



Spravedlnost  
Giustizia  
Justice  
Óiguskáilmused  
Justiz Oikeusasiat Tieslietas  
Justicia  
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# Screening SERBIA

Analytical examination of the acquis

Chapter 23 - Judiciary

Brussels – 25 SEPTEMBER 2013



European Commission  
Justice

## Sources – EU Charter of Fundamental Rights

- **Limited acquis on the judiciary in general – Different legal traditions, Constitutions, models, checks and balances**
- **Separation of powers, Rule of Law**
- **Charter of Fundamental Rights of the European Union: Title VI – Justice – Right to an effective remedy and to a fair trial, presumption of innocence and Right to defence, Principle of Legality and proportionality of criminal offences and penalties, Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

## Sources – International soft law

- **UN Basic Principles on the Independence of the Judiciary (1985)**
- **Bangalore Principles of Judicial Conduct (“Bangalore Principles”) – adopted by the UN Human Rights Commission on 23 April 2003**
- **European Convention on Human Rights**
- **Council of Europe Recommendation CM/Rec(2010) 12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities**
- **Council of Europe Recommendation Rec(2000) 19 on the Role of Public Prosecution in the Criminal System**
- **European Charter on the statute of judges (1998)**
- **Magna Carta of Judges (Fundamental Principles) (2010)**
- **European Guidelines on Ethics and conduct for public prosecutors (the Budapest guidelines adopted by the Conference of Prosecutors General of Europe on 31 May 2005)**

## Council of Europe – Standard setting

- **Consultative Council of European Judges (CCJE) – advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges – issued 14 Opinions since 2001 on: 1) Standards concerning the independence of the judiciary and the irremovability of judges; 2) Funding and management of courts; 3) Ethics and liability of judges; 4) Training for judges; 5) Law and practice of judicial appointments to the European court of human rights; 6) Fair trial within a reasonable time; 7) Justice and society; 8) Role of judges in the protection of the rule of law and human rights in the context of terrorism; 9) Role of national judges in ensuring an effective application on international and European law; 10) Council for the Judiciary in the service of society; 11) Quality of judicial decisions; 12) Relations between Judges and Prosecutors in a democratic society; 13) Role of Judges in the enforcement of judicial decisions; 14) justice and information technologies.**

## Council of Europe – Standard setting (2)

- **The European Commission for the Efficiency of Justice (CEPEJ) – composed by experts from the ministries of Justice and the judiciary with the aim to improving the efficiency and functioning of justice in the CoE member States and the development of the implementation of the instruments adopted by the Council of Europe – issues every 2 years an Evaluation report of European judicial systems – last edition 2010 (2008 data): Efficiency and quality of justice**
- **SERBIA PARTICIPATES ACTIVELY**
- **Very close cooperation between the European Commission and CEPEJ for the preparation of the EU JUSTICE SCOREBOARD**
- **The European Commission for Democracy through Law (Venice Commission) – advisory body on constitutional matters – contributes to the dissemination of the European constitutional heritage, based on the continent’s fundamental legal values while continuing to provide “constitutional first aid” to individual states – composed by independent experts (senior academics, supreme or constitutional court judges, members of national parliaments) – issues, *inter alia*, opinions on specific national laws and studies on general constitutional topics, e.g.: Study 494/2008 – Report on the independence of the judicial systems – The independence of judges/ the prosecution service; Opinion 403/2008 – Judicial appointments**

## The most recent standard :Council of Europe Recommendation (2010) 12 on judges: independence, efficiency and responsibilities - Context

- **Update of Recommendation (94) 12 on Independence, Efficiency and Role of Judges by the Group of specialists on the judiciary (CJ-S-JUD) which reported to the European Committee on Legal Co-operation (CDCJ).**
- **The new recommendation addresses the issues of external and internal independence of the judiciary, efficiency and means, statute of the judge, responsibilities, ethics. Particular attention is devoted to the link between independence and impartiality and to the role of High Councils/Councils for the Judiciary.**
- **Awareness of the need of updated common standards to address general principles in the field and to support justice reforms, where ongoing.**
- **Clear distinction between external and internal independence, emphasis on the role of High Councils/Councils for the Judiciary, clear distinction between administration of justice and courts' administration, enhanced attention on efficiency.**
- **Multilateral and integrated approach.**

## The most recent standard: Council of Europe Recommendation (2010) 12 on judges: independence, efficiency and responsibilities – Key features

- **Chapter I (General aspects) identifies the scope of the recommendation, applicable to all persons exercising judicial functions, including those dealing with constitutional matters and non professional judges.**
- **Judicial independence is defined as a guarantee to the fundamental right to have cases decided in a fair trial, on legal grounds and without any improper influence – independence of the judiciary as a whole is a fundamental aspect of the rule of law.**
- **The level at which judicial independence should be safeguarded is the constitutional or highest possible legal level with more specific rules at the legislative level.**
- **Chapter II (External independence) states the link between independence of judges and the principle of equality of citizens before the law. To this respect, independence of judges and of the judiciary as a whole is not a prerogative or privilege, but is granted in the interest of rule of law and of persons seeking and expecting impartial justice.**
- **External independence is treated under the perspective of constitutional separation of powers and addressing the relationship with media.**
- **Judicial decisions should be reasoned and made public. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings as provided for by the law.**
- **The issues of public confidence and right to information are addressed on the basis that judicial matters are of public interest. To this respect, the establishment of courts' spokespersons or press and communication services in the courts or under Councils for the Judiciary or other independent authorities is encouraged.**

## The most recent standard: Council of Europe Recommendation (2010) 12 on judges: independence, efficiency and responsibilities – Key features (2)

- **Chapter III (Internal Independence) defines such principle as the independence of each individual judge in the exercise of adjudicating functions, without any restriction, improper influence, pressures, threat or interferences, from any authority, including authorities internal to the judiciary, in the decision-making.**
- **The allocation of cases within a court should follow objective and pre-established criteria, as well as the withdrawal of a case.**
- **Freedom to form and join professional organisations whose objectives are to safeguard the independence of judges, protect their interests and promote the rule of law is ensured.**
- **Chapter IV (Councils for the Judiciary) states that, where existing, Councils for the Judiciary are governing bodies that have proved to be essential in safeguarding the independence of the judiciary and of individual judges in both aspects (internal and external).**
- **Principles on Councils for the Judiciary include widest representation of all levels of the judiciary through election by peers, rules of transparency, participation of members of bar and academia.**
- **Where existing, such Councils should be established at the constitutional or highest possible legal level. Not less than half the members should be judges elected by their peers and with full respect for pluralism inside the judiciary.**



## The most recent standard: Council of Europe Recommendation (2010) 12 on judges: independence, efficiency and responsibilities – Key features (3)

- Chapter V (**Independence, efficiency and means**) defines efficiency as the delivery of quality decisions within a reasonable time.
- The issue of efficiency is addressed through its relations with means and initial and in-service training.
- The principle of adequate allocation of resources, facilities and equipment to the courts to enable them to function in accordance with the standards of the fair trial is highlighted. It includes the allocation of a sufficient number of judges and appropriately qualified and experienced support staff, the use of electronic case management systems and information communication technologies, the provision of appropriate means to fulfil judicial functions efficiently on cases involving foreign or international elements.
- Chapter VI (**Status of the judge**) deals with:
  - Selection and career. All decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities, having regard to merit, qualifications, skills, capacity, and respect to human dignity. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers; at least half of the members of the authority should be judges elected by their peers. The right to challenge the procedure under which the decision was made is to be guaranteed.
  - Tenure. Security of tenure (guaranteed tenure until a mandatory retirement age) and irremovability (consent of the judge to a new appointment or to transfer, except in cases of disciplinary sanctions or reform of the organisation) are identified as key elements of the independence of judges. Probationary periods should be exceptional.
  - Remuneration. Judges' remuneration should be commensurate with their profession and responsibilities; systems linking remuneration for judicial functions with performance should be avoided.
  - Training (initial and in-service) is to be guaranteed as a pre-requisite for efficiency of judicial systems..
  - Assessment. Systems for the assessment of judges should be based on objective criteria, published by the competent authority. The procedure should enable judges to challenge assessments before an independent authority or a court.

## The most recent standard: Council of Europe Recommendation (2010) 12 on judges: independence, efficiency and responsibilities – Key features (4)

- Chapter VII (**Duties and responsibilities**) provides for a list of duties and responsibilities of judges, including, *inter alia*, the protection of the rights and freedoms of all persons equally, respecting their dignity in the conduct of court proceedings; the management of each case with due diligence and within a reasonable time; the reasoning of judgements; regular updating. On liability and disciplinary proceedings, the recommendation states that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine the case should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. Specific rules on civil, criminal and disciplinary liability of judges are needed and suggested, but any reference to the concept of immunity, general or functional, was deliberately avoided in the text as a result of the debate of the group of experts.
- Chapter VIII (**Ethics of judges**) promotes the development of codes of judicial ethics, as a means to uphold justice and strengthen public confidence in judges and the judiciary.

## Chapter 23 - Judiciary

- **Method: exchange of information, questionnaires, peer review missions, Commission's opinion and progress reports, lesson learnt from previous enlargements**
- **Purpose: identifying key principles and best practices as common standards and denominators of EU countries and ensuring mutual trust and confidence in the respective legal systems in a common area of Justice, Freedom and Security**

## Chapter 23 – Judiciary – Areas of interest

- **Appointment and career development** of Judges and Prosecutors should be based solely on merit and be free from any political or external influence.
- Independent **appointing body or panel** responsible for appointments, assignment to judicial and prosecutorial posts, and promotions (Judicial/Prosecutorial Council or other body), independent of the government and of the Parliament.
- **Objective and transparent criteria** for appointment – *qualifications, integrity, ability and efficiency* -. A **national public competition**, including a written exam and systematic interviewing of all candidates is one effective method of guaranteeing fair selection of candidates and avoiding political influence. **Judicial vacancies** should be **assessed regularly** and systematically in order to appropriately plan the recruitment of judges and ensure a fair competition for posts.
- **Career progression**, and in particular appointment to **leadership posts** must be based on objective, pre-established and transparent criteria, based on applications and an objective assessment of professional experience, skills and merit.
- Decisions regarding the **discipline or dismissal** of judges and prosecutors must be free from external or internal influence. Permanence of tenure is one the core guarantees of judicial independence. Reasons for dismissal should be limited to major breaches of duty following disciplinary action. The conduct which may lead to removal from office or disciplinary sanctions should be clearly defined and there should be set procedures for dismissals and disciplinary sanctions. The decision of disciplinary bodies must be **subject to an appeal** and the bodies must be fully accountable. It also should not be possible (apart from disciplinary grounds) to permanently transfer a judge or prosecutor from a particular post or court without his/her consent.

## Chapter 23 – Judiciary – Areas of interest (2)

- **Self-governing judiciary – the Judicial Council model**
- **A Judicial Council, as a self-governing body, independent from government and administration, with responsibility for career of Judges is an established model in many EU Member States. One model is to have a separate Prosecutorial Council, in other cases the Judicial council is also responsible for prosecutors.**
- **The composition of the Judicial Council should be carefully configured in a way to guarantee its independence. Where the Council is composed solely of judges, these should be representative of the whole judiciary and elected by their peers. Where it has a mixed composition members coming from outside (e.g. academia, legal profession) should be selected according to competence, in a transparent manner, and a substantial number of its members, preferably at least half, should be, in any case, judges and prosecutors elected by their peers. The role of the Minister for Justice (if they are a member of the councils) should be carefully defined and limited. It is not advisable for the Minister for Justice to be able to vote on all subjects especially on appointments and appointments to leadership roles, in order to avoid any political influence on such decisions. The Judicial Council should also be accountable. It should be subject to judicial scrutiny and report regularly to the public, Parliament or some other forum. Control over its own procedural rules, staff and budget helps the Judicial Council distance itself from any external political influence.**

## Chapter 23 – Judiciary – Areas of interest (3)

- **Internal independence**
- **The principle of internal judicial independence means the independence of each individual judge within the judiciary.**
- **Every judge, whatever their place in the court system, should be able to exercise the same authority to judge, and should be independent of other judges and court presidents. They should also be free from both instructions on cases from other members or the judiciary and undue influence of the attitudes of other judges. The Higher courts, such as a Supreme Court should not supervise the activities of the general courts by adopting guidelines, explanations or recommendations. Their authority should rather be through the influence of case-law.**
- **To prevent undermining impartiality of decisions, as far as possible allocations of cases should follow objective criteria, for example assignment should be random, or in a fixed order, taking into due account subject specialization. The withdrawal of cases from judges should be avoided. Deciding the criteria governing the assignment and allocation of cases in advance helps to prevent individual decisions on particular cases.**
- **The remedies against judicial decisions are to be found within the appeals system.**
- **Independence of Prosecutors**
- **The prosecutors should be independent from external and internal influence. Prosecutors should be free to submit to the court any legal arguments. Where prosecution is not mandatory adequate guarantees should be in place to ensure equality of all citizens before the law. The assignment and re-assignment of cases should also be organised in a way which is impartial and independent.**

## Chapter 23 – Judiciary – Areas of interest (4)

- **Working Conditions**
- Judges and prosecutors should receive an **adequate salary** as well as be provided pension and sick pay schemes. Non- financial benefits and remuneration linked to performance are problematic.
- All judicial post holders and public prosecutors should also have the right and duty to initial and **life long-learning and training**, including on EU law.
- Judges and prosecutors should have adequate support staff and equipment to ensure that they can act efficiently including document management IT-equipment and access to data bases with Supreme Court precedents and new legislation in order to complete their work. Non- judicial tasks should be assigned to other staff.
- **Efficiency and access to justice**
- An efficient justice and court system is essential in ensuring a fair trial and reasonable timing for the delivery of decisions. An effective strategy or policy, taking into account all activities at national, regional and court level, is essential.
- Operational processes from the preparation of cases to decision, should, as far as possible, be designed to ensure a timely decision. Codes of procedure, for example should include adequate tools for speeding up procedures and sanctioning abusive delays. Systems for evaluating court management including the regular provision of reliable statistics are helpful.
- As to **access to justice**, practical information about the functioning of the courts should be provided. Laws and court judgements should be published and be widely available. A comprehensive system of legal aid should be envisaged.

## THE EU JUSTICE SCOREBOARD

- A new (2013) comparative tool to promote effective justice systems in the European Union and thereby reinforce economic growth. The 'European Justice Scoreboard' provides objective, reliable and comparable data on the functioning of the justice systems in the EU's 27 Member States. Improving the quality, independence and efficiency of judicial systems already forms part of the EU's economic policy coordination process under the European Semester, which is aimed at laying the foundations for a return to growth and job creation.
- "The attractiveness of a country as a place to invest and do business is undoubtedly boosted by having an independent and efficient judicial system," said Vice-President Viviane Reding, the EU's Justice Commissioner. "That is why predictable, timely and enforceable legal decisions are important and why national judicial reforms became an important structural component of the EU's economic strategy. The European Justice Scoreboard acts as an early warning system and will help the EU and the Member States to achieve more effective justice at the service of our citizens and businesses."
- Effective justice systems are crucial for growth: trusting that the rule of law is fully upheld directly translates into the confidence to invest in the economy. And as national courts play an essential role in upholding EU law, the effectiveness of national justice systems is also fundamental to the effective implementation of EU law. Shortcomings in national justice systems are therefore not only a problem for the Member State in question. They can also affect the functioning of the EU's Single Market and the implementation of EU instruments based on mutual recognition and cooperation, as well as undermining the protection that citizens and businesses can expect in enforcing their EU law rights.
- The 2013 Justice Scoreboard focuses on the parameters of a justice system which contribute to the improvement of the business and investment climate. In particular, it examines efficiency indicators for civil and commercial cases, which are relevant for resolving commercial disputes. It also covers administrative courts, as they play an important role in a business environment, for example, with regard to delivering licences or for disputes with tax authorities or with national regulatory bodies.



- The key findings of the first scoreboard include:
- The length of judicial proceedings varies considerably between EU Member States, with one third of Member States having a length of proceedings at least two times greater than the majority of Member States. Problems can be compounded where low rates of resolving cases lead to an increasing number of pending cases.
- Monitoring and evaluation help to improve the speed and quality of justice. While most Member States have a comprehensive monitoring system, several lag behind.
- Alternative methods for resolving disputes, such as mediation reduce the workload of courts. These should be used more widely.
- Perceptions of the independence of national justice systems also vary widely. Even though several Member States are among the top 10 worldwide leaders in terms of the perception of judicial independence, there is a rather low level of perception of judicial independence by business end-users of the justice system in certain Member States.
- The 2013 European Justice Scoreboard provides data on the time needed to resolve cases in court, the rate of resolving cases, numbers of pending cases, use of electronic means for managing cases, use of alternative dispute resolution, training available to judges and resources for courts. Justice must not only be done, but also be seen to be done - the scoreboard therefore also provides data on the perceived independence of justice systems, based on findings of the World Economic Forum and the World Justice Project.
- While the Scoreboard includes a comparison on particular indicators, it is not intended to present an overall single ranking or to promote any particular type of a justice system. Indeed, the Justice Scoreboard will be operated as a tool that respects the different legal systems and traditions of the Member States
- **The importance of the promoting judicial reforms in programme Countries mainly GR/PT.**

**Thank you for your attention!**



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