should be regular reporting structures, and a database on the performance of the judicial system in each state. In addition, there should be transparency about the additional activities undertaken by judges outside their judicial functions.

Accountability of the individual judge

Understandable proceedings and decisions

Accountability includes in this context that judges should explain their decisions in such a way that parties, media and the public in general can understand and verify their reasoning.

3.6.2 Subjective judicial accountability

Even if there are formal objective procedures in place to ensure judicial accountability, the subjective perception of citizens as to judicial accountability is of equal importance. For example, judges and the judicial system may be seen as a ‘closed shop’, operating for its own benefit rather than for the benefit of society. In these circumstances, it is also important to obtain data from surveys to measure, analyse and evaluate public perceptions of judicial accountability.

3.7 The empirical assessment of judicial accountability

In order to assess formal and objective judicial accountability, it is necessary first to define specific performance indicators to enable the key components listed above to be measured, analysed and evaluated. The same comments as have been made above in relation to the “empirical assessment of judicial independence” are applicable in relation to the empirical assessment of judicial accountability.

IV. Indicators of the Independence of the Judiciary

4.1 Introduction

The project group has sought to develop a set of real indicators for the evaluation of the independence and accountability of a Judiciary and a state's judicial system. This Chapter deals with the indicators relating to the independence of the Judiciary, and Chapter 5 deals with the accountability of the Judiciary. An overview of the indicators has been included in Appendix C. The questionnaire which was used to measure the indicators within the pilot has been included in Appendix D. The objective scoring rules of the pilot which the project group established have been included in Appendix E.

In these indicators, the Judiciary is taken to include judges, together with their legal and administrative staff, and the governing bodies of courts as well as Councils for the Judiciary.³ The indicators have been developed to put into effect the framework contained in Chapter 3, taking into account the ENCJ's vision of independence and accountability, as presented in Chapter 10, and the risks referred to in Chapter 7.

In Chapter 3 a distinction was made between objective and subjective independence and accountability. Objective characteristics relate to the way in which judicial structures are in practice arranged, whilst subjective characteristics relate to the perception of the Judiciary and the judicial system amongst different interest groups including judges and citizens generally.

A further important distinction is made between the Judiciary as a whole and the individual judge. The objective independence of the Judiciary as a whole is not sufficient, if the independence of the individual judge is restricted. Thus, both levels must be addressed. The distinction is less meaningful for subjective independence, as perceptions will generally not differentiate between the Judiciary generally and the individual judge.

The indicators of the objective independence of the Judiciary as a whole fall into the following categories:

- 1) Legal basis of independence;
- 2) Organizational autonomy of the Judiciary;
- 3) Funding of the Judiciary;
- 4) Management of the court system.

The indicators of the objective independence of the individual judge fall into the following categories:

- 1) Human resource decisions about judges;
- 2) Irremovability of judges;

³ ENCJ: Judicial Reform in Europe, Report 2011-2012, page 4.

- 3) Procedures that are in place in the event of a threat to individual judicial independence;
- 4) Internal independence of the Judiciary.

The indicators of the subjective independence of the Judiciary and the individual judge fall into the following categories:

- 1) Independence as perceived by citizens in general;
- 2) Trust in Judiciary, relative to trust in other state powers by citizens in general;
- 3) Judicial corruption as perceived by citizens in general;
- 4) Independence as perceived by court users at all levels;
- 5) Independence as perceived by judges themselves.

In total **13 indicators** have been identified that are particularly important to assess judicial independence. As will be explained below, most indicators consist of several sub-indicators.

4.2 Objective Independence of the Judiciary as a whole

Indicator 1 objective independence of Judiciary: legal basis of independence

The legal basis for independence comprises a number of sub-indicators concerning the formal protections for independence that are in place as follows:

- Formal guarantees of the independence of the Judiciary;
- Formal assurances that judges are bound only by the law;
- Formal methods for the determination of judges' salaries;
- Formal mechanisms for the adjustment of judges' salaries;
- Formal involvement of judges in the development of legal and judicial reform.

Formal guarantees of the independence of the Judiciary

This indicator measures the degree to which the independence of the Judiciary is formally safeguarded. Once suitable protections are in place, the degree of independence is determined by the ease with which the executive can impugn or alter these protections. It should be noted that in some constitutions the independence of the Judiciary is guaranteed, whilst in others only the independence of the judge is safeguarded. In this context, the difference may not be important if the protections are properly entrenched.

The strongest protection is a guarantee in the constitution or the state's equivalent provisions. What is important is that the position of the Judiciary cannot be impugned by a simple majority of the legislature. Constitutional courts are also able to bolster the necessary protections. There is no single possible compliant system. The entire constitutional and historical protections need to be viewed as a whole.

Formal assurances that judges are bound only by the law

This indicator measures whether judges are explicitly bound only by the law, and thereby prevented from responding to political, media and other external pressures. Again, the strongest

protection is a constitutional safeguard. Weaker protection is provided by laws that can be changed by a simple majority of the legislature, or by judicial precedent.

Formal methods for the determination of judges' salaries

The independence of the Judiciary can be undermined if the salaries of judges are controlled by the executive, and if the executive is not bound by formal controls relating to fixing these salaries. Punitive salary cuts are totally unacceptable. But arbitrary executive control of judicial salaries exposes judges to the risk of inappropriate pressures and corruption. Formal protection for judges' salaries is, therefore, of great importance. Again, the strongest protection is a constitutional safeguard. A legal safeguard that can be changed by a majority in the legislature is a weaker protection. Customs preventing interference in judicial salaries offers some, though often a weaker protection.

Formal mechanisms for the adjustment of judges' salaries

This indicator addresses whether a formal mechanism exists to adjust salaries to keep pace with the average development of salaries in the country and/or with inflation. In the absence of such a mechanism the salaries of judges would be arbitrarily determined, making formal protections ineffective.

Formal involvement of judges in the development of legal and judicial reform

This indicator measures whether the Judiciary has the formal right to propose law reforms, and to advise about proposed developments in legal and judicial practice. The independence of the Judiciary can be severely affected by law reform in general and judicial reform in particular. Such reforms can also offer opportunities to strengthen the independence of the Judiciary and to implement reforms that the Judiciary feels are necessary to improve its functioning. The strongest protection is a formal guarantee that the Judiciary is entitled to propose law reforms and to advise on proposals for law reform and judicial reforms proposed by the executive and/or the legislature.

Indicator 2 objective independence of Judiciary: organizational autonomy

This indicator is a particularly important support for the legal independence of the Judiciary. It is crucial in times of political tension. Judicial self-government is necessary to put independence into practice. The ENCJ's 2013 report on the "Distillation of ENCJ Guidelines Recommendations and Principles" defines a Council for the Judiciary as "a self-governing body that operates autonomously to guarantee judicial independence, the maintenance of the rule of law, the promotion of civil liberties and individual freedoms, basic human rights and the effective and transparent administration of justice".⁴ From this perspective, a Council for the Judiciary is the preferred way for a Judiciary to govern its own affairs in a transparent manner.

In practice, Councils for the Judiciary vary greatly. They have a variety of different tasks assigned to them; they have different degrees of autonomy from the other state powers; and they have

⁴ ENCJ: Distillation of ENCJ Guidelines, Recommendations and Principles, Report 2012-2013, page 6.

different organizational structures. It is hardly possible to state the minimum requirements for an organization to be properly regarded as Council for the Judiciary in the first place. This means that the contribution of Council for the Judiciary to organizational autonomy cannot be generalized. The indicators should allow for diversity.

In some countries, even in the absence of a Council for the Judiciary, the Judiciary is able to achieve a large degree of self-government, where, for example, the Ministries of Justice delegate to judges and representatives of civil society. Independent commissions or councils for the appointment and discipline of judges are a case in point. Consequently, the indicators allow for the possibility that a Council for the Judiciary will exist, and for the possibility that the responsibilities more normally entrusted to a Council for the Judiciary will, instead, be entrusted to one or more equivalent independent bodies. These indicators should be read as encompassing this latter possibility.

Organizational autonomy comprises a number of sub-indicators, taking into account whether or not a Council for the Judiciary exists, as follows:

If a Council for the Judiciary exists:

- Formal position of the Council for the Judiciary;
- Formal relationship between the Council and the Judiciary;
- Compliance with ENCJ guidelines;
- Responsibilities of the Council.

If a Council does not exist, the relevant sub-indicator relates to the influence of judges on decisions concerning the Judiciary.

Formal position of the Council for the Judiciary

Where there is a Council for the Judiciary, the formal position of the Council for the Judiciary must be considered. Its position can be described in the constitution or by an ordinary law. Once again constitutional incorporation is by far the preferred option.

Formal relationship between the Council and the Judiciary

Self-governance implies that the Council for the Judiciary is a part of the Judiciary itself. In practice, however, other practical solutions are sometimes adopted. The Council of the Judiciary as part of the Judiciary is the preferred option.

Compliance with ENCJ guidelines

This indicator measures whether a Council for the Judiciary conforms to ENCJ guidelines. ENCJ guidelines state that:

- a) At least 50% of the members of the Council for the Judiciary should be judges;
- b) At least 50% of the members of the Council for the Judiciary who are judges should be chosen by their peers;
- c) The Minister of Justice should not be a member of the Council for the Judiciary;

- d) The Council for the Judiciary should control its own finances independently of both the legislative and executive branches of government;
- e) The Council for the Judiciary should control its own activities independently of both the legislative and executive branches of government.

Obviously, it is desirable that a Council for the Judiciary conforms with as many of the above guidelines as possible.

Responsibilities of the Council for the Judiciary

This indicator captures the scope of the responsibilities of the Council for the Judiciary. The following key responsibilities are recommended as part of the functions of the Council for the Judiciary:

- a) The appointment and promotion of judges and magistrates;
- b) The training of judges and magistrates;
- c) Judicial discipline;
- d) Judicial ethics;
- e) Complaints against the Judiciary;
- f) The performance management of the Judiciary;
- g) The administration of courts;
- h) The financing of the Judiciary;
- i) Proposing legislation concerning the courts and the Judiciary.

The greater the self-governance of the Judiciary, the greater the number of responsibilities that will be entrusted to the Council for the Judiciary or an equivalent body.

Where there is no Council for the Judiciary, judges can still have a decisive influence on decisions with respect to the responsibilities enumerated above. Alternative ways to achieve the organizational autonomy of the Judiciary are captured in the indicator.

Indicator 3 objective independence of Judiciary: funding of the Judiciary

The funding of the Judiciary is a vulnerable aspect in the relations between state powers. There are two aspects that need to be covered by the indicators. The first aspect covers the institutional arrangements: the degree to which the Judiciary is involved in the determination of budgets, the way budgets are constructed and the degree of freedom for the Judiciary to allocate budgets once these have been determined. The second aspect is even more important: the degree to which the actual budgets that are the outcome of the budget process are sufficient for the Judiciary to fulfil its responsibilities.

The funding of the Judiciary comprises a number of sub-indicators as follows:

- Budgetary arrangements;
- Funding system;
- Occurrence of conflicts about budgets;
- Resolution of conflicts about budgets;

- Sufficiency of actual budgets.

Budgetary arrangements

The involvement of the Judiciary in the budget process is determined by its role in the subsequent phases of this process. These phases are:

- a) preparation of the budget to be allocated to the courts;
- b) formal proposal on the budget to be allocated to the courts;
- c) adoption of the budget allocated to courts;
- d) management of the budget allocated to courts;
- e) evaluation / audit of the budget allocated to courts.

The position of the Judiciary is stronger, the more often it has the lead in these phases.

Funding system

The indicator describes whether or not the funding of the Judiciary is based upon transparent, objective criteria. Possibilities are among others: actual costs (e.g. number of judges and court staff), the workload of courts and a fixed percentage of government expenditure or GDP. In the long run budgets should match the workload of the courts, while in the short run its actual costs must be covered, also in case the caseload declines. If such an objective system is in place, the issue is whether or not it can be changed easily. A system that is fixed by law offers more safeguards than a common practice.

Occurrence of conflicts about budgets

The indicator counts the number of conflicts between the Judiciary and government about the budget of the Judiciary in the last five years. Has the government (e.g. minister of Justice or Minister of Finance) refused a budget proposal from the Judiciary or has the government promulgated a budget for the Judiciary that was opposed by the Judiciary?

Resolution of conflicts about budgets

An important issue is how conflicts between the Judiciary and government about the budget are handled. The indicator describes whether or not the Judiciary has the right to address Parliament, where it is convinced that the government does not allocate sufficient funds.

Sufficiency of actual budgets

The formal arrangements need to guarantee that actual budgets are sufficient. The indicator deals with the sufficiency of budgets by distinguishing key activities that must receive adequate funding. These are:

- a) handling of caseload;
- b) engaging experts, translators etc. where necessary and when fees are paid by the court;
- c) keeping the knowledge and skills of judges and staff up to date;
- d) facilitating judges and other personnel in matters of IT systems, buildings etc.

Indicator 4 objective independence of Judiciary: court management

The responsibility for court management differs between countries. While self-governance implies that the Judiciary is integrally responsible, in practice, in several countries (many aspects of) court management lies with the Minister of Justice or with court services under the authority of the Minister of Justice. These practices pose a risk for the independence of the Judiciary, as matters of court management such as housing and IT affect the functioning of the Judiciary. The more decisions taken by the Judiciary, the better independence is served.

The degree of responsibility of the Judiciary itself for court management is captured by an indicator that describes whether or not the Judiciary is in charge⁵ of the following tasks:

- a) General management of a court;
- b) Appointment of court staff (other than judges);
- c) Other human resource management decisions in relation to court staff;
- d) Decisions regarding the implementation and use of IT in courts;
- e) Decisions regarding court buildings;
- f) Decisions regarding court security;
- g) Decisions regarding outreach activities.⁶

4.3 Objective independence of judges

Indicator 1 objective independence of judges: human resource decisions about judges

Human resource decisions concerning selection and appointment, disciplinary processes and removal are an area of vulnerability for the independence of judges. In these areas, judges are exposed to potentially improper interference by other state powers, including, for example, political appointments of judges. Both interference and the appearance of interference undermine the perceived independence of the Judiciary. There need to be transparent processes regulated by law and under the supervision of the Judiciary.

Human resource decisions about judges comprise a number of sub-indicators as follows:

- Selection, appointment and dismissal of judges and court presidents;
- Selection, appointment and dismissal of Supreme Court judges and the President of the Supreme Court;
- Compliance with ENCJ guidelines about the appointment of judges;
- Evaluation, promotion, disciplinary measures and training of judges;
- Compliance of the promotion of judges with ENCJ guidelines.

⁵ 'In charge' is defined as either under the control of a Council for the Judiciary or under the control of a governing body (bodies) dominated by judges.

⁶ This includes all communication and promotional activities aimed to inform society about the Judiciary.

Selection, appointment and dismissal of judges and court presidents

The indicator measures the degree to which the Judiciary itself is responsible for the selection, appointment and dismissal of judges and court presidents by distinguishing the following decisions:

- a) Proposal of candidates⁷ for the appointment as judges (not Supreme Court judges);
- b) Decision on the appointment of a judge;
- c) Proposal for the dismissal of a judge;
- d) Decision on the dismissal of a judge;
- e) proposal of candidates⁶ for the appointment as court presidents;
- f) Decision on the appointment of a court president;
- g) Proposal for the dismissal of a court president;
- h) Decision on the dismissal of a court president.

Selection, appointment and dismissal of Supreme Court judges and the President of the Supreme Court

A separate indicator specifically relates to judges and the President of the Supreme Court, as these posts are of special importance.

Compliance with the ENCJ guidelines about the appointment of judges

The ENCJ has developed guidelines for the appointment of judges. The indicator establishes the degree to which these guidelines are adhered to. In particular:

- a) The appointment process should be open to public scrutiny and fully and properly documented;
- b) The appointment process should be undertaken according to published criteria;
- c) The appointment of judges should be based solely on merit;
- d) The appointment process should promote the diversity of people within the Judiciary, whilst avoiding discrimination;
- e) The appointment process should provide for an independent complaint procedure.

Evaluation, promotion, disciplinary measures and training of judges

The indicator measures the degree to which the Judiciary itself is responsible for the evaluation, promotion, disciplinary measures⁸ and training of judges by evaluating separately the following decisions:

- a) Decision on the evaluation of a judge;
- b) Evaluation of the performance management of courts;
- c) Decision on the promotion of a judge;
- d) Adoption of ethical standards;
- e) Application of ethical standards;
- f) Proposal for the appointment of a member of the disciplinary body for judges;

⁷ The final proposal of candidate(s) which is transmitted to the body that appoints/elects them.

⁸ Written, step-by-step process which the Judiciary commits itself to follow in every case where a judge has to be warned, reprimanded, or dismissed.

- g) Decision on the appointment of a member of the disciplinary body for judges;
- h) Proposal for a disciplinary decision regarding a judge;
- i) Disciplinary decision regarding a judge;
- j) Decision on the follow-up to a complaint against the Judiciary/a judge;
- k) Decision on the program/content of training for judges.

Compliance of the promotion of judges with ENCJ guidelines

The ENCJ has developed guidelines for the promotion of judges. The indicator establishes the degree to which these guidelines are adhered to. In particular:

- a) The promotion process should be open to public scrutiny and fully and properly documented;
- b) The promotion process should be undertaken according to published criteria;
- c) The promotion of judges must be based solely on merit;
- d) The promotion process should promote the diversity of people within the Judiciary, whilst avoiding discrimination;
- e) The promotion process should provide for an independent complaint procedure.

Indicator 2 objective independence of judges: irremovability

Irremovability of judges comprises a number of sub-indicators as follows.

Formal guarantee of irremovability of judges

A major guarantee of the independence of individual judges is their irremovability. It should not be possible to transfer judges without their consent, except for disciplinary reasons in exceptional circumstances. In some jurisdictions irremovability is not guaranteed. Safeguards offer protection in varying degrees.

The indicator captures whether or not irremovability is formally guaranteed. As disciplinary measures were already discussed, the indicator is about the removal of judges for other than disciplinary reasons. If protections are in place, a key factor is, as before, how easy these can be changed by the other state powers. The strongest protection is a guarantee in the Constitution or in documents that are equivalent in the sense that the position of the Judiciary cannot be changed by simple majority. A guarantee in laws that can be changed by simple majority offers weaker protection, whilst customary protection is even weaker.

Arrangements for the transfer of judges without their consent

The indicator addresses the situation in which irremovability is not fully guaranteed. The indicator captures the features of the arrangements for transfer of judges by addressing the following questions:

- a) Are transfer decisions taken within the Judiciary and/or by the government?
- b) Are transfers for short or long periods of time?
- c) What are the reasons for transfers?
- d) Are these reasons prescribed by law?
- e) Can a judge be taken off a case without his consent?

- f) If a judge is transferred is he guaranteed an equivalent post (in terms of position, salary, etc.)?
- g) Can the judge appeal the transfer?

As the transfer of judges without their consent is undesirable, the more limited the use of transfers and the better the legal protection of the judges, the better for the level of independence.

Indicator 3 objective independence of judges: procedures in case of threat to independence

Independence requires that judges are adequately protected from threats, in order to carry out their duties unhindered. Threats can come from private persons, but also from public figures, such as politicians, and the media.

Procedures in case of threat to independence comprise of two sub-indicators as follows:

- Existence of formal procedures in case of threat to independence; and
- Adequacy of formal procedures in case of threat to independence.

Existence of formal procedures in case of threat to independence

This indicator captures whether a formal procedure exists when a judge or an authority within the Judiciary considers that the independence of an individual judge or of the Judiciary as a whole is threatened. This includes procedures to protect the independence of the Judiciary against improper influence of the media, including social media.

Adequacy of formal procedures in case of threat to independence

Key issues to evaluate the adequacy of the procedures are:

- a) Who can launch the procedure?
- b) Which authority has the power to react to the complaints?
- c) What are the measures that this authority can take to protect judicial independence?

Indicator 4 objective independence of judges: internal independence

Independence does not only mean independence from outside forces, but also internal independence. The judge should be able to decide a case in full independence. This does not mean that the Judiciary cannot develop non-binding guidelines for matters such as uniformity, consistency, timeliness and efficiency. It can reasonably be demanded from judges that they explain why they did not comply with a guideline, but they cannot be compelled to comply. Improper influence by (senior) judges and by the management of the court should be avoided.

Internal independence comprises a number of sub-indicators as follows:

- Influence by higher ranked judges;
- Use and status of guidelines;
- Influence by the management of the courts.

Influence by higher ranked judges

The indicator describes whether higher ranked judges have the authority to intervene in a verdict of a lower ranked judge (outside of an appeal system, the precedent doctrine or a preliminary ruling system) and for what purpose (e.g. minimum quality, uniformity and consistency, timeliness and efficiency). To be able to assess whether such interventions are acceptable it is necessary to distinguish between types of interventions, in particular:

- a) A guideline (advisory opinion of general application for all courts/judges);
- b) An advisory opinion of concrete application in a specific judicial decision;
- c) An obligatory decision of concrete application to a specific judicial decision, e.g. regarding minimum quality standards of a verdict;
- d) A dissenting opinion.

Use and status of guidelines

The indicator focuses on the use of guidelines within the courts. To evaluate these practices, the following issues are relevant:

- a) Do guidelines have broad coverage?
- b) Have the guidelines been developed by judges?
- c) Are the guidelines binding?

Influence by the management of the court

The indicator describes whether the management of the court can exert influence in individual cases on the way judges handle their cases, for instance, with respect to the uniformity / consistency and timeliness / efficiency.

4.4 Subjective independence

Subjective independence is about perceptions in society as to the independence of judges. Three groups are distinguished: citizens in general, court users, and judges. In addition to perceptions about independence, a related concept is the trust citizens place in the Judiciary relative to their trust in the other state powers. This is an important indicator of the attitudes of citizens towards the Judiciary. Perceived corruption within the Judiciary is also directly relevant. Corruption is inevitably a breach of independence. The indicators fall into the following categories:

- 1) Independence as perceived by citizens in general;
- 2) Trust in Judiciary, relative to trust in other state powers by citizens in general;
- 3) Judicial corruption as perceived by citizens in general;
- 4) Independence as perceived by court users at all levels;
- 5) Independence as perceived by judges themselves.

Indicator 1 subjective independence: independence as perceived by citizens in general

Independence as perceived by (groups of) citizens is measured in several Cross-European and worldwide comparisons. The indicator uses the results of the recent Eurobarometer with respect to independence. An average is taken for the three areas of law that the Eurobarometer distinguishes (civil, criminal and administrative law). It also uses the Global Competitiveness

Report (2012/2013) with respect to judicial independence and the recent World Rule of Law Index (2014). The average of the three scores is taken.

Indicator 2 subjective independence: trust in Judiciary, relative to trust in other state powers by citizens in general

In most European countries surveys about the trust of citizens in their institutions are held on a regular basis. The indicator describes whether the trust in the Judiciary is higher, equal to or lower than the average of the trust in government and in Parliament.

Indicator 3 subjective independence: judicial corruption as perceived by citizens in general

The extent of perceived judicial corruption is based on one indicator, namely cross European comparison of judicial corruption. The indicator uses the results of the recent European Commission report with respect to corruption.

Indicator 4 subjective independence: independence as perceived by the courts users

Independence as perceived by court users comprises two sub-indicators:

- Availability of customer satisfaction surveys; and
- Perceived independence by the users of the courts.

Availability of customer satisfaction surveys

The indicator describes whether a survey among the clients of the courts has recently been conducted (past three years or less). These surveys are important for Judiciaries to carry out, as it informs them about the experiences and perceptions of their clients.

Perceived independence by the users of the courts

The indicator is the percentage of the users of the courts who perceive the judges to be independent.

Indicator 5 subjective independence: independence as perceived by judges

Independence as perceived by judges comprises of two sub-indicators:

- Availability of surveys among judges; and
- Perceived independence by the judges.

Availability of surveys among judges

The indicator describes whether a survey among the judges has recently been conducted (three years or less).

Judicial independence as perceived by judges

The indicator is the percentage of judges who feel themselves to be independent.

V. Indicators for the Accountability of the Judiciary

5.1 Introduction

Objective indicators can generally be relatively easily identified. Assessment of subjective indicators requires the existence of opinion surveys among relevant groups within society. Surveys about several elements of subjective independence are available, but that is not the case for subjective accountability. Subjective accountability is, therefore, not addressed further in this report.

The objective accountability of the Judiciary must be considered at both the structural level and at the level of the individual judge. It is not sufficient for the Judiciary as a whole to be accountable. Individual judges must also be accountable. Their decision-making must be transparent and undertaken in public.

The indicators of the objective accountability of the Judiciary fall into the following categories:

- 1) Allocation of cases;
- 2) Complaints procedure against judges and the courts in general;
- 3) Periodic reporting by the Judiciary;
- 4) Relations between the Judiciary and the press;
- 5) External review of the Judiciary.

The indicators of the objective accountability of the individual judge fall into the following categories:

- 1) Applicable codes of judicial ethics;
- 2) The procedures relating to the withdrawal and recusal of an individual judge;
- 3) Whether judges are allowed to undertake external activities, and the disclosure of such activities and interests;
- 4) The degree to which legal proceedings are readily accessible and understandable to citizens generally.

9 indicators have been developed. These indicators consist again of several sub-indicators, as will be discussed below.

5.2 Objective accountability of the Judiciary as a whole

Indicator 1 objective accountability of the Judiciary: allocation of cases

The mechanism for the allocation of cases should guarantee the independent and impartial as well as expert treatment of every case. Accountability also requires that this mechanism is made public.

Allocation of cases comprises two sub-indicators as follows:

- Existence of a transparent mechanism for the allocation of cases;

- Content of the mechanism for the allocation of cases.

Existence of a transparent mechanism for the allocation of cases

The indicator describes whether or not a transparent mechanism has been established by the courts, and, if so, what the status of this mechanism is (such as custom or court regulation).

Content of the mechanism for the allocation of cases

The indicator is based on:

- 1) The method of allocating cases;
- 2) The official charged with allocating cases;
- 3) The supervision of the mechanism.

Compliance with ENCJ guidelines

ENCJ guidelines are currently being developed, and the compliance with these guidelines will be added once they are ready.

Indicator 2 objective accountability of the Judiciary: complaints procedure

Complaints about the substance of judicial decisions are to be raised on appeal. However, accountability requires also the opportunity to raise complaints about other matters such as the treatment of a case by a judge and the behavior of court staff.

The complaints procedure comprises of a number of sub-indicators as follows:

- Availability of a complaints procedure;
- External participation in the complaints procedure;
- Scope of the complaints procedure;
- Appeal against a decision on a complaint;
- Number of complaints.

Availability of a complaint procedure

The indicator describes whether or not the Judiciary or the individual courts have a complaint procedure.⁹

External participation in the complaint procedure

Procedures that allow for participation by representatives of civil society make the Judiciary more accountable to society than internal procedures. The indicator is whether or not external participation is provided for.

Scope of the complaints procedure

The indicator describes the scope of the procedure by enumerating the admissible grounds for complaints, such as the behaviour of the judge, timeliness and administrative mistakes.

⁹ A prescribed method of lodging a complaint to the Judiciary. This does not relate to the substance of judicial decisions.

Appeal against a decision on a complaint

The indicator describes whether or not a decision on a complaint can be appealed.

Number of complaints

The indicator is the number of complaints against the Judiciary for all courts together. This is currently used as background variable.

Indicator 3 objective accountability of the Judiciary: periodic reporting

To allow external scrutiny it is common for public organizations to provide information about its performance, including the way it spends public money. In this respect the Judiciary is no different from other public organizations. The same holds for public benchmarking of the courts with respect to their performance, for instance in the area of timeliness.

Periodic reporting about the Judiciary comprises three sub-indicators:

- Availability of annual reports about the functioning of the Judiciary;
- Scope of the annual reports;
- Benchmarking of the courts.

Availability of annual reports about the functioning of the Judiciary

The indicator is whether or not the Judiciary publishes annual reports on how it has discharged its functions.

Scope of the periodic reports

The indicator captures whether or not the report includes data about:

- The output and the duration of cases;
- Disciplinary measures, (successful) complaints, (successful) requests for recusal.

Benchmarking of the courts

The indicator is whether or not the courts are periodically and publicly benchmarked with respect to their performance.

Indicator 4 objective accountability of the Judiciary: relations with the press

In order to be open and transparent, the Judiciary should maintain an open dialogue with the media, explain its practices as well as decisions in individual cases. The Judiciary should also have an educational role in explaining to the population the role of the Judiciary in society.

Relations with the press comprises three sub-indicators:

- Explanation of judicial decisions to the media;
- Availability of press guidelines;
- Broadcasting of court cases.

Explanation of judicial decisions to the media

It is commonly accepted that judges do not explain their own decisions other than in their verdicts or judgments. But court officials (for example, communications officers or press judges) can do so. The indicator measures whether or not judicial decisions are explained to the media.

Availability of press guidelines¹⁰

The indicator measures whether the Judiciary has established guidelines that regulate what the press is allowed to report and by which medium.

Broadcasting of court cases

The indicator measures whether or not the Judiciary allows the broadcasting of court cases.

Indicator 5 objective accountability of the Judiciary: external review

Another approach to accountability is to open an organization to external review or evaluation. External review can take different forms, such as external audit and inspection. External review can measure different aspects of performance, such as quality and efficiency, but also specific topics such as knowledge management. An external review for these purposes is one that is undertaken by persons outside the Judiciary. External reviews undertaken or commissioned by other state powers may compromise independence and are undesirable.

External review comprises three sub-indicators:

- Use of external review;
- Types of external review;
- Responsibility for external review.

Use of external review

This indicator measures whether or not external review is used to evaluate the performance of the courts on a regular basis.

Types of external review

This indicator addresses the different types of external review, as mentioned above. These types differ in scope and impact:

- Inspection;
- Audit committee;
- Other.

Responsibility for external review

The indicator relates to the identity of those commissioning an external review of the Judiciary:

- The Judiciary itself;

¹⁰ A document clarifying the goals and interests of both the Judiciary and the media, and stating how courts deal with the media and what the media may expect of court staff (ENCJ: Distillation of ENCJ Guidelines, Recommendations and Principles, Report 2012-2013, p. 15)

- The Executive;
- The Legislature.

The preferred option is for the Judiciary itself to commission external reviews, as the other options conflict with independence.

5.3 Objective accountability of the judge

Indicator 1 objective accountability of the judge: code of judicial ethics

Such ethical principles lay down the standards of conduct that society can expect from its judges, and for which judges can be held accountable. A code of judicial ethics can strengthen public confidence and promote a better understanding of the role of the judge in society.

The existence of a code of judicial ethics is one indicator.

Availability of a code of judicial ethics

The indicator measures the existence of a code of judicial ethics. The code must of course be available to the public.

Indicator 2 objective accountability of the judge: withdrawal and recusal

The judge is required to adjudicate a case entrusted to him independently and impartially. If this is not possible, he should voluntarily withdraw from the case. Also, there should be a transparent procedure for recusal in case parties doubt the impartiality of a judge.

Withdrawal and recusal comprise a number of sub-indicators:

- Voluntary withdrawal;
- Breach of an obligation to withdraw;
- Request for recusal;
- The authority determining the question of recusal;
- Appeal against a decision for recusal.

Voluntary withdrawal

This indicator measures whether or not a judge is obliged to withdraw from adjudicating a case if he himself believes that his impartiality is in question or compromised or that there is a reasonable perception of bias.

Breach of an obligation to withdraw

This indicator addresses whether a judge who fails to respect the obligation to withdraw from adjudicating a case, can be subject to a sanction, and, if so, the severity of the sanction.

Request for recusal

This indicator measures whether or not a procedure exists to decide on a request for recusal by a party who considers that a judge is partial or biased.

Deciding authority

The issue here is which authority takes the decision on a request for recusal, in particular, the Judiciary or the Executive. The latter option is, of course, problematic from the perspective of judicial independence.

Appeal against a decision on a request for recusal

This indicator measures whether or not an appeal lies from a decision to refuse to recuse.

Indicator 3 objective accountability of the judge: are judges allowed to undertake external activities, and do they disclose such activities and interests?

Policies differ among the nations of Europe on whether judges are allowed to combine being a judge with other paid and unpaid functions and offices. Whilst paid and unpaid functions may endanger independence, they may also allow judges to become more in touch with society. The best approach is, therefore, unclear. From the perspective of accountability it is important that, when judges are allowed to hold other offices or perform other functions, they do so transparently. This is also necessary for the effective use of the right to request recusal. It is noted that in some countries the privacy of judges is a reason not to disclose information.

The question of whether judges are allowed to undertake external activities, and the disclosure of such activities and interests comprise a number of indicators as follows:

- Policy on paid offices and functions;
- Policy on unpaid functions;
- If paid or unpaid activities are allowed, the type of activities allowed;
- Availability of a public register of external activities and functions of judges;
- Policy relating to disclosure of financial interests.

Policy on paid offices and functions

This indicator measures whether or not judges are allowed to undertake other paid functions or offices.

Unpaid offices and functions

This indicator measures whether or not judges are allowed to undertake unpaid offices and functions.

Permitted offices and functions

If offices and functions outside the Judiciary are allowed, the follow-up indicator seeks information about the nature of activities that are permitted. Categories are the following:

- Political functions;
- Functions in (the governance of) companies;
- Functions in (the governance of) public institutions such as schools and sports clubs;
- Arbitration;
- Lawyer;
- Teaching at universities or schools.

Public register of external offices and functions

This indicator seeks information as to existence of a public register of the external offices and functions undertaken by judges.

Disclosure of financial interests

Another matter is whether judges should disclose - in a register - their financial interests, above a certain amount. Opinions differ about this issue. The indicator measures the existence of such a financial disclosure obligation.

Indicator 4 objective accountability of the judge: Understandable proceedings

Judicial proceedings need to be understandable for the parties as well as for society in general. The judge plays a key role in keeping procedures as transparent as possible and in explaining them to the parties. Understandable proceedings comprises of two sub-indicators:

- Explanation of procedures;
- Training of judges.

Duty of judges to make proceedings intelligible to the parties

This indicator measures whether or not judges are obliged to make sure that parties understand the proceedings.

Training of judges

The indicator captures whether judges get training in how to:

- Conduct hearings in an understandable manner to the parties;
- Explain the proceedings in an understandable manner to the parties;
- Explain the decisions in an understandable manner to the parties.

VI. Pilot: Measurement of the Indicators

6.1 Introduction

In chapters 4 and 5 a set of indicators for independence and accountability was presented. The actual measurement of the indicators was tried out by 4 members of the ENCJ. The pilot was undertaken to establish (1) whether the indicators can actually be measured, (2) whether the outcomes make sense, (3) whether meaningful lessons can be drawn from the indicators, and (4) what kind of conclusions can be reached about the state of independence and accountability of Judiciaries in Europe.

The selection of the 4 members that participated in the pilot reflects the different legal traditions in Europe and its geography. The selected members were Judiciaries from **Ireland, Italy, the Netherlands and Romania**. They filled in the questionnaire presented in Appendix D. The completed questionnaires were processed by the coordinator of the project group. As the indicators generally consist of several sub-indicators, the scores with respect to the sub-indicators had to be aggregated to arrive at scores for the indicators. The arithmetical scoring rules that were used reflect the reasoning of the previous chapters, and are given in Appendix E.

These scoring rules contain arbitrary elements such as the weights to be attached to sub-indicators. It was informally checked whether the outcomes make intuitive sense by having an expert (the chair of the project group) independently assess the scores for the indicators qualitatively by examining those for the sub-indicators. The coordinator's scoring had a good correlation with the scores derived from the application of the scoring rules. This was, of course, an informal procedure. When the measurement of the indicators is extended to all ENCJ members and perhaps observers, it will be advisable to establish an expert group to review the scoring rules (see Chapters 8 and 9).

6.2 Outcomes

The results of the pilot are given in the following tables. In these tables the scores for the pilot countries are presented using 5 categories, ranging from very positive, positive, via neutral to negative and very negative. These broad categories are represented by colours.¹¹ Where indicators could not be measured due to lack of data, as occurs frequently with respect to subjective independence (perceptions about independence in society and among clients and judges), fields are shown in white. It should be noted, however, that this is not a neutral outcome, as in many cases absence of data will reflect a lack of interest in these matters. It is, for instance, very difficult to discuss independence in practice, as long as it is not known how the judges themselves appreciate their independence.

¹¹ Very positive: dark green, positive: green, neutral: yellow, negative: orange, very negative: red. No data: white.

1. Indicators about objective independence for four countries

	Ireland	Italy	Netherlands	Romania
Legal basis of independence	positive	very positive	positive	positive
Organizational autonomy	negative	very positive	very positive	very positive
Funding for the Judiciary	positive	negative	very positive	positive
Court Management	very positive	negative	very positive	very positive
HR decision about judges	negative	very positive	very positive	very positive
Irremovability of judges	very positive	positive	very positive	very positive
Procedures in case of threat to independence	very negative	very negative	negative	negative
Internal Independence	positive	very positive	very positive	very positive

Table 2a Indicators about subjective independence in general for four countries

	Ireland	Italy	Netherlands	Romania
Perceived Independence	positive	neutral	very positive	neutral
Trust in Judiciary compared to State Powers	very positive	very positive	very positive	very positive
Perceived Corruption	positive	neutral	positive	very negative

Explanation of the colours:

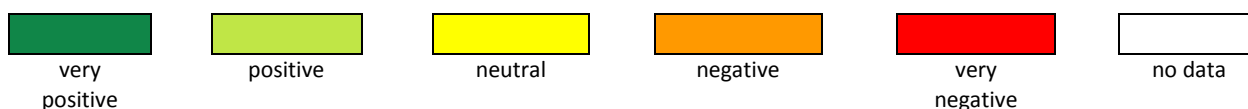


Table 2b Indicators about subjective independence perceived by the participants in court cases for four countries

	Ireland	Italy	Netherlands	Romania
Perceived by users				
Perceived by judges				

Table 3 Indicators about objective accountability for four countries

	Ireland	Italy	Netherlands	Romania
Allocation of cases				
Complaints procedure				
Periodic reporting				
Relation with press				
External review				
Code of judicial ethics				
Withdrawal and recusal				
Accessory functions/disclosure				
Understandable proceedings				

The outcome of the pilot provided answers to the 4 questions listed above. These will be discussed in the following.

6.3 Measurement of the indicators

There were few problems in measuring the indicators relating to objective independence and accountability. The questionnaire could be completed in a short period of time (half a day), once a

Council had determined who was to answer it. Some points of interpretation about the indicators on objective independence and accountability arose that required discussion with or follow-up questions by the project group coordinator. A few issues remained.

The measurement of the indicators on subjective independence was straightforward insofar as these could be based on international sources. Where no such sources were available and national surveys, if any, had to be used, the availability of these national surveys determined whether the indicators were measurable for the countries concerned. As noted already, regarding the perceptions of court users and judges, data are scarce, and this issue needs to be addressed. This is discussed further below.

6.4 Intuitive sense of the measured indicators

The outcomes generally make sense, in view of the differences in legal traditions and the problems Judiciaries face. The outcomes reflect the less formalized character of common law legal systems and systems as well as - to a lesser extent - that of the Netherlands. The outcomes also show that a high score on objective independence (many green fields) does not guarantee a high score on subjective independence. This is also a reasonable outcome. In their decisions, judges have to show that they are independent for society to be able to acknowledge the actual independence of the Judiciary. The issues about independence go much deeper than putting formal arrangements in place. This may be a disappointment for members that have invested much effort in getting their formal arrangements in order, but it has to be recognized that more and wider efforts are needed.

6.5 Potential for lessons to be learned

The results highlight the issues the members should consider working on. These issues differ for the 4 members, and that in itself is an important outcome. While some shared problems exist such as with respect of procedures in case of a threat to independence and lack of data on subjective independence, the issues vary. It is comforting to see that in these 4 countries the list of aspects that could be improved on is relatively short. This gives focus to efforts to improve independence as well as accountability.

A major outcome is that more importance needs to be given to subjective independence. The measurement of perceptions about the Judiciary requires much more effort, and ways to improve these perceptions and their determinants should be considered (see Chapters 8 and 9). As was argued in Chapter 3, objective independence is important in itself, as it provides protections to court users and judges alike, but it is insufficient to gain the trust of society, and that must be the ultimate goal. While the outcomes for a country may not come as a surprise for experts from this country, the indicators provide an objective assessment and identify issues that need to be debated.

6.6 Conclusions about independence and accountability in Europe

This was already largely discussed under (3). In these 4 members the state of objective independence and accountability is generally at a fairly high level, but specific improvements should be considered. Independence as actually experienced and perceived in society requires greater attention. It should be emphasized that the indicators do not provide a solid basis for an overall comparison of the independence in general of judicial systems. Systems have positive and negative aspects, and these are of diverse importance. It should also be noted that the indicators do not provide for a quantitative assessment of the issues at hand.

Therefore, it might be the case that a specific problem that leads to a negative score on an indicator pertains to a very small number of cases, and has little impact. It may, however, also be relevant for many cases with a large impact. An overall comparison was not intended, and conclusions in that direction should be avoided.

To conclude, the set of indicators is a useful instrument to improve our insight into actual independence and accountability of judicial systems, and to find aspects that require consideration. It would be of great interest to have all members and, if possible, observers of the ENCJ participate in the measurement of the indicators.

This is further discussed in Chapters 8 and 9.

VII. Risks threatening the independence of the Judiciary

7.1 Introduction

This Chapter will address:

- the identification of the risks to the independence and accountability of the Judiciary in member states and observer states; and
- ways in which these identified risks can be ameliorated.

The project group has been at pains to consider the new and modern challenges facing the independence and accountability of the Judiciary. Much of the documented research was done before, for example, Facebook and Twitter, existed. Accordingly, there is useful work to be done in relation to the vision of the ENCJ in an age dominated by the internet and by rapid communication.

7.2 Identification of the risks to the independence and accountability of the Judiciary

The survey of ENCJ members immediately prior to the Sofia General Assembly asked a number of questions about the challenges that members faced to the independence of their Judiciaries. That survey formed a starting point for this part of the project group's work. There were, however, many risks to independence that were not, at least directly, covered by this survey. Moreover, the sub-group was conscious that most judges consider themselves individually and structurally independent, even though their independence may, in truth, be seriously and sometimes imperceptibly, challenged.

The risks were considered alongside the indicators identified by the first sub-group as contained in Appendix C as follows.

The following risks to the objective independence of the Judiciary were identified:

- Inadequate investment in the Judiciary, courts and judicial structures.
- Increases in case complexity and workload.
- Gratuitous criticism of judicial decisions by politicians, parliamentarians and the executive, and how judges respond to them.
- The risks of inadequate staffing and administrative assistance being provided for judges.

The following risks were identified to the objective independence of the individual judge:

- Changes to the retirement ages for judges.
- Challenges to the security of tenure of judges.
- Reduction in judicial pay and pensions and adverse changes to judicial conditions.
- Inappropriate proximity between judges and the executive, including incidents of so-called 'telephone justice'.

- Pressure on judges arising from media comment.
- Internal pressure by Councils for the Judiciary on judges or by senior judges on more junior judges
- Increases in unsubstantiated complaints about judges personally, specific judicial decisions and the Judiciary.
- Increases in the number of inappropriate disciplinary proceedings brought against judges. “Inappropriate” in this context means unjustified disciplinary proceedings aimed at discouraging a judge from taking decisions independently according to the law and the evidence.

The following risks were identified to the accountability of both the Judiciary as a whole and of individual judges:

- The failure of judges to reflect changes in civil society, and their being out of touch with ordinary citizens.
- The problems created by judges having an online presence, by joining Facebook, Twitter, Instagram and other such social networks.
- The absence of satisfactory systems for the appropriate allocation of judges to particular cases.
- Judicial corruption.
- The absence of a functioning press office which can advise judges involved in newsworthy cases, and ensure that an accurate account is given to the public.
- Problems in recruiting judges of adequate quality, particularly for certain roles and in certain regions.

7.3 Detailed analysis of the main current risks to the independence of the Judiciary

The sub-group concerned with this Chapter began by asking its members to identify the most pressing risks to the independence of the Judiciary in their countries. As a result of the responses, the project sub-group concentrated on a sub-set of the risks identified above as follows:

- The risks created by pressure from the media.
- The risks created by the actions of populist politicians and Governments.
- The risks created by failure of judges and judicial systems to attract the confidence of the public.
- The risks created by the internet.
- The risks created by organised crime and corruption.

The risks created by pressure from the media

This risk is widely regarded as the most pressing and dangerous. Judges are often afraid of the media. Moreover, in most states, it is considered wholly inappropriate for judges to talk to the media either about their own cases or generally. If judges do talk to the media, they are often unable to communicate effectively for a number of reasons. Either the media is unwilling to listen

to or report serious comment about complex legal issues, or the judges' comments are published in only the serious press, and does not reach the large majority of the population.

One of the most obvious pressures is the media's seemingly endless wish to press for longer sentences than are customarily given to criminals. The sub-group received a number of examples of media pressure on judges.

Judges will normally think that they can stand up to this kind of media pressure. But they are sometimes wrong. The imperceptible effect of media campaigns on legal issues can lead judges, albeit subconsciously, to take the line of least public and media resistance. This is perhaps most evident in sentencing decisions, where the popular press is always most vocal.

The risks created by the actions of populist politicians and Governments

The sub-group agreed that judges from most states can produce examples of situations in which the importance of an independent Judiciary as the third arm of state has been side-lined or ignored by their Governments. The problem is perhaps exacerbated by the global trend towards populist Governments and short-term political horizons. Again, numerous examples were produced.

In many countries, politicians have found that they can gain popular advantage by publicly criticising judicial decisions. The clear distinction between (a) the executive's right to propose changes to the law to reverse judicial decisions, and (b) the convention that judicial decisions, when applying the existing law, are not criticised by the executive, is no longer properly understood.

In countries where judicial pay and pensions have been adversely affected, these changes create a reduction in judicial quality. The risk of corruption is increased, and judges become amenable to influence, and also have the incentive to take inappropriate alternative jobs, lowering standards of judicial decision-making.

In many countries, politicians have found that they can gain popular advantage by publicly criticising judicial decisions. The clear distinction between (a) the executive's right to propose changes to the law to reverse judicial decisions, and (b) the convention that judicial decisions, when applying the existing law, are not

criticised by the executive, is no longer properly understood. It is a central function of the rule of law that independent judges decide cases between citizens and the state, according to certain and established laws.

The executive is often able to get away with criticising the Judiciary in general and judges in particular, because the majority of the general public has little detailed understanding of the detailed workings of the judicial system. In most countries, significantly less than 10% of the population have been involved in criminal or civil cases. As a result, the majority have little appreciation of the importance of the impartiality and independence of the Judiciary.

The risks created by failure of judges and judicial systems to attract the confidence of the public

Judges are almost universally regarded as remote and out of touch. Although this perception is often far from reality, it is perpetuated in the media, and because judges cannot defend themselves when publicly attacked or criticised.

Judges can only explain their decisions in their legal judgments, which tend themselves to be complex and not easily intelligible to the untrained public. This indicates the need to find ways to explain judicial decision-making and specific judicial decisions.

The risks already mentioned all themselves contribute to a lack of public confidence in the Judiciary. If the media is perpetually attacking judicial decisions if they do not pander to populist opinion, and if politicians jump on a similar band-waggon, public confidence in the Judiciary is bound to be adversely affected.

The risks created by the internet

The risks created by the internet are rapidly developing. But the background to the effect of the internet on judges and judicial systems can be summarised as follows:

- Whilst some older judges have refrained from participation in social media, younger judges have not. It must be assumed that, in the future, all judges will be brought up in the same way as their peers to participate in current social media.
- Judicial participation in social media is potentially problematic, because it can expose the private life of the judge to public knowledge and scrutiny.
- Those wishing to attack or target a judge or a judge's decision may, in these circumstances, be able to find confidential information about judges' past conduct or their friends and families.

The first point to make in response to this background is that one should be cautious about suggesting that technological developments will pose any greater risk to judicial independence in the future than they have in the past. It was suggested many years ago, when the use of the telephone became widespread, that this would threaten judicial independence. The fear proved, of course, to be unfounded.

Secondly, there is no doubt that well-designed education in safe use of the internet, addressed to young people in schools, as well as to trainee lawyers, prosecutors and judges, will go a long way towards ensuring that the problems are contained.

Nonetheless judges should be astute to the problem in the transitional period between a non-internet age and an internet age. There are undoubtedly judges who have used the internet unwisely and have thereby exposed themselves to problematic targeting. And there are undoubtedly also those who are able already to uncover personal information about judges (through no fault of the judge) which enables pressure to be applied to them.

Nonetheless, there are worrying developments. For example, websites can threaten the Judiciary: a Swedish website called ‘corruptio’ has been established to attack Swedish public officials including police and judges, both as to their decisions and their personal lives.

The risks created by organised crime and corruption

In several states within the European Union, there is significant corruption and organised crime. It is often well hidden and officially denied. But this does not mean that it should be ignored. Judicial corruption, real or perceived, is probably the single greatest factor that undermines both the independence of the Judiciary and the rule of law.

Combating organised crime is difficult, because prosecutors and sometimes judges are targeted in an attempt to prevent prosecutions or to defeat those that are brought. The published reports prepared by the Council of Europe’s Group of States Against Corruption (GRECO), Transparency International, and the World Economic Forum (WEF) provide a useful starting point.

7.4 Ways in which these identified risks can be ameliorated

This aspect of the project is important. On one analysis, there would be no point in identifying risks to the independence of the Judiciary if there were nothing that could be done to combat them. The sub-group considered a large number of measures that could or should be taken to ameliorate the risks discussed in this Chapter. It is perhaps useful to list **the measures that were thought to be most likely to improve the situations** described as follows:

- Subject to careful control, the televising or webcasting of the court process to make it more accessible to the general public and improve general understanding of and public confidence in the court process.
- The creation of a broad selection of outreach programmes to explain court processes and the work done by the Judiciary to the general public.
- The introduction of rapid response systems to ensure that individual judicial decisions can be explained in the media by trained representatives of the Judiciary (other than the judges themselves) immediately they are released.
- The publication of judicial summaries of decisions in language that is accessible to ordinary citizens.
- Opening courts to the public at week-ends to view mock trials involving real lawyers and real judges. A pilot of this ‘open court’ exhibition was piloted in Sweden in 2013. It was very well-attended and was a great success.
- Volunteering to allow the media to undertake insights into the court process so as to explain to the general public how it works.
- Continually educating judges that their job involves the need to be brave in order to decide all cases according to the evidence and according to the law, entirely free from any third party influences, including those from politicians and the media.

- Improving education in relation to the functions and operation of the judicial system in schools at all levels, including court visits and lecture programmes involving the active participation of judges, prosecutors and lawyers.
- Training programme for the journalists to learn about the courts.
- Training programmes to educate politicians so that they understand that the Judiciary is the 3rd arm of state.
- The publication of all decisions by judges at all levels (such decisions are anonymised in Poland and Hungary).

VIII. Implementation of the Indicators

8.1 Introduction to implementation

Independence is, as we have already said, the core value of the Judiciary. It represents a safeguard for judges to prevent them from direct or indirect influences, a guarantee to the citizen of independent justice and the Rule of Law.

Judicial systems in the European Union are not uniform and this study does not intend to promote any particular type of system. The independence of the Judiciary is implemented differently at national level from one state to another. Constitutions are generally designed to protect the Judiciary against threats to its independence.

The implementation process requires the adoption of specific policies applicable at both European Union and national level. Where specific threats have been manifested, action may be required at both levels.

The European Commission has developed several instruments that directly or indirectly promote the independence of the Judiciary. The Justice Scoreboard is an information tool aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States.

In the EU Anti-corruption Report,¹² the independence of the Judiciary is regarded as a key element of anti-corruption policy. It is important to both the capacity of the justice system effectively to handle corruption cases at all levels, and to the standards of integrity within the justice system itself. Effective independence safeguards and high ethical standards within the Judiciary are essential to securing the necessary framework for an effective Judiciary which renders justice in corruption cases in an objective and impartial manner without any undue influence.

The Rule of Law framework¹³ provides that independent and impartial courts stem from the Rule of Law, provided by the case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission.

National standards for implementation of the independence of the Judiciary may involve:

- The reactions of independent bodies in the case of threats to judicial independence;
- Constitutional protections for the Judiciary aimed at providing the checks and balances between the powers of state.

¹² COM (2014) 38 final, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

¹³ COM (2014) 158 final, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

- The development by national judicial systems of self-regulating mechanisms that do not require external intervention.

The implementation of indicators of independence and accountability includes:

- Collection of data;
- Assessment of the overall situation;
- Best methods of implementation; and
- Evaluation of the procedure of implementation of the indicators.

8.2 Collection of data

The EU Justice Scoreboard emphasises the need for a systematic overview of the functioning of justice systems in all Member States. This has much enhanced the cooperation between the ENCJ and the European Commission. The ENCJ has assisted in the collection of information on the legal protection of judicial independence in Member States. The Commission has expressed its intention to strengthen the cooperation with the ENCJ and to explore the possibility of collecting data on the functioning of the justice systems in other focused areas.¹⁴

We would underline the importance of collecting objective, reliable and comparable data.¹⁵ To avoid the shortcomings of subjectively presented or non-comparable data, we have developed a set of 13 indicators for independence and 9 indicators for accountability, as shown in Chapters 4 and 5. These indicators should be taken into account when collecting data. The mechanism for collecting data on these indicators will vary as between objective and subjective indicators.

Data on objective independence of the Judiciary and judges and their objective accountability can be obtained through:

- 1) Periodical generic reports from judicial authorities (answers to questionnaires);
- 2) Peer-review/audit missions (including interviews at national level);
- 3) Information obtained from independent bodies at national level (such as NGOs, experts) or international level (international organisations, authorities involved in cross-border cooperation); and
- 4) Widely available complaints systems.

It is most useful to combine these methods of obtaining data. Whenever there are threats or breaches of judicial independence, a developed permanent monitoring mechanism should be put in place. A judicial system may, therefore, be subjected to either permanent or periodic monitoring. This may apply to a specific indicator in respect of which a problem is identified.

¹⁴ Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and Committee of the Regions COM (2014) 155 final.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 160 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf

Data on subjective independence of the Judiciary and judges and their subjective accountability can be obtained throughout specific surveys organised at European level or at national level.

In addition, the project group recommends that surveys of judges views' of their own independence should be undertaken in order to feed in to the evaluation of the subjective independence and accountability of the Judiciaries in Members and Observer countries.

8.3 Assessment of the overall situation

The collection of data and the subsequent assessment should not be aimed at establishing an overall single ranking of judiciaries or judicial systems. Instead, the project group aims at achieving an overview of the functioning of justice systems. This objective will have two benefits. It will create a list of vulnerable judiciaries which are predisposed to threats to independence, and it will provide a system of red flagging for breaches to independence whenever alarm signals are sounded. The project group intends to apply the indicators to all Members and Observers of the ENCJ in the coming year.

The application of the indicators will be supported by an expert group comprising 4 members, 3 from the ENCJ and an external expert will be sought to be part of the group. The expert group will attempt to liaise with each respondent country in order to ensure consistency and accuracy of the answers being provided. The expert group will evaluate the results, and report its findings to the project group.

The results will be evaluated as shown above in Chapter 6 and recorded on colour charts to demonstrate areas of concern in respect of particular indicators. It is to be expected that all respondents will demonstrate some areas of weakness.

8.4 Best methods of implementation

Rather than specifically categorising the weaknesses, the project group suggests the establishment of dialogue or focus groups comprising, say, 4 members from different parts of Europe, in which the participation of experienced judges is also recommended. These groups would meet together in each others' countries with a view to drilling down into the problems of independence and accountability identified by the application of the indicators and the views of the expert group. Where red flagging or important measures should be taken, the participation of representatives of the executive board of the ENCJ is advisable. Observers are invited to participate in this process.

Having in mind that each judicial system has its own peculiarities, the implementation should imply a dialogue with the representatives of the respective judicial system and other national bodies in order to find out which are the most appropriate ways of implementation. The judiciaries should also be encouraged to propose their own methods of implementation they consider to be the most adequate and efficient.

The dialogue groups would report periodically to the Executive Board and annually to the ENCJ's General Assembly. It is hoped that the member Councils will provide their full support to this important process. Methods of implementation may vary depending on the nature of the indicators involved and the specificities of each judicial system assessed.

8.5 Evaluation of the procedure of implementation

As we have said, the dialogue groups should report periodically to the Executive Board and annually to the ENCJ's General Assembly. It is hoped that the dialogue groups could continue to operate over a period of years. Moreover, the application of the indicators should be repeated every two years so as to ascertain improvements or deteriorations in independence and accountability over time.

In concrete situations where the implementation was focused to a specific breach of the independence, the evaluation procedure should assess the remedies and should ensure that the process is irreversible. A report should be prepared for the ENCJ's General Assembly.

IX. Recommendations

The project group considered the next steps that are required in its plenary meeting in Bucharest on 24th and 25th March 2014. There was a lively discussion as to whether in addition to the current set of indicators that applies to the Judiciary, indicators should be developed next year so as to apply to prosecutors. It was agreed that a project sub-group should be established to undertake this process. The sub-group will comprise mainly those Councils for the Judiciary which include prosecutors amongst their membership and responsibility. The sub-group will obviously aim to apply the revised indicators to the independence and accountability of prosecutors in member and observer states.

As regards judges, the project group will continue next year and will broadly undertake the following tasks as already indicated in chapter⁸:

- 1) Application of the indicators of independence and accountability of the Judiciary to each member of the ENCJ and to each observer country by means of the questionnaire, presented in Appendix D.
- 2) The application of the indicators by the members and observers to be supported and the results evaluated by an expert group comprising 4 members, 3 from the ENCJ and an external expert will be sought to be part of the group. The expert group will ensure consistency and accuracy of the answers to the questionnaire being provided. The expert group will report its findings to the project group.
- 3) Undertaking a survey of the views of judges in all member countries (and, so far as possible, observer countries) as to their own independence and accountability.
- 4) The establishment of a number of dialogue groups comprising 4 members of the ENCJ from different parts of Europe (and possibly observer countries if they wish to participate) aimed at discussing the results of the application of the indicators and identifying the real problems facing the independence and accountability of the Judiciary in each country, and identifying remedies. The dialogue groups will report to the executive board and annually to the ENCJ General Assembly.

It is intended that the dialogue groups could continue to operate over a period of years. Moreover, the application of the indicators should be repeated every two years so as to ascertain improvements or deteriorations in independence and accountability over time.

X. Vision of Independence and Accountability

It is now necessary to undertake a subjective evaluation of the applicable principles, and a consideration of how far the ENCJ's vision can or should differ from received European or International standards.

The ENCJ has spent 10 years now developing applicable principles together with standards, guidelines and recommendations. In 2013, it published its Distillation of ENCJ Guidelines Recommendations and Standards, which sought to distil the wisdom of all previous ENCJ project teams and to create an accessible summary that could be used to enable member Councils for the Judiciary and equivalent bodies in candidate and potential candidate Member States to identify good practices in relation to the management of a modern European justice system. It is important that the Distillation is kept up to date, and that recommendations are heeded by members and observers.

The ENCJ's vision of the independence and accountability of the Judiciary is encapsulated in that document and in the earlier sections of this report. With respect to this vision the essence of this report can be summarized as follows.

The independence of the Judiciary as a whole and that of the individual judges lie at the heart of the rule of law. Without it the Judiciary cannot fulfil its functions. But independence does not stand on its own. It must be recognized that independence is directly linked to accountability. A Judiciary that claims independence, but refuses to be accountable to society will not gain the trust of society, and will not be granted the independence it strives at.

Independence must be earned. It is, by no means, automatic. The Judiciary achieves legitimacy and the respect of its citizens by excellent performance, resulting in impartial, well-reasoned, decisions. The best safeguard of independence is excellent and transparent performance. In that way, the Judiciary fulfils its mandate and demonstrates that it does so. Whilst mistakes will always occur and draw criticism, an independent and accountable Judiciary is open to justified criticism and learns from its mistakes. This mechanism provides a powerful link between independence and accountability.

Excellent performance cannot replace formal safeguards. Therefore, both objective and subjective independence of the Judiciary are important, where objective independence stands for formal safeguards, whilst subjective independence reflects the perceptions in society, including those of the judges themselves. It must be recognized, however, that ultimately independence must be recognized by society. Councils for the Judiciary should not focus solely on formal safeguards, but also on improving performance and informing the public about the functions and the functioning of the Judiciary. Each judge has a role to play in this respect.

The ENCJ tries hard to be inclusive rather than prescriptive. It is not suggesting that "one size fits all" or that one approach to achieving judicial independence and accountability will work in all parts of the EU let alone all parts of the world. Nonetheless, the ENCJ believes that the model of a

Council for the Judiciary still provides the best approach to a self-governing independent and accountable Judiciary.

In this context, it is perhaps to be noted that there are also highly challenged judicial systems in countries where their constitution provides for an entirely compliant constitutional structure, including an apparently independent Council for the Judiciary.

The ENCJ thinks it is important to recognise the difficulties and risks as well as the successes; otherwise, there is no prospect of achieving improvement. That is the importance of Chapter 7 of this Report which highlights some of the existing problems facing judiciaries in many parts of Europe arising from widespread changes in European culture, technology and politics.

It is quite clear that a lack of judicial independence can only exist in the dark. Thus, it is necessary for EU institutions and European networks to shine a light on areas of concern. That is the value of surveys and the educational programmes mentioned in Chapters 8 and 9. Moreover, it may be hoped for as one outcome of the European Commission's Justice Scoreboard.

Judicial accountability is also a function of public understanding. The more interest that citizens show in the operation of their justice system, the more likely it is to be truly accountable. Public ignorance and disinterest allow judges to continue to exist within unaccountable justice systems.

The ENCJ's vision, arising from this report, is therefore, for more attention to be paid to the functioning of judicial systems in all parts of the EU and indeed Europe generally. If politicians, citizens and judges alike recognise the need for real independence and accountability of their judicial systems, a lack of transparency and a lack of funding will not be tolerated. For that reason, education is key to ensuring that judicial systems progress towards greater independence and accountability rather than the reverse.

The next stage of this project will apply the indicators that we have developed to all the members and observers of the ENCJ, and will survey judges' views of their own independence.

Perhaps most importantly, the ENCJ will be setting up dialogue groups aimed at drilling down into the real independence and accountability problems faced by Councils for the Judiciary and by judges themselves in each member and observer state.

Appendix A: participants Project Team

Coordinator of the Project Team:

Rvdr The Netherlands	Frits Bakker
	Frans van Dijk
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Subgroup 1 Indicators for the Independence and Accountability of the Judiciary:

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Mateja Koncina Peternel

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Appendix B: Summary of European and International Standards

The project group has consulted the following European and International materials:

- [ENCJ Distillation of ENCJ Guidelines, Recommendations and Principles: Report 2012-2013](#)
- [ENCJ Justice Society and the Media: Report 2011-2012](#)
- [ENCJ Judicial Ethics: Report 2009-2010](#)
- [Sofia Declaration on Independence and Accountability of the Justice System - June 2013](#)
- [Dublin Declaration setting Minimum Standards for the selection and appointment of judges - May 2012](#)
- [Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate - June 2011](#)
- [London Declaration 2010 on Judicial Ethics – June 2010](#)
- [Resolution of Bucharest on Transparency and Access to Justice - May 2009](#)
- [Resolution of Budapest on Self-Governance for the Judiciary: Balancing Independence and Accountability - May 2008](#)
- [ENCJ Judiciary and the Media: Report 2005-2006](#)
- [The Bangalore Principles of Judicial Conduct \(2002\) and resolution 2006/23 of the UN Social and Economic Council](#)
- [The UN's Basic Principles on the Independence of the Judiciary \(1985\)](#)
- [The UN's International Covenant on Civil and Political Rights \(1966\)](#)
- [The Universal Declaration of Human Rights \(1948\) as adopted by the UN General Assembly](#)
- [The Universal Charter of the Judge \(1999\)](#)
- [The European Charter on the Statute for Judges \(1998\)](#)
- [The Judges' Charter in Europe \(1997\) from the European Association of Judges](#)
- [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities \(Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies\)](#)
- [CCJE's Magna Carta of Judges \(2010\) being a consolidated version of the principles contained in the CCJE's Opinions](#)
- [The Venice Commission Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, CDL-AD\(2012\)014, 18.06.2012](#)
- [The Venice Commission Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, CDL-AD\(2010\)040, 03.01.2011](#)
- [The Venice Commission Report On the Independence of the Judicial System. Part I: The Independence of Judges. CDL-AD\(2010\)004; 16.03.2010](#)
- [Report „Judicial Appointments”, adopted by the Venice Commission at its 70th Plenary Session, CDL-AD\(2007\)028, 22.06.2007](#)
- [The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia \(2010\) by the OSCE's Office for Democratic Institutions and Human Rights](#)
- [The Universal Declaration on the Independence of Justice \(The Singhvi Declaration\)](#)

The issues dealt with in these various sources which impact on judicial independence and accountability may be summarised under the following headings:

Objective Independence.

- a) Legal basis of independence;
- b) Council for the Judiciary;
- c) Funding of the Judiciary;
- d) Management of the court system;
- e) Human resources decisions about judges;
- f) Irremovability of judges;
- g) Procedures in case of threat to independence;
- h) Internal independence;
- i) Immunity.

Subjective independence.

- a) Independence as perceived by society;
- b) Independence as perceived by court users;
- c) Independence as perceived by the judges;

Objective accountability.

- a) Allocation of cases;
- b) Withdrawal and recusal;
- c) Case management and timeliness;
- d) Disclosure of interests
- e) Code of judicial ethics;
- f) Relations with the press;
- g) Understandable proceedings;
- h) Transparency.

Subjective accountability.

- a) Accountability as perceived by society;
- b) Accountability as perceived by court users;
- c) Accountability as perceived by the judges.

It is a fundamental principle that everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The independence of the Judiciary is a cornerstone of the rule of law, from which there can be no exceptions. Thus, States must guarantee that fundamental rights and freedoms as well as equality before the law are fully respected.

Judicial independence has two aspects. First, objective independence, to ensure that the Judiciary as a whole is institutionally independent, and secondly, subjective independence, to ensure the independence of individual judges in decision making.

11.1 Objective independence

A. Legal basis of independence

The independence of the judge and of the Judiciary should be enshrined in the constitution or at the highest possible legal level in member states with more specific rules provided at the legislative level. The independence of the Judiciary is guaranteed through the principle of the separation of powers. Thus, there should be a clear statement that the courts constitute a separate power and are independent. There should be a clear reference to the principle of the independence of the judicial power and concrete guarantees for the autonomous administration of the Judiciary should be included in the constitutional or other basic law. Strong guarantees should be provided for the independent administration of courts and there should be no room for political intervention.

Since the appointment process for judges is of vital importance for guaranteeing their independence and impartiality, procedure for their appointment should be regulated in the constitution. For the same reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the constitution.

B. Council for the Judiciary

An appropriate method for guaranteeing judicial independence is the establishment of a Council for the Judiciary which should be endowed with constitutional guarantees for its composition, powers and autonomy. This Council should be at the service of society. The Council should exercise its functions in an independent manner. Its responsibility towards the public includes transparency, accountability and reporting. The Council should be positioned at the constitutional level in those countries having a written constitution or in the equivalent basic law or constitutional instrument in other countries. Provision should be made for the establishment of such a body, for the definition of its functions and for the identification of the sectors from which members may be drawn. Provision should be made for the establishment of criteria for membership and the selection methods.

Beyond its management and administrative role *vis à vis* the Judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the Judiciary.

The Council should safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts and in accordance with law. The Council should have decisive influence on the decisions relating to the appointment and career of judges. This does not necessarily exclude national systems with a decision making process within the sphere of a minister for justice accountable to parliament, provided that such a system works in the country concerned without negatively affecting judicial independence. Such Councils should

have an external perspective achieved by a pluralistic composition. A substantial part of its membership ought to be composed of judges.

Due to the diversity of legal culture in Europe, something that is precious and should be safeguarded, there is no single model which applies to all countries. With the exception of ex officio members, judges participating in the Council for the Judiciary should be elected or appointed by their peers. The Council for the Judiciary should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline and should be responsible for overseeing the training of judges.

Although the legitimacy of Council for the Judiciary is not necessarily at risk when they are created by statute, in countries that are in the process of consolidating democratic institutions, placing Council for the Judiciary on a constitutional footing may help strengthen their legitimacy within the legal and judicial framework. Constitutional provision for the Council will grant it the legitimacy of constitutional recognition and may help insulate it from interference by the executive through legislative decrees or rulings. Such establishment through a constitutional provision may help emphasise its importance as a guarantor of judicial independence.

C. Funding of the Judiciary

Councils for the Judiciary, where they exist, or other independent authorities with responsibility for the administration of courts, the courts themselves and/or judges' professional organisations should be consulted when the judicial systems budget is being prepared.

Although the funding of courts is a part of the state budget presented to Parliament by the Ministry of Finance of Justice, such funding should not be subject to political fluctuations. Although the level of funding that a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the Judiciary when setting its budget.

Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the Judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the Council for the Judiciary. Arrangements for the parliamentary adoption of the judicial budget should include a procedure that takes into account judicial views. Once the budget is allocated, its implementation should be left to the courts. It is important that courts are not financed on the basis of discretionary decisions of official bodies, but in a stable way on the basis of objective and transparent criteria.

D. Management of the court system

Without prejudice to their independence, judges and the Judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges

in order to facilitate an effective and efficient administration of justice. Judicial proceedings and matters concerning the administration of justice are a public interest.

The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence. The establishment of courts spokespersons or press and communications services under the responsibility of the courts or under Councils for the Judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media. While the participation of the Council for the Judiciary in judicial appointments is crucial, it need not take over the whole administration of the justice system, which may be left to the Ministry of Justice.

An autonomous Council for the Judiciary that guarantees the independence of the Judiciary does not imply that judges must be self-governing. The management of the administrative organisation of the Judiciary should not necessarily be entirely in the hands of judges. Individual judges should be responsible for ensuring the efficient management of cases before them and they should fulfil their functions with reasonable despatch, being mindful of the need to deliver judgments within a reasonable time. However, the need to provide timely judgments should not impact on the quality of such judgments.

The authorities responsible for the organisation of the judicial system must provide judges with the conditions and facilities to enable them to attain efficiency. The introduction of new technologies, such as the use of case management systems, offers the chance to modernise the administration of justice and has the added benefit of reducing the costs per case. The adoption of such technologies should be promoted by both authorities and judges and their use in courts is to be encouraged.

E. Human resources decisions about judges

The authorities responsible for making and advising on appointments and promotions should publish and give effect to objective criteria for appointment to the Judiciary with the aim of ensuring that the selection and career of judges is based on merit and has regard to qualifications, integrity, ability and efficiency.

Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skill and capacity of candidates. The authority taking decisions on the selection and career of judges should be independent of executive and legislative powers.

Security of tenure and irremovability are key elements of the independence of judges. Thus, judges should have guaranteed tenure until a mandatory retirement age where that exists. A permanent appointment should only be terminated in cases of serious breach of disciplinary or criminal provisions established by law or where the judge can no longer perform judicial functions. Irremovability of judges should be an express element of the independence enshrined at the

highest internal level. The intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline.

Standards should be produced defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including, for example, a move to a different court or area. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers should be reasoned. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied relevant rules and criteria in relation to appointments and promotions. An independent Council for the Judiciary should have decisive influence on decisions on the appointment and career of judges.

Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. However care must be taken to ensure that appointments by the executive and the possible involvement of parliament are always based on a nomination procedure in the hands of an independent and apolitical body. Probationary periods for judges are disapproved as they can undermine the independence of the judge in question. Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one were to choose between the two, judicial independence is the crucial value. Any action to remove incompetent or corrupt judges should live up to the high standards set by the principle of the irremovability of the judges whose independence must be protected. It is necessary to de-politicise any such action. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision. The dismissal of a judge should only be possible on the basis of sound and clearly defined grounds.

F. Irremovability of judges

Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age where such exists.

G. Procedures in case of a threat to independence

Freedom from undue external influence constitutes a well-recognised general principle. The law should provide for sanctions against persons seeking to influence judges in any manner. The difficulty lies in deciding what constitutes undue influence and in striking an appropriate balance between, for example, the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interest of open discussion of matters of public interest in public life and in a free press.

A prohibition of a general nature on the use of the media with the aim of preventing it from influencing the court is questionable, as it is too broad and may lead to a breach of the right to

freedom of expression. There should be no attempt to prevent the media from criticising the organisation or the functioning of the justice system.

It is also important to find a balance between freedom of expression and the need to ensure that courts make their decisions free from external influence. As part of the right of defence, individuals and their defenders may communicate with the media, voice their opinions about proceedings and proclaim their innocence or disputed rights, not only in court, but also before the public. It is a normal and rightful exercise which should not be prohibited or punished. The law should provide clear guidance with respect to expression which may be considered unlawful. The discretion of authorities is wider in restricting freedom of expression in the course of court proceedings or within the court premises. It is also common for rules of court to establish dress code standards or behavioural conduct within the court premises. Expression may also be limited within the close vicinity of the court, if it clearly disturbs the proper functioning of the court.

H. Internal independence

The principle of judicial independence means that each individual judge in the exercise of their adjudicating function is independent. In their decision making, judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the Judiciary.

Hierarchical judicial organisations should not undermine individual independence. In exercising their functions, Councils for the Judiciary should not interfere with the independence of individual judges. The system of evaluation, where it exists, should not be perceived as a mechanism of subordination of lower court judges to superior court judges. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.

Internal independence requires that a judge takes decisions only on the basis of the constitution and the law and not on the basis of instructions given by higher ranking judges. The issue of internal independence within the Judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions, it is stated that judges are subject only to the law. This principle protects judges against undue external influence. It is, however, also applicable within the Judiciary.

A hierarchical organisation of the Judiciary, in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity, would be a clear violation of this principle. The independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision making activity. Granting a supreme court the power to supervise the activities of the general courts would seem contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside or to modify the judgments of lower courts, it should not supervise them.

I. Immunity

Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the state, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Judges should only have functional immunity i.e. immunity for acts done in the course of their judicial function, or such immunity as may be necessary to protect the independence of the Judiciary against the threat from wrongful arrest. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen. Judges cannot claim immunity from ordinary criminal process. Passive corruption, traffic of influence, bribery and similar offences cannot be considered as acts committed in the lawful exercise of judicial functions. The lifting of judicial immunity should never be a competence of Parliament. The Council for the Judiciary or other judicial authority is the appropriate body to take such a decision.

11.2 Subjective independence

Judges should act and be seen to act without any improper external influence on judicial proceedings. Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning.

Permanent mechanisms to obtain such feedback, set up by Councils for the Judiciary or other independent authorities, would contribute to this. Judges should avoid activities liable to compromise the dignity of their office or increase the risk of a conflict of interest. Therefore, they should refrain from any activity that would restrict their independence or jeopardise their impartiality.

Judges may, however, engage in activities outside their official functions but only those that preserve the independence of their office. They should, for example, be free to join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence. It is desirable that there be established within the Judiciary one or more bodies or persons who are available to advise judges when they have some uncertainty as to whether a given activity in the private sphere is compatible with their status as judge.

11.3 Objective accountability

A. Judicial accountability

The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding them responsible and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure.

The principle of the independence of the Judiciary requires that judicial proceedings are conducted fairly and that the rights of the parties are respected. In this context, the Council for the Judiciary has the task of establishing the necessary tools to evaluate the justice system, to report on the state of services and to ask the relevant authorities to take the necessary steps to improve the administration of justice.

A balance needs to be struck between judicial independence and self-administration, on the one side, and necessary accountability on the other so as to avoid negative effects of corporatism within the Judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. Establishing a Council for the Judiciary with a balanced composition of membership is one of the ways to achieve this. When the Judiciary or the Council for the Judiciary has budgetary powers, it should be accountable for the use of the funds in question to the parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by an audit office in charge of supervising the use of public money, when such exists.

B. The allocation of cases

The allocation of cases within a court should follow objective, pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.

C. Withdrawal and recusal

Judges should withdraw from a case or decline to act where there are valid reasons defined by law and not otherwise.

D. Periodic reporting

The Council for the Judiciary or other governing body should periodically publish a report of its activities, the aim of which being, on the one hand, to describe what the Council for the Judiciary has done and the difficulties encountered and, on the other, to suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public.

The publication of this report may be accompanied by press conferences with journalists, meetings with judges and spokespersons of judicial institutions to improve on the dissemination of information and on the interactions within the judicial institutions.

E. Disclosure of interests

Judges will inevitably engage in various activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence. However, such extra professional activities may jeopardise their impartiality or sometimes even their independence.

A reasonable balance, therefore, needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the final analysis, the question must always be asked whether, in the particular context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures means that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner.

- a) In some states, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the Judiciary are forbidden from carrying out any professional or paid activities. Exceptions are made for educational, research, scientific, literary or artistic activities. Subject to the proper performance of judicial duties, a judge may:
- b) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
- c) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;
- d) Serve as a member of an official body or other Government Commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;
- e) Engage in other activities that do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties;
- f) A judge may form or join associations of judges or participate in other organisations representing the interests of judges.
- g) A judge shall not practice law whilst the holder of judicial office.

F. Code of judicial ethics

Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer

guidance to judges on how to conduct themselves. The ethical aspects of judges' conduct need to be considered for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are a corollary of these values and a precondition for confidence in the administration of justice.

A code of professional conduct or a code of ethics for judges, although not compulsory, serves an important purpose. Such a code will help judges in resolving questions of professional ethics which, in turn, will give them the necessary autonomy in their decision making power and will help them in guaranteeing their independence from other authorities. Such a code also informs the public about the standards of conduct it is entitled to expect from judges. Finally, such a code will also contribute in giving the public assurance that the administration of justice is independent and impartial.

G. Relations with the press

Public reporting of trials and judicial decisions is essential to create and maintain public confidence. Article 6.1 of the European Convention on Human Rights provides that judgment should be pronounced publicly. Moreover, the right of the public to information is a fundamental principle as per Article 10 of the Convention.

The ENCJ itself compiled the following reports: 'Judiciary and the Media 2006' and 'Justice Society and the Media'. The conclusion of the last report was that all members are encouraged to develop a proactive media approach. Further press guidelines which are part of a national strategy plan should regulate the relations between the Judiciary and the media. This plan should be executed through a system of judicial spokesperson in the form of press judges and communication advisors. Moreover audio and video recordings of court hearings, under the control of the judge, could be implemented with safeguards for non-professionals involved in the proceedings. Finally the Judiciary should have a website which will contain a database of judgements which is freely accessible for the public.

H. Understandable proceedings

The Judiciary should build public trust and enhance its ability to deliver justice on a daily, case-by-case basis, as its performance contributes to building public confidence in the integrity of the justice system as a whole. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

Judges should give reasons for their judgments in language which is clear and comprehensible. The transparency of procedures and proper reasoning of decisions are a means of guaranteeing accountability and increasing trust in the Judiciary.

I. Transparency

Councils for the Judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions. Judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence.

The establishment of courts' spokespersons or press and communications services under the responsibility of the courts or under Councils for the Judiciary or other important authorities is encouraged. Judges should exercise restraint in their relations with the media.

Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the Judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interests, self-protection and cronyism within the Judiciary. Transparency in the appointment and promotion of judges will be ensured by publishing the appointments criteria and disseminating the post descriptions.

Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the relevant rules and criteria in relation to an appointments or promotions. There are considerable advantages to having audio recordings of court hearings, notably for the purpose of settling any disputes about what transpired in court and also from the point of view of the transparency of proceedings. It can also help to ensure public scrutiny of the functioning of the justice system.

Video recording of court hearings may serve the same purpose, but the presence of cameras may create difficulties in criminal cases. Victims of crime and witnesses, not to mention the parties, may feel intimidated by the presence of cameras. The European Court of Human Rights has stated that contracting states must enjoy a wide margin of appreciation in regulating freedom of the press to transmit court hearings live. It has noted that the case law on the right to private and family life and on a person's right to his or her image is more developed and has to be kept in mind. However, the Strasbourg court itself broadcasts its public sittings live on the internet.

Oral hearings are an aspect of transparency which is a core democratic value. Oral hearings can improve the quality of judicial decision making because the judges obtain a more immediate impression of the facts, of the parties and of their divergent legal opinions. At the same time, oral hearings serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.

11.4 Subjective accountability

It is important to ensure that justice mechanisms are accessible and affordable, perceived as fair and considered effective and performing to an acceptable standard by the users of the justice system. These aspects are essential to building trust in the Judiciary; therefore all actors within the justice sector should make coordinated efforts or agree to have independent mechanisms to measure the extent to which the users of the justice system may be confident in it.

Appendix C: Overview of the Indicators

INDICATORS OF THE OBJECTIVE INDEPENDENCE OF THE JUDICIARY AS A WHOLE

1. Legal basis of independence, with the following sub-indicators:

- Formal guarantees of the independence of the Judiciary;
- Formal assurances that judges are bound only by the law;
- Formal methods for the determination of judges' salaries;
- Formal mechanisms for the adjustment of judges' salaries;
- Formal guarantees for involvement of judges in the development of legal and judicial reform.

2. Organizational autonomy of the Judiciary, with the following sub-indicators where there is a Council for the Judiciary or equivalent independent body:

- Formal position of the Council for the Judiciary;
- Formal relationship between the Council and the Judiciary;
- Compliance with ENCJ guidelines;
- Responsibilities of the Council.

Sub-indicator when there is no Council for the Judiciary or an equivalent body:

- Influence of judges on decisions.

3. Funding of the Judiciary, with the following sub-indicators:

- Budgetary arrangements;
- Funding system;
- Occurrence of conflicts about budgets;
- Resolution of conflicts about budgets;
- Sufficiency of actual budgets.

4. Management of the court system.

- Management responsibility of the courts.

INDICATORS OF THE OBJECTIVE INDEPENDENCE OF JUDGE

1. Human resource decisions about judges, with the following sub-indicators:

- Selection, appointment and dismissal of judges and court presidents;
- Selection, appointment and dismissal of Supreme Courts judges and the President of the Supreme Court;
- Compliance with ENCJ guidelines about the appointment of judges;
- Evaluation, promotion, disciplinary measures and training of judges;

- Compliance with ENCJ guidelines about the promotion of judges.

2. Irremovability of judges, with the following sub-indicators:

- Formal guarantee of irremovability of judges;
- Arrangements for the transfer of judges without their consent.

3. Procedures in case of threat to independence, with the following sub-indicators:

- Existence of formal procedures in case of threat to independence;
- Adequacy of formal procedures in case of threat to independence.

4. Internal independence, with the following sub-indicators:

- Influence by higher ranked judges;
- Use and status of guidelines;
- Influence by the management of the courts.

INDICATORS OF THE SUBJECTIVE INDEPENDENCE OF THE JUDICIARY AND THE INDIVIDUAL JUDGE

1. Independence as perceived by (groups of) citizens in general;

- Eurobarometer 2013, average across areas of law (Q5.2. Q6.2 and Q7.2);
- Global competitiveness report 2013-2014 (item 1.06);
- World Justice Rule of Law Index 2014 (item 1.2).

2. Trust in Judiciary, relative to trust in other state powers by citizens in general;

3. Judicial corruption as perceived by citizens in general;

4. Independence as perceived by courts users at all levels;

5. Independence as perceived by judges themselves.

INDICATORS OF THE OBJECTIVE ACCOUNTABILITY OF THE JUDICIARY

1. Allocation of cases, with the following sub-indicators:

- Existence of a transparent mechanism for the allocation of cases;
- Content of the mechanism for the allocation of cases.

2. Complaints procedure, with the following sub-indicators:

- Availability of a complaints procedure;
- External participation in the complaints procedure;
- Scope of the complaints procedure;
- Appeal against a decision on a complaint;

- Number of complaints.

3. Periodic reporting by the Judiciary, with the following sub-indicators:

- Availability of annual reports;
- Scope of the annual reports;
- Benchmarking of the courts.

4. Relations with the press, with the following sub-indicators:

- Explanation of judicial decisions to the media;
- Availability of press guidelines;
- Broadcasting of court cases.

5. External review, with the following sub-indicators:

- Use of external review;
- Type of external review;
- Responsibility for external review.

INDICATORS OF THE OBJECTIVE ACCOUNTABILITY OF INDIVIDUAL JUDGE

1. Code of judicial ethics, with the following sub-indicators:

- Availability of a code of judicial ethics.

2. Withdrawal and recusal, with the following sub-indicators:

- Voluntary withdrawal;
- Breach of an obligation to withdraw;
- Request for recusal;
- Deciding authority;
- Appeal against a decision on a request for recusal.

3. Are judges allowed to undertake external activities, and do they disclose such activities and interests, with the following sub-indicators:

- Policy on paid offices and functions;
- Policy on unpaid functions;
- If paid or unpaid activities are allowed, the type of activities allowed;
- Availability of a public register of external activities and functions of judges;
- Policy relating to disclosure of financial interests.

4. Understandable procedures, with the following sub-indicators:

- Duty of judges to make proceedings intelligible to the parties;
- Training of judges.

Appendix D: Pilot Questionnaire

Questionnaire indicators independence and accountability of the Judiciary¹

INDEPENDENCE INDICATORS

Objective Indicators

Objective independence of the Judiciary as a whole

1. Legal basis of the independence of the Judiciary as a whole

1a. Is the independence of the Judiciary or the judge formally guaranteed?

- Yes
- No

1b. If the answer to 1a. is yes, is this done in/by:

- The Constitution or equivalent documents¹⁶
- Law¹⁷
- Constitutional court

1c. Are judges bound only by law?

- Yes
- No

1d. If the answer to 1c. is yes, is this guaranteed in/by:

- The Constitution or equivalent texts
- Law
- Jurisprudence

1e. Is the salary of judges determined by law?

- Yes
- No

¹⁶ Equivalence means here specifically that the position of the Judiciary cannot be changed by simple majority.

¹⁷ That can be changed by simple majority.

1f. If the answer to 1e is yes, is this guaranteed in:

- The Constitution or equivalent texts
- Law

1g. Is there a formal mechanism to adjust the salaries of judges to keep pace with the average development of salaries in the country and/or with inflation?

- Yes
- No

1h. Is the involvement of the Judiciary in law and judicial reform formally guaranteed?

- Yes
- No

1i. If the answer to 1h. is yes, is this done in:

- The Constitution or equivalent documents
- Law

1j. If the answer to 1h. is yes, can the Judiciary:

- Propose changes of laws
- Advise on legislative proposals

1k. Is the Judiciary involved in the formation and the implementation of judicial reform?

- Yes
- No

1l. Has the Judiciary initiated judicial reform?

- Yes
- No

2. Organizational autonomy of the Judiciary

2a. Does your country have a Council for the Judiciary?

- Yes
- No

2b. Is the position of the Council for the Judiciary formally guaranteed?

- In the Constitution or equivalent documents
- Law
- No

2c. Is this Council part of the Judiciary?

Yes

No

2d. Is the Council organized in accordance with ENCJ Guidelines concerning:

- At least 50% of the members of the Council are judges Yes No

- At least 50% of the members of the Council who are judges are chosen by their peers Yes No

- Minister of Justice is not a member of the Council Yes No

- The Council controls its own finances independently of both the legislative and executive branches Yes No

-The Council controls its own activities independently of both the legislative and executive branches Yes No

2e. Is the Council responsible¹⁸ for the following:

-The appointment and promotion of magistrates Yes No

-The training of magistrates Yes No

-Judicial discipline and judicial ethics Yes No

-Complaints against the Judiciary Yes No

-The performance management of the Judiciary Yes No

-The administration of courts Yes No

-The financing of the Judiciary Yes No

-Proposing legislation concerning the courts and the Judiciary Yes No

2f. If the answer to question 2a. is no, do judges have decisive influence on decisions in the following areas?

-The appointment and promotion of magistrates Yes No

-The training of magistrates Yes No

-Judicial discipline and judicial ethics Yes No

-Complaints against the Judiciary Yes No

-The performance management of the Judiciary Yes No

-The administration of courts Yes No

-The financing of the Judiciary Yes No

-Proposing legislation concerning the courts and the Judiciary Yes No

¹⁸ Responsible implies that the Council executes these tasks. But it can also mean that the Council has delegated these tasks to a separate body.

3. Funding of the Judiciary

3a. Is the funding of the Judiciary organised as to allow the courts:

- To handle their caseload
- To engage experts/translators/etc. in cases when necessary if fees paid by court
- To keep the knowledge and skills of judges and staff up to date
- To facilitate judges and other personnel in matters of IT-systems, buildings etc.

3b. Who makes the decisions?

[Please insert an "x" into the box that corresponds to the situation in your country.]

- a) Involvement in the preparation of the "budget allocated to courts"
- b) Formal proposal on the budget allocated to courts
- c) Adoption of the budget allocated to courts
- d) Management of the budget allocated to courts
- e) Evaluation/audit of the budget allocated to courts

	a)	b)	c)	d)	e)
The Judiciary					
The executive¹⁹					
The legislature					

3c. Is the funding of the Judiciary based upon transparent and objective criteria?

- Yes
- No

3d. If the answer to 3c is yes, is the funding based on:

- Actual costs (e.g. number of judges and court staff)
- Workload of courts
- Fixed percentage of government expenditure or GDP
- Other (specify): ...

3e. Where have these criteria been defined?

- In well-established practice
- In law
- Other (specify)

¹⁹ Such as the Minister of Justice

3f. Has it occurred that the government has refused a budget proposal of the Judiciary or has the government promulgated a budget for the Judiciary that was opposed by the Judiciary?

- Yes, please state the number for the past 10 years:
- No

3h. In case the government does not allocate sufficient funds, may the Judiciary address the parliament?

- Yes
- No

4. Court management

4a. Which authorities can take the following decisions?

[Please insert an “x” into the box that corresponds to the situation in your country.]

- a) General management of a court
- b) Appointment of court staff (other than judges)
- c) Other human resource management decisions on court staff
- d) Decisions regarding the implementation and use of Information and Communication Technology in courts
- e) Decisions regarding court buildings
- f) Decisions regarding court security
- g) Decisions regarding outreach activities²⁰

	a)	b)	c)	d)	e)	f)	g)
The Judiciary							
The executive							
The legislature							

²⁰ This includes all communication and promotional activities aimed to inform society about the Judiciary.

Objective independence of the judge

5. Human resource decisions about judges

5a. Selection, appointment and dismissal of judges and court presidents

Which authorities or bodies have the power to deliver the following decisions in the judiciary?

[Please insert an “x” into the box that corresponds to the situation in your country.]

- a) Proposal of candidates²¹ for the appointment as judges (not sc judges)
- b) Decision on the appointment of a judge
- c) Proposal for the dismissal of a judge
- d) Decision on the dismissal of a judge
- e) Proposal of candidates for the appointment as court presidents
- f) Decision on the appointment of a court president
- g) Proposal for the dismissal of a court president
- h) Decision on the dismissal of a court president

	a)	b)	c)	d)	e)	f)	g)	h)
The Judiciary								
The executive								
The legislature								

5b. Selection, appointment and dismissal of Supreme Court judges and the President of the Supreme Court

[Please insert an “x” into the box that corresponds to the situation in your country.]

- a) Proposal of candidates⁶ for the appointment as Supreme Court judges
- b) Decision on the appointment of a Supreme Court judge
- c) Proposal for the dismissal of a Supreme Court judge
- d) Decision on the dismissal of a Supreme Court judge
- e) Proposal of the candidate(s) for the appointment of the President of the Supreme Court
- f) Decision on the appointment of the President of the Supreme Court
- g) Proposal for the dismissal of the President of the Supreme Court
- h) Decision on the dismissal of the President of the Supreme Court

	a)	b)	c)	d)	e)	f)	g)	h)
The Judiciary								
The executive								
The legislature								

²¹ The final proposal of candidate(s) which is transmitted to the body that appoints/elects them.

5c. Is the appointment of judges in compliance with the ENCJ guidelines?

- Is the appointment process open to public scrutiny and fully and properly documented
- Is the appointment process undertaken according to published criteria
- Is the appointment of judges is solely based on merit
- Does the appointment process promote the diversity of people within the Judiciary, whilst avoiding discrimination
- Does the appointment process provide for an independent complaint procedure

5d. Evaluation, promotion, disciplinary measures²² and training of judges

[Please insert an “x” into the box that corresponds to the situation in your country.]

- a) Decision on the evaluation of a judge
- b) Evaluation of the performance management of courts
- c) Decision on the promotion of a judge
- d) Adoption of ethical standards
- e) Application of ethical standards
- f) Proposal for the appointment of a member of the disciplinary body for judges
- g) Decision on the appointment of a member of the disciplinary body for judges
- h) Proposal for a disciplinary decision regarding a judge if any
- i) Disciplinary decision regarding a judge if any
- j) Decision on the follow-up to a complaint against the judiciary/a judge
- k) Decision on the program/content of training for judges

	a)	b)	c)	d)	e)	f)	g)	h)	i)	j)	k)
The Judiciary											
The executive											
The legislature											

5e. Is the promotion of judges in compliance with the ENCJ standards?

- Is the promotion process open to public scrutiny and fully and properly documented
- Is the promotion process undertaken according to published criteria
- Is the promotion of judges is solely based on merit
- Does the promotion process promote the diversity of people within the Judiciary, whilst avoiding discrimination
- Does the promotion process provide for an independent complaint procedure

²² Written, step-by-step process in which the Judiciary commits itself to follow in every case where a judge has to be warned, reprimanded, or dismissed.

6. Irremovability of judges

6a. Can a judge be transferred (temporarily or permanently) to another judicial office (to other judicial duties, court or location) without his/her consent?²³

- Yes
- No

6b. If no, is the irremovability guaranteed in:

- The Constitution or equivalent text
- Law
- Jurisprudence

6c. If yes, which authority or body decides on a (temporary or permanent) transfer of a judge without his/her consent?

- The Judiciary
- The executive
- The legislature

6d. For what reasons can a judge be transferred without his/her consent? [several answers possible]

- For organizational reasons (specify; e.g. closure of a court): ...
- For other reasons (specify): ...

6e. At what level are these reasons prescribed?

- In law
- Other (specify): ...

6f. In case a judge is transferred without his/her consent is he/she guaranteed an equivalent post (in terms of a position, salary...)?

- Yes
- No

6g. Can a judge be taken off a case without his/her consent?

- Yes
- No

²³ Not including measure following disciplinary proceedings.

6h. Can a judge appeal if he/she is transferred without his/her consent?

- Yes
- No

6i. If yes, which authority or body decides on such an appeal?

- The Judiciary
- The executive
- The legislature
- Other (specify): ...

7. Procedures in case of threat to independence

7a. When a judge or an authority considers that independence of an individual judge or of the judiciary is threatened, are there any specific procedures, other remedies or sanctions²⁴ for protecting it?

- Yes
- No

7b. If yes, who can launch such a request or a procedure?

- A judge who believes his/her independence is threatened
- President of a court
- Judicial inspection body
- Council for the Judiciary
- Other independent body (specify): ...
- Public Prosecution Service
- Minister of justice
- Other (specify): ...

7c. If yes, which authority or body has the power to react to such complaints from judges or authorities for protecting judicial independence? [several answers possible]

- Council for the Judiciary
- Other independent body (specify): ...
- Judicial inspection body
- Court
- President of a court
- Higher court / President of a higher court
- Supreme Court / President of the Supreme Court

²⁴ "Sanctions against persons seeking to influence judges in an improper manner", Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 14.

- Public Prosecution Service
- Other (specify): ...

7d. If yes, what are the measures that these authorities can take on the basis of a request in order to protect judicial independence?

- Notification to other authorities
- Sanctions
- Press releases
- Other (specify): ...

7e. Are there any procedures, other remedies or sanctions in place in order to protect the independence of the Judiciary against influence of the media, including social media?

- Yes
- No

8. Internal independence

8a. In your system, can higher ranked judges change a verdict of a lower ranked judge (outside of an appeal system, the precedent doctrine or a preliminary ruling system)?

- Yes
- No

8b. If yes, what kind of decisions can higher ranked judges deliver on their own initiative to ensure the uniformity or consistency of judicial decisions (outside of an appeal system or the precedent doctrine)?

- A guideline (advisory opinion of general application for all courts/judges)
- An advisory opinion of concrete application to a specific judicial decision
- An obligatory decision of concrete application to a specific judicial decision, regarding minimum quality standards of a verdict (fe motivation)
- A dissenting opinion
- Other (specify): ...

8c. Have guidelines gotten broad coverage?

- Yes
- No

8d. Have the guidelines been developed by the judges of the courts?

- Yes
- No

8e. Are the guidelines binding?

Yes

No

8f. Can the management of the court exert influence in individual cases on the way judges handle their cases with respect to the uniformity/consistency?

Yes

No

8g. Can the management of the court exert influence in individual cases on the way judges handle their cases with respect to the timeliness/efficiency of judicial decisions?

Yes

No

Subjective independence

9. Independence as perceived by society

9a. Perceived independence according to Eurobarometer, average across areas of law (Q5.2, Q6.2 and Q7.2). Percentage of respondents that rate very good or fairly good.....

9b. Perceived independence according to the World Economic Forum Competitiveness Report 2013-2014, item 1.06. Score on 7-point scale.....

9c. Perceived independence according to the World Justice Rule of Law Index, item 1.2. Percentage of respondents.....

10. Trust in Judiciary

10a. Are opinion surveys available in which the Judiciary is compared with the executive (national government) or legislature (national parliament)?

Yes

No

10b. If yes, is the Judiciary:

- Ranked higher than the executive or legislature²⁵;
- Ranked approximately equal to the executive or legislature?
- Ranked below the executive or legislature?

11. Perceived Judicial corruption

11a. Perceived Judicial corruption according to EU Anti-Corruption report 2013 is. Percentage of respondents that believe corruption is widespread.

12. Independence as perceived by the clients of the courts

12a. Are client satisfaction surveys available which contain a question with respect to the perceived independence of the Judiciary?

- Yes
- No

12b. If yes, please state the percentage of respondents that rate the perceived independence very good or fairly good.....

13. Independence as perceived by judges

13a. Are surveys available which contain questions with respect to external and internal pressures judges experience during their daily work?

- Yes
- No

13b. If yes, please state the percentage of respondents that rate the perceived independence very good or fairly good.....

²⁵ The other two branches of government are Parliament and Executive.

ACCOUNTABILITY INDICATORS

Objective Indicators

Objective accountability of the Judiciary as a whole

1. Allocation of cases

1a. Is there a well-defined mechanism for the allocation of cases?

- Yes
- No

1b. If yes, is the content of the mechanism based on:

- The method of allocating cases?
- The official charged with allocating cases?
- The supervision mechanism if any?

1c. If yes, where have these criteria been defined?

- In well-established practice of the court
- In an act adopted by the court
- In implementing regulations
- In law
- Other (specify):

1d. Who assigns the cases to judges at the courts?

- President of the court assigns cases
- A member of the court staff assigns cases (e.g. listing officer)
- A special chamber of the court assigns cases
- The cases are assigned randomly (e.g. through a computerized system)
- Other (specify): ...

1e. What are the criteria for the allocation of cases?

- Random-based
- Specialization
- Experience
- Workload
- Other (specify):

1f. Is the allocation of cases subject to supervision?

- Yes
- No

2. Complaints procedure

2a. Does the Judiciary or do the individual courts have a complaint procedure ?

- Yes
- No

2b. If the answer on 2a. is yes, does this procedure provide for external participation in the complaint procedure:

- Yes
- No

2c. Is it admissible to complain about:

- Behaviour of the judge
- Timeliness
- Administrative mistakes
- Other (specify):...

2d. Is an appeal against a decision on a complaint possible?

- Yes
- No

3. Periodic reporting on the Judiciary

3a. Does the Judiciary as a whole provide annual reports on how it has discharged its functions?

- Yes
- No

3b. If the answer on 3a. is yes, does this report include data on:

- The output of cases?
- Duration of cases?
- Disciplinary measures
- (Successful) complaints
- (Successful) requests for recusal

3c. Are the courts periodically and publicly benchmarked with respect to their performance, e.g. timeliness?

- Yes
- No

4. Relations with the press

4a. Do officials (communication officers or press judges) of the courts explain judicial decisions to the media?

- Yes
- No

4b. Has the Judiciary established press guidelines?

- Yes
- No

4c. Does the Judiciary give authorization to broadcast court cases that draw particular public interest on television?

- Yes
- No

5. External review

5a. Is the performance of the courts regularly reviewed or evaluated by external bodies?

- Yes
- No

5b. If the answer on 5a. is yes, in what kind of manner is the performance of courts regularly reviewed or evaluated?

- Visitation
- Audit committee
- Other (please specify)

5c. Who can commission an external review of the Judiciary?

- The Judiciary
- The executive
- The legislature
- Other (please specify)

Objective accountability of the judge

6. Code of judicial ethics

6a. Does the Judiciary have a code of judicial ethics?

- Yes
- No

6b. If the answer to 6a. is yes, is the code published?

- Yes
- No

7. Withdrawal and recusal

7a. Is a judge obliged to withdraw from adjudicating a case if the judge believes that impartiality is in question or compromised or that there is a reasonable perception of bias?

- Yes
- No

7b. If yes, what is the source of the obligation to withdraw from adjudicating a case?

- A well-established practice of judges
- Set in an act adopted by a court
- Set in an act adopted by the Council for the Judiciary
- Set in an act adopted by the Minister of justice
- Set in law
- Other (specify):

7c. If a judge disrespects the obligation to withdraw from adjudicating a case, could the judge be subject to a sanction?

- Yes (specify; e.g. type of disciplinary measure):
- Oral warning
- Written warning
- Suspension
- Disciplinary dismissal
- No

7d. Which authority or body takes the first decision on a request for recusal by a party who considers that a judge is partial / biased? [several answers possible]

- The Judiciary
- The executive
- Other (specify): ...

7e. Is an appeal against a decision on a request for recusal possible?

- Yes
- No

7f. If yes, which authority or body decides on such an appeal?

- The Judiciary

- The executive power
- Other (specify): ...

8. Admissibility of accessory functions and disclosure of interests

8a. Are judges allowed to have other paid functions?

- Yes
- No

8b. Are judges allowed to have other unpaid functions?

- Yes
- No

8c. If the answer to 8a./8b. is yes, please specify whether the following is allowed:

- Political functions
- Functions in (the governance of) companies
- Functions in (the governance of) public institutions such as schools and sports clubs
- Arbitration
- Lawyer
- Teaching at universities or schools
- Other (specify): ...

8d. Is there a public register of the jobs and functions judges actually have?

- Yes
- No

8e. Is there a register which discloses financial interests judges may have?

- Yes, please specify the minimum amount which needs to be disclosed:...
- No

8f. If the answer to 8e. is yes, is this register public?

- Yes
- No

9. Understandable proceedings

9a. Are judges obliged to make parties understand the proceedings?

- Yes
- No

9b. Do judges get training in how to:

- Conduct hearings in an understandable manner to parties?
- Explain the proceedings in an understandable manner to parties?
- Explain the decisions in an understandable manner to parties?

Appendix E: Scoring Rules of the Pilot

Explanation scoring

To make an objective ranking possible a scoring scheme has been developed. All sub-indicators have been graded according to Chapters 4 and 5. The scores on the sub-indicators that form an indicator were aggregated in the way given below. Then for each indicator the following formula was used to map the scores on the indicators onto the agreed upon colour coding:

Score of indicator / maximum score of indicator x 10 gives a standardized score between 0 and 10.

The standardized scores were mapped in the following manner:

0, 1, 2:	red
3, 4:	orange
5:	yellow
6, 7:	light green
8, 9, 10:	green

This scoring method was used for all indicators, unless explicitly stated otherwise.

A. Scoring Independence Indicators

Indicator 1: legal basis of independence

1a and 1b:	No	0
	Constitution	3
	Law	2
	Consti. Court	1
1c and 1d:	No	0
	Constitution	3
	Law	2
	Jurisprudence	1
1e and 1f:	No	0
	Constitution	2
	Law	1
1g:	No	0
	Yes	1

1h and 1i:	No	0
	Constitution	2
	Law	1
1j:	No	0
	Propose	2
	Advise	1
1k:	No	0
	Yes	1
1l:	No	0
	Yes	1

Minimum score: 0

Maximum score: 15

Indicator 2: Council for the Judiciary

2a and 2b:	No	0	
	Constitution	3	
	Law	2	
	Yes	1	
2c:	No	0	
	Yes	1	
2d:	No	0	5x
	Yes	1	
2e:	No	0	8x
	Yes	1	
Or:			
2f:	No	0	8x
	Yes	1	

Minimum score: 0

Maximum score: 17

Maximum score without a Council: 8

Indicator 3: Funding for the Judiciary

3a:	No	0	4x
	Yes	1	
3b:	Executive	0	5x
	Judiciary	2	
	Legislature	1	
3c, 3d and 3e:	No	0	
	Workload	3	
	Fixed percentage	2	
	Actual costs	1	
	Practice	1	
	Law	2	
	Other	1	
3f:	No	5	
	Yes	1x: 3	2x: 2 3-4x:1 >5: 0
3h:	No	0	
	Yes	1	
Minimum score:		0	
Maximum score:		25	

Indicator 4: Court Management

4a:	Executive	0	7x
	Judiciary	2	
	Legislature	1	
Minimum score:		0	
Maximum score:		14	

Indicator 5: Human resource decisions about judges

5a:	Executive	0	8x
	Judiciary	2	
	Legislature	1	
5b:	Executive	0	8x

	Judiciary	2	
	Legislature	1	
5c:	No	0	5x
	Yes	1	
5d:	Executive	0	11x
	Judiciary	2	
	Legislature	1	
5e:	No	0	5x
	Yes	1	
Minimum score:		0	
Maximum score:		64	

Indicator 6: Irremovability of judges

6a	No	15
	Yes	0
6b:	Constitution	3
	Law	2
	Jurisprudence	1
6c:	Executive	0
	Judiciary	2
	Legislature	1
6d:	Organizational	2
	Other	1
6e:	Law	1
	Other	0
6f:	No	0
	Yes	1
6g:	No	1
	Yes	0
6h:	No	0

	Yes	1	
6i	Executive	0	
	Judiciary	2	
	Legislature	1	
Minimum score:		0	
Maximum score (with no):		19	
Maximum score (with yes):		11	

Indicator 7: Procedures in case of threat to independence

7a:	No	0	
	Yes	1	
7b:	No	0	8x
	Yes	1	
7c:	No	0	9x
	Yes	1	
7d:	Notification	1	
	Sanctions	3	
	Press releases	2	
7e:	No	0	
	Yes	5	
Minimum score:		0	
Maximum score:		29	

Indicator 8: Internal Independence

8a:	No	5	
	Yes	0	
8b:	Guideline	3	
	Advisory opinion	1	
	Obligatory decision	0	
	Dissenting opinion	2	
	Other	1	

8c:	No	0
	Yes	1
8d:	No	0
	Yes	1
8e:	No	1
	Yes	0
8f:	No	5
	Yes	1
8g:	No	5
	Yes	1
Minimum score:		0
Maximum score (with no)		18
Maximum score (with yes)		12

Indicator 9 a, b and c: Independence as perceived by society

9a, 9b and 9c: Total score is average of Percentage of 9a, Percentage of 9b (score on 7-points scale recalculated as percentage) and Percentage of 9c, divided by 10.

Minimum score:	0
Maximum score (with no)	10

Indicator 10 a and b: Trust in Judiciary relative to trust in the other state powers

10a and 10b:

No	0
Higher	3
Equal	2
Below	1

Minimum score:	0
Maximum score:	3

Indicator 11: Perceived judicial corruption

11a:	< 11	9
	11-20	7
	21-30	5
	31-40	3
	> 40	1

Indicator 12: Independence as perceived by clients of the courts

12a and 12b:	No	0
	81-100	9
	61-80	7
	51-60	5
	< 50	3

Indicator 13: Independence as perceived by judges

13a and 13b:	No	0
	81-100	9
	61-80	7
	51-60	5
	< 50	3

B. Scoring Accountability Indicators

Indicator 1: Allocation of cases

1a, 1b and 1c:	No	0
	Method	3
	Official	2
	Supervision	1
	Practice	1
	Act	2
	Regulations	1
	Law	3
	Other	1
1d:	President	0
	Court staff	2
	Special chamber	3
	Randomly	4
	Other	1
1e:	No	0

	Yes	1	5x
1f:	No	0	
	Yes	1	
Minimum score:		0	
Maximum score:		16	

Indicator 2: Complaints procedure

2a - 2d:	No	0	3x
	Yes	1	
	Behaviour	1	
	Timeliness	1	
	Administrative mistakes	1	
	Other	1	
Minimum score:		0	
Maximum score:		7	

Indicator 3: Periodic reporting on the Judiciary

3a -3c:	No	0	2x
	Yes	1	
	Output	1	
	Duration	1	
	Disciplinary measures	1	
	Complaints	1	
	Recusal requests	1	
Minimum score:		0	
Maximum score:		7	

Indicator 4: Relations with the press

4a, 4b, and 4c:	No	0	3x
	Yes	1	
Minimum score:		0	
Maximum score:		3	

Indicator 5: External review

5a and 5b:	No	0
	Yes	1
	Visitation	1
	Audit	1
	Other	1

5c:	Executive	0
	Judiciary	2
	Legislature	1

Minimum score:	0
Maximum score:	6

Indicator 6: Code of judicial ethics

6a and 6b:	No	0	2x
	Yes	1	

Minimum score:	0
Maximum score:	2

Indicator 7: Withdrawal and recusal

7a:	No	0
	Yes	1

7b:	Practice	1
	Act by court	2
	Act by Council	3
	Act by MoJ	1
	Law	4
	Other	1

7c:	No	0
	Oral warning	1
	Written warning	1
	Suspension	1
	Disciplinary dismissal	1

7d:	Executive	0
	Judiciary	2
	Other	1
7e and 7f:	No	0
	Judiciary	3
	Executive	1
	Other	2
Minimum score:		0
Maximum score:		14

Indicator 8: Admissibility of accessory functions and disclosure of interests

8a:	No	10
	Yes	0
8b:	No	10
	Yes	0
8c:	Politics	0
	Companies	0
	Public institutions	3
	Arbitrations	0
	Lawyer	0
	Teaching	3
	Other	0
8d:	No	0
	Yes	5
8e:	No	0
	Yes	5
8f:	No	0
	Yes	5
Minimum score:		0
Maximum score no:		27
Maximum score yes		

Indicator 9: Understandable proceedings

9a and 9b:	No	0
	Yes	1
	Conduct hearings	1
	Explain proceedings	1
	Explain decisions	1

Minimum score: 0

Maximum score: 4

