



European Network of Councils  
for the Judiciary (ENCJ)

Reseau européen des Conseils  
de la Justice (RECJ)

# Independence, Accountability and Quality of the Judiciary

*Indicators and Surveys: Leading a process of  
positive change*

## ENCJ Report 2018-2019



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## Executive Summary and Recommendations

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In 2018/2019 the work of the project consisted of several activities in the area of Independence and Accountability and Quality of Justice. This report presents the outcomes of the project and recommendations to the ENCJ.

Central to the mission of the ENCJ is the reinforcement of independent, yet accountable judiciaries in the European Union to guarantee access to fair, independent and impartial courts. To this end the ENCJ is working systematically to develop standards and guidelines for the governance of the judiciary and the conduct of essential functions such as the appointment of judges. To assess the extent to which standards and guidelines are realized a set of indicators on independence and accountability has been developed and implemented. These indicators focus, on the one hand, on the formal safeguards and mechanisms that are essential for judicial independence and accountability and, on the other hand, on the perceptions of independence by stakeholders. The approach has been extended to quality of justice as a high quality justice is the ultimate goal.

## Independence and Accountability of the Judiciary

### Evaluation of the use of the indicators

Last year, the indicators were used to set priorities for improvements to be made at the national level. Improvement plans were to be drawn up and implemented. This year, the Project started off by taking a closer look at the progress made to implement improvements on a national level. This progress was evaluated and lessons were drawn for future steps. It was found that not all Members and Observers have yet developed improvement plans for different reasons. The most common reason is lack of time; other reasons involved Councils not having the competence to adopt plans for the courts and the alignment of an improvement plan with broader strategic plans. Also, the dependence on change of laws makes planning difficult. It was concluded that these reasons, whilst valid in specific national circumstances, should not lead to taking the pressure off the development of improvement plans. The ENCJ should allow time for Members and Observers to get acquainted with and accustomed to strategic planning in the area of independence and accountability. Also, the development of improvement plans is not a one-time activity, but part of a cyclical process of improvement.

**It is therefore proposed to reconfirm the continued necessity to protect and strengthen the independence and accountability of the judiciaries of Europe by means of a structured cycle of change and improvement. As part of this structured cycle, the next improvement plans are to be developed in the first half of 2021.**

### Improvement of the Independence and Accountability indicators

The methodology and the indicators themselves have been improved, drawing in particular of the reports on the external validation conferences held with European organisations and the scientific community. Also, the concept of accountability that the ENCJ uses has been clarified to consist of:

- (1) transparency about the functioning of the judiciary,

- (2) involvement of civil society in judicial governance and
- (3) existence of mechanisms to promote and maintain the ethical standards of the judiciary.

The indicators have been adjusted accordingly. External validation of the answers to the questionnaire that is used to measure the indicators, will improve the quality of the answers and the (external) credibility of the indicators.

**It is proposed to apply the improved indicators of independence and accountability and to organise at the national level an expert group to validate the measurement of the indicators. The so-called hard data about the functioning of the judiciary will be gradually expanded.**

### Survey among the judges of Europe

For the third time, a survey was conducted among the judges of Europe about their independence. The survey asked them to give a general assessment of their independence, but also to assess a range of aspects that affect independence. In addition to the actual functioning of the mechanisms of independence, it asked whether they felt that judicial independence is respected by diverse stakeholders ranging from the governing bodies of the judiciary, parties and the other two state powers as well as the media/social media. The survey makes a cautious start with regard to the accountability of the judiciary. Judges from 25 countries participated in the survey, in total 11,335 judges. In several countries prosecutors also took part. In this report, the outcomes for judges are presented. It should be noted that several countries, including Poland, did not participate in the survey for different reasons. Greece, Hungary and Bosnia and Herzegovina participated for the first time. The main findings are:

1. Judges generally evaluate their independence positively. On a 10-point scale judges rate the independence of the judges in their country on average between 6.5 and 9.8.
2. Two countries show a large increase of their independence score since the first survey in 2015: Spain and Slovakia. Two countries show a large decrease: Portugal and Romania.
3. Examining the answers to all questions, Hungary and Romania, in particular, face issues across a range of aspects of independence. As the response rate of Romania was low, the outcomes for that country must be used with caution.
4. In many judiciaries judges are critical about human resource decisions concerning judges and, in particular, about appointment and promotion. In the survey a distinction is made for the first time between appointment to the courts and to the Supreme Court/Court of Cassation. Appointment to the Supreme Court/Court of Cassation is seen as most problematic in many countries.
5. Many judges are very critical about their working conditions, and believe that these affect their independence. Case-load and court resources are a great concern in many countries, and this concern has increased much since the previous survey. Also, issues about salary, pensions and retirement age have become more serious.
6. A new question was added with regard to the Implementation by government of judgments that go against the interest of the government. This proves to be an issue in many countries across Europe.

7. Many judges experience - and increasingly so - a lack of respect for their independence by the other state powers and the media. In a variety of judiciaries more than 40% of the respondents feel their independence not respected by government: Bulgaria, Hungary, Italy, Latvia, Portugal, Romania and England and Wales. Generally, only few judges feel their independence is negatively affected by the judicial governance institutions and the leading courts.
8. Three questions were added about accountability. While judges generally believe that their colleagues adhere to ethical standards, they are more critical about the mechanisms to combat judicial misconduct and judicial corruption in several countries.

### Survey among the lawyers of Europe

Together with the Council of Bars and Law Societies of Europe (CCBE) a survey was conducted among lawyers. In total 4.250 lawyers participated. The response is much lower than that for judges and varies widely among countries. Countries with an extreme low response rate are not included. In several countries, including Hungary and Poland, many lawyers participated. As the closing date of the survey had to be postponed, the outcomes have become available too late to include all results in this report. In general, lawyers are more critical than judges about judicial independence. The lawyers rate the independence of the judges in their country on average between 5.2 and 9.0. The outcomes must be used with caution due to low response rate but strengthen the urgency of improvement plans and subsequent actions.

### Format of court user surveys

Perceptions about judicial independence are particularly important in the indicator system. Data is available about the perceptions of citizens in general and of businesses, lawyers and judges, but not about the perceptions of the users of the courts based on actual experience. National surveys among court users are far from commonplace and cover a variety of subjects, but surprisingly pay little attention to independence. There are two challenges in this area:

- (1) the systematic implementation of court user and lawyer surveys about their actual experience in all judiciaries is necessary to provide essential feed-back on the quality of the judiciary and
- (2) such surveys should include independence which is a rather abstract notion and to be practical needs to be made concrete.

As to the first challenge, Councils for the Judiciary can, dependent on their mandate, play a prominent role in organizing such surveys. In order for the ENCJ to be able to promote this, the ENCJ has to consider the content of such surveys not only from the perspective of independence but also from the broad perspective of quality of justice. Regarding the second challenge, questions that could help to make independence less abstract were formulated. Before the ENCJ could suggest that Members and Observers incorporate these questions into a customer survey, the questions need to be tested in a pilot.

### Proposals for next steps on Independence and Accountability in 2019/2020

1. Application (measurement) of the improved indicators by all Members and Observers, as the start of the next cycle of improvement, beginning in September 2019. The national expert groups will be used to validate the outcomes.
2. Further development of a court user survey that covers aspects of independence and accountability as well as quality.

3. Analysis by all judiciaries of the outcomes of the judges and lawyers surveys for their countries and communication with the judges of outcomes and lessons to be drawn.
4. The perceived increase of lack of respect for judicial independence by the other State Powers makes the Strategic Plan in which the ENCJ has taken it upon itself to initiate a dialogue with these State Powers on the EU level more urgent. The Executive Board is in charge of this action.

## Quality of Justice

To expand on the work previously undertaken, including in 2017/2018 when a set of quality indicators was developed and tested, in 2018/2019 the Project continued with that work in order to achieve an improved questionnaire on quality of justice. The problems with the first version of the questionnaire were assessed and, after detailed discussions, a revised questionnaire was developed. Among the amendments made were the simplification of questions and the removal of almost all questions requiring the exercise of subjective judgment by the respondent. Other more specific changes were made to address concerns that the earlier version had produced patterns of results which did not appear to reflect the reality of the systems concerned. The revised version has been piloted by the Members and Observers that participated in this work. The pilot demonstrates results which appear, at first sight and on a provisional basis, to be broadly realistic and useful.

### Proposals for next steps Quality in 2019/2020

It is proposed that in the next period the questionnaire will be completed by all Members and Observers with a view to the results being analysed and reported upon at the General Assembly which takes place in May/June 2020.

It is proposed, furthermore, that (consistent with what was proposed in the General Assembly which met in Lisbon in June 2018):

- The questionnaire results will be analysed against existing, external data about quality of justice for their use in the indicator system;
- The indicators will be subjected to further review by the Project Group – as well as by external sources in March 2020, as part of a validation process – in the light of the questionnaire results and any further comments received from Members and Observers when submitting their completed questionnaires.
- All Councils should adopt a framework that defines their involvement in guaranteeing and promoting quality of justice and their approach to it, and to improve quality of justice by examining their country profiles, taking the general recommendations into account.

## Introduction<sup>1</sup>

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Central to the mission of the ENCJ is the reinforcement of independent, yet accountable judiciaries in the European Union to guarantee access to fair, independent and impartial courts. This fundamental right is laid down in the article 47 of the EU Charter of Fundamental Rights. The ENCJ lends support to individual Councils of the Judiciary, but it also works systematically to develop standards and guidelines for the governance of the judiciary and the conduct of essential functions such as the appointment, promotion and dismissal of judges. It is the view of the ENCJ that it is not sufficient to set standards and guidelines, but also the extent to which these are realized in practice needs to be systematically assessed. To this end a set of indicators on independence and its complement accountability has been developed and implemented. These indicators focus on the one hand on the formal safeguards and mechanisms that are essential for judicial independence and on the other hand on the perceptions of independence by stakeholders, as what matters in the end is independence, as experienced in society. The outcomes provide Councils and other governing bodies with insights that they can use to improve their judicial systems to enable judges to fulfil better their essential function in society, and, when necessary, engage with the other state powers on matters of independence.

The system of standards and indicators requires permanent work as (conceptual) improvements always need to be considered, but also as discussions and political decisions concerning the judiciary in Member States raise new questions about institutional design from the perspective of judicial independence, and new or more detailed standards need to be set, and the indicators adapted accordingly. In addition, the scope of the indicators is getting larger, as independence and accountability cannot be separated from quality of justice. Meaningful indicators of quality of justice are more difficult to develop than those for independence and accountability, as the influence of legal tradition and culture is larger.

In this period the following activities were undertaken:

### *Independence & Accountability*

- (1) The progress made to implement the priorities for improvement identified at the national level, supported by the dialogue meetings that have been conducted in the previous period, was evaluated, and lessons were drawn.
- (2) The methodology and indicators have been improved drawing, in particular, on the reports on the external validation conferences held with European organisations and the scientific community.
- (3) Two surveys on the independence of the judiciary have been undertaken: a survey among judges and, together with the CCBE, among lawyers.
- (4) Concepts for a uniform format for a court user survey from the perspective of judicial independence have been developed.

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<sup>1</sup> This report was composed and edited, with the input of the project team, by Mr. Frans van Dijk, Mr. Simon Picken and Ms. F. Kadieva. Technical support of the judges survey and lawyers survey was provided by the High Council of Justice of Belgium, Mr. Kevin Verhoeyen and by the Netherlands Council for the judiciary, Mr. Bart Diephuis. The ENCJ office, Ms Monique van der Goes provided general support.



### *Quality*

(5) The set of indicators and scoring has been thoroughly simplified and improved.

The project team worked in three subgroups. The first sub-group was chaired by the Judicial Council of Lithuania and worked on the improvement plans and court user surveys, the second sub-group was chaired by the Netherlands Council for the Judiciary and worked on independence and accountability including the judges and lawyers surveys and the third sub-group was led by the Judges Council of England and Wales and worked on the quality part of the report. All documents that were produced by the subgroups were discussed in the project team as a whole.

Four project meetings were held in 2018/2019:

- Bucharest, 17-18 September 2018
- The Hague, 17 December 2018
- Rome, 28 February 1 March 2019
- Vilnius, 11-12 April 2019

Part 1 of the report presents the outcomes of the activities on independence and accountability.

Part 2 of the report covers the development of indicators on quality of justice. It builds on foundations that were laid in the report of last year (2017/2018). To make it possible to read this report independently, the vision on quality and the selection of areas of quality that were developed in that report, are recapitulated first. Then, the new set of indicators is presented. This set was tried out in a pilot. The results of the pilot are presented in annex 2 to this report. Finally, conclusions and proposals for the next steps on quality will be presented.

# Part 1. Independence and Accountability

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## 1. Background

At the General Assembly of the ENCJ the following steps were agreed.

1. Implementation by Members and Observers of the national plans to improve independence and accountability.
2. Repetition of the survey of professional judges. Some predominantly technical improvements needed to be considered in preparation.
3. Review of the indicators I&A to reflect practical suggestions of the validation seminars and development of a system of external validation per country (external experts per country), followed by implementation of the adjusted indicator system by all Members and Observers.
4. Continued cooperation with the CCBE to conduct a survey among the lawyers of Europe about the independence of the judiciary, aiming at a higher participation of countries and lawyers within countries.
5. Develop a uniform format for a court user survey that focuses on the experiences of the parties in court cases, and a method how to conduct the survey.
6. Develop an opinion about the incorporation of hard data about outcomes in the system to measure real (de facto) independence, and to incorporate in the system.

In the following sections the outcome of these activities will be discussed. First, the use of the indicators to improve judicial systems at the national level is addressed in section 2. Section 3 discusses conceptual aspects regarding the set of indicators and describes the changes made in the indicators. The main subject of this part of the report is the survey among the judges of Europe. The outcomes are presented in detail in section 4. As the results of the survey among lawyers have become available later than expected, only a summary can be presented. This is done in section 5. Next the possibilities to solicit the perceptions of court users on independence are discussed in section 6. Finally, the conclusions and proposals for the next steps on independence and accountability are presented.

## 2. Improvement cycle and improvement plans

### 2.1 Improvement cycle

The indicators on independence and accountability and the surveys among judges and lawyers that are part of the indicators, are not a goal in themselves. Their purpose is to bring to light the need and possibilities for the improvement of judicial systems with regard to independence and accountability. The ENCJ has developed standards for many areas of the responsibilities of Councils for the Judiciary, ranging from the appointment of judges to the funding of the judiciary, many of which are applicable as well by other governance structures than Councils.

To structure the use of the indicators as these became available in 2016/2017, dialogue meetings took place to identify priorities for change at the national level. In the dialogue meetings generally four Members and Observers discussed the outcomes of the indicators including the judges survey, identified weak aspects of their judicial systems and thought about solutions. A variety of topics were discussed in the dialogue group meetings of which the most important ones were the relationship with the other state powers and the relationship with the general public (lack of trust), the influence of the media and the appointment and promotion procedures of judges as well as the Councils. Other topics of discussion were the recruitment processes of judges, external review and the lack of insight in subjective independence (lack of national opinion surveys and court user surveys), initiatives to set up Councils for the judiciary, the position of lay judges and judicial ethics. During the meetings, the participants commented on the issues raised, suggested alternative views and generated together ideas for solutions. The dialogue meetings were evaluated very positively.

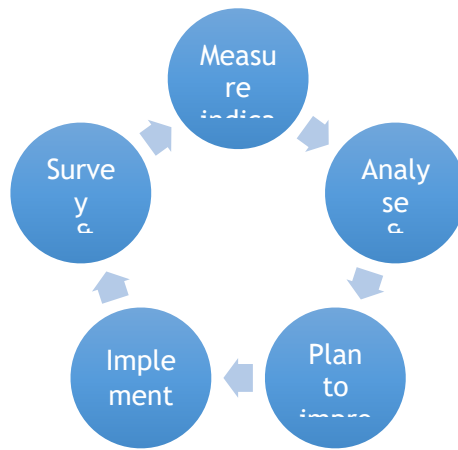
The next step was to develop improvement plans at the national level, taking into account the results of the dialogue meetings. It was agreed that the national improvement plans would be presented at the General Assembly in June 2018. By the end of June 2018 only a part of the ENCJ Members and Observers submitted a national improvement plan. Some of these plans were presented at the General Assembly. The Members and Observers that did not provide plans were invited to do so, and this project team was asked to examine the reasons why plans had not been developed. The most common reasons were time issues. Also, it often proved to be complex to align a plan specifically aimed at independence and accountability with broader strategic plans of Councils or other governance bodies that have their own strategic planning cycle. Part of the problem is that the representatives that participate in the work of the ENCJ not always succeed in getting the backing of their full Councils. Moreover, in several countries the Councils did not have the competence to adopt and implement plans for the courts on the identified priorities. Also, many actions required change of laws for which government and parliament are responsible. Often, there was no willingness to do so or, if there was, the process to do so was beyond the grip of the Councils.

It was concluded that these reasons, while valid in specific national circumstances, should not lead to taking the pressure off the development of improvement plans. The ENCJ should allow time for Members and Observers to get acquainted with and accustomed to strategic planning in the area of independence and accountability. In this area a strategic approach is very much needed in view of the often complex interaction with the other state powers and the media on the one hand and the courts on the other hand. The outcomes of judges survey, as presented in section 4, illustrate vividly these complexities (see, in particular, the figures about respect for judicial independence).

Also, it should be emphasized that the development of improvement plans is not an activity that is undertaken once and for all, but part of a cyclical process of improvement (in quality work this is often called a PDCA-cycle: Plan, Do, Check, Act). The improvement cycle that the ENCJ has embarked on, can be visualized as follows.

*Implementation cycle*

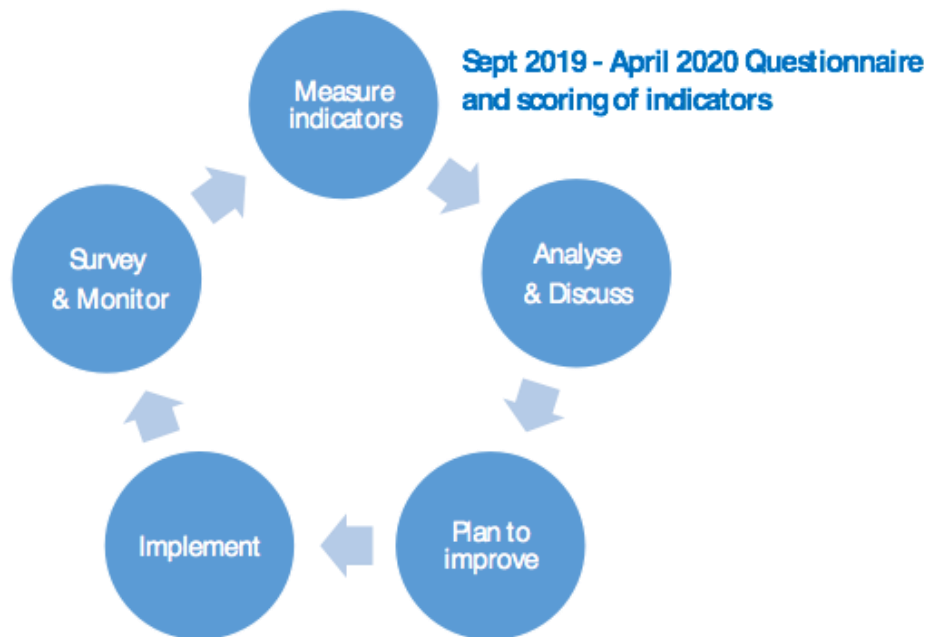
The cycle starts with the followed by the analysis This provides the input implementation of plans consuming phase. During to be monitored. Part of in particular, among also input for the a new cycle starts in plans are adjusted, if



measurement of the indicators, and discussion of the outcomes. for planning. The is often by far the most time-implementation progress needs the monitoring are the surveys, judges. These surveys provide measuring of the indicators. And which results are discussed and necessary.

This cycle can be made years. See the next scheme. Members and Observers will be invited to fill in the I&A questionnaire in September 2019. The next section sets out the adjusted set of indicators and

concrete for the coming



the questionnaire to be used to measure the indicators. The scores will be published in June 2020. Dialogue groups would then take place between September and January 2020. The improvement plans are foreseen to be developed in the first half of 2021. Monitoring includes the next survey among judges. That survey would take place in the first quarter of 2022.

To illustrate the continuous character of improvement, the next cycle is also depicted.



## 2.2 Improvement plans

The project team examined the available national improvement plans and derived from that the following recommendations that Councils may want to consider when they develop their own plans.

1. **Focus on 2-3 topics:** the dialogue meetings aim to identify three top priorities for each judiciary. It is advisable to stick to these top priorities, once these have been endorsed by the Councils. Given the complexity of achieving objectives in the area of independence and accountability, focus is essential.
2. **Integration in general strategic planning:** Councils are advised to decide explicitly about the relationship between the I&A improvement plan and overall strategic planning of the Council. Integration is an overall strategy process, especially if a formal legislative procedure is mandatory to approve plans, may be efficient. This may affect the timeline of the improvement plan, and the ENCJ should be informed about this.
3. **Focus on the mandate of the Council (if possible):** to achieve results speedily it is advisable to focus on topics that are within the mandate of the Council or, second best, the judiciary. Dependence on the co-operation of actors outside the judiciary can easily lead to delay or worse. However, this will not always be possible, as the top priorities in this area often require legislation. A balance between topics that require legislation

and others that can be achieved internally should be strived at. As to topics that require legislation or otherwise close co-operation with the other state powers, a strategic approach with regard to the interaction with the other powers, aimed at establishing a constructive dialogue, is necessary. This may involve the media as well. Such a strategic approach will require a long term perspective.

4. **Use a simple format:** in order to facilitate exchange of ideas with other Councils it is recommended to address the following topics in an improvement plan (or in an extract about independence and accountability of a general strategic plan):
  - (1) **main challenges:** presented in a few sentences with a concise presentation of the context in which the challenges have arisen;
  - (2) **strategic objective(s) to address the challenge(s):** described by linking them to a specific area that is planned to be improved;
  - (3) **methodology (how will the objectives be realised):** the informativeness of this part has a significant added value for the implementation of the member's own objective as well as for the dissemination of good practices among ENCJ members;
  - (4) **key stakeholders:** identified by linking them to the challenges or the strategic objectives to address the challenges;
  - (5) **risks:** identified for each of the strategic objectives;
  - (6) **concrete timelines:** even if the selected measures are to be applied in a continuous process of improvement of the judicial system, distinguishing stages encourages the interest in achieving the results and allows self-control;
  - (7) **monitoring mechanism:** not only a monitoring process should be determined but also the variables to measure success and the periodicity of measuring for each of the strategic objectives.

## 3. Improvement of the methodology and Indicators on Independence & Accountability

### 3.1 Concepts and vision

Independence and accountability are interrelated and multi-dimensional concepts. To come to grips with this complexity a general framework is required. The framework that has been developed and implemented by the ECNJ over the years has proved to be useful in practice. However, its terminology is not fully aligned with the relevant scientific literature, as was discussed at the validation seminars that took place in 2018 (see section 3.2). The ENCJ framework distinguishes between objective independence, which it defines as the legal and otherwise objectively observable aspects of the legal system that are essential for independence, and subjective independence, which it defines as the perceptions in society about actual independence. In the literature a distinction is often made between ‘de iure’ and ‘de facto’ independence.<sup>2</sup> ‘De iure’ independence stands for the formal safeguards and arrangements with regard to independence and ‘de facto’ independence for the independence that is actually exercised in the decisions of judges. This latter concept is difficult to observe directly, and a range of indicators and variables has been developed to capture this illusive real independence. The perceptions about independence in society offer one approach to approximate real independence. The use of the term objective independence by the ENCJ leads to confusion with ‘de facto’ or real independence. To avoid such unnecessary confusion the term formal independence will be used instead and strictly confined to legal safeguards and arrangements. While the term subjective independence is still adequate, it can be more precisely described as perceived independence.

The same terminology will be applied with regard to accountability. Formal accountability relates to the rules about requirements and mechanisms of accountability and perceived accountability to the perceptions of judicial accountability in society. The ENCJ concept of accountability is clarified in section 3.3.

A focus on formal and perceived independence and accountability leaves an area of ‘hard’ data unexplored that are informative about the application of the formal arrangements. Such data may concern numbers of complaints, recusals and disciplinary measures, but also, for instance, budgets related to caseload. This is a subject for further development, and is discussed in section 3.4.

In the revisited terminology, the vision of the ENCJ can be summarised by five basic notions.

1. Independence and accountability go together: accountability is a prerequisite for independence. A judiciary that does not want to be accountable to society and has no eye for societal needs will not gain the trust of society and will endanger its independence in the short or long run. Accountability without independence reduces the judiciary to a government agency.
2. The existence of formal, legal safeguards of independence (formal independence) are not sufficient for a judge to be independent. Actual independence depends on his or her behaviour and shows in his or her decisions, and this is reflected in independence as perceived by society

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<sup>2</sup> For an overview see J. Rios-Figueroa and J.K. Staton (2014.). An evaluation of cross-national measures of judicial independence. *Journal of Law, Economics and Organization* 30/1 104-137.

and its constituent groups as well as by the judges themselves (perceived independence). It should be noted that perceptions frequently differ between societal groups.

3. For the judiciary to be independent, the judiciary as a whole must be independent and the individual judge must be independent. 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.
4. To be accountable, not only the formal requirements about accountability must be met, but also the population must perceive the judiciary to be accountable. Even if there are formal procedures objectively 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 their own benefit rather than for the benefit of society.
5. Accountability, like independence, relates to the judiciary as whole and to the individual judge. At the level of the judiciary as a whole, accountability means to be transparent about performance, while accountability of the individual judge relates in particular to personal aspects that may affect decisions.

As to the assessment of the formal aspects, the categorisation is done by the Councils or, in the absence of a Council, other governance bodies, using a standardised questionnaire. It is a self-evaluation, of which aspects can be checked by anybody who is knowledgeable about the legal systems concerned. Still, it is proposed in section 3.3 to ensure external validation of the answers to the questionnaire.

The indicators of perceived independence consist of the perceptions of independence and related topics amongst the population, the users of the courts and the judges themselves. With respect to independence, external surveys are available about perceptions in the society. Also, some judiciaries have conducted satisfaction surveys among court users, but these surveys hardly address issues about independence and surveys are not available for most countries. In this report suggestions are made for a uniform format for court user surveys from the perspective of judicial independence (see section 6). As to the perceptions of judges, the ENCJ regularly conducts a survey among the judges of Europe about their independence, and it has last year for the first time conducted a survey among lay judges. In the first quarter of this year the survey among the judges was held and in section 4 the outcomes are presented. In co-operation with the CCBE (Council of Bars and Law Societies of Europe) a survey was held among lawyers. The outcomes are presented in section 5.

The surveys among judges and lawyers include some questions about accountability, and these are included in the indicators. In as far as the court users are concerned accountability can be addressed by court user surveys. Still, subjective accountability is weakly covered by the indicators.

Having defined appropriate indicators for formal and perceived judicial independence and accountability, the next step is to identify an appropriate methodology to score the results. This requires a normative assessment of what is good and bad practice. To simplify matters, a points system, using scoring rules, is employed, and the following underlying principles are applied:



1. With respect to all formal safeguards, the key issue concerns the ease with which such safeguards can be removed or altered. A safeguard embedded in a constitution offers more protection than one contained in normal legislation. Legislative safeguards are more effective than those contained in subordinate legislation, general jurisprudence or tradition.
2. Judicial self-government, balanced by accountability, is desirable. Where other state powers have the authority to make decisions about the judiciary, decisions based on objective criteria are to be preferred to discretionary decisions.
3. Responses based upon transparent rules are to be preferred to *ad hoc* reactions to particular situations.
4. Judicial decisions and procedures, including complaints processes should all preferably be formalised, public and transparent.
5. Transparency requires active dissemination of information, rather than simply making information theoretically available.

Most indicators consist of several aspects, captured by sub indicators. With each sub indicator, points can be earned, and a total score for an indicator is reached by combining the scores per sub indicator.

As mentioned before, the set of indicators consists of objective and subjective indicators. The objective indicators are divided into indicators about the judiciary as a whole and about the individual judge.

Table 1 Types of indicators

	independence		accountability	
<b>formal</b>	Judiciary as a whole	Individual judge	Judiciary as a whole	Individual judge
<b>perceived</b>	Perceptions by a range of groups		Only perceptions of judges and lawyers	

### 3.2 Adjustment of indicators Independence and Accountability

The existing set of indicators has been adjusted to take into account diverse comments and observations received in particular at:

1. two validation seminars organized in the first half of 2018. One seminar was attended by European judicial networks, Council of Europe bodies and the European Commission, the other by scientist in the field.

2. the special issue of the International Journal for Court Administration devoted to the indicators, as follow-up to the scientific seminar.<sup>3</sup>
3. discussions in the project team about several omissions in the indicators that had been made visible by current developments in some Eastern-European countries detrimental to judicial independence.

The adjusted set of indicators is listed below. The main changes are the following.

### ***Independence***

- Appointment of judges for life as formal guarantee was added to indicator 1 (legal basis of independence). Appointment for life was so far taken for granted, but apparently exceptions exist. This has also repercussions for indicator 5 (human resource decisions about judges). A sub-indicator is added about probationary periods after first appointment. A probationary period after having been appointed as a judge is undesirable, and, if it occurs, should be subject to procedural guarantees.
- Compliance of Councils of the Judiciary with ENCJ guidelines in indicator 2 (organizational autonomy of the judiciary): the sub-indicators did not include all relevant ENCJ guidelines and were also not precise. The proposed sub-indicators are:
  - 1) At least 50% of the members of the Council are judges who are (with the exception of ex-officio members) chosen by their peers<sup>4</sup>
  - 2) The judicial members represent the whole judiciary (all tiers of the Judiciary are represented in the Council)
  - 3) (Former) Members of government are not a member of the Council<sup>5</sup>
  - 4) (Former) Members of parliament are not a member of the Council<sup>6</sup>
  - 5) The Council controls its own finances (including the administrative and human resources) independently of both the legislative and executive branches<sup>7</sup>
  - 6) The Council controls its own activities independently of both the legislative and executive branches.
- Disciplinary measures (indicator 6): the indicator did not address the reasons for disciplinary measures. The proposed sub-indicator disallows disciplinary measures for interpretation of the law, assessment of facts or weighing of evidence in determining a case. Also, disciplinary measures can never be initiated against a judge for speaking out when democracy and fundamental freedoms are in peril.
- Non-transferability of judges (indicator 7): the sub-indicators were difficult to answer and were drastically simplified.
- Allocation of cases (new indicator 8) has been moved from Accountability to Independence at the suggestion of the scientific seminar.

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<sup>3</sup> [P. Langbroek and F. van Dijk, editors \(2018\). Measuring Judicial Independence and Accountability, Special Issue, International Journal for Court Administration, 9-3.](#)

<sup>4</sup> Only in case of a Council representing judges and prosecutors, please read magistrates.

<sup>5</sup> ENCJ Standards report on non judicial members in judicial self governance 2016

<sup>6</sup> Idem

<sup>7</sup> The finances of the Council for the Judiciary refer to the budget of the Council itself and not to the budget of the Judiciary as a whole.

- Independence of judges as perceived by lawyers (new indicator 12): the inclusion of this indicator is now possible as the lawyers survey covers a sufficient number of countries.
- Trust in judiciary (new indicator 16): the answers were based on national sources. For reasons of comparability it is proposed to base the answers on the public opinion surveys of the European Commission.

### ***Accountability***

From several sides there was criticism that accountability was not (adequately) defined explicitly and implicitly in a narrow and non-standard way. While some of the criticism cannot be avoided, as the independence of the judiciary stands in the way of hierarchical forms of accountability, the interpretation of the ENCJ can be clarified, as the indicators were not well organized. In the view of the ENCJ accountability of the judiciary consists of three areas:

1. Transparency about the functioning of the judiciary
2. Involvement of civil society in judicial governance
3. Existence of mechanisms to promote and maintain the ethical standards of the judiciary

The main changes in the indicators are the following.

- Participation of civil society in governance bodies of the judiciary (new indicator 6). In line with the proposed conceptualization of accountability, an indicator is added that measures the participation of civil society in three types of governance bodies, namely bodies that are responsible for selection of judges, complaints procedures and disciplinary measures.
- Understandable procedures (old indicator 9). The topic of this indicator is very much related to quality of justice, and it is proposed to shift this topic to the quality part of the indicator system.
- Adherence to ethical standards (new indicator 10). The indicator measures an aspect of subjective accountability and concerns the extent to which judges adhere to ethical standards, as perceived by judges about their colleagues and lawyers about judges. The indicator is derived from the survey among judges and from the survey among lawyers.
- Adequacy of actions by judicial authorities to address judicial misconduct and corruption (new indicator 11 and 12). This indicator also measures an aspect of subjective accountability and concerns the extent to which judicial authorities address judicial misconduct and corruption, as perceived by judges and by lawyers about judges. Indicator 11 is derived from the survey among judges and indicator 12 from the survey among lawyers.

The adjusted set of indicators is listed below.

## INDICATORS OF THE FORMAL 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 guarantees that judges are appointed permanently until retirement
  - 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. Organisational 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;
- Compliance with ENCJ guidelines; See below for proposed change of sub-indicators
- Responsibilities of the Council.

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

- Influence of judges on decisions.

### 3. Financial independence, with the following sub-indicators:

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

### 4 Management of the court system.

- Management responsibility of the courts.

## INDICATORS OF THE FORMAL INDEPENDENCE OF THE INDIVIDUAL JUDGE

### 5. 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 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 with ENCJ guidelines about the promotion of judges.

#### **6. Disciplinary measures, with the following sub-indicators:**

- Disciplinary measures can **never** be initiated against a judge (except in cases where there has been malice or gross negligence) for the following reasons:
  1. interpretation of the law,
  2. assessment of facts
  3. weighing of evidence in determining a case
- Disciplinary measures can **never** be initiated against a judge for speaking out when democracy and fundamental freedoms are in peril.
- Compliance with ENCJ standards about procedure re disciplinary measures against judges
- Competent body to make decisions about disciplinary measures against judges

#### **7. Non-transferability of judges, with the following sub-indicators:**

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

#### **8. 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.

#### **9. 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 PERCEIVED INDEPENDENCE OF THE JUDICIARY AND THE INDIVIDUAL JUDGE**

#### **10. Independence as perceived by society**

- Flash Eurobarometer 474 (2019) 'Perceived independence of the national justice systems in the EU among the general public', Q1 and Flash Eurobarometer 475 (2019) 'Perceived independence of the national justice systems in the EU among companies', Q1.
- WEF, Global Competitiveness Report 2019, 1.07.
- WJP, Rule of Law Index 2019,

**11. Independence as perceived by courts users**

- National surveys.

**12. Independence as perceived by lawyers**

- CCBE survey 2019, question 10

**13. Independence as perceived by judges**

- ENCJ survey 2019, question 16

**14. Judicial corruption as perceived by citizens in general**

- Special Eurobarometer 470 (2017) 'Corruption', QB7 (to be updated)

**Trust in justice/legal system, relative to trust in other state powers by citizens**

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- EC Public Opinion, eu.europa.eu

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**INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE**

**Transparency about the functioning of the judiciary**

**1. Periodic reporting by the judiciary, with the following sub-indicators:**

- Availability of annual reports;
- Publishing of the annual report;
- Scope of the annual reports;
- Periodic and public benchmarking of the courts.

**2. Relations with the press and outreach activities, with the following sub-indicators:**

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

**3. Outreach activities aimed at civil society**

- Open door days;
- Educational programmes conducted at schools
- Development of television/radio/social media programme formats to give insight in the work of the judge.

**4. External review, with the following sub-indicators:**

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

**INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE**

**Transparency about the functioning of the judiciary: involvement of civil society in judicial governance**

**5. Participation of civil society in governance bodies of the judiciary:**

- Selection and appointment of judges;
- Disciplinary measures against judges;
- Complaints against judges and the court(s) in general.

**INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE INDIVIDUAL JUDGE AND STAFF:**

**Mechanisms to promote and maintain ethical standards of the judiciary**

**6. Complaints procedure, with the following sub-indicators:**

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

**7. 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.

**8. Admissibility of external functions and disclosure of external functions and financial interests, with the following sub-indicators:**

- Policy on admissibility of external functions;
- Authorisation for the exercise of accessory functions;
- Availability of a (public) register of external functions of judges;
- Availability of a (public) register of financial interests of judges.

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

- Availability of a code of judicial ethics.
- Availability of training on judicial ethics;  
Responsible body to provide judges with guidance or advice on ethical issues

**INDICATORS OF THE PERCEIVED ACCOUNTABILITY OF THE JUDICIARY AND THE INDIVIDUAL JUDGE**

**10. Adherence to ethical standards, as perceived by judges**

- ENCJ survey 2019, Q19.

**11. Adequacy of actions by judicial authorities to address judicial misconduct and corruption, as perceived by judges**

- ENCJ survey 2019, Q19 and 20.

**12. Adequacy of actions by judicial authorities to address judicial misconduct and corruption, as perceived by lawyers**

- CCBE survey 2019, Q11 and 12.

The indicators are described in full detail, including the scores given to the answers, in Annex 3 in the format of the questionnaire, to be filled in by the councils and other governing bodies. The scoring rules are summarized and the way the scores are aggregated to calculate the indicators is presented in Annex 4.

### **3.3 External validation of the Independence and Accountability questionnaire**

#### **Need for an external validation mechanism**

One of the issues raised at the scientific seminar in 2018 was that the answers that are given to the questionnaire by the national Councils and other governing bodies of the judiciary should be externally validated by an external party or body to increase reliability and credibility. The arguments are that (1) self-reporting is generally not seen as reliable, (2) an examination of a small sample of the answers to the questionnaire actually shows mistakes and (3) the external credibility of the outcomes is, consequently, limited. External validation conducted at the national level by local experts would help to reduce incorrect answers, thereby creating a better basis for discussion and follow-up action, and would increase the external credibility of the indicators, the Councils and the ENCJ. Especially, when outcomes



are counterintuitive and/or go against preconceived ideas, a credible, transparent validation mechanism is needed to be convincing.

External validation should not be seen as supervision, but rather as a method to signal issues for discussion with the ultimate goal of broader support for the answers and a stronger methodology. It should lead to a learning cycle and it could help to stabilize the outcomes. Within a judiciary different scores over time should come from material changes and not from different persons answering the questionnaire.

In the current situation a check of the answers is also taking place. However, this is an internal check, done by persons from within the ENCJ Project Team. This check happens after the answers have been given and the scoring has been done, and it is executed by a group with members from different countries who cannot be expected to have in-depth knowledge about the national legal systems except their own, and who can primarily check the plausibility and consistency of the answers and the correct application of the scoring rules, given the answers. These functions are very useful and unique, for instance because the group can highlight inexplicable differences among countries. Still, as a validation method it is not sufficient.

To conclude, it is desirable to institute an external mechanism in each participating country (Member or Observer) to validate the answers to the - in principle tri-annual - I&A questionnaire.

#### **Design of the external validation mechanism**

It should be recognized that incorrect answers to the questionnaire can have different reasons. *Firstly*, the questionnaire is quite extensive and it could be the case that people involved in filling out the questionnaire are not entirely certain about some answers. Due to time constraints answers might not be thoroughly checked. *Secondly*, even though the questionnaire seeks to be applicable to various different justice systems, some questions might still be difficult to translate to the situation on a national level. To that end, the answers may not be unambiguous and might be the result of a discussion between different internal experts who were involved in answering the questionnaire. A *third* reason for a wrong answer could be that people filling in the questionnaire believe that a certain answer might be more favourable to their judicial systems in the international context. Also, it might work the other way around. When the persons who fill in the questionnaire would like to effectuate change it might be attractive to deliberately fill in an answer that stresses the pitfalls of a judicial system. These reasons point to the need that the external experts involved in the validation mechanism are independent (are not led by the objectives of the internal experts) and have much expertise about the judicial system of their country, preferably comparative to that of other countries. The process would be that the questionnaire is first answered by (internal experts of) the Council or other governing body itself and that then a group of external experts validates the answers as objectively as possible.

It should further be noted that the first time that the questionnaire has to be answered for a judicial system is time consuming. Once this has been done, it generally involves not much work anymore, as long as systems are not drastically reformed. A small external expert group would normally suffice. Bearing this in mind, it is up to the individual Councils to decide on the size of the group with two persons as minimum size for balance.

#### **Composition of a national expert group**

Given the need for objectivity and expertise, it stands to reason that members are selected from respected persons from the scientific community with knowledge about the subject and

known for their objectivity. It has been suggested that in addition persons from knowledgeable groups such as bar associations, judges associations and/or organizations of prosecutors, could be involved. These groups have in common that they do not belong to the Council or other responsible body but due to their job experience have significant knowledge of the justice system. Selection of members needs to be done in a transparent, objective manner, else the validation group can be easily discredited.

### **3.4 Extension of indicators to hard data**

The current set of indicators distinguishes between indicators about formal independence and about perceived independence. At the scientific validation conference in May 2018 it was noted that previous distinction between objective and subjective independence was ambiguous. The most important example being the sufficiency of the budget which indicator is part of the indicators about objective independence regarding financial matters. It was also suggested to gather 'hard', i.e. quantitative data about the subjects covered by the indicators, for instance about the actual use of disciplinary measures. At the conference it was felt that there is a lack of such data about the practices related to independence in the judiciaries. The EU Justice Scoreboard contains some quantitative data. These data have been gathered by means of an annual questionnaire among the Members/Observers of the ENCJ. Consequently, the ENCJ already compiles the data, but does not use them in its framework. In addition, it would be possible to strengthen the perception part of the indicators by using more answers from the judges survey in the indicator system, as this is currently restricted to one indicator.

An analysis of the available so called hard data and of the further use that can be made of the judges survey leads to the following observations.

- a) The quantitative data are not comprehensive. By design the survey data are much more comprehensive, as the judges survey has been developed on the basis of the indicators.
- b) The quantitative data are interesting as such, but it is not obvious in most cases what is a good and what is a bad outcome. For instance, is the frequent use of disciplinary measures good or bad? Similarly, is a large number of complaints good or bad? In all likelihood the number of complaints will be strongly affected by the design and scope of the complaints procedure.
- c) It would be conceivable to match a large part of the formal indicators about independence with detailed questions of the survey among the judges, and in the near future perhaps also among the lawyers. The formal indicator describes then the arrangements as such in a certain area, while the relevant survey question captures how the arrangements work in practice in the view of the respondents. However, the survey questions do not (always) cover all aspects of the indicators. Also, it could be considered to be one-sided to depend heavily on the judges survey.

It is suggested to leave the indicators as they are, and present the outcomes as usual in country profiles, but provide a one-page background analysis per country that links the formal indicators to the relevant survey questions and the available quantitative data. The advantages of this approach would be to keep the country profiles as simple as possible, and provide a flexible format for additional information. Especially, the inclusion of non-normative aspects does not fit in the indicator system. In the future the system may become more comprehensive, once standards have been set.



## 4. Survey among the judges of Europe

For the third time a survey was conducted among the judges of Europe about their independence. The survey asked them to give a general assessment of their independence, but also to assess a range of aspects that affect independence. In addition to the actual functioning of the mechanisms of independence, it asked whether they felt the independence of the judge was respected by the diverse stakeholders of the judiciary, ranging from the governing bodies of the judiciary, the parties in procedures and the other two state powers as well as the (social) media. The survey makes a cautious start with regard to the accountability of the judiciary. The survey has benefitted from the suggestions done in the two validation seminars that were organized in 2018.<sup>8</sup>

Judges from 25 countries participated in the survey, in total 11,335 judges. In a few countries in which Councils are also responsible for the prosecution, prosecutors were asked to participate as well.<sup>9</sup> In this report, only the results of the participation by the judges are presented. In this survey France did not participate due to the change of membership of the Council right before the start of the survey. Also, Poland did not participate, as its Council did not qualify anymore for membership of the ENCJ and was suspended. Compared to the previous survey, Albania, Estonia and Serbia did not participate either. New participants are Bosnia and Herzegovina, Greece, Hungary and Montenegro.

### 4.1 Methodology

All Members and Observers of the ENCJ (i.e. Councils for the Judiciary and, where these do not exist, other governing bodies of the judiciary such as ministries of Justice) were asked to take part in the survey. The HJPC of Bosnia and Herzegovina, not being a Member or Observer of the ENCJ, asked to participate, and this was agreed. The participating governing bodies distributed a letter of introduction and a recommendation of the president of the ENCJ to all judges within their jurisdictions. The letter contained a link to the internet site of the ENCJ that hosted the survey. The governing bodies translated the survey in their languages, and for each language a Google form was created that was made available on the ENCJ internet site. The respondents could fill in the survey on line anonymously. They were asked to specify the country in which they were working as a judge. Judges could fill in the survey in any language into which the survey had been translated.

Most Councils were able to distribute the letter of introduction directly to the judges, other Councils had to send the letter to the court president who in his/her turn distributed the letter among the judges of his/her court. Some Councils secured the endorsement of the judges association of their country. The survey was addressed only to professional judges, and not to lay judges.

The survey was designed in such a way that it asked judges to give a general assessment of their independence as they perceive it, to provide the data for the relevant Independence indicator (I13), but also explored different aspects of independence in depth. In addition, they were asked some about some personal characteristics (gender and experience) and their work (type of court and area of law). The questions are essentially the same as the previous surveys, but some questions were added and a question was deleted. New questions concern

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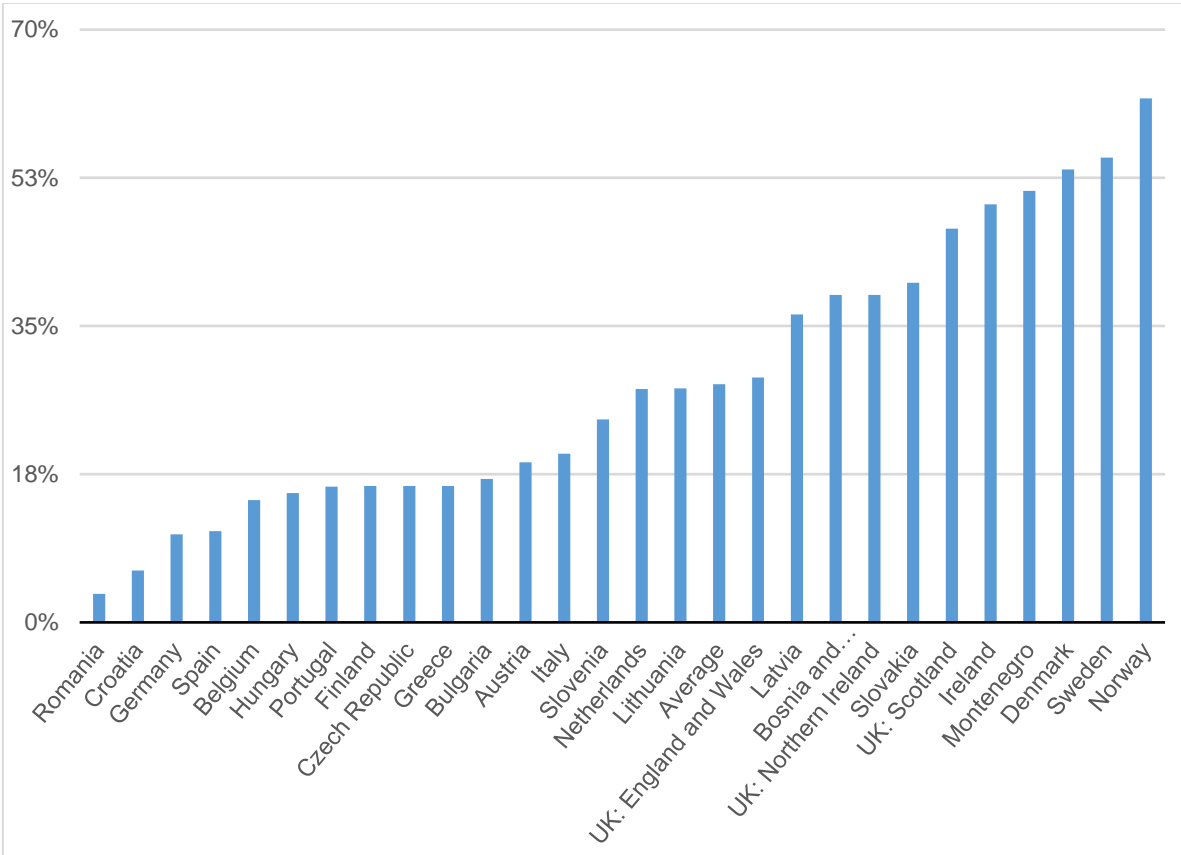
<sup>8</sup> We are in particular grateful to Stefan Voigt and his colleagues of Hamburg University who made practical suggestions during the preparation of the survey.

<sup>9</sup> The total number of respondents is 12,034, of which 11,335 judges, 682 prosecutors and 17 invalid responses (no answer to question judge or prosecutor, or invalid answer to question about country).

the change of independence as experienced by the judges since they took office and the extent to which judicial decisions that go against a government are implemented by that government. Independence cannot be separated from authority: a judiciary may be fully independent, but if its decisions are not taken seriously independence has no meaning. The latter question addresses part of this issue. Three questions regarding accountability were added to fill in the new accountability indicators A10 and A11. The question about possibilities for improvement of independence was dropped, as it proved complicated and did not have added value to other questions.

**4.2 Response rate**

Figure 1 gives the response rate per country. A target was set at 15% responding judges minimally, but this threshold was not reached in four countries. Still, the absolute number of respondents was deemed sufficient to retain all countries in the results. The number of respondents is given in figure 2.



Note: the number of judges is based on CEPEJ data of total professional judges 2016.

Figure 1 Response rate

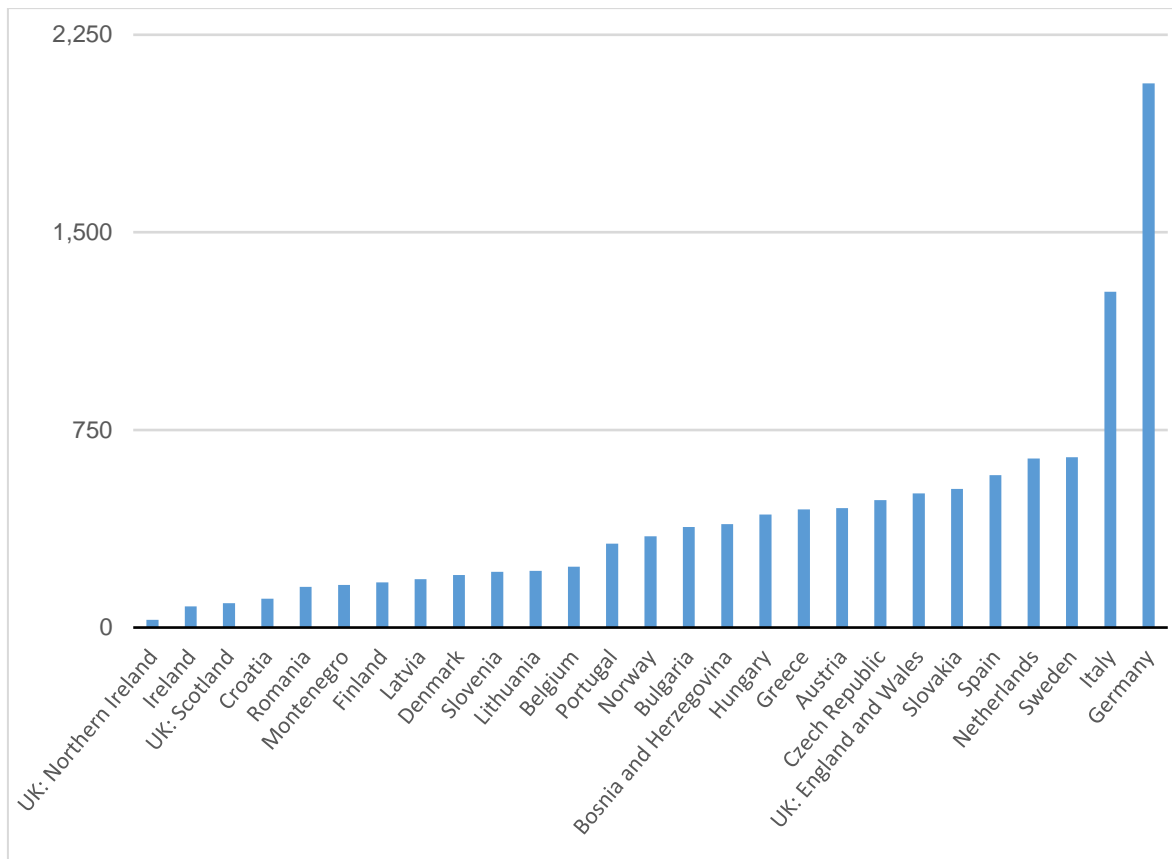


Figure 2 Number of respondents

### 4.3 Characteristics of respondents

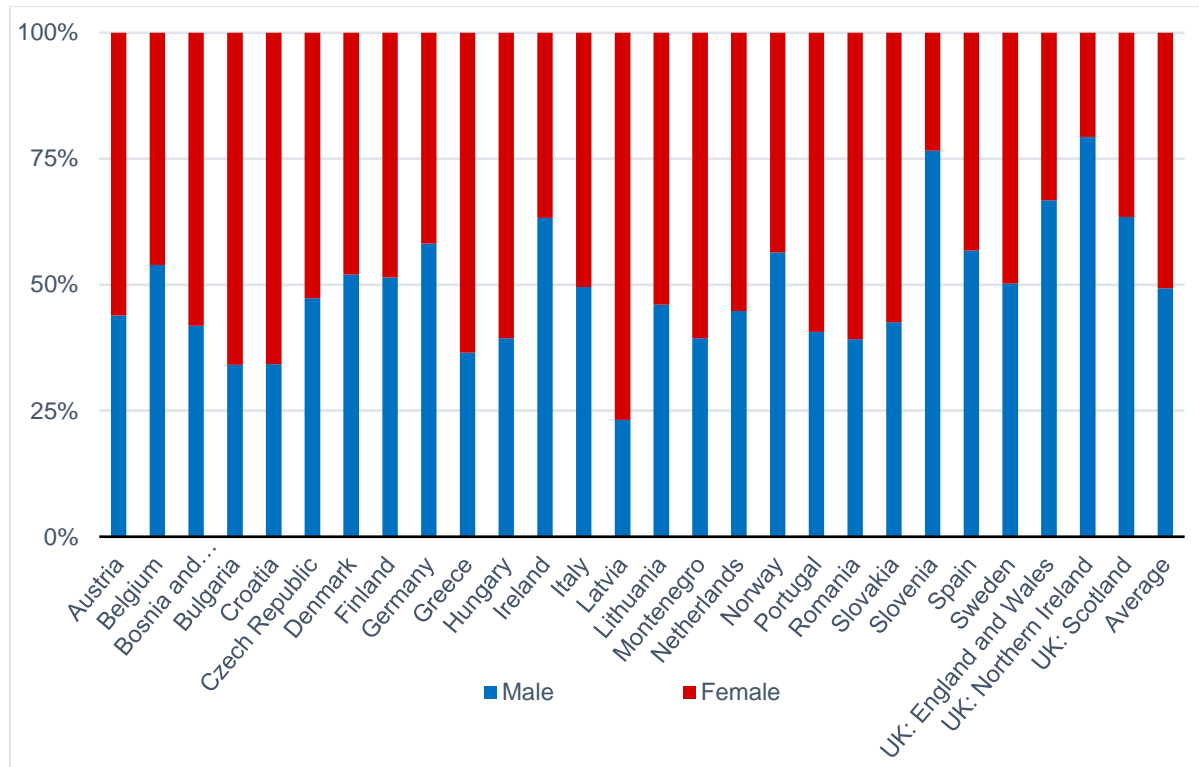


Figure 3 Gender of respondents

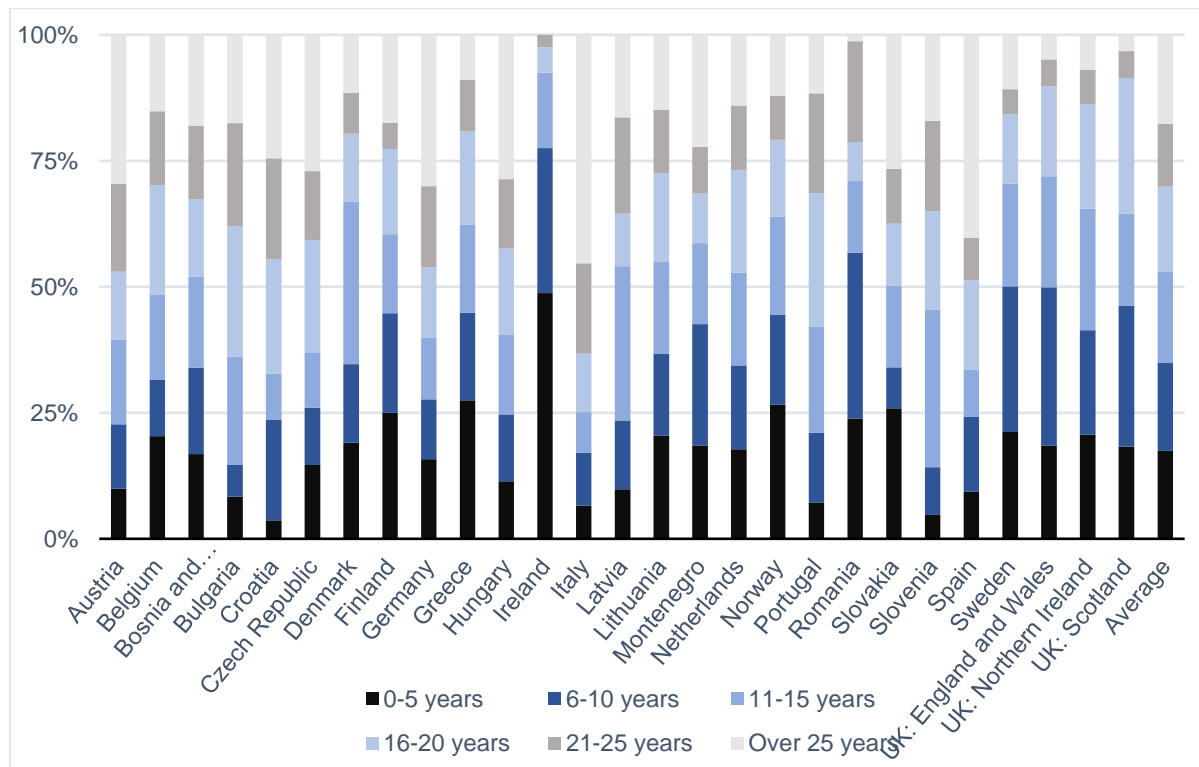


Figure 4 Judicial experience

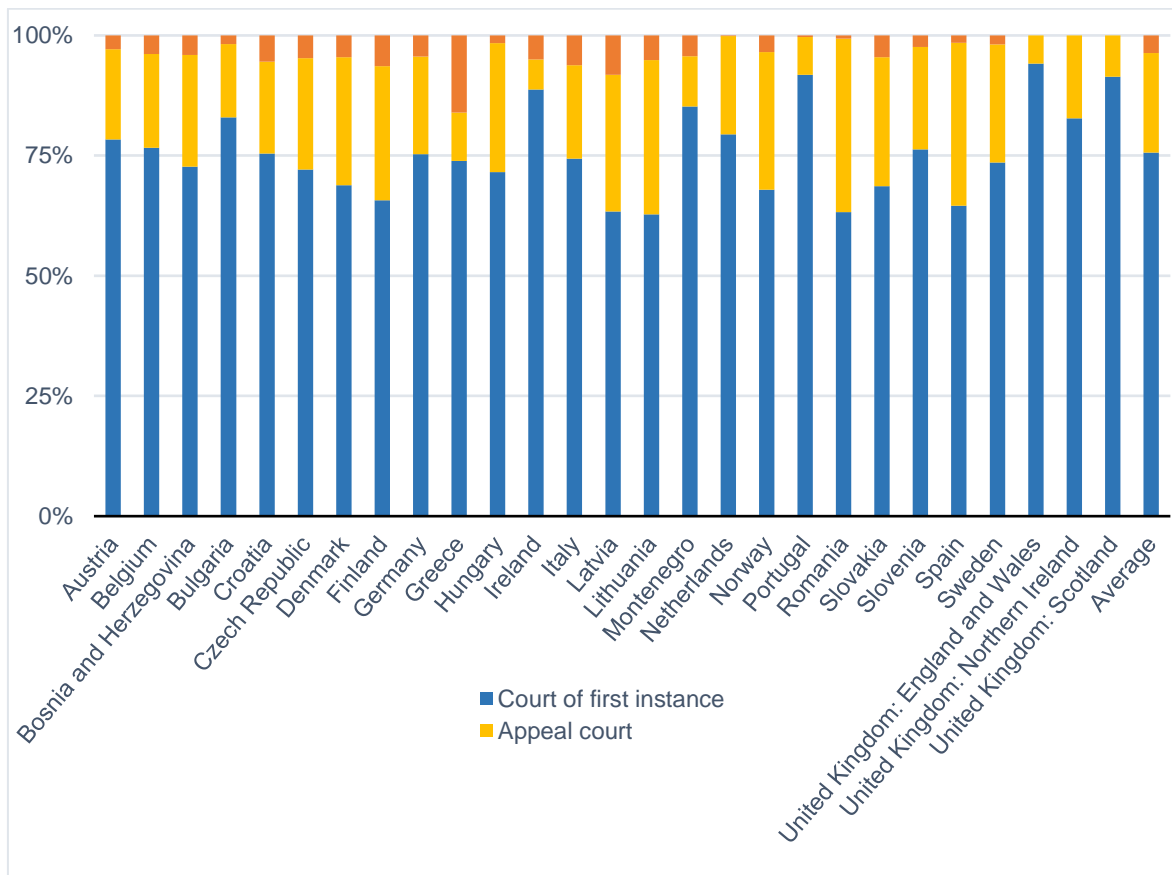


Figure 5 Respondents by type of court

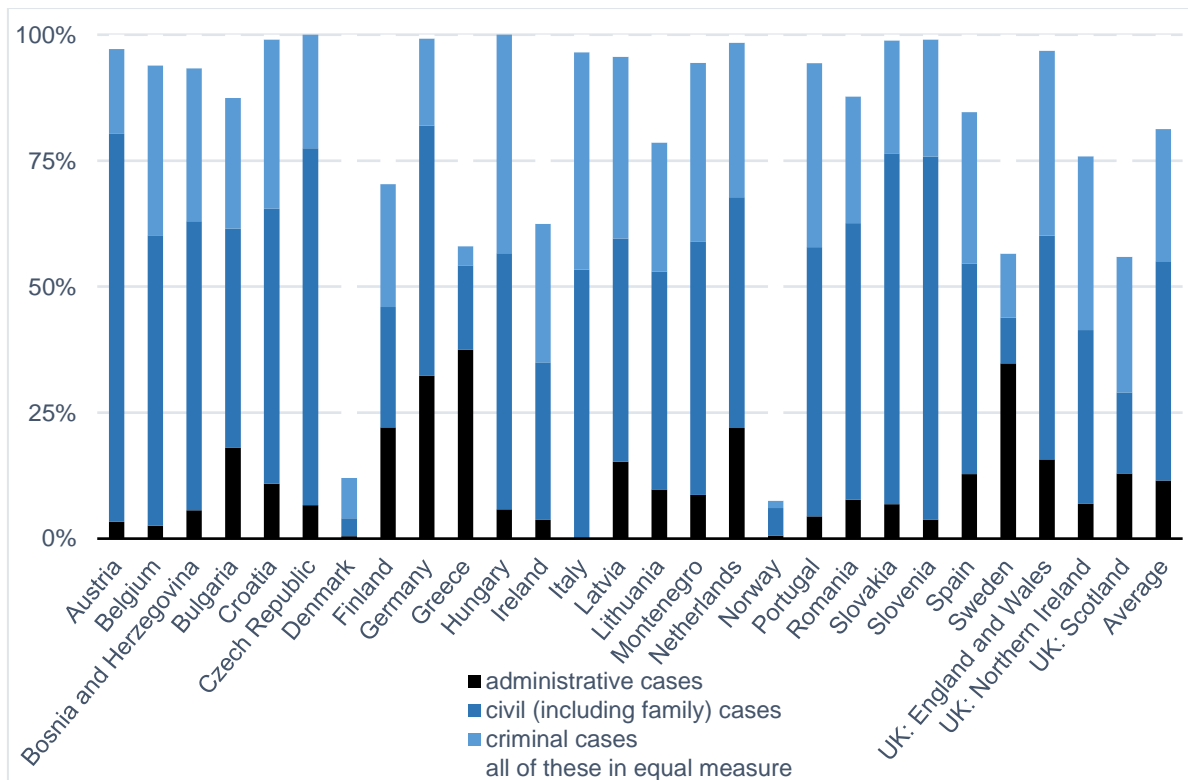




Figure 6 Respondents by type of case they primarily adjudicate

#### 4.4 Overall perception of independence

On a 10-point scale judges rate the independence of the judges in their country on average between 6.5 and 9.8. Three countries, Bulgaria, Croatia and Latvia, have scores between 6.5 and 7. The scores of six countries are between 9 and 10. These countries are the UK, Ireland, the Netherlands and the Scandinavian countries (except Sweden). Judges were asked also to rate their personal independence (figure 8). These scores are much higher than the scores about the judges in general (0.6 point on average) with the difference increasing with the decrease of the score for all judges.

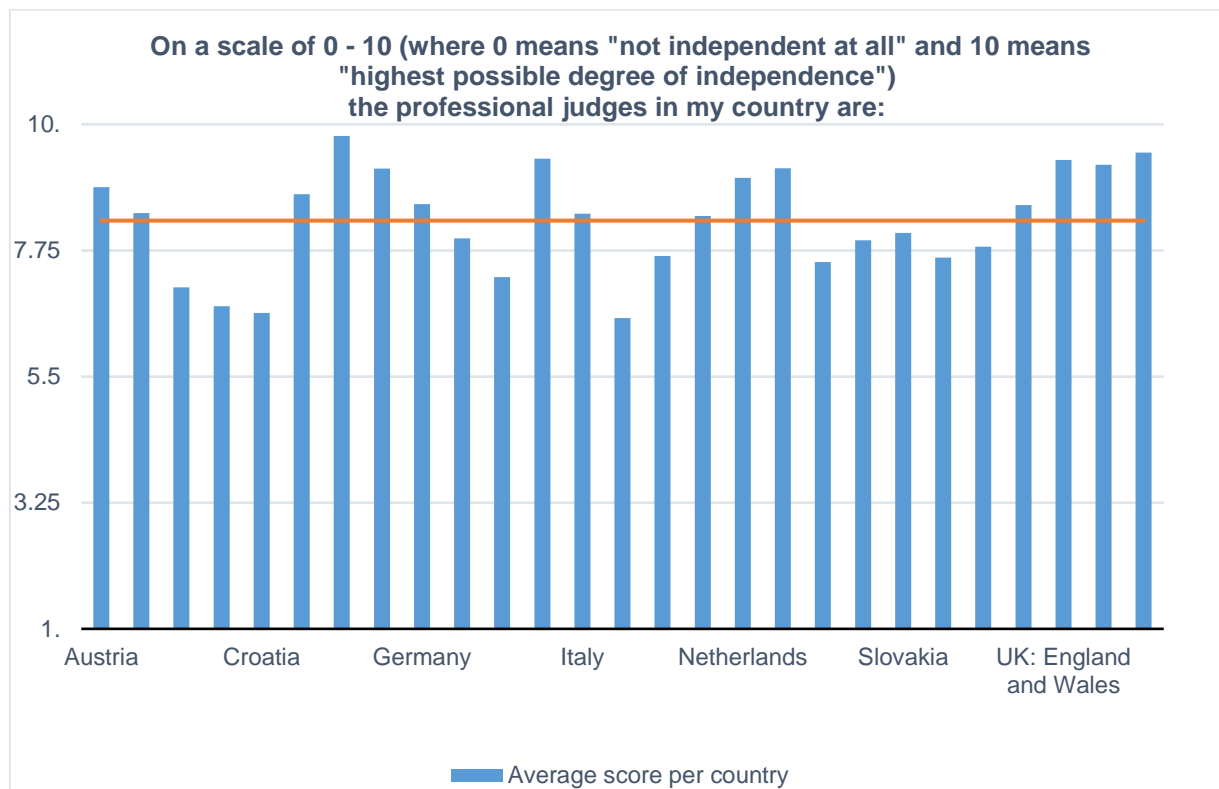


Figure 7 Independence of judges in general

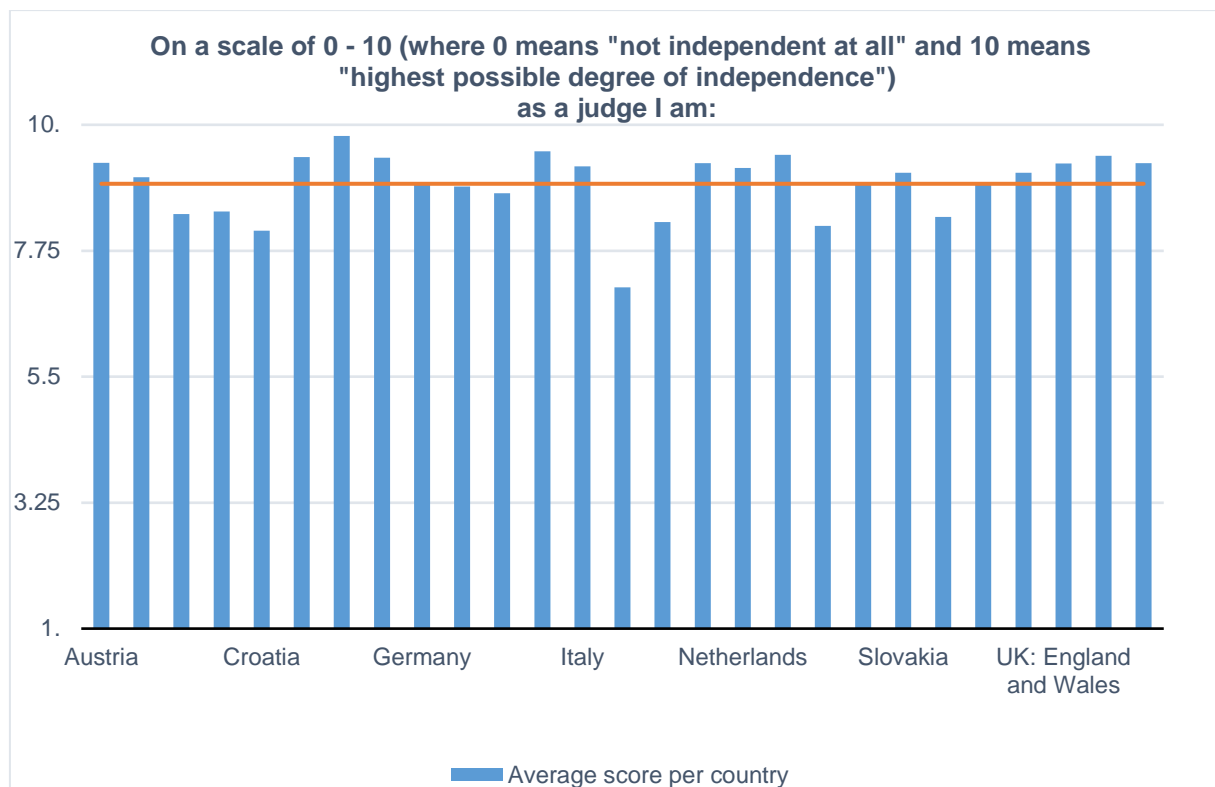


Figure 8 Personal independence of judges

Earlier surveys took place in 2015 and 2017. Overall the outcomes remain roughly the same. Large differences occur for four countries that participated in all three surveys (change of at least 0.5 point). There was an increase of perceived independence in Spain with the score regarding the independence of judges in general increasing from 6.6 in 2015 to 7.5 in 2017 and 8.1 in 2019 (personal independence increased from 8.0 to 8.7 and 9.0). Also for Slovakia a large increase was recorded: from 6.7 to 7.7 and 8.1 (from 8.0, to 8.9 and 9.1). Decreases occurred in Portugal: from 8.1 to 7.9 and 7.5 (from 9.1 to 8.8 and 8.2), and in Romania: from 8.7 to 8.1 and 7.9 (from 9.4 to 8.9 and 8.9). It should be noted that Poland did not participate in the present survey, as it was suspended as a member of the network. Hungary, as another country in which reforms have caused concern about judicial independence, has participated in the survey for the first time this year.

Taking a longer perspective, judges were asked whether their independence has increased or decreased since they started as a judge. These answers can be meaningfully combined with the years of experience judges have (see above figure 4). Figure 9 gives the results for Slovakia. It shows that the (net) largest percentage of the judges that have experienced a big improvement of independence are those that have started 25 years ago. Also, many judges working more than 15 years report large improvements. Judges that started in more recent years see smaller and mixed changes. A pattern of large improvement over the last 25 years - with frequent emphasis on the earlier periods - is found for most countries of Eastern Europe. Only Hungary shows a radically different pattern (figure 10). For the other countries the percentages of judges that see large changes for the better or worse are much smaller and the patterns of responses differ widely. For some countries reversed patterns are found, where especially or only recently appointed judges report positive change. Such outcomes may reflect different attitudes towards modernization of the judiciary. Annex 1 gives the profiles for all countries/entities.

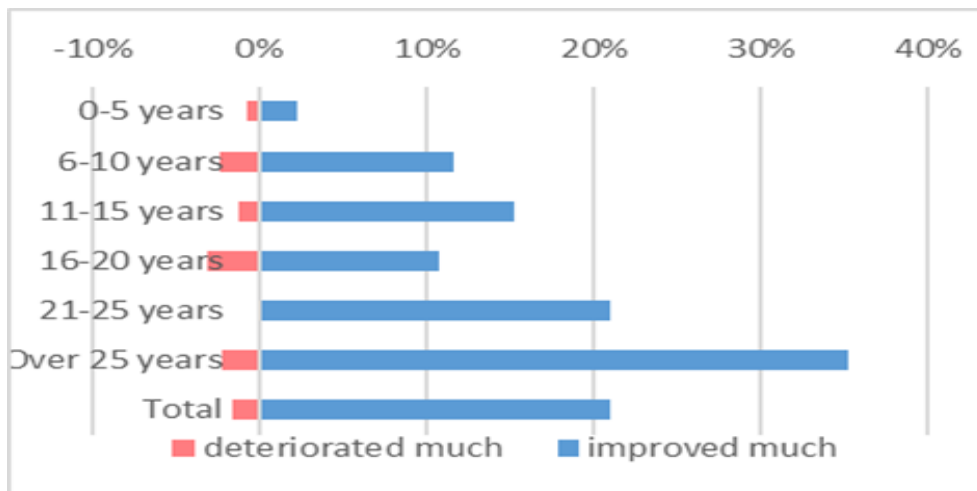


Figure 9 Perceived change of independence, percentage of judges that report a large deterioration or improvement in Slovakia by years of judicial experience

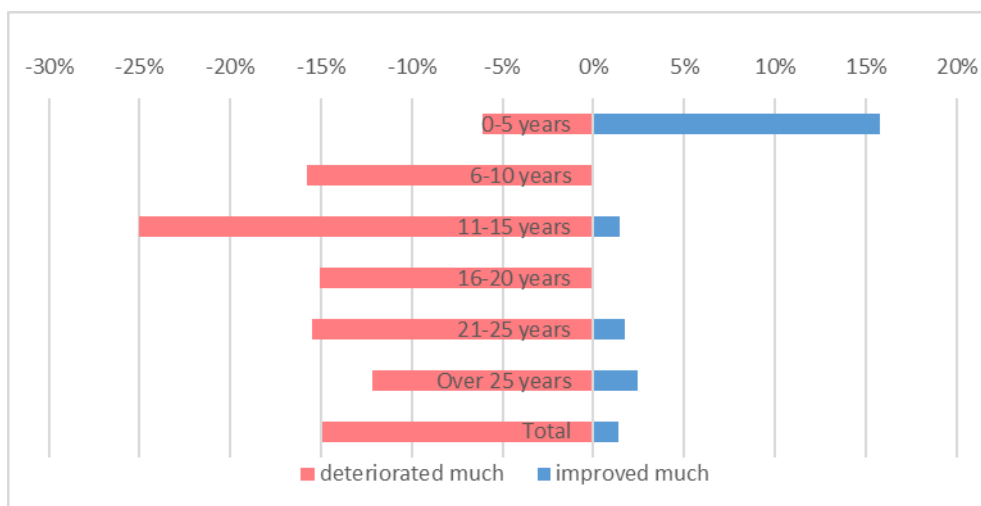


Figure 10 Perceived change of independence, percentage of judges that report a large deterioration or improvement in Hungary

#### 4.5 Aspects of independence: case-related

The vast majority of judges in Europe do not experience inappropriate pressure to influence their decisions in judicial procedures (figure 11). Across all countries 5% of the judges report inappropriate pressure with less than 1% reporting that this happens regularly. Percentages of 10% and higher are reported for Croatia (15%), Latvia (19%) and Lithuania (13%). The fact that judges are under inappropriate pressure does not mean, of course, that they yield to that pressure. When judges experience inappropriate pressure, the most given answers - across all countries - as to who exerts this pressure are court management, the parties and, at the same level, other judges and the media.

Turning to external pressure, figure 12 concerns the occurrence of corruption within the judiciary, focused on efforts to influence the outcome of procedures. In the previous survey the question was about taking bribes; in the present survey taking bribes was broadened to other forms of corruption (accepting non-monetary gifts or favours). As in the previous survey three categories of countries can be distinguished: (1) judiciaries in which nearly all judges (96% or more) are sure that corruption does not occur. Countries are Denmark, Finland, Ireland, the Netherlands, Norway, Sweden and the UK. (2) Judiciaries in which a very small percentage of judges (2% or less) believes that corruption occurs, and 8% - 15% is not sure. Austria, Belgium, Germany and Montenegro<sup>10</sup> fall into this category. And (3) judiciaries in which a higher percentage believes that corruption occurs (8% - 41%) and many more than 15% (up to 50%) are uncertain. The fact that judges are uncertain about the occurrence of corruption is a bad sign in itself. On the positive side: when judges believe that corruption occurs, they seldom expect this to happen regularly. Italy is an extreme case: 41% believe corruption occurs, but 26% (point) believe this happens very rarely. The five countries for which the most judges report that corruption occurs regularly or occasionally are: Bulgaria (19%), Croatia (16%), Italy (14%), Lithuania (13%) and Latvia (11%).

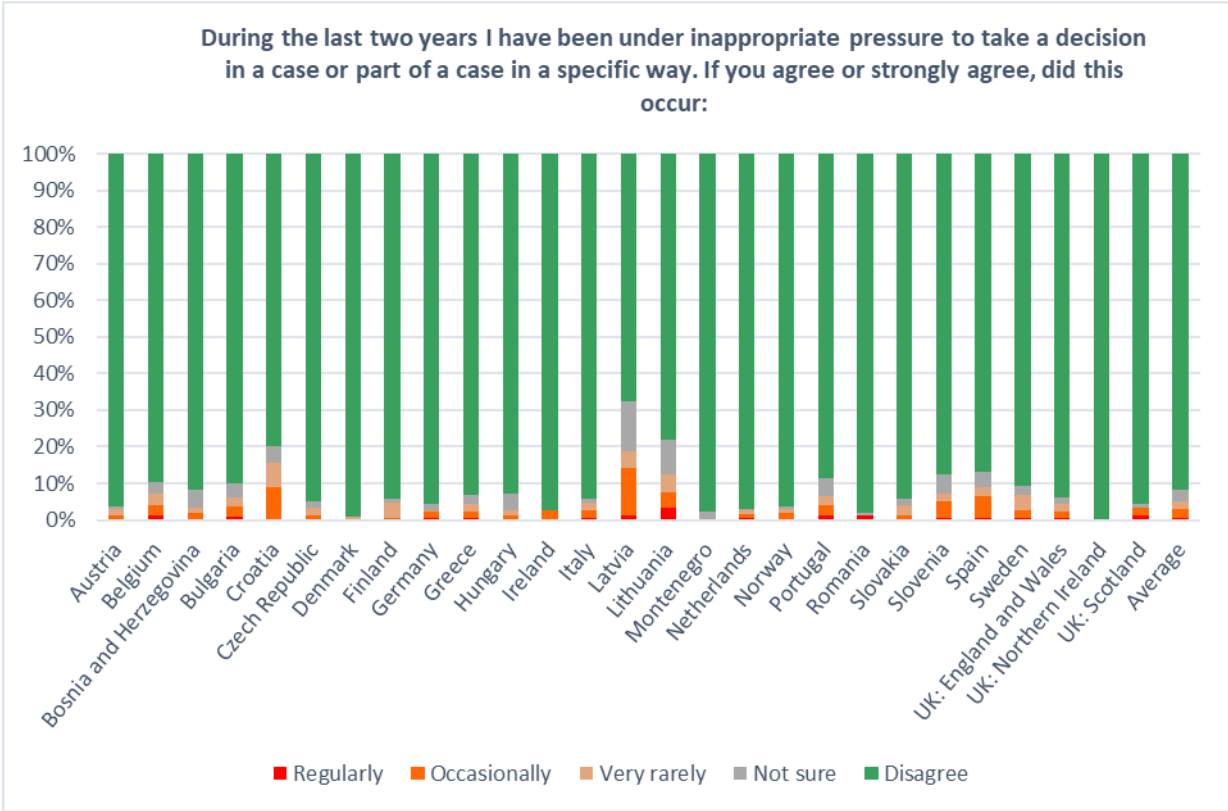


Figure 11 Inappropriate pressure

<sup>10</sup> The scores of Montenegro differ much from those of neighbouring countries. It has been reported elsewhere that the judges in Montenegro assess their situation in general and with regard to independence and corruption very positively and much more positively than court users and lawyers (Worldbank 2018, <http://documents.worldbank.org/curated/en/673881525871078007/pdf/Experiences-and-Perceptions-of-Judicial-Performance-in-Montenegro.pdf>).

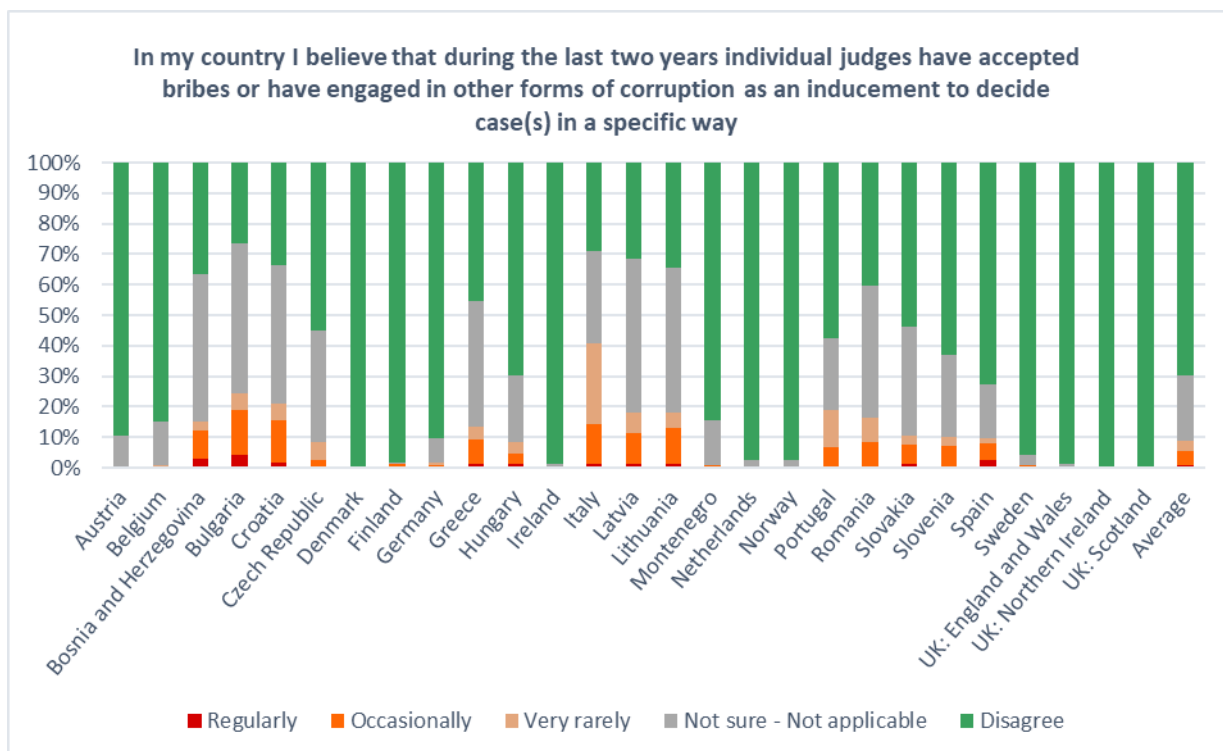


Figure 12 Judicial corruption

External pressure can also take the form of claims for personal liability. Figure 13 shows that while not negligible, claims are not a big issue in the eyes of the respondents.

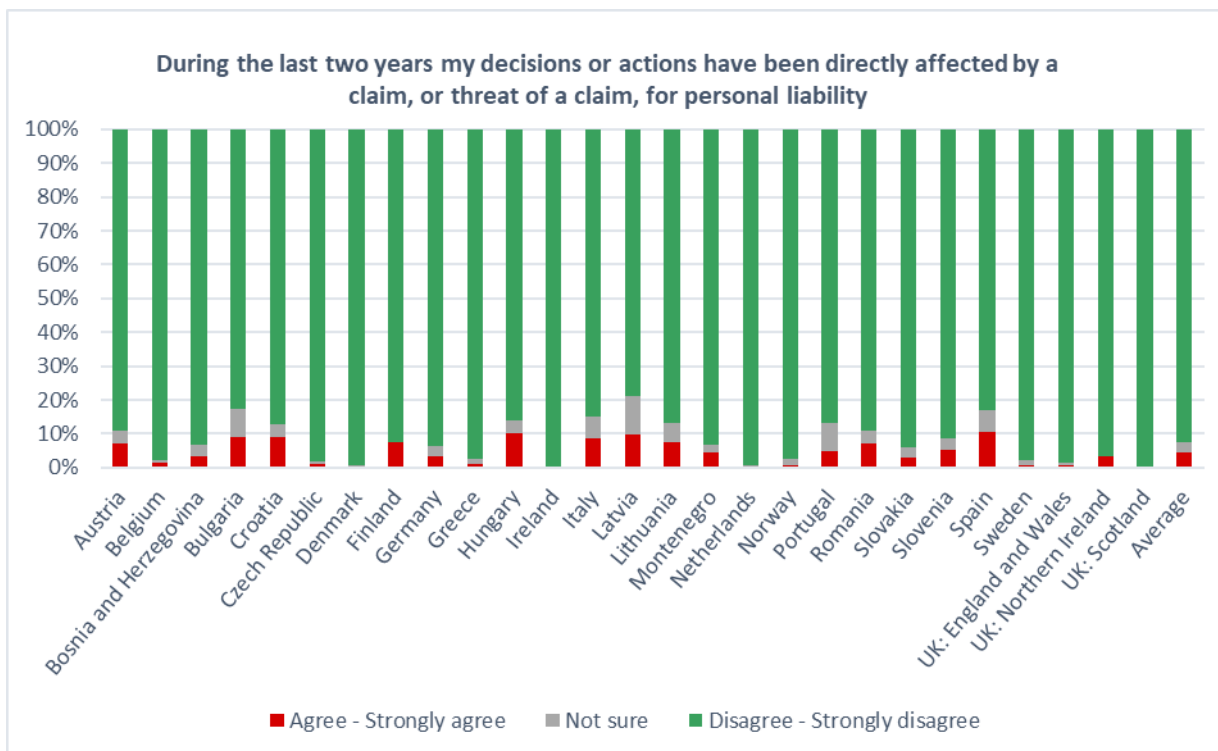


Figure 13 Personal liability

More important sources of external influence on decisions are the media and social media. Many judges see an inappropriate impact on judicial decisions. The impact of the media on decisions of judges is large in most countries. Only in Scandinavia, the Netherlands, Ireland and the UK do well under 10% of judges believe this impact to exist. The highest percentages occur for Croatia (71%), Portugal (50%), Bulgaria (41%), Latvia (43%) and Slovakia (41%). The impact of social media is seen an inappropriate by less respondents, but still 46% in Croatia and 39% in Portugal. The relationship with the media is further discussed below.

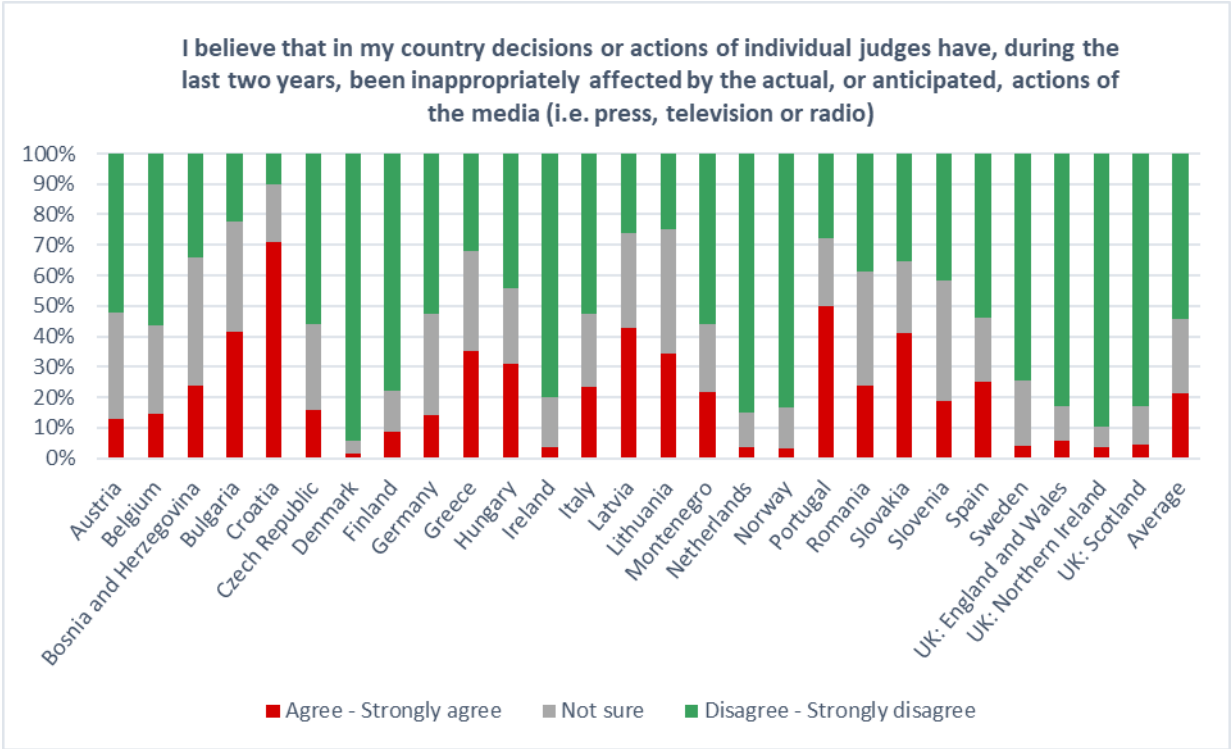


Figure 14 Influence of the media

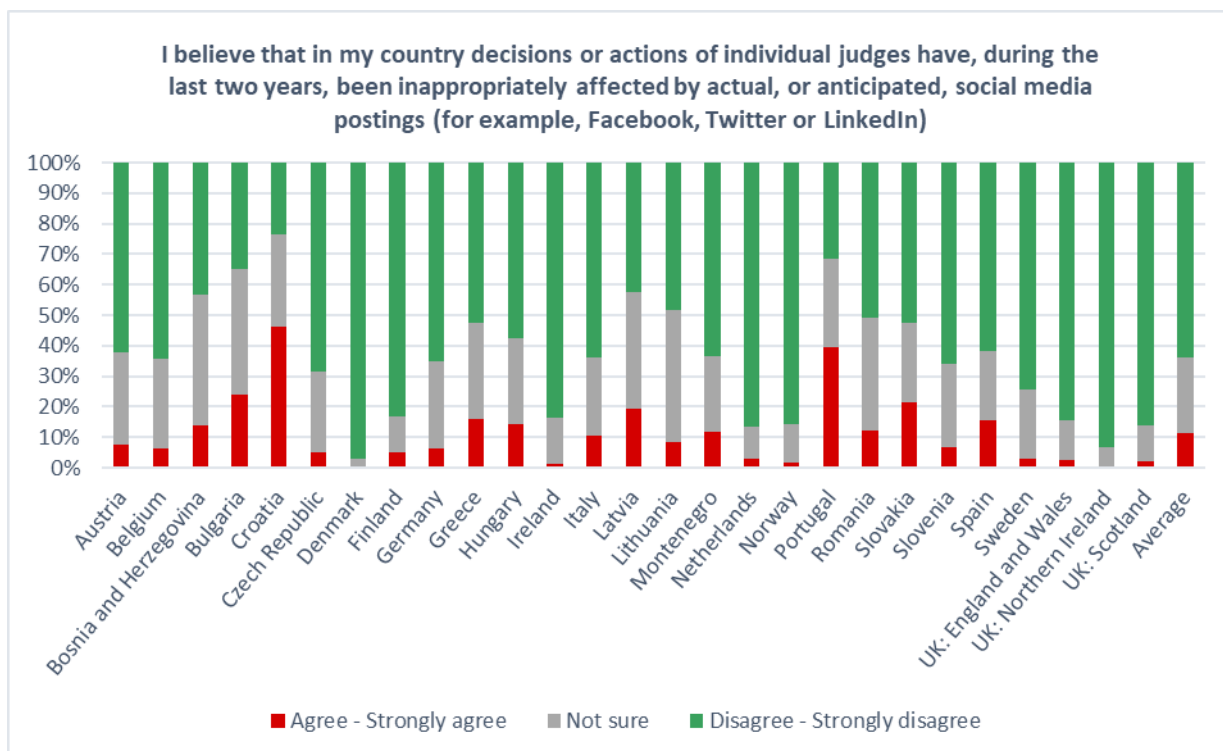


Figure 15 Influence of social media on decisions

Turning to internal pressures, figure 16 presents the pressure judges experience when deciding cases by disciplinary procedures. According to the respondents, this pressure is particularly strong in Latvia and Lithuania, while also present in Greece, Romania, Portugal and Spain.

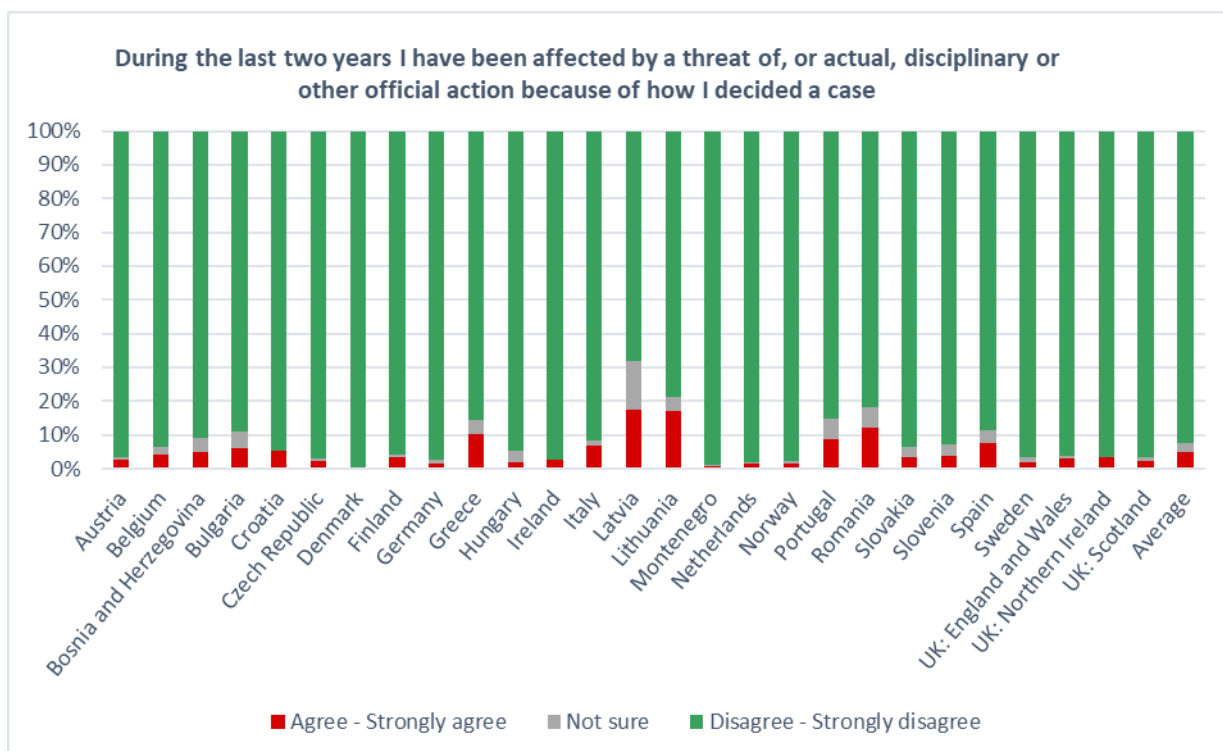


Figure 16 Disciplinary action

The outcome of cases can also be influenced by case allocation. The allocation of specific cases to specific judges, if the allocation mechanism allows for such discretionary decisions by, for instance, court management, can determine the outcome of these cases in foreseeable ways. In particular, many judges in Portugal (24%) and Spain (26%) believe this to happen in their countries, while similar percentages are not sure about this. But this phenomenon seems to be broader, as Bulgaria, Croatia, Greece, Hungary and Latvia also draw high percentages.

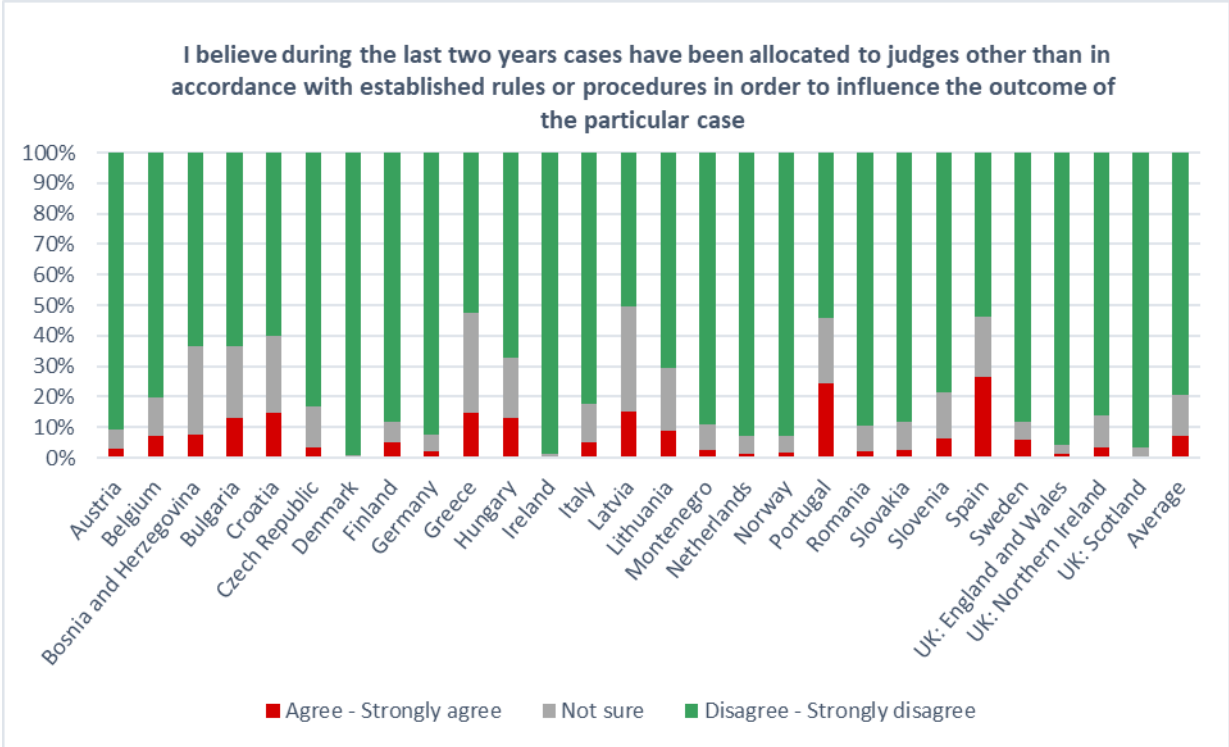


Figure 17 Allocation of cases

Above, inappropriate pressure on judges from several sources, including court management, was discussed. Figures 18 and 19 differentiate the potential influence of court management by examining separately the always inappropriate influence on the content of decisions and the influence on the timeliness of decisions that may or may not be inappropriate, depending on the pressure exerted. Influence on the content of decisions is rare. Only in Latvia, Lithuania, Croatia and Hungary more than 5% of the respondents actually report that such pressure has been exerted on them. As to timeliness, pressure that is perceived to be inappropriate occurs much more often. For a diversity of countries the percentage of judges that experience inappropriate pressure is well above 10%. For instance, in both England and Wales and Slovenia 17% of the judges report such pressure.

A similar grey area seems to exist with regard to the impact of guidelines developed by judges. Note that such guidelines do not include the obligation to follow precedent. Guidelines that promote the uniform interpretation of (procedural) law may go against the professional opinion of individual judges, but they still may feel bound to comply. From the perspective of independence this is undesirable. Figure 19 shows that this phenomenon is actually widespread in Eastern Europe, but also occurs in England and Wales. In other judiciaries more unanimity seems to exist about guidelines.



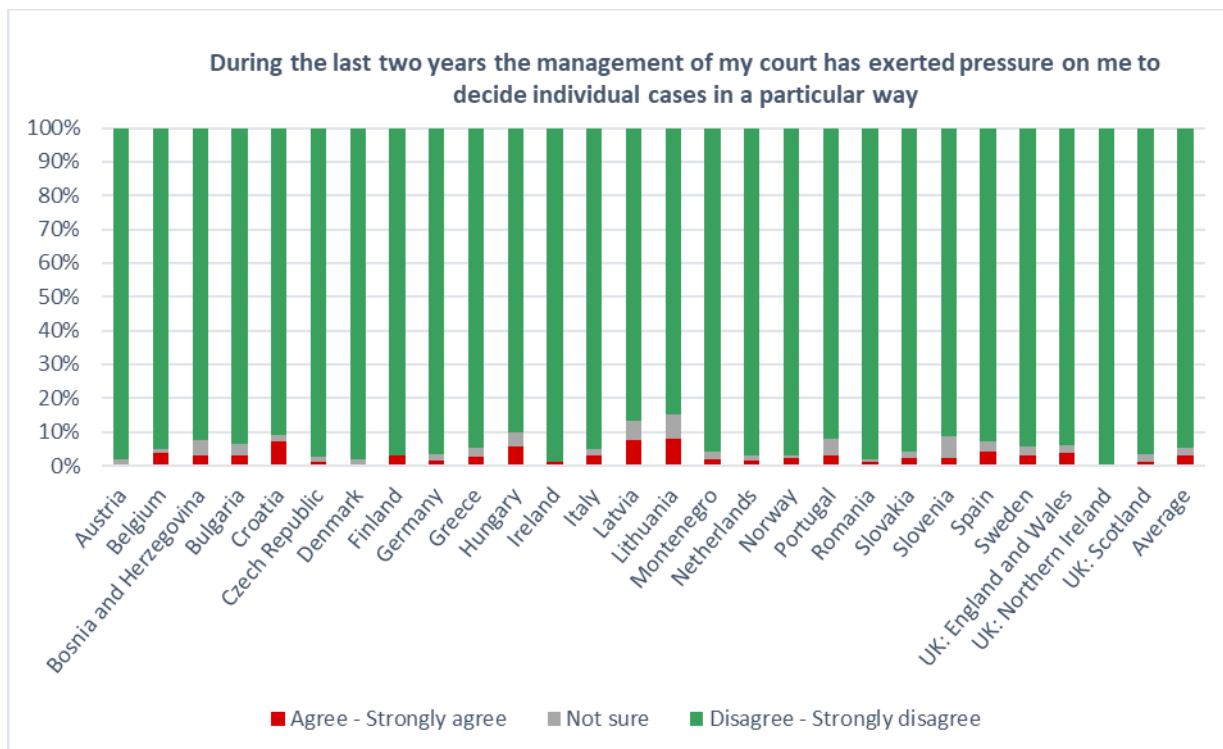


Figure 18 Inappropriate pressure of court management: content of decisions

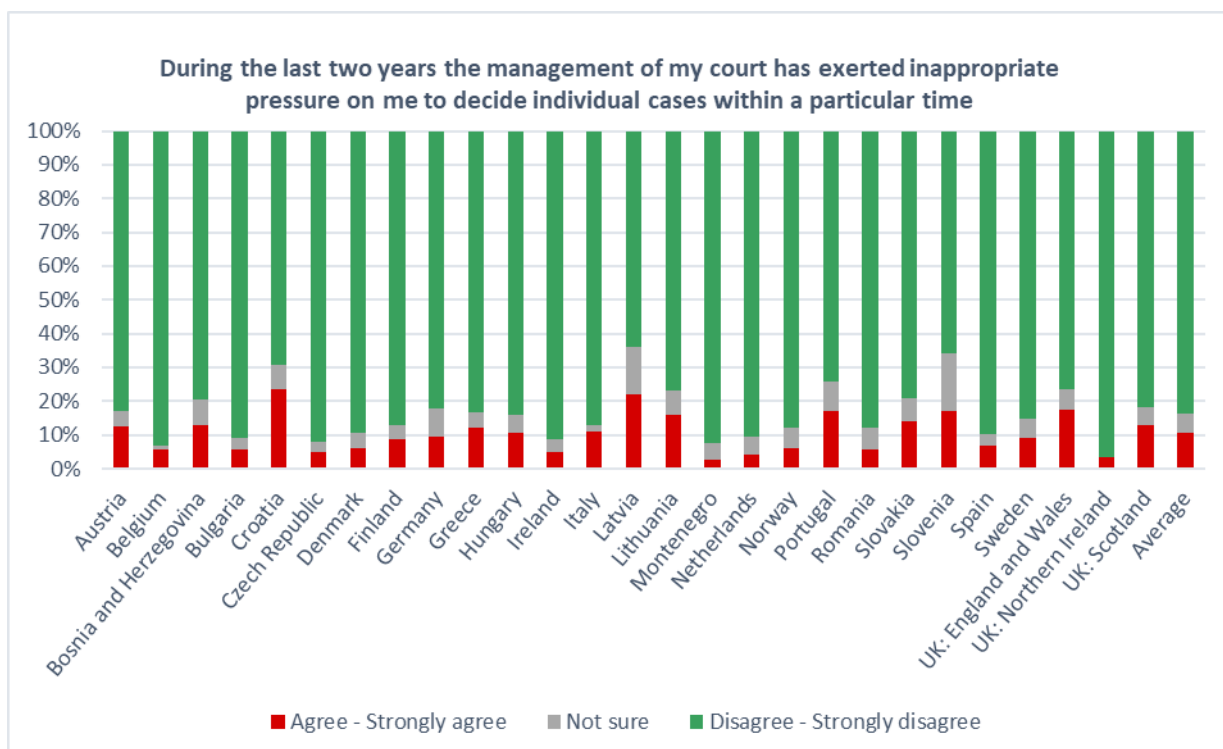


Figure 19 Inappropriate pressure of court management: timeliness

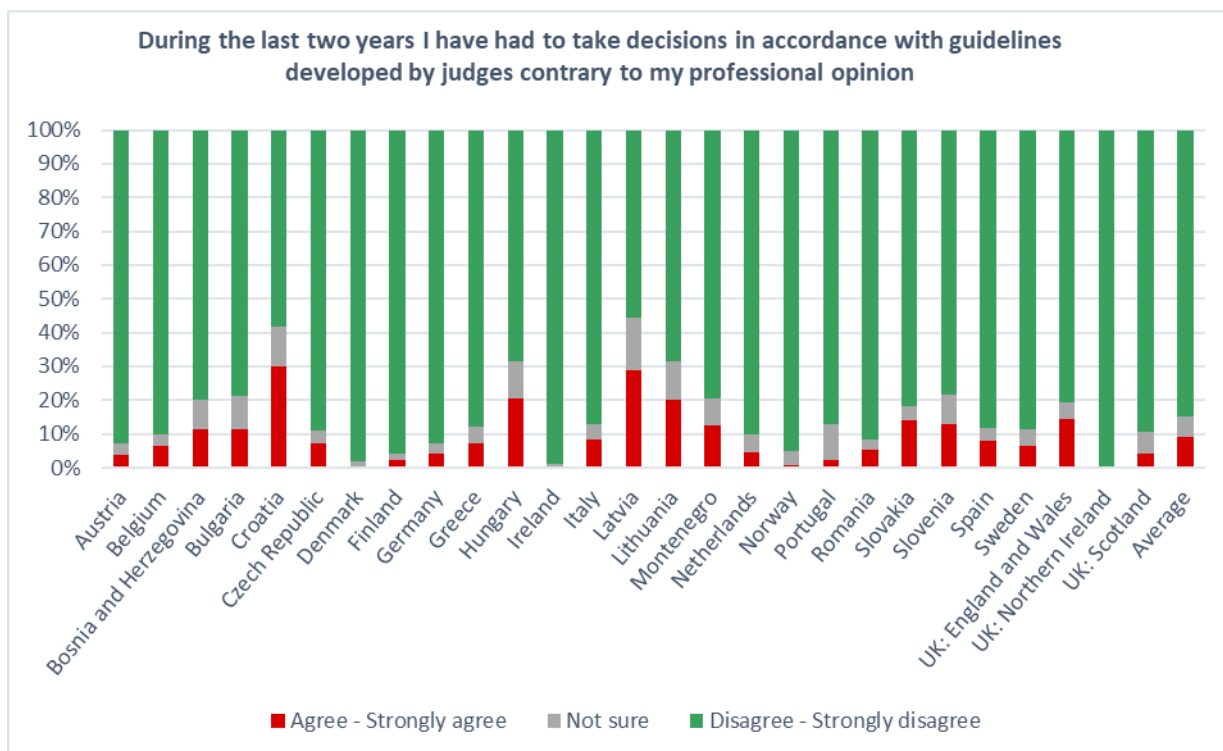


Figure 20 Impact of guidelines on independence

#### 4.6 Aspects of independence: appointment and promotion of judges

Human resource decisions about judges form a key area of independence, and belong often to the primary tasks of a Council for the Judiciary. The previous survey generated discussion about the possible causes of low scores. For that reason a distinction was made in this survey between first appointment to the first and second instance courts and appointment to the Supreme Court / Court of Cassation, as the procedures for appointment are generally very different. Figures 19 and 20 present the outcomes. Figure 19 concerns first appointment to the judiciary and addresses the issue whether appointment is solely based on ability and experience. Only in a few judiciaries (nearly) full consensus is expressed that this is the case (Denmark and the Netherlands, but also Romania). In other judiciaries this belief does not exist at all, with at the maximum 65% of the judges in Croatia, 49% in Hungary and 38% in Bosnia and Herzegovina expressing the opposite. This remains a major issue to address.

As to appointment to the Supreme Court / Court of Cassation, the scores are even worse. 68% of the respondents from Spain, 53% from Portugal as well as Hungary and 46% from Italy, but also 34% from Germany express that appointments are not only based on ability and experience.

Promotion of judges at the first instance and appeal courts draw even worse scores, and it is evidently difficult to organize in such a way across Europe that it is only based on ability and experience and it is seen and accepted to be a such. Only, Denmark seems to succeed in this.

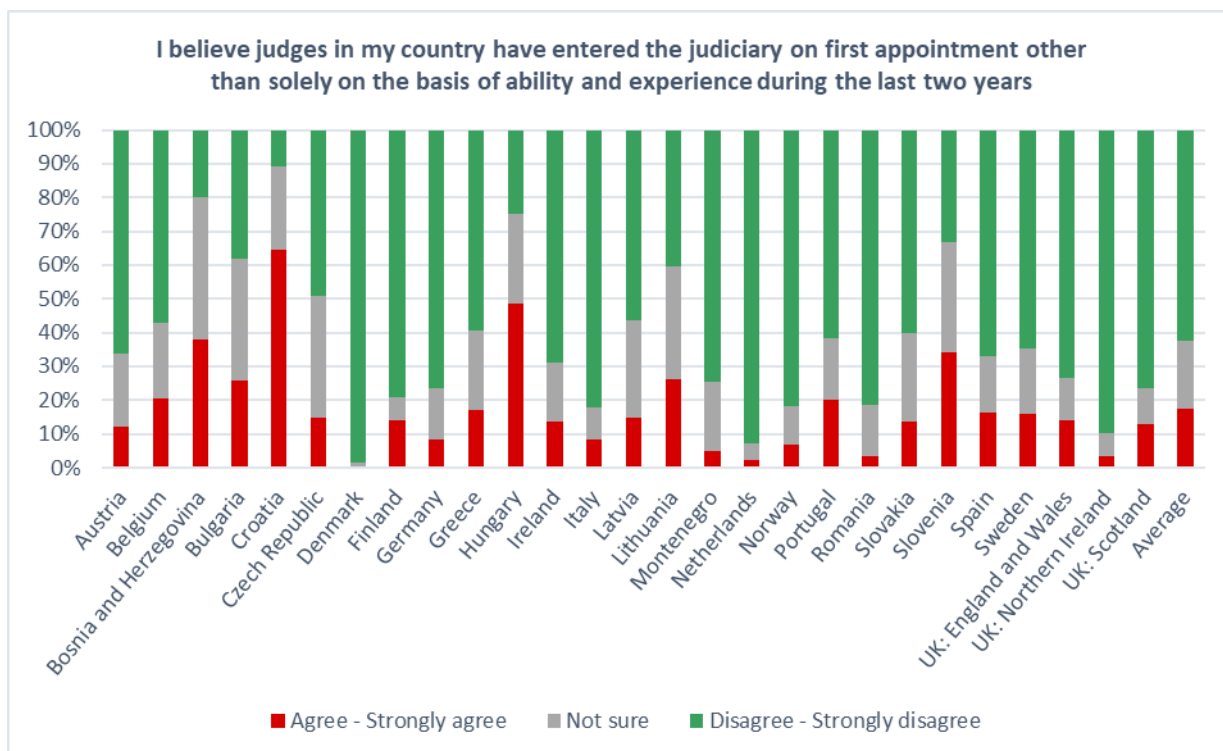


Figure 21 First appointment of judges

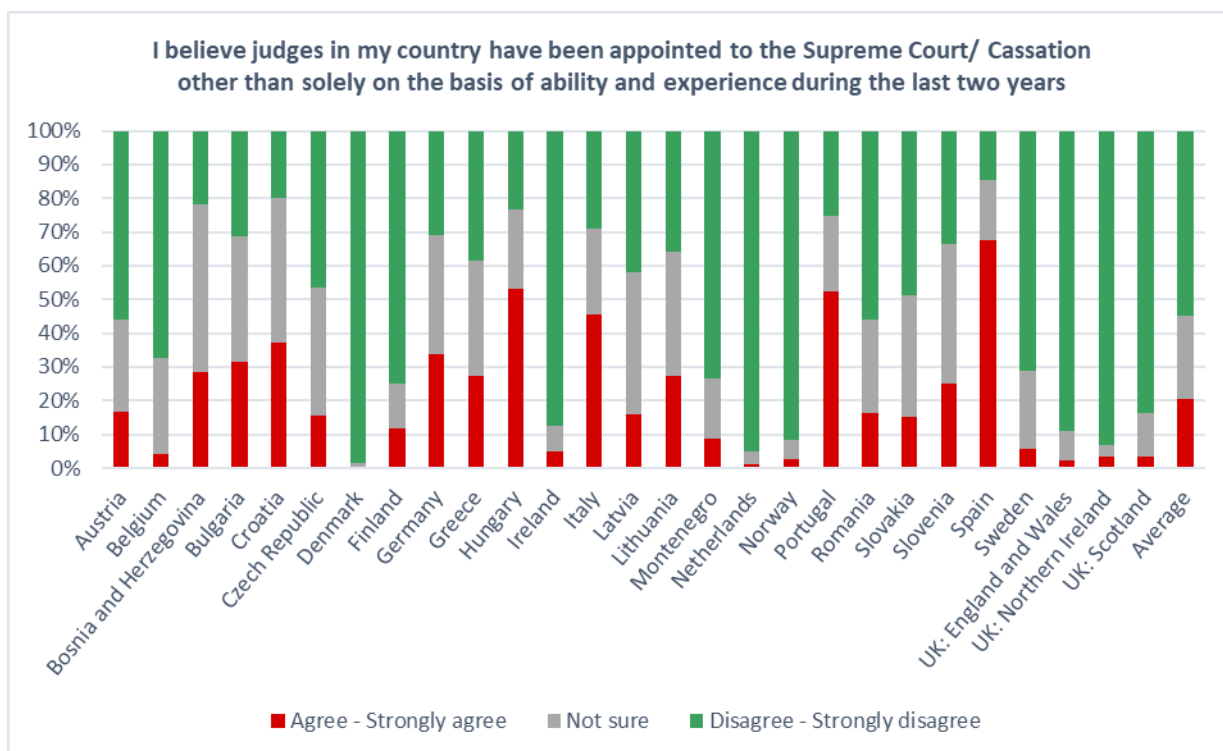


Figure 22 Appointment to supreme court/court of cassation

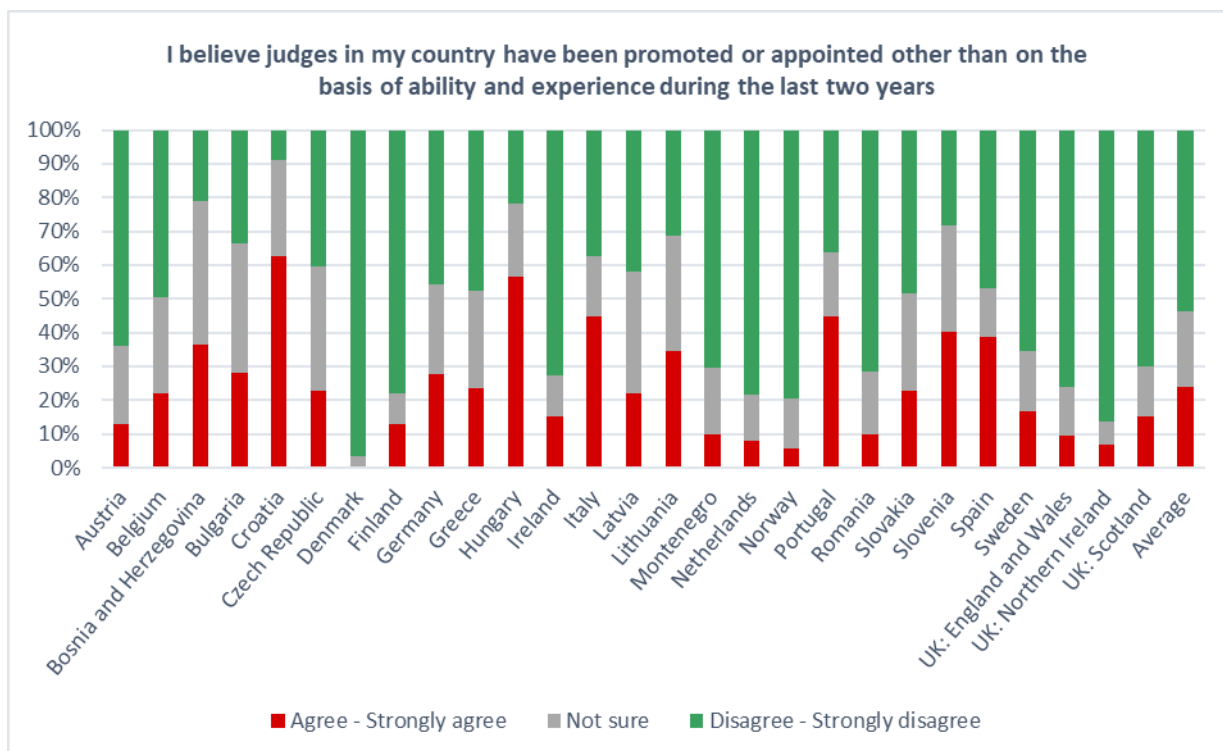


Figure 23 Promotion of judges

#### 4.7 Aspects of independence: working conditions

The way judges can adjudicate cases may also depend on their working conditions. Judges may be fully independent in the aspects described above, but if they, for instance, lack the resources to conduct procedures in the manner they deem necessary for a fair trial, independence comes to nothing. In the survey the respondents were therefore asked to give their opinion on several aspects of changes in their working conditions. The following figures give the outcomes.

Issues about pay, pensions and retirement age play a role in many countries, in particular, Spain, Portugal, Hungary, Belgium, Greece and the UK, to such an extent that these affect independence in the eyes of the respondents. Caseload and, close related, court resources are an even larger issue than pay. In all countries this is an issue, even in Scandinavian countries like Norway. The only exception is Denmark where less than 10% of the respondents view caseload and court resources as a threat to their independence. The issues are seen as larger in judiciaries in West- and South-Europe than in East-Europe. Finally, transfer of judges to other courts or locations is not an important issue.

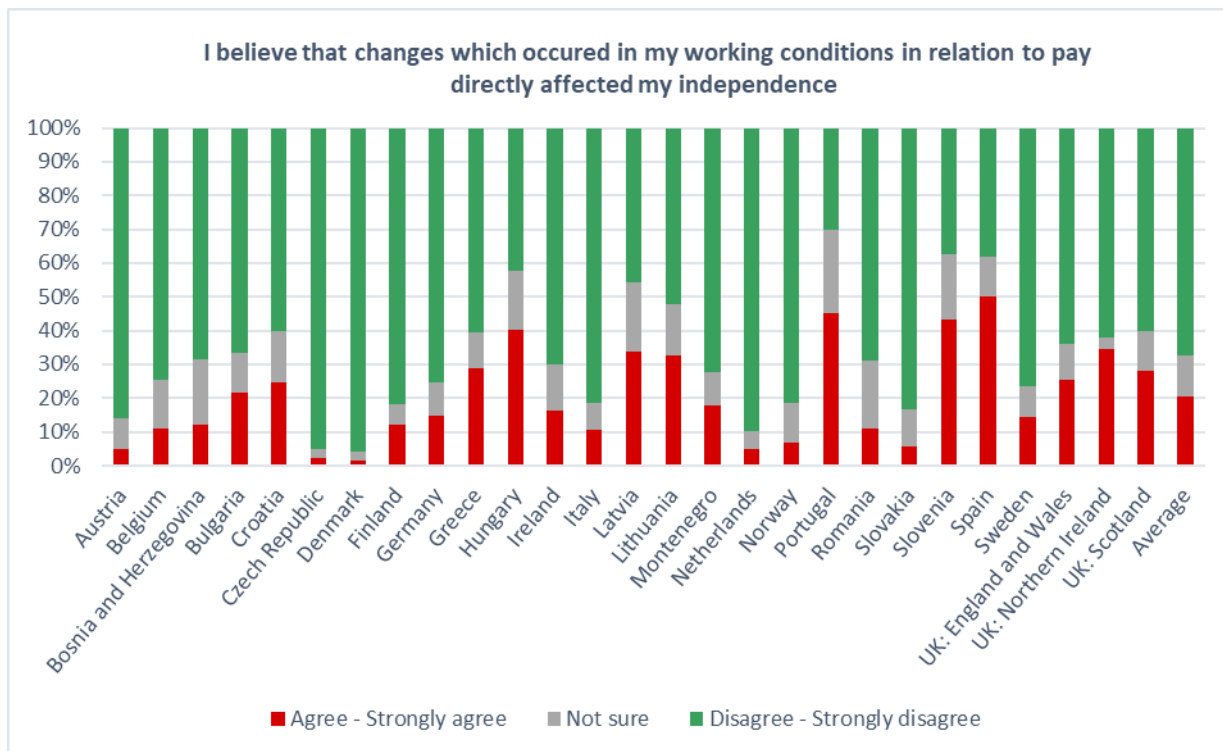


Figure 24 Impact of changes in working conditions: pay

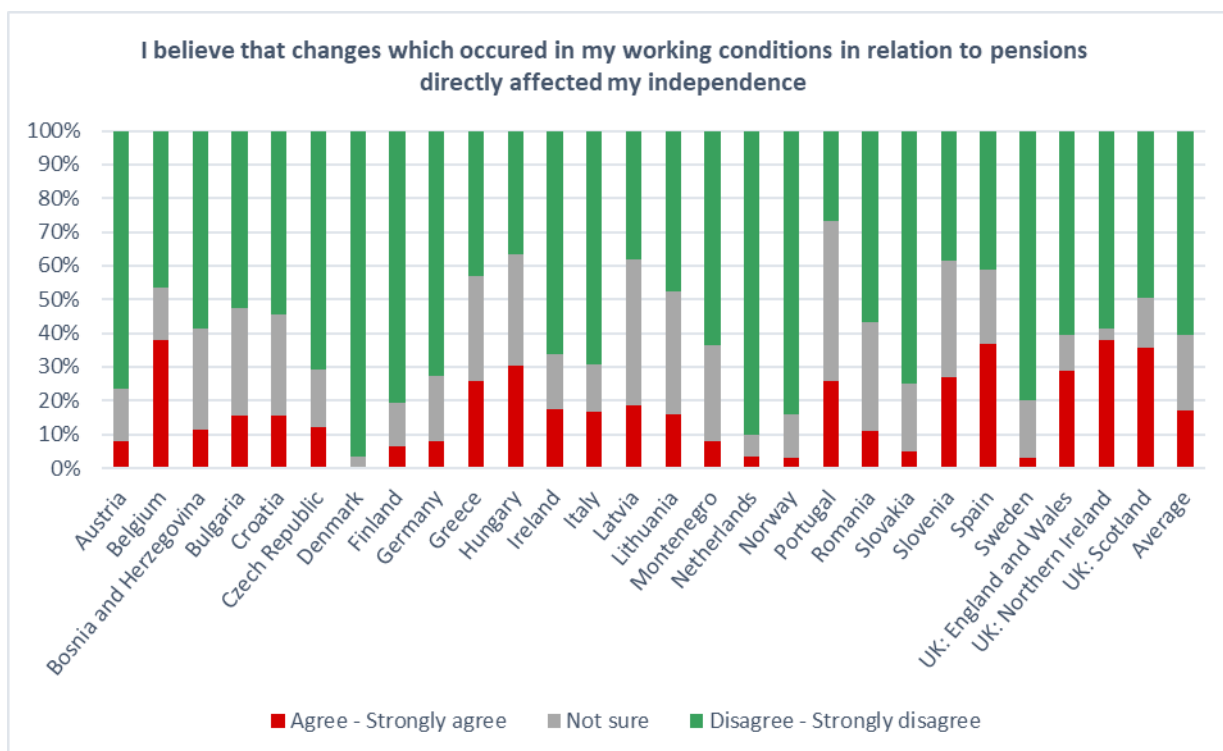


Figure 25 Impact of changes in working conditions: pensions

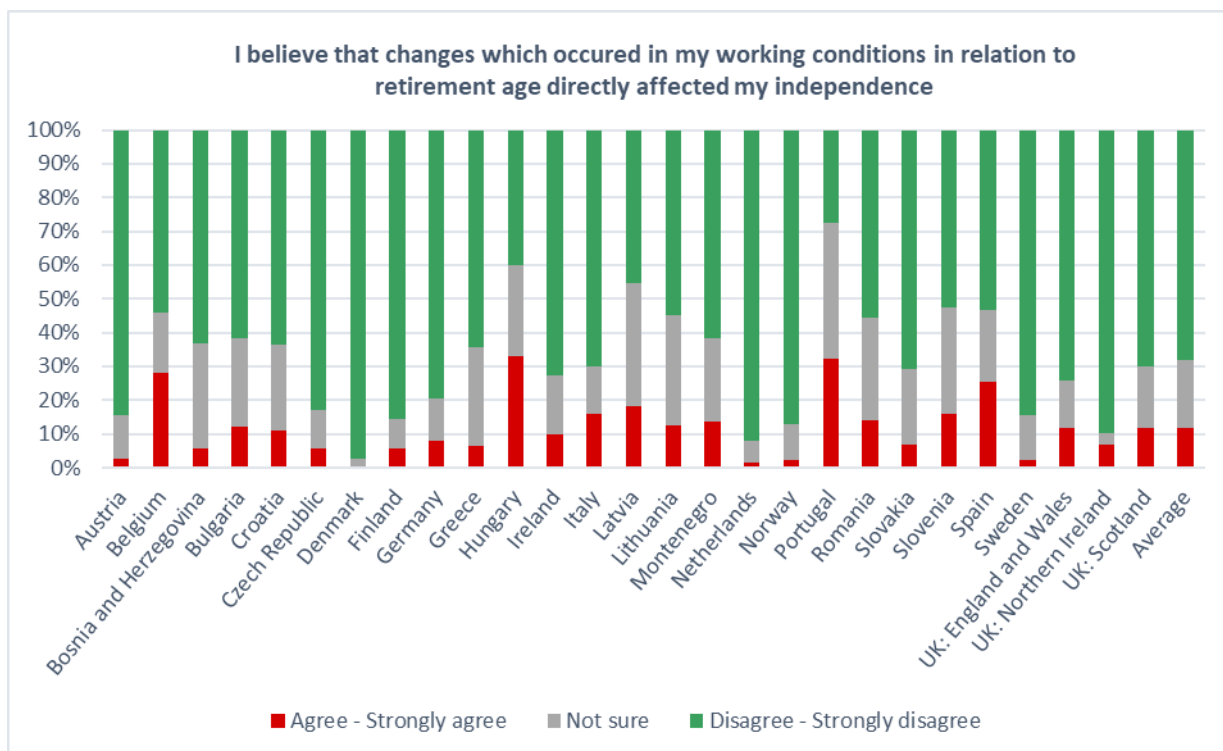


Figure 26 Impact of changes in working conditions : retirement age

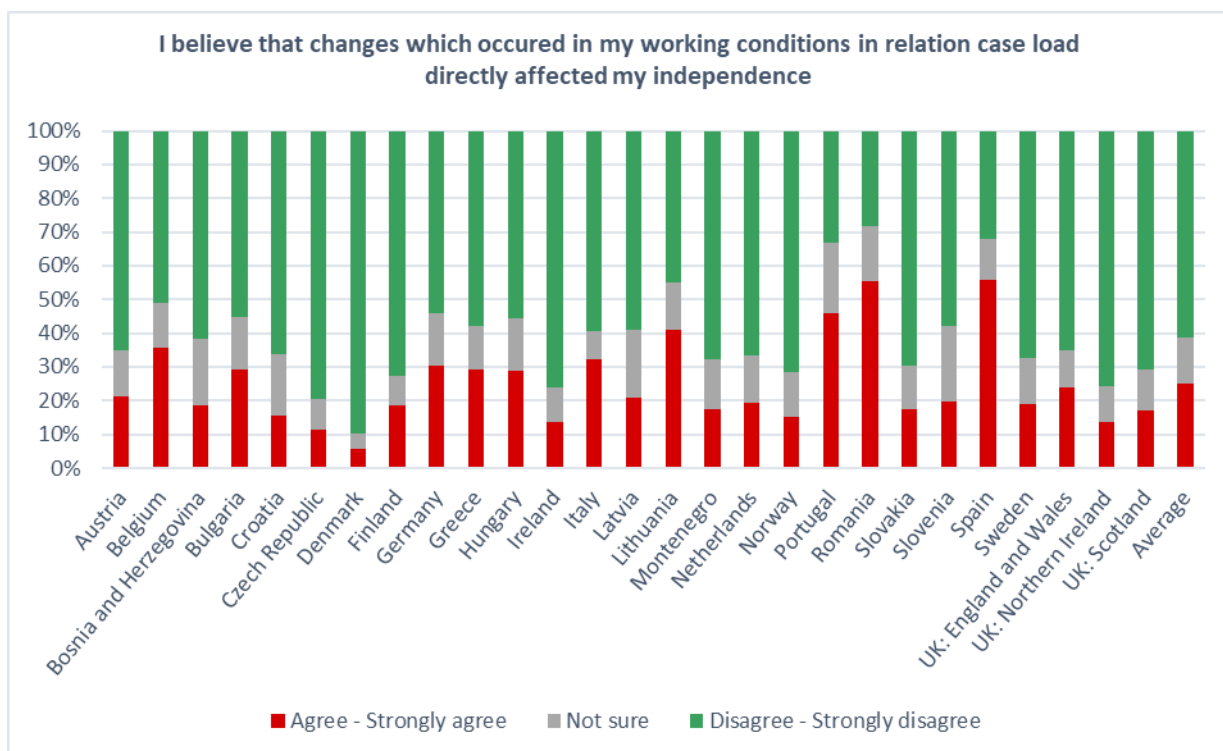


Figure 27 Impact of change in working conditons: caseload

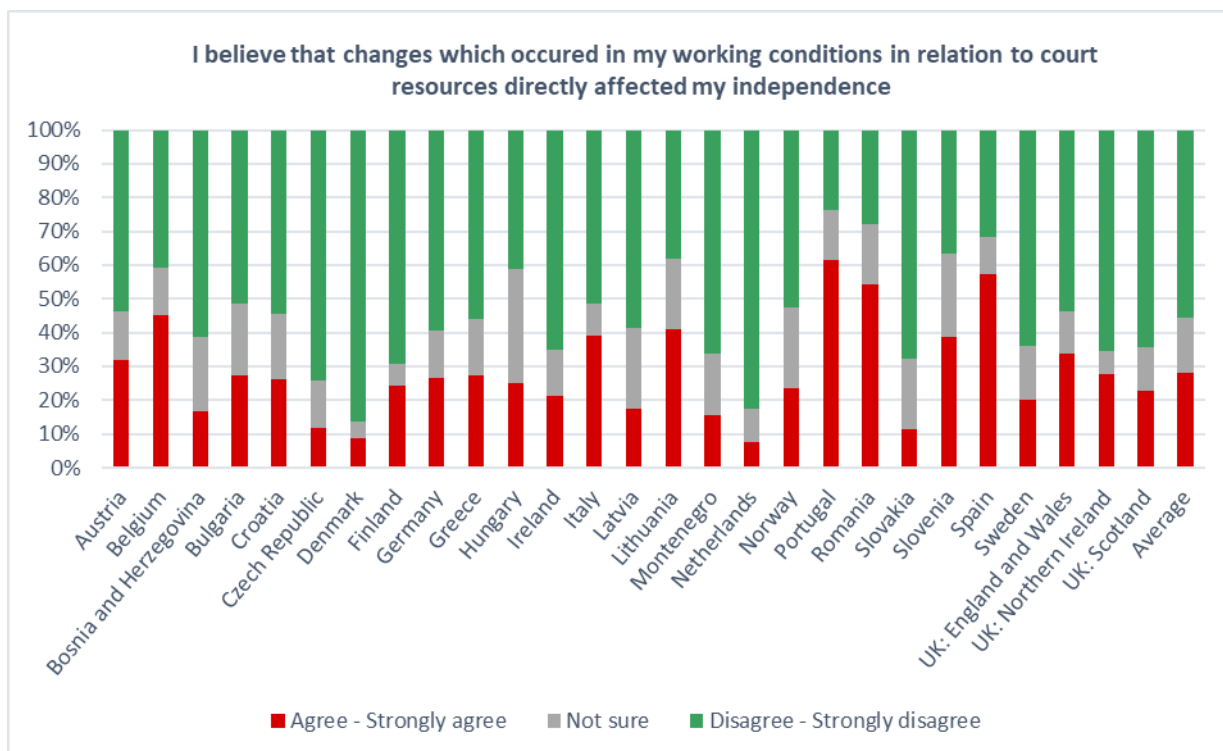


Figure 28 Impact of change of working conditions: court resources

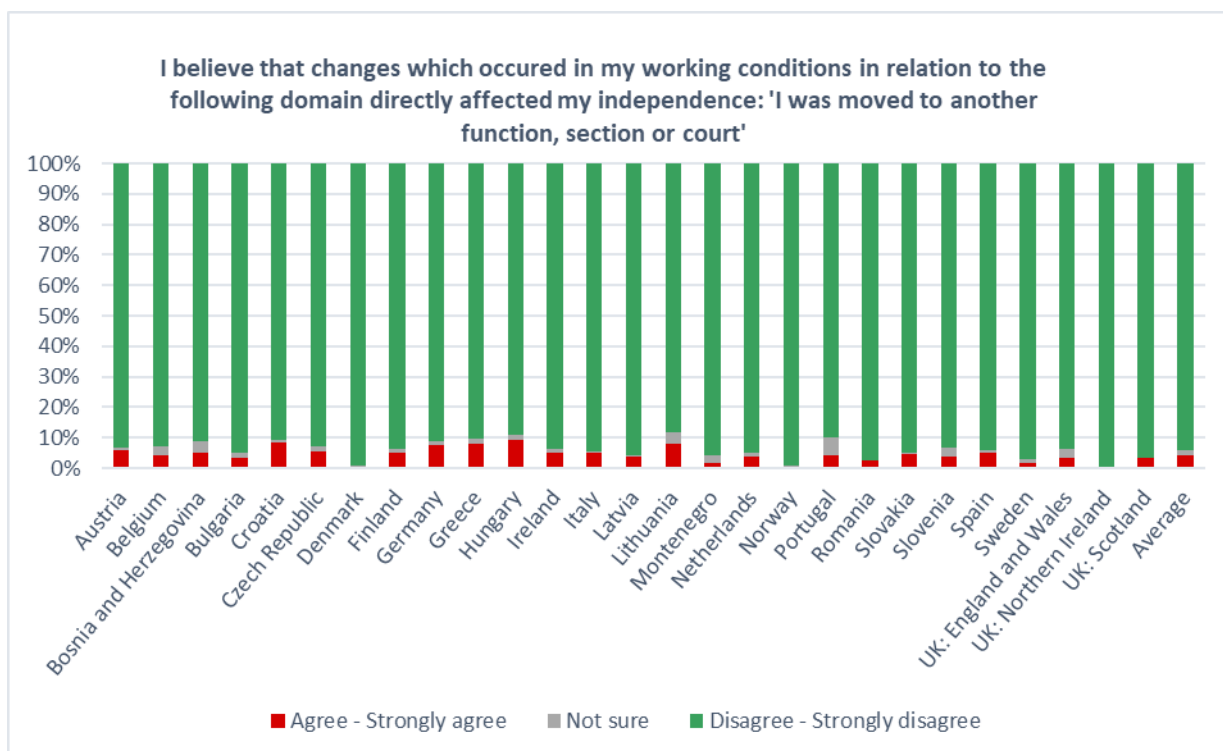


Figure 29 Impact of change in working conditions: transfer to other courts or locations

#### 4.8 Aspects of independence: implementation of judgments

As noted in the introduction to this section of the report, the implementation of judicial decisions is essential to the position of the judiciary as an independent state power. Figure 30 gives the perceptions of the respondents about the implementation of judgments that go against the interests of the government by the same government. Italy has the highest score with 53 % of the respondents believing that such judgment is usually not implemented, many of the other countries have scores of 20 % or more. The Netherlands has the best score with only 8% of the respondents disagreeing with the proposition.

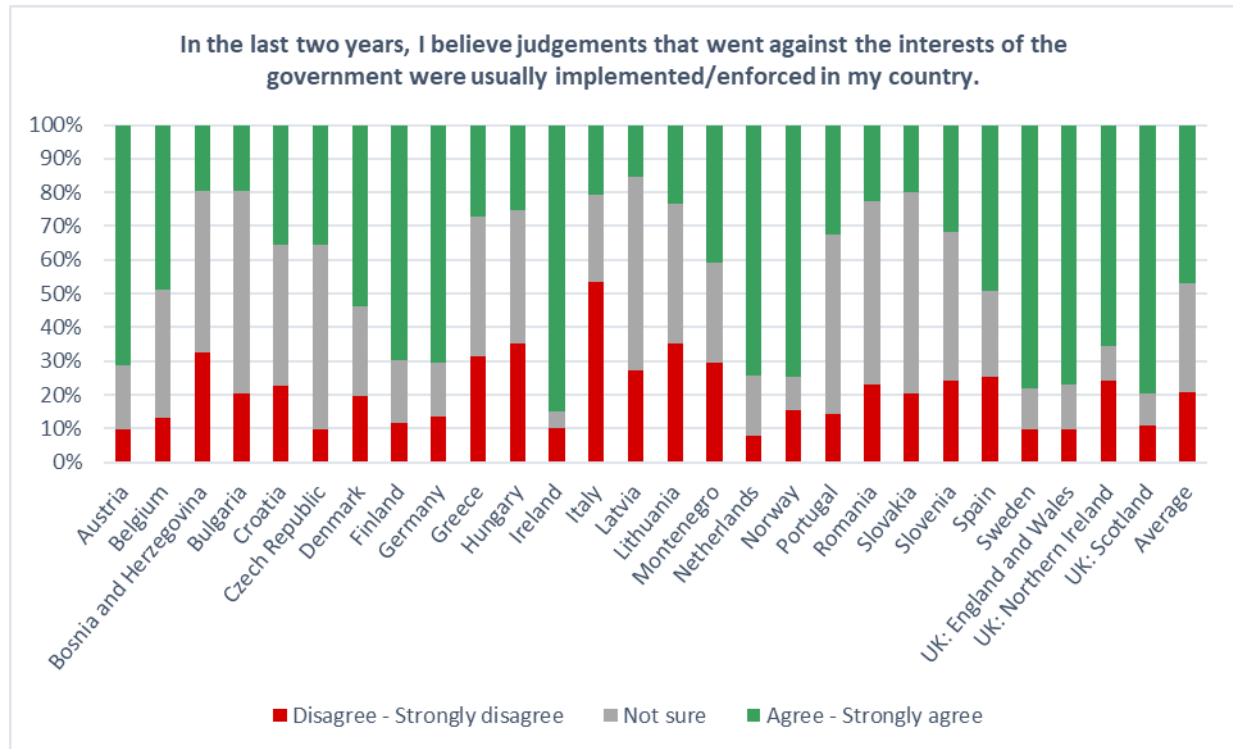


Figure 30 Implementation of judgments against the interests of government

#### 4.9 Accountability

The following three figures address some important aspects of the accountability of the judiciary. The issues included in the survey concern the adherence of judges to ethical standards, while the other two aspects are about the way the judicial authorities address judicial misconduct and judicial corruption. As to the behaviour of judges, the differences among judiciaries are relatively small. The country average is 6% of respondents disagreeing with the proposition that judges adhere to the ethical standards. With regard to the performance of the judicial authorities the outcomes differ much more among judiciaries. For Spain, Portugal and Bosnia and Herzegovina many respondents feel that the authorities do not act appropriately to judicial conduct (38%, 23% and 23%, respectively). As to the effectiveness of policies against corruption the worst scores are found for Bosnia and Herzegovina (27%), Croatia (26%), Bulgaria (21%) and Romania (23%).



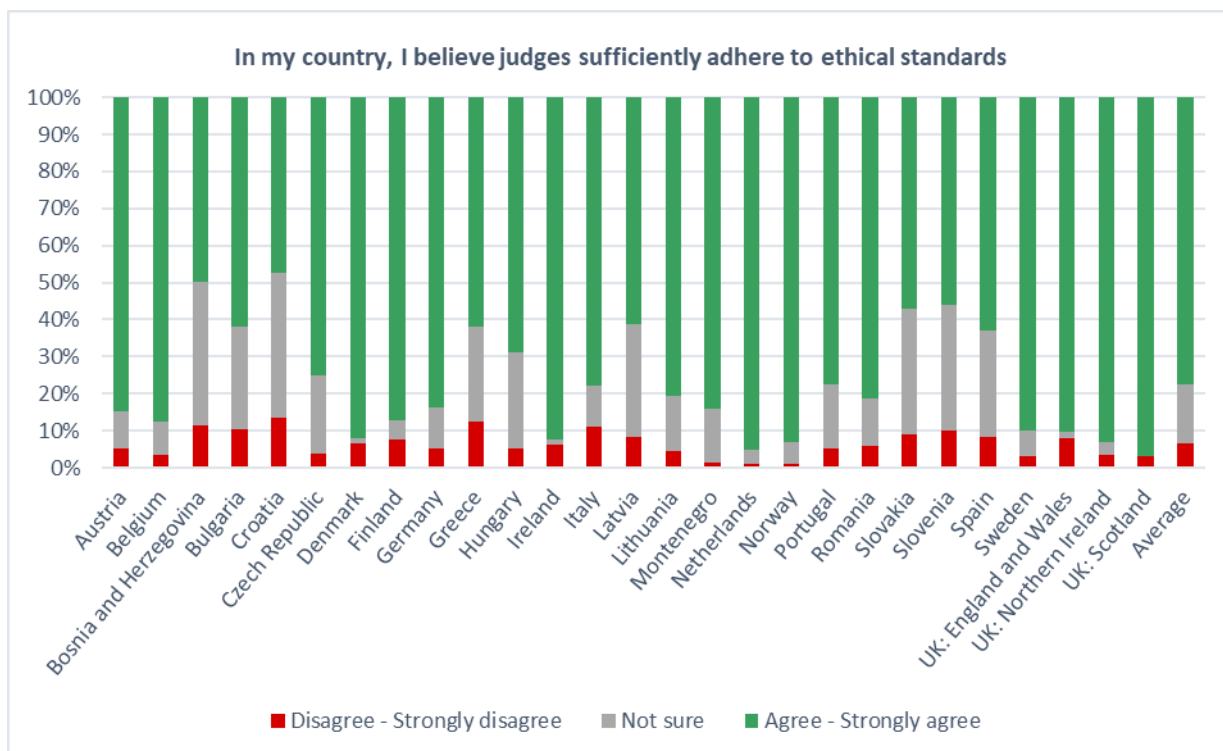


Figure 31 Adherence by judges to ethical standards

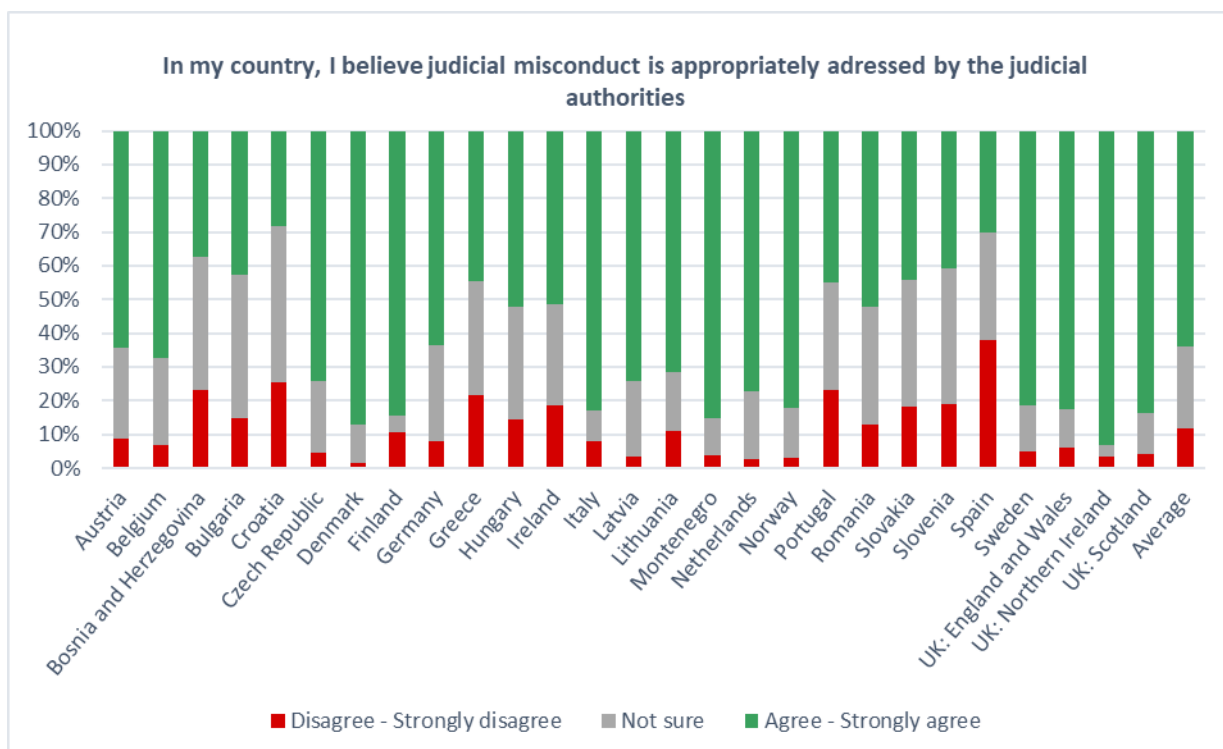


Figure 32 Handling of judicial misconduct by judicial authorities

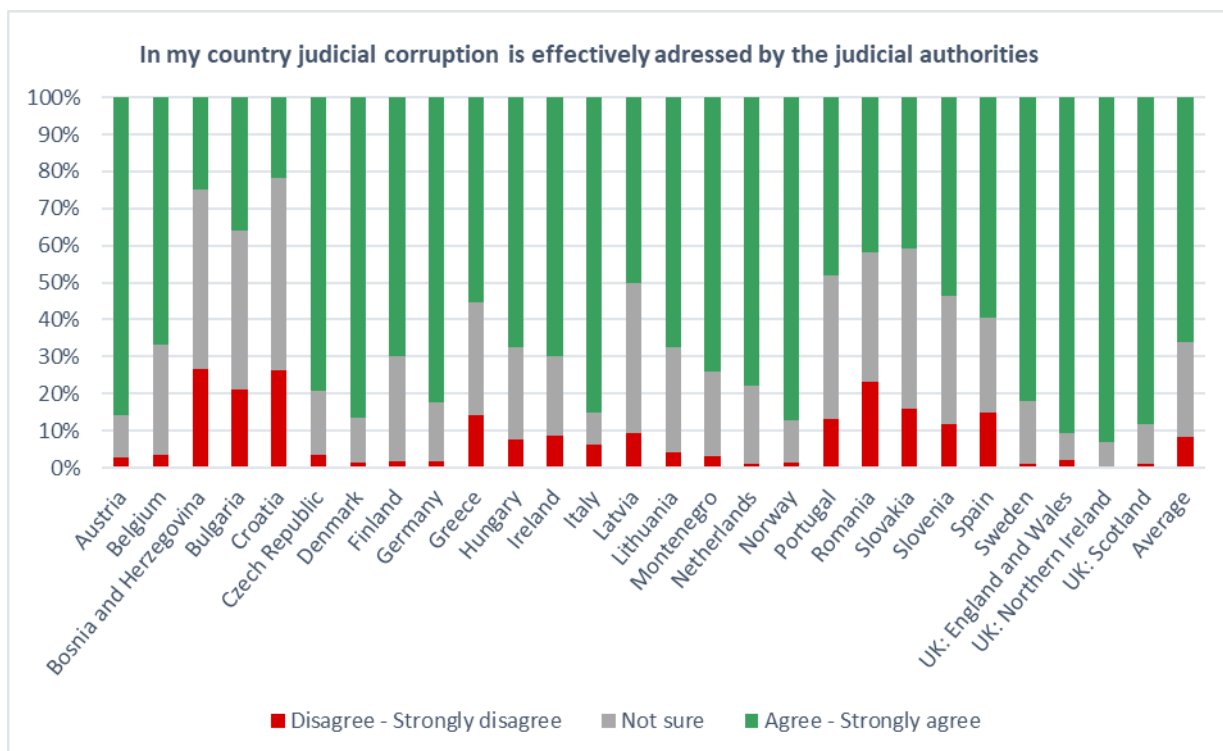


Figure 33 Handling of judicial corruption by judicial authorities

#### 4.10 Respect for independence of judges

The independence of judges is an important element in democracies based on the rule of law. The functioning of such a system depends very much on the interaction of the three state powers and in particular the respect they show for each others' role. In the case of the judiciary this is foremost respect for the independence of the judiciary. In this section the outcomes are reported of questions about the perceptions of judges about the respect for judicial independence of a range of stakeholders in a broad sense. These stakeholders are the judicial authorities, the parties to procedures and their legal representation, and the other state powers and the (social) media. The figures show that, while some tensions exist within the judiciary and in some countries with the lawyers, judges feel much less respected by the other state powers and by the media. Compared to the previous surveys, these sentiments have become stronger.

##### Judicial authorities

Judicial governance bodies (as far as these exist), the leading courts and judges associations are distinguished.

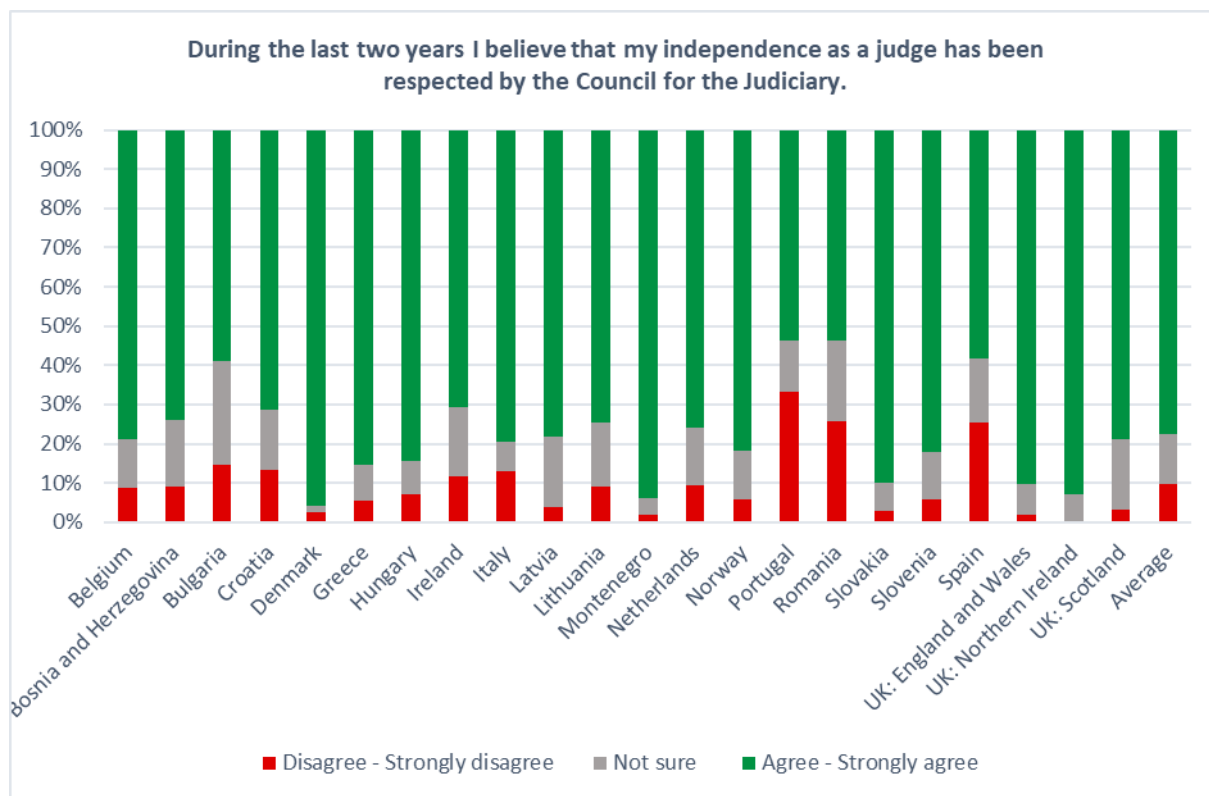


Figure 34 Respect for judicial independence by Councils of the Judiciary

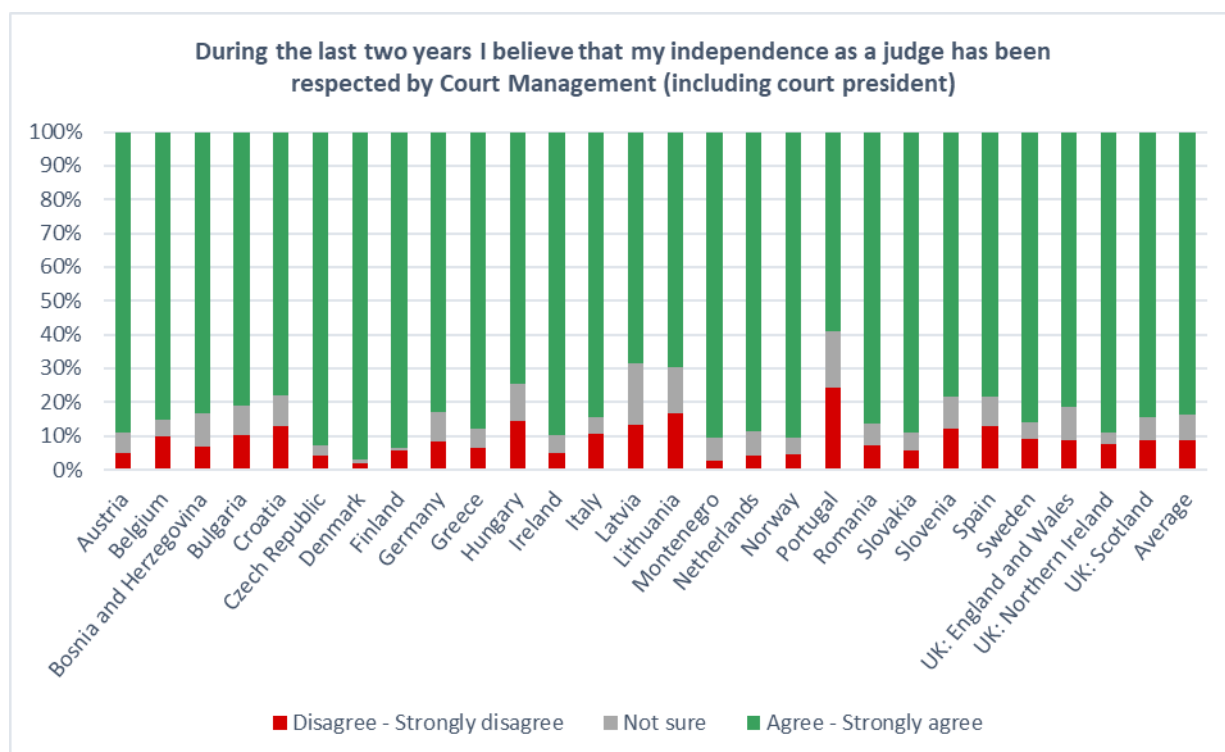


Figure 35 Respect of judicial independence by court management

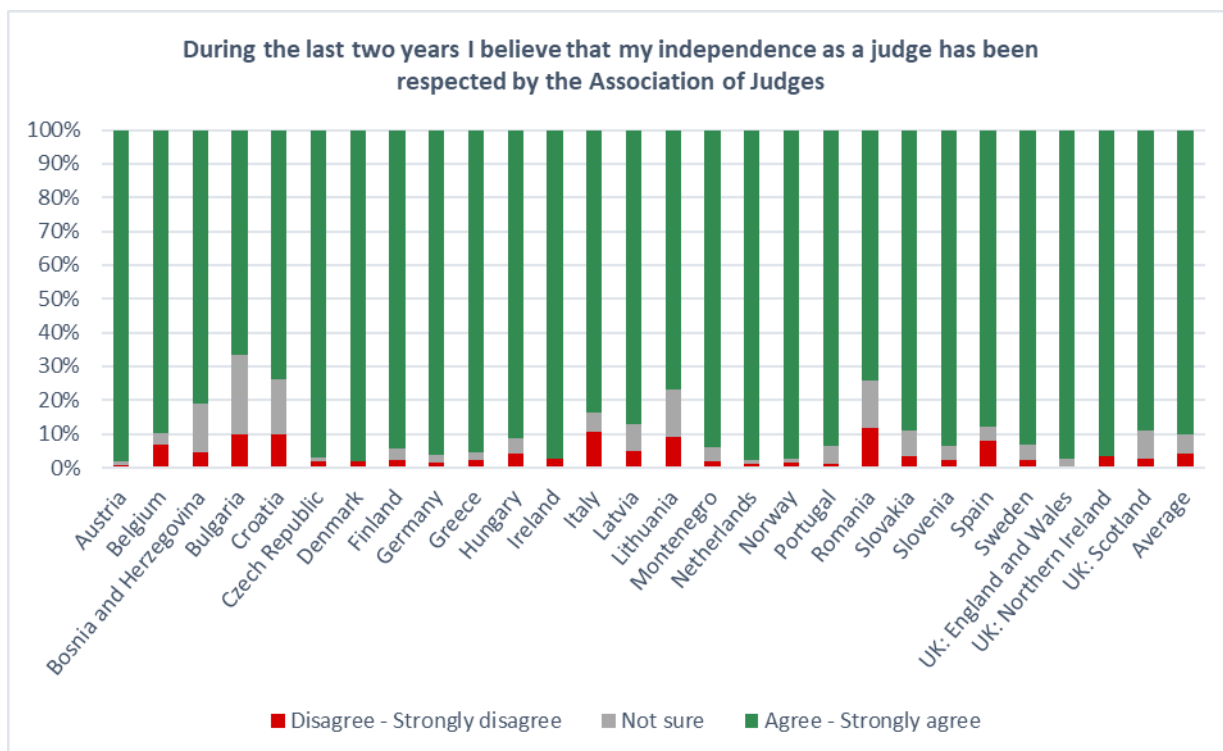


Figure 36 Respect of judicial independence by associations of judges

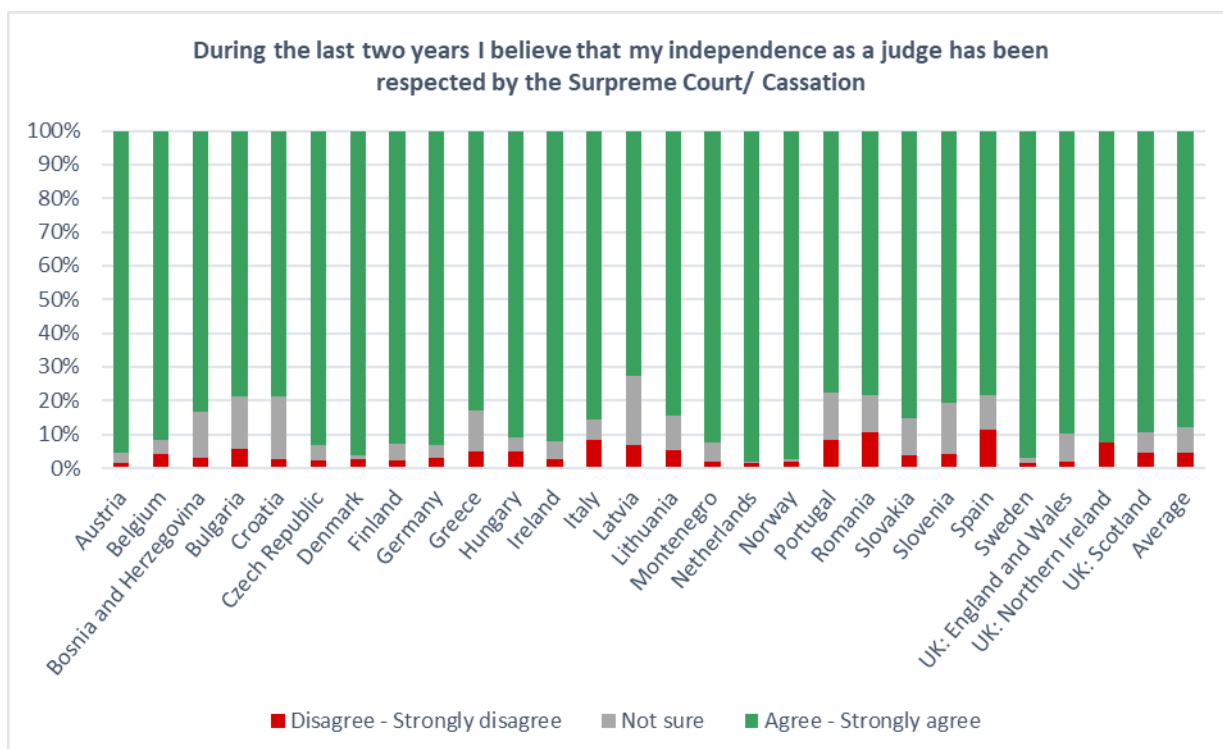


Figure 37 Respect of judicial independence by supreme court/court of cassation

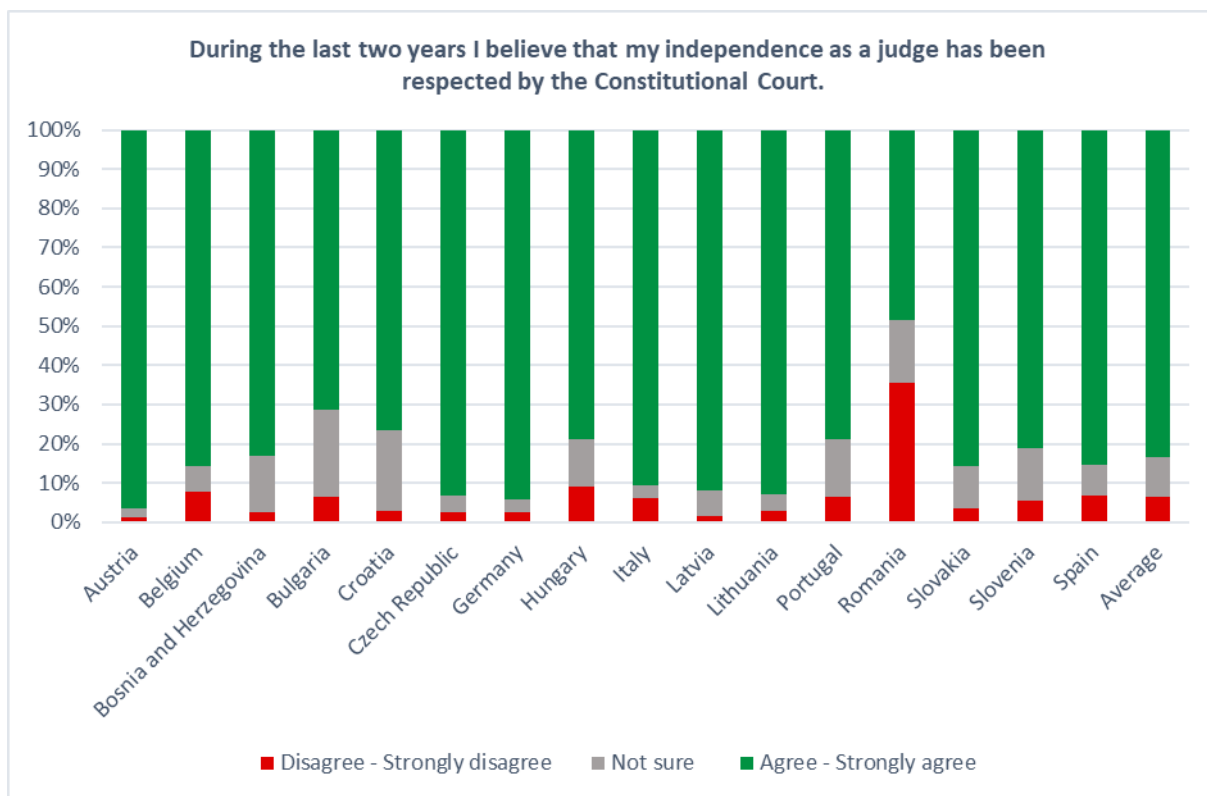


Figure 38 Respect of judicial independence by constitutional court

### Parties in procedures

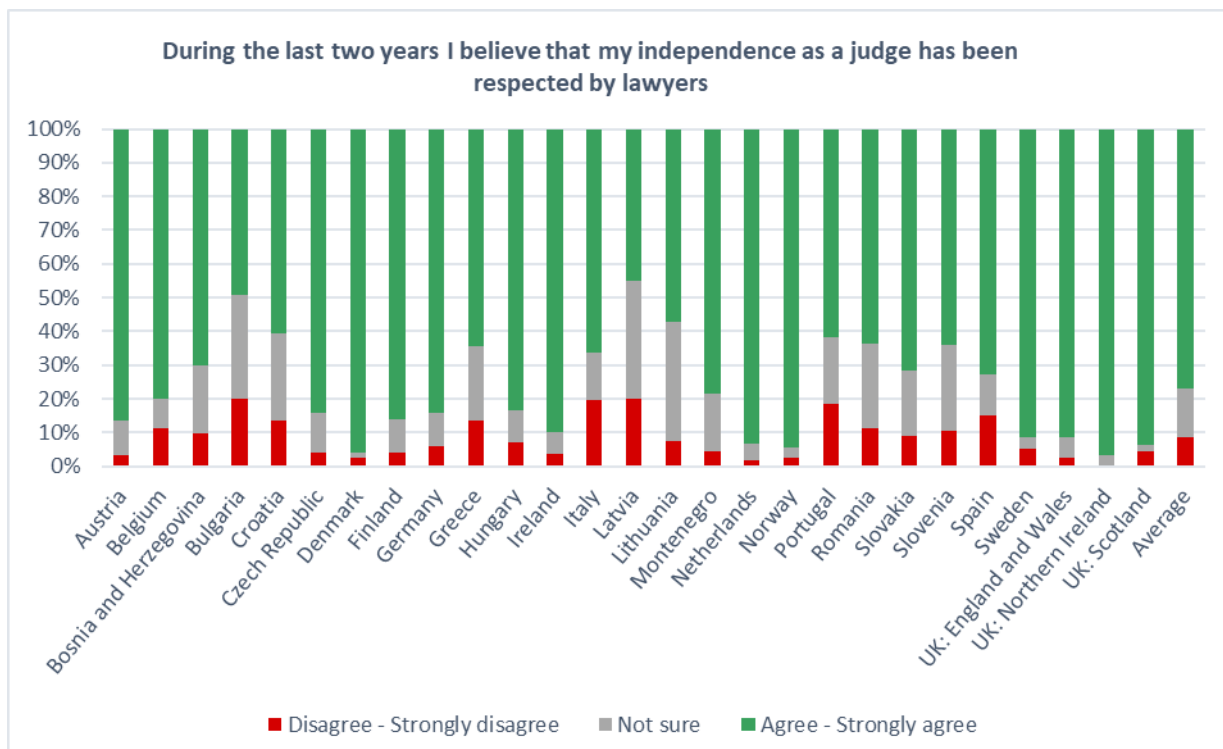


Figure 39 Respect for judicial independence by lawyers

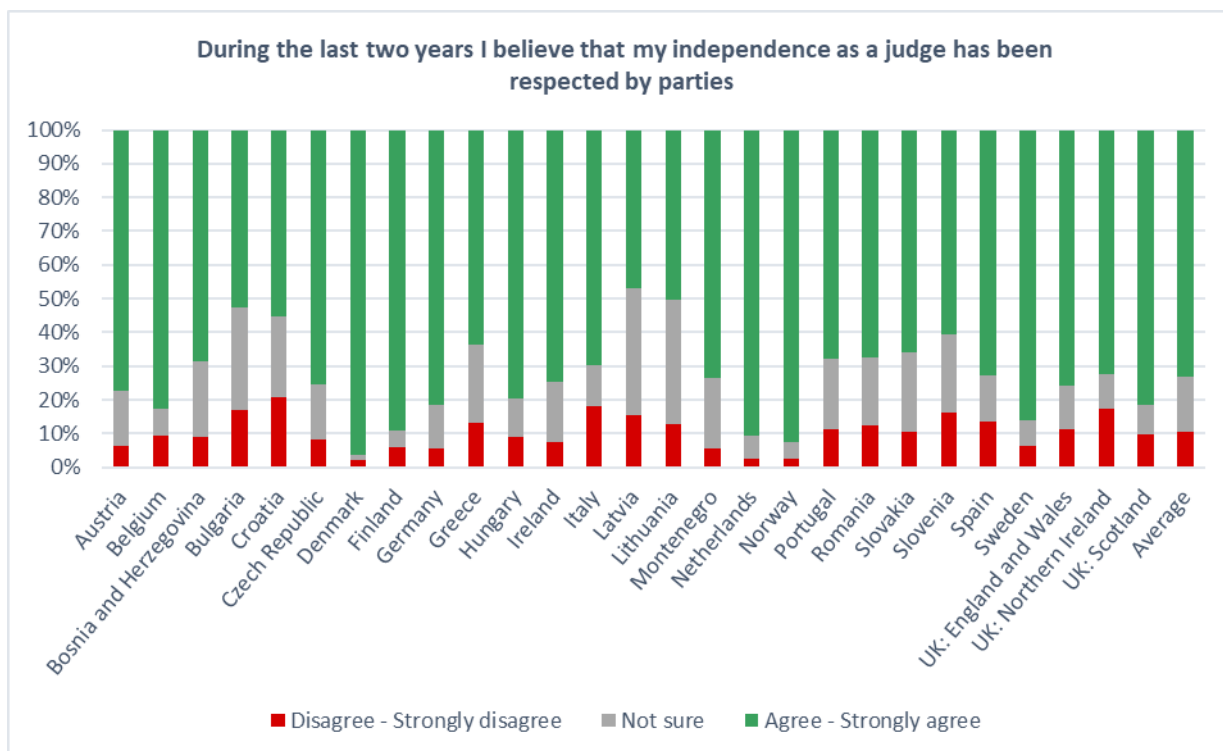


Figure 40 Respect for judicial independence by parties

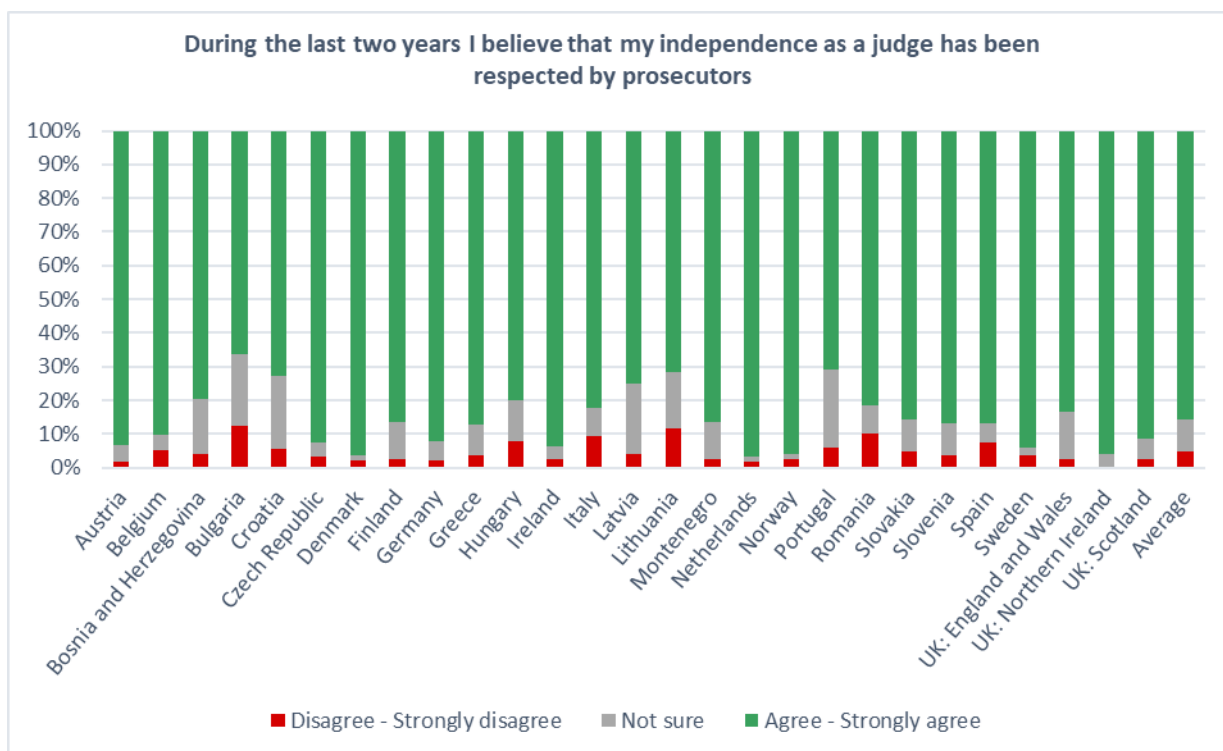


Figure 41 Respect for judicial independence by prosecutors

**Politics and media**

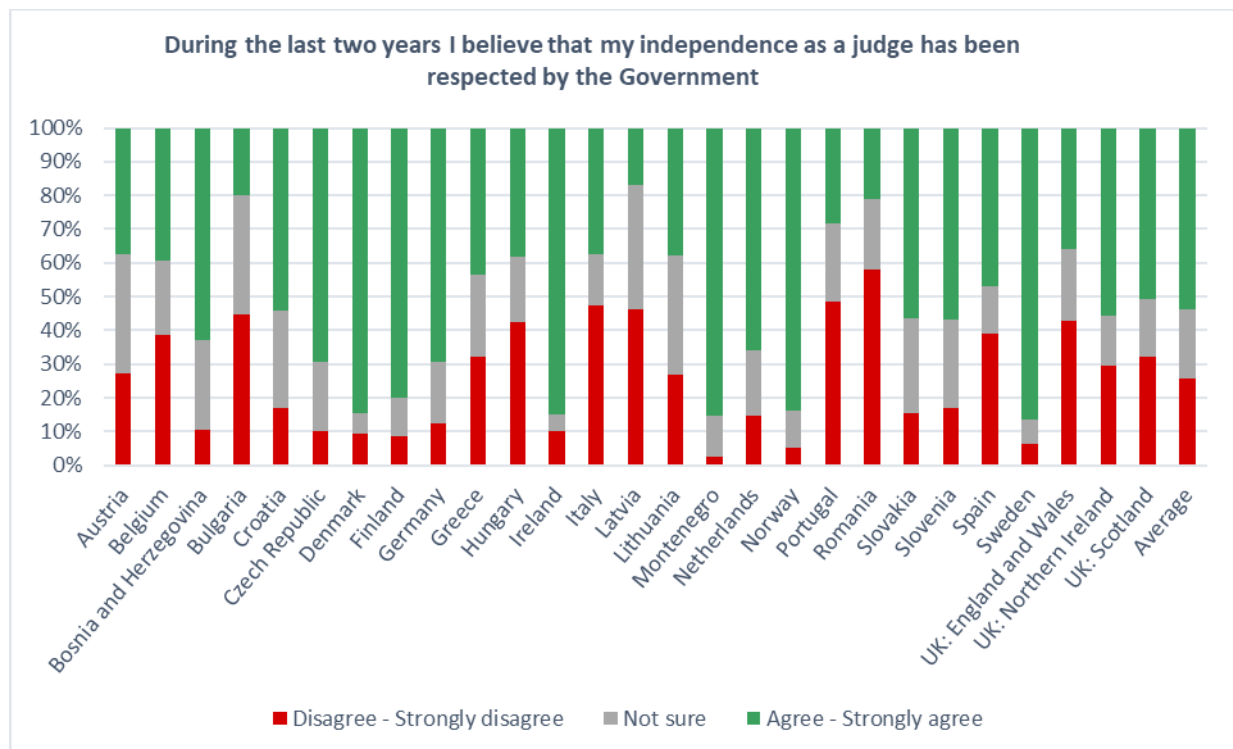


Figure 42 Respect for judicial independence by government

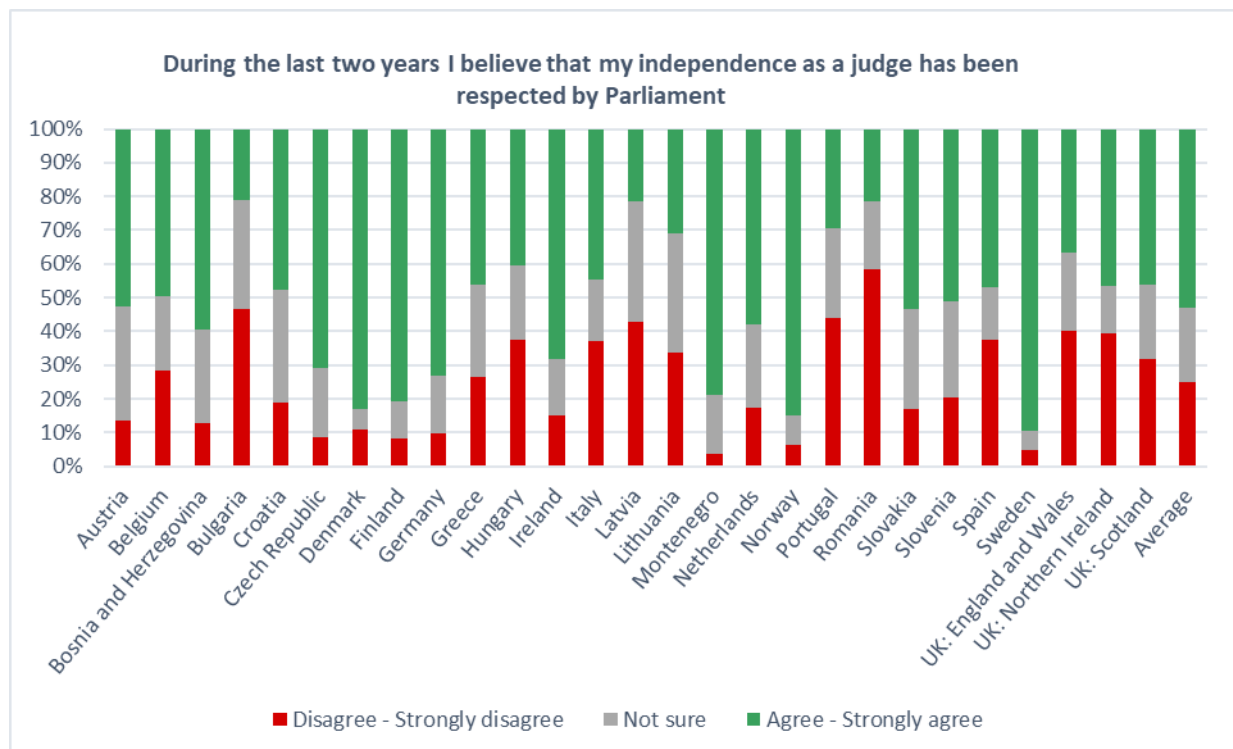


Figure 43 Respect for judicial independence by parliament

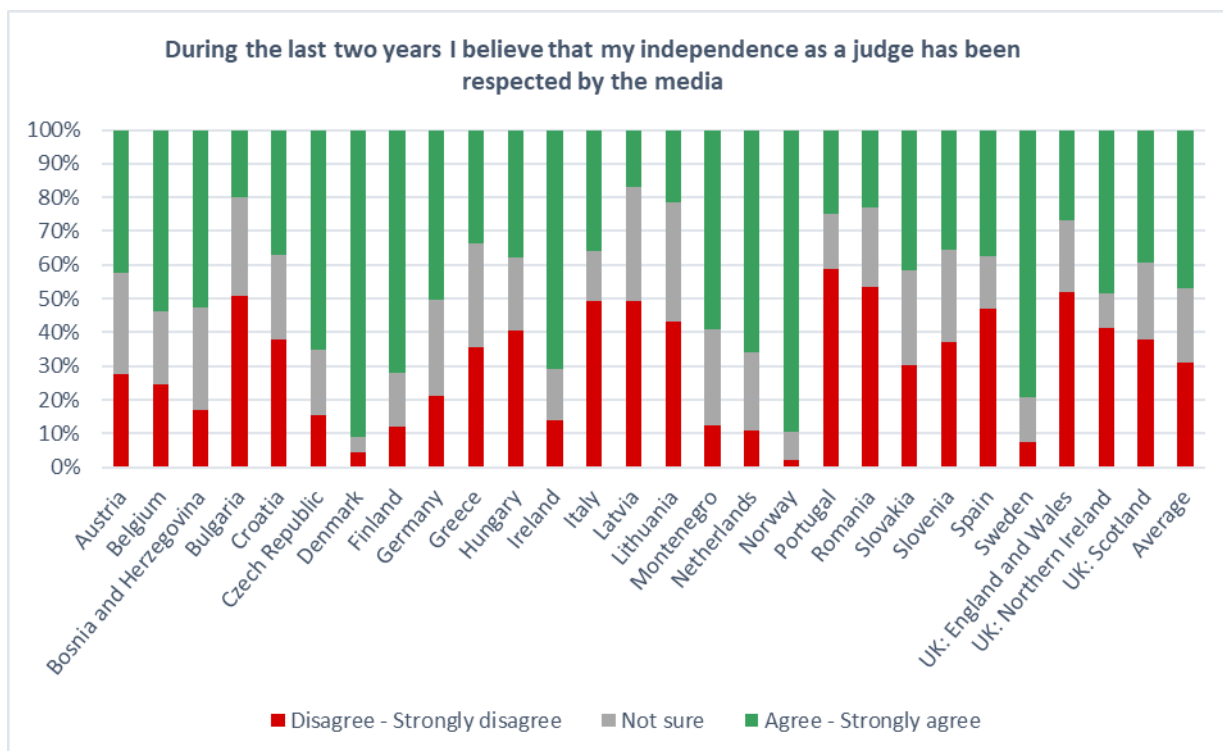


Figure 44 Respect for judicial independence by the media

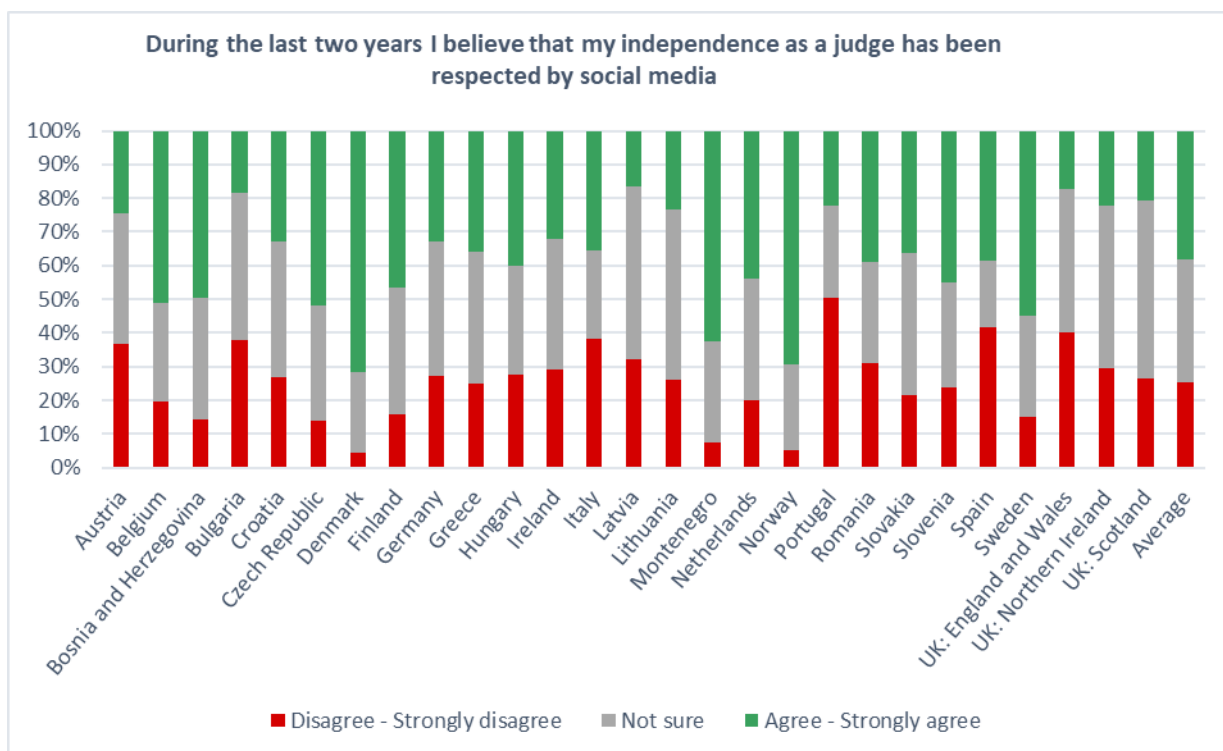
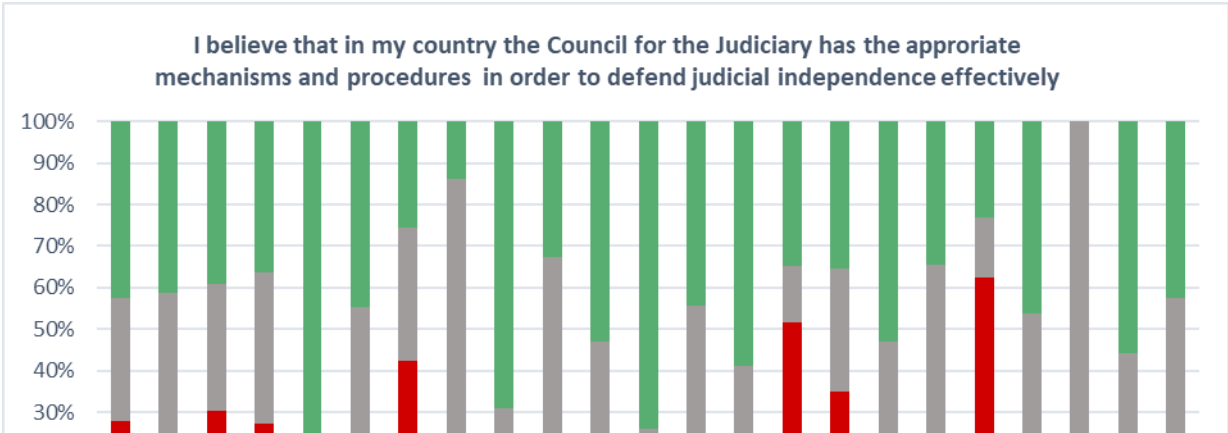


Figure 45 Respect for judicial independence by social media



Figure 46 Mechanisms of Councils for the judiciary to defend judicial independence



#### 4.11 Conclusions

The survey among judges has been conducted successfully, thanks to the efforts of the Members and Observers of the ENCJ, but foremost to the judges who participated so willingly once again in vast numbers. The outcomes of the survey are very informative about the state of independence in Europe. The main conclusions are the following.

1. On a 10-point scale judges rate the independence of the judges in their country on average between 6.5 and 9.8.
2. Two countries show a large increase of their independence score since the first survey in 2015: Spain and Slovakia. Two countries show a large decrease: Portugal and Romania. It should be noted that Poland did not participate in the survey. Hungary participated for the first time. The scores for the other countries are roughly the same.
3. Examining the answers to all questions, Hungary and Romania, in particular, face issues across a range of aspects of independence. As the response rate of Romania was low, the outcomes for that country must be used with caution.
4. In many judiciaries judges are critical about human resource decisions concerning judges and, in particular, about appointment and promotion. In the survey a distinction is made for the first time between appointment to the courts and to the Supreme Court/Court of Cassation. This distinction proves to be important, as both types of appointment draw much criticism, but scores often differ very much per country. Appointment to the Supreme Court/Court of Cassation is seen as most problematic in many countries.
5. Many judges are very critical about their working conditions, and believe that these affect their independence. Case load and court resources are a great concern in many countries, and this concern has increased much since the previous survey. Also, issues about salary, pensions and retirement age have become more serious.
6. A new question was added with regard to the implementation of judgements by the government that go against the interest of the government. This proves to be an issue in many countries across Europe.
7. Many judges experience - and increasingly so - a lack of respect for their independence by the other state powers and the media. It is likely that this is related to the previous two points. In a variety of judiciaries more than 40% of the respondents feel that their independence is not respected by the government: Bulgaria, Hungary, Italy, Latvia, Portugal, Romania and England and Wales. Generally, only few judges feel their independence is negatively affected by the judicial governance institutions and the leading courts.
8. Three questions were added about accountability. While judges generally believe that their colleagues adhere to ethical standards, they are more critical about the mechanisms to combat judicial misconduct and judicial corruption in several countries in Eastern Europe and in Spain and Portugal.

## 5. Survey among the lawyers of Europe

For the second time, the ENCJ, together with the CCBE, conducted a survey about the independence of judges among the lawyers of Europe. The survey asked the lawyers to give a general assessment of the independence of the judges in their country. It also asked them to assess aspects that affect independence, of which they thought they were able to observe as lawyers. The survey also addressed some aspects of the accountability of the judiciary. The questions formulated for the lawyers are, as far as possible, the same as those included in the judges survey. The comparison of the views of judges and lawyers is particularly interesting to get a broader perspective on judicial independence and accountability.

Lawyers from 25 countries participated in the survey, in total circa 4,250 lawyers. While the number of participating countries is the same as in the judges survey, the composition of the countries differ. In the lawyers survey Cyprus and Luxembourg participated, but Bosnia and Herzegovina, Bulgaria, Croatia and Montenegro did not. As in the previous survey among lawyers it is difficult to get a high response for all countries. Consequently, outcomes cannot be presented for all countries that participated, and the outcomes that are presented need to be interpreted with caution.

Due to the low response rate in some countries, the closing date of the survey was postponed. This meant that the outcomes of the survey were not available on time to be fully incorporated in this report. Therefore, only the highlights are presented. The full results will be published later in a separate report concerning the judges and lawyers surveys.

### 5.1 Methodology

The ENCJ and the CCBE agreed on the content of the survey, taking the judges survey as a starting point. The CCBE then asked all national bar and law societies to translate the survey in their languages. The national organizations subsequently invited the lawyers to participate in the survey and provided them with a link to the CCBE website. As the response was low in some countries, the CCBE urged the national organizations to promote the survey several times, and the closing date of the survey was postponed.

The survey was designed in such a way that it asked lawyers to give a general assessment of the independence of judges, to provide the data for the relevant Independence indicator (I12), but also explored different aspects of independence in depth. In addition, some questions concerned personal characteristics (gender and experience) or were work related (type of court they frequented and area of law). Two questions regarding accountability were included to fill in the new accountability indicator A12.

### 5.2 Response rate

Figure 47 gives the number of respondents per country. The number of responses was considered to be too low for Austria, Denmark, Estonia, Finland and Luxembourg, therefore these countries are not included in the figure. The cut-off point is 49, which is the number of responses for the UK. With regard to the UK it should be noted that the response rate is too low to make distinguish between England and Wales, Northern Ireland and Scotland. The response pattern across the countries differs very much from the pattern of the judges. Lawyers in Poland and Hungary show strong participation. Besides from Sweden and Norway, in several countries in Western Europe there seems to be a lack of interest to participate. The high response rate for Poland is particularly relevant, as Poland did not participate in the judges survey. Given the legal reforms in Hungary, the high response rate for that country is also of interest.

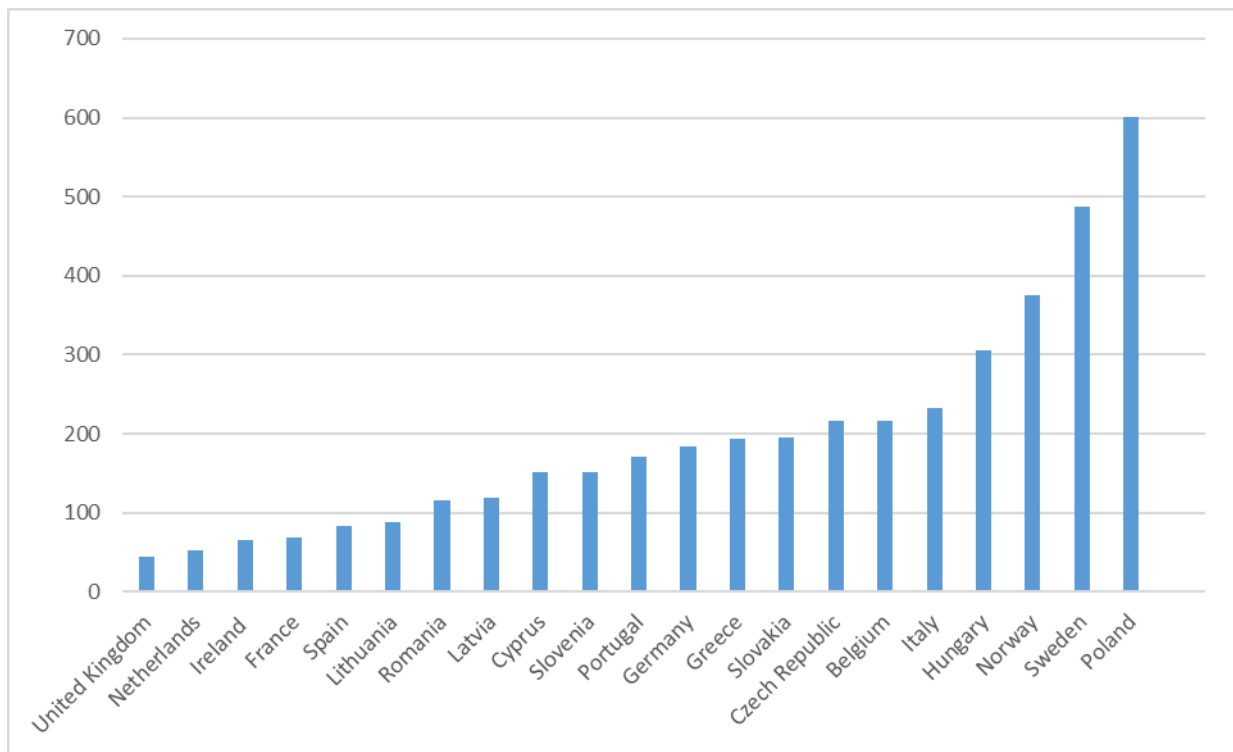
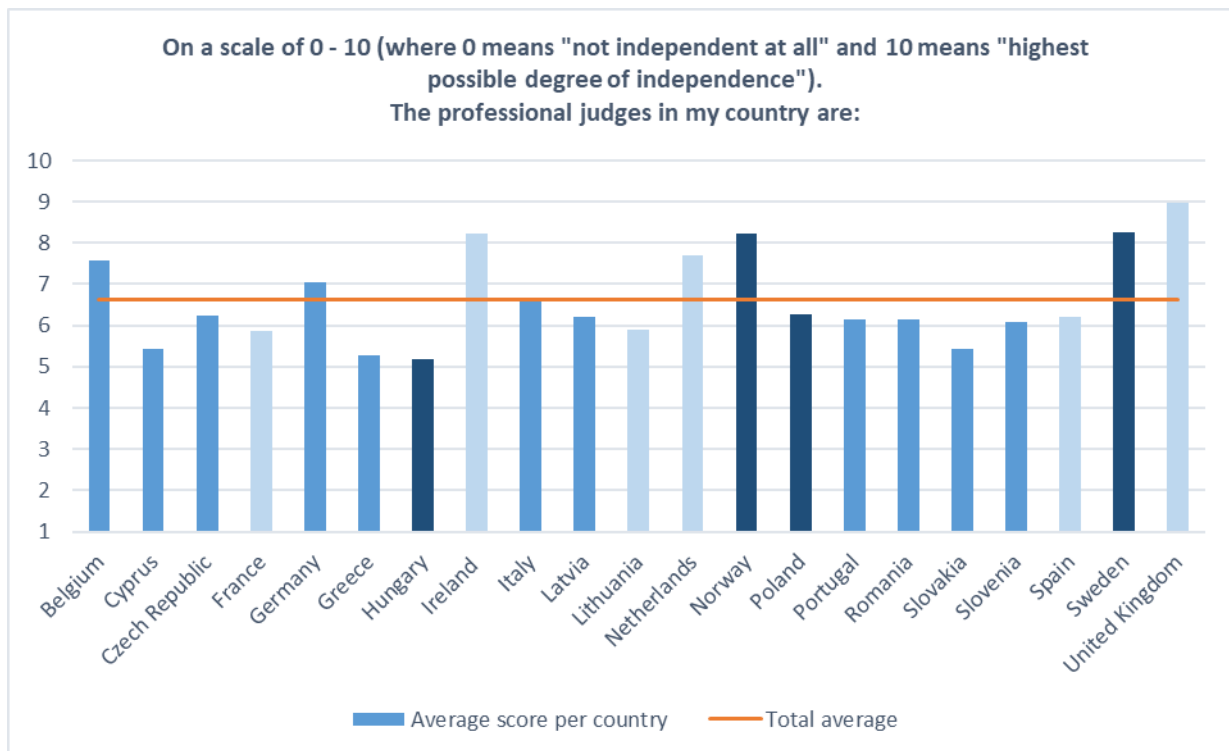


Figure 47 Number of respondents per country

### 5.3 Overall perception of independence by lawyers

On a 10-point scale, the participating lawyers rated the independence of the judges in their country on average between 5.2 for Hungary and 9.0 for the UK. Five countries, Greece, Hungary, Lithuania, Slovakia and Cyprus, have scores between 5.2 and 6. No scores are above 9. The scores are in general (much) lower than the scores given by the judges (compare with figure 8). It should be stressed that the outcomes for Poland, Sweden, Norway and Hungary are more reliable than those for the other countries, due to differences in response. This is indicated in figure 48.



Note: dark blue : number of respondents (n) > 300, blue : 100 < n < 300 and light blue : 49 < n < 100

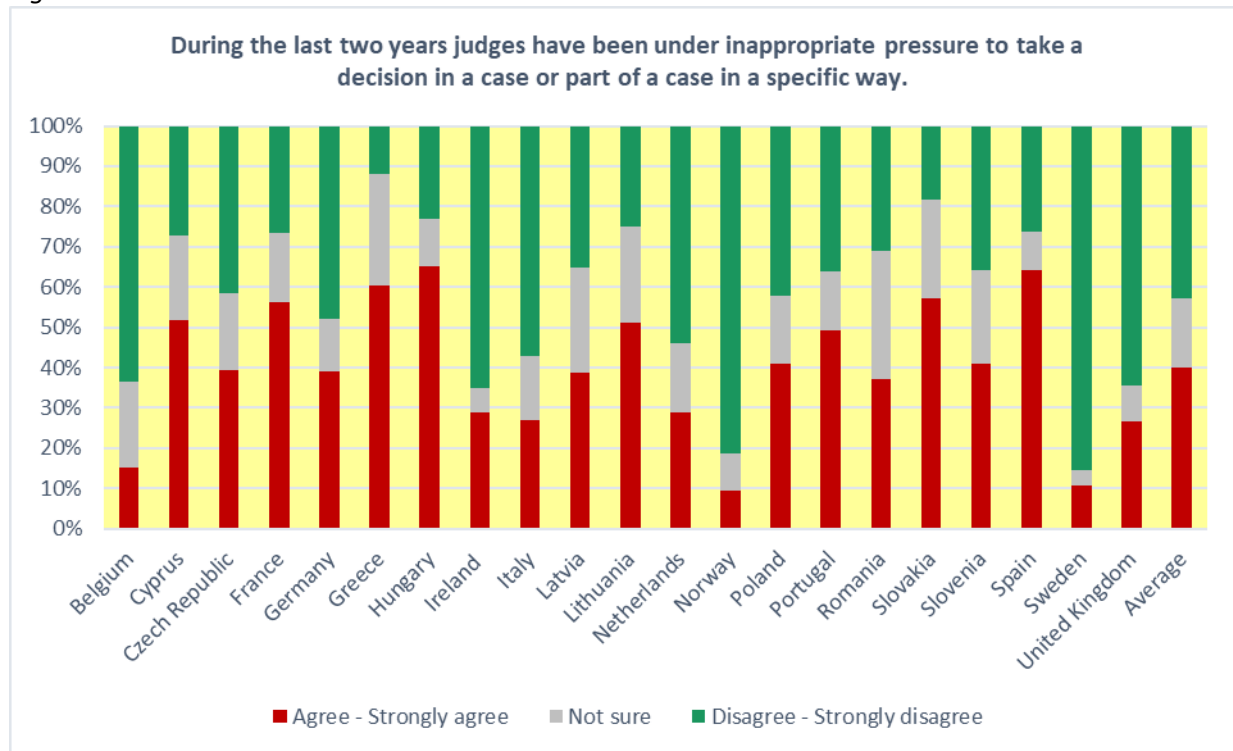
Figure 48 Independence of judges in general, according to lawyers

#### 5.4 Aspects of independence according to lawyers: case related

The relatively low scores on independence in general are reflected in lower scores on the diverse aspects of accountability. The following figures illustrate this. While across the countries that participated in both surveys 6% of the judges report inappropriate pressure to influence decisions (figure 11), 38% of the lawyers report this pressure to occur (figure 49). It should be noted that the averages reported in both figures cannot be compared as the composition of the countries differs. The fact that judges are under inappropriate pressure does not mean, of course, that they yield to that pressure. Also, more lawyers believe that corruption occurs in the judiciary, although the percentage that believes that this occurs on a regular basis is generally low.

Another example is case allocation (figure 51). More lawyers than judges believe that the rules or procedures of case allocation are deviated to influence the outcome of cases, but the pattern across the countries is much the same.

The beliefs of lawyers about the impact of the media on actual judicial decisions are of particular interest (figure 52). Also in countries like the UK and Germany the media are believed to have more impact on decisions than judges express.



ppropriate pressure on judges

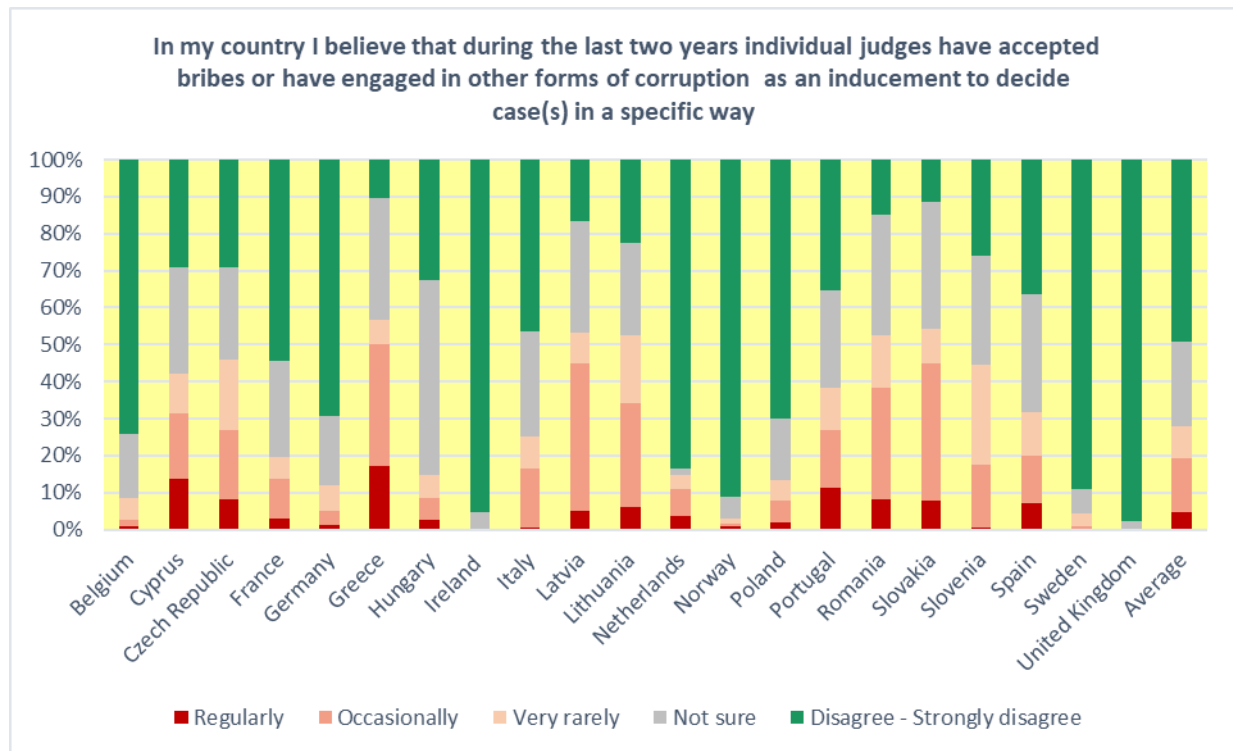


Figure 50 Judicial corruption

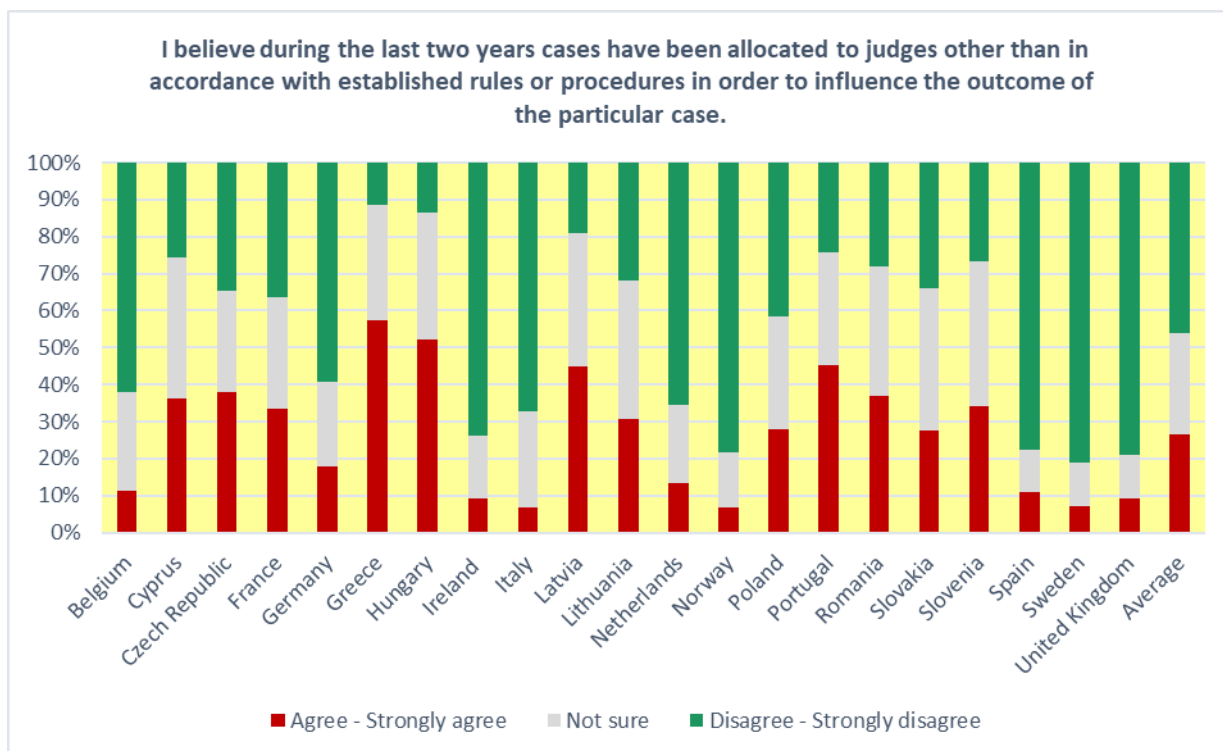


Figure 51 Case allocation

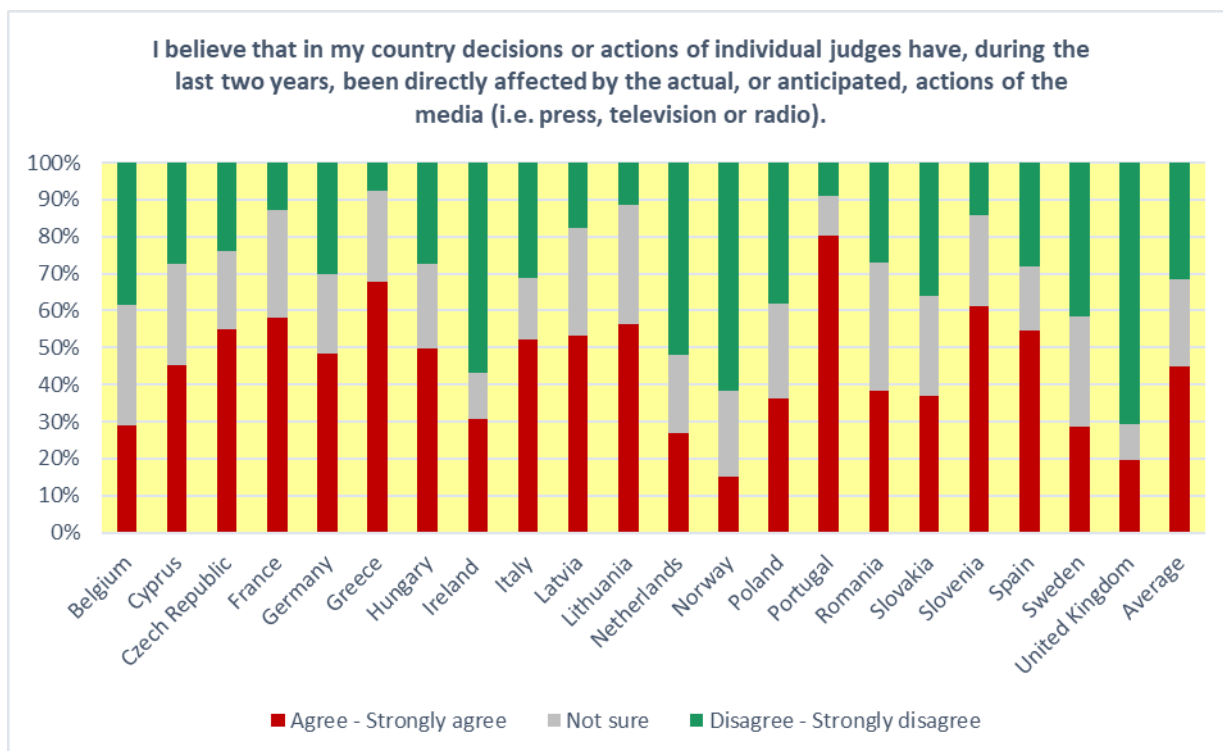


Figure 52 Influence of the media

## 5.5 Aspects of independence according to lawyers: appointment and promotion of judges

Very high percentages of lawyers believe that appointment and promotion decisions about judges are not only based on ability and experience. The following three figures present the outcomes. Poland, Hungary, Cyprus and Slovenia score negative on all three questions, but other countries have low scores as well on one or two of the questions.

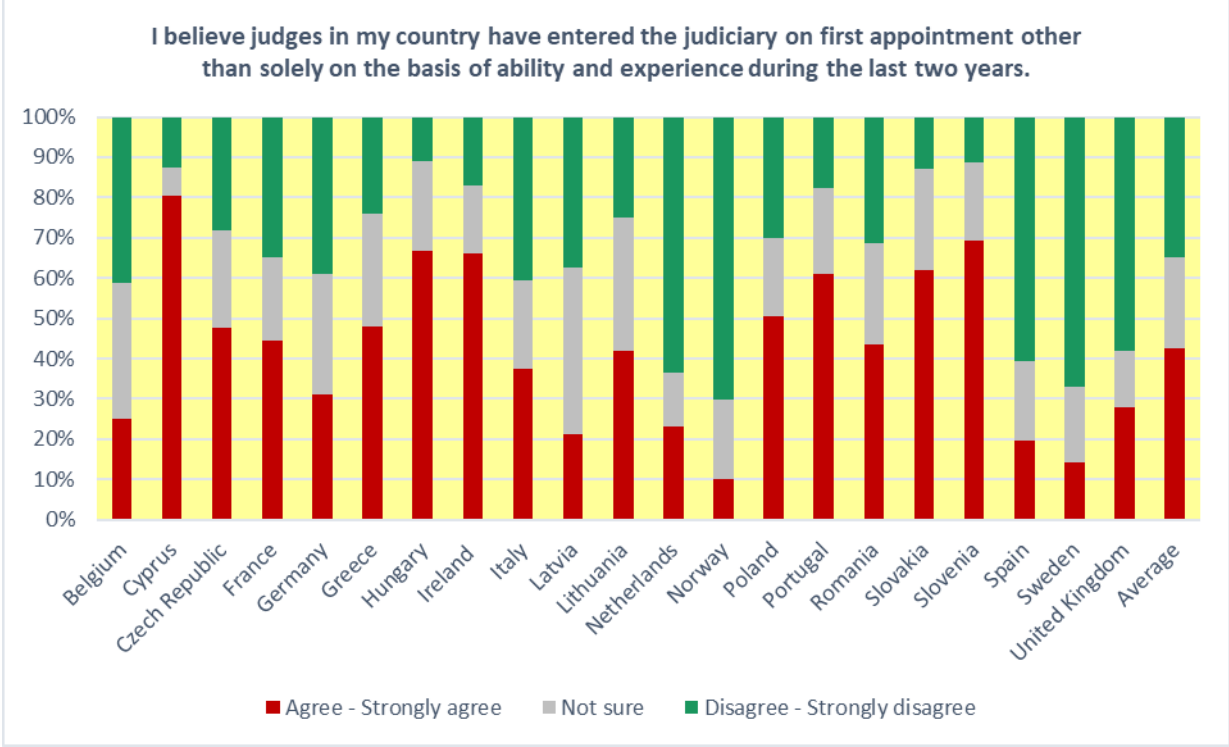


Figure 53 First appointment of judges



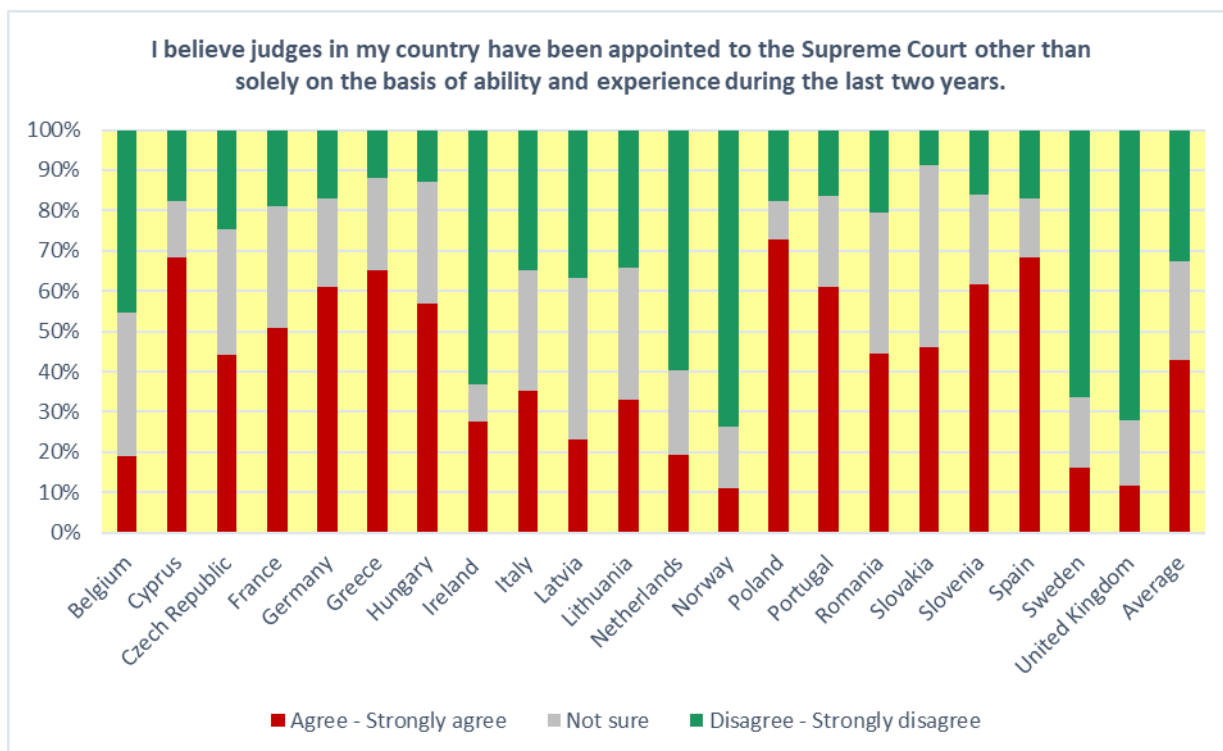


Figure 54 Appointment to Supreme Court/Court of Cassation

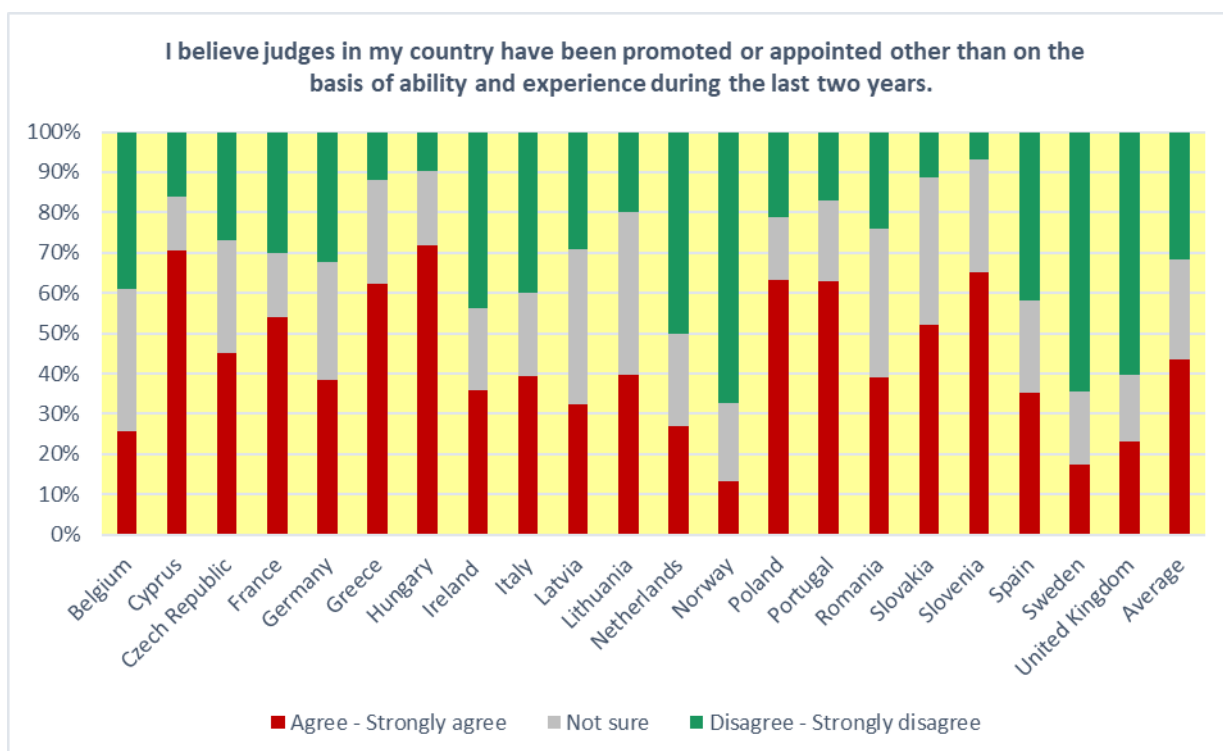


Figure 55 Promotion of judges

## 5.6 Aspects of judicial governance according to lawyers

The survey contains the question whether the Council for the judiciary has the appropriate mechanisms and procedures to defend judicial independence effectively. The answers of the lawyers are very much in line with the answers of the judges. As Poland and Cyprus have participated only in the lawyers survey, the already bleak picture becomes even less favourable. Figure 56 shows that many lawyers do not believe that protection is effective with percentages going up to 60% in Hungary, Poland and Spain and even 70% in Cyprus.

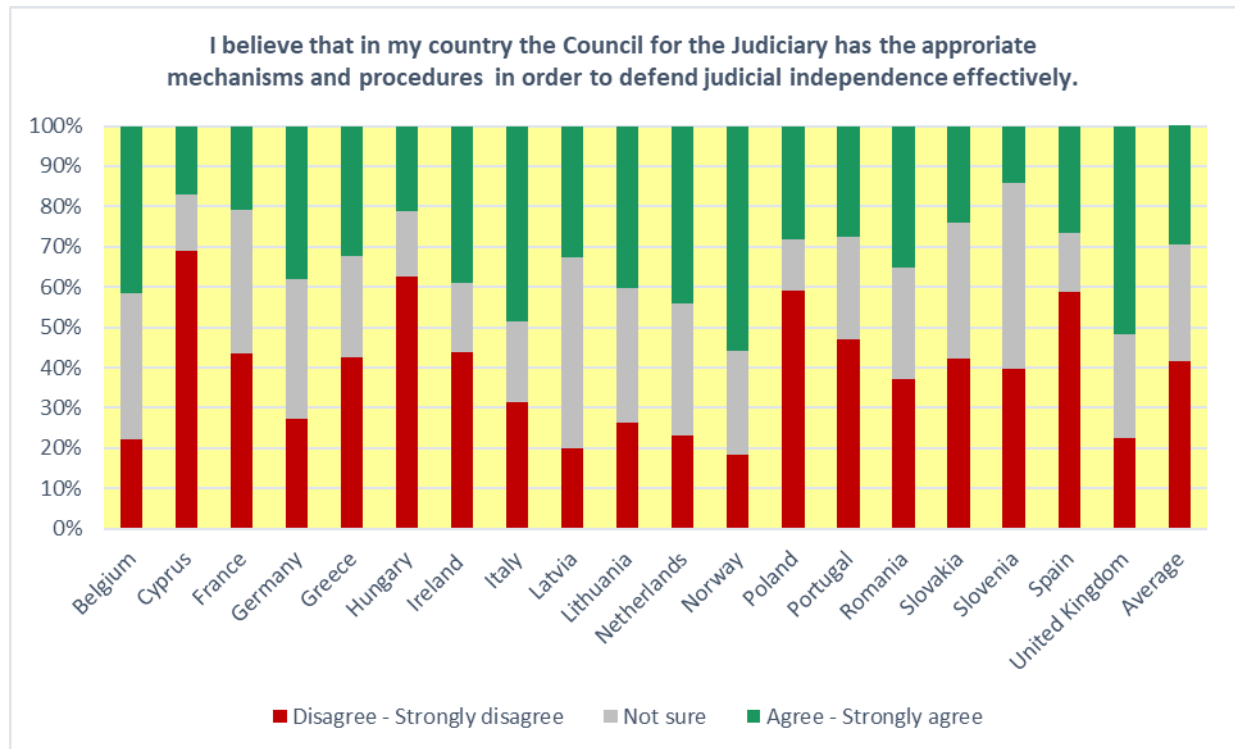


Figure 56 Mechanisms of Councils for the judiciary to defend judicial independence

Figure 50 dealt with judicial corruption. The related issue under the heading of accountability concerns the effectiveness of the judicial authorities in addressing corruption. Large percentages of lawyers believe that corruption is not effectively addressed (figure 57). Especially for Slovakia, Greece and Cyprus this is the case, but for many other countries as well, albeit less extreme.

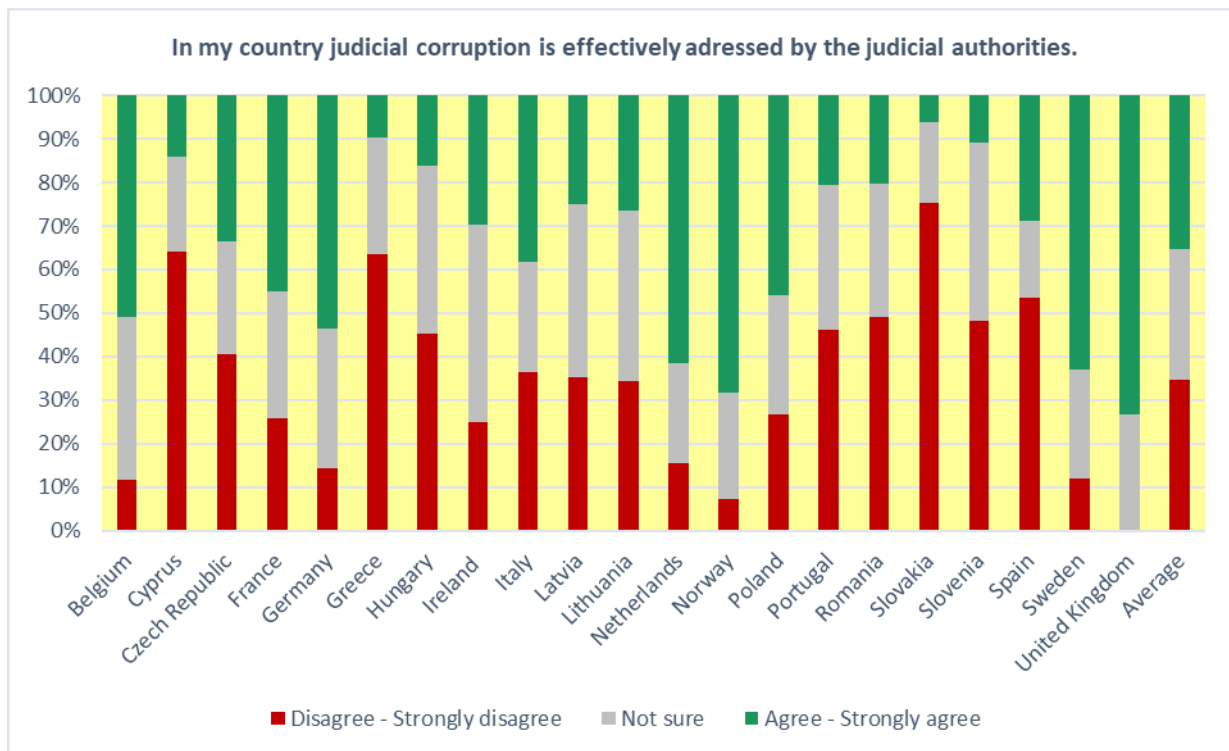


Figure 57 Handling of judicial corruption by judicial authorities

## 5.7 Conclusions

The survey among lawyers has achieved moderate success, as in some countries it proved difficult to get lawyers to participate, despite the efforts of the CCBE and national bar and law societies. Still, the results are informative about the state of the independence and accountability of the judiciary in Europe. The perspective of lawyers is an important addition to that of judges. In addition the participation in the survey by countries that did not participate in the judges survey, in particular Poland but also Cyprus, fills an important information gap. Due to time constraints the outcomes could not be fully presented in this report, and a separate report will be made available about both surveys. The main conclusions are the following.

1. On a 10-point scale judges rate the independence of the judges in their country on average between 5.2 and 9.0. Most countries get a positive score, but several score just above 6.
2. In general, the lawyers are more critical than the judges, overall and on most aspects of independence.
3. Especially, with regard to appointment and promotion of judges many lawyers believe that such decisions are not solely based on ability and experience. Poland, Hungary, Cyprus and Slovenia have low scores on all aspects.
4. As to an aspect of accountability, the handling of judicial corruption by the judicial authorities is considered by lawyers not to be effective in many countries.

## 6. Format for court user surveys

Perceptions about judicial independence are particularly important in the indicator system. There is data available on the perceptions of citizens in general and of businesses, lawyers and judges, but not about the perceptions of the users of the courts, based on actual experience. This is a major knowledge gap. The general survey among lawyers has an uneven and in many countries low response rate and the answers are not specifically related to the direct experience with concrete court cases. For both groups, data about their actual experience in contrast to their general perception of the independence of the courts would be extremely valuable. As the EU Justice Scoreboard documents, surveys among court users are far from common, and cover a variety of subjects, but surprisingly do not pay attention to independence. Moreover, the available surveys often concern specific courts, and do not give a representative overview of the courts in a country. The handbook of CEPEJ for conducting satisfaction surveys<sup>11</sup>, which is in many respect an excellent handbook, also does not focus on aspects of independence. An example of a survey among court users and lawyers that covers the whole judiciary and is undertaken on a regular basis is provided by the Netherlands. This extensive survey contains one question related to independence. This question asks both clients and lawyers about the impartiality of the judge in the case concerned.

There are two challenges in this area. (1) The systematic implementation of court user and lawyer surveys about their actual experience in all judiciaries is necessary to provide essential feed-back on the quality of the judiciary and (2) such surveys should include the key issue of the independence of judges which is a rather abstract notion and to be practical needs to be made concrete, especially for parties that do not have a legal background.

As to the first challenge, Councils for the Judiciary can, dependent on their mandate, play a prominent role in organizing such surveys. In order for the ENCJ to be able to promote this, the ENCJ has to consider the content of such surveys not only from the perspective of independence but also from the broad perspective of quality of justice. This requires a link with its work on quality (part 2 of this report) which so far has not been made. Now an operational set of indicators of quality of justice has been developed, it is feasible to examine the implications for user and lawyer surveys, building upon the available examples in the next cycle. Some preliminary ideas were developed for a user survey. It was felt that a survey should be short and focus only on major issues. Along those lines, a simple rough design was developed for further consideration at a later stage from the perspective of the quality indicators.

Regarding the second challenge, attention was given to questions that could help to make independence less abstract, while still retaining the connection with the indicators. The following questions are designed to inquire the experience at a court hearing. While not all questions relate to independence in the same direct way, the questions together provide a fairly complete picture of the efforts of the judge to treat parties impartially and the degree of success.

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<sup>11</sup> [CEPEJ \(2016\). Handbook for conducting satisfaction surveys aimed at court users in Council of Europe Member States.](#)

1. The proceedings were duly conducted (the hearing started at the hour scheduled, there were no hearings postponed without reasonable cause, documents were served on time).
2. The judge explained in an understandable way the procedure and issues in my case.
3. My rights and obligations during the proceedings were explained to me in an understandable way.
4. The judge listened attentively to my explanations.
5. The judge treated all parties and their representatives with the same respect.
6. The judge was neutral (had no prejudice, no visible preference was given to the viewpoint of any of the parties or their representatives).
7. I believe that the case has been resolved or will be resolved fairly.
8. If you disagree or strongly disagree with 7 or are unsure about 7, what are the reasons for this (multiple answers are possible):
  - you feel that the judge wasn't duly prepared for the case (didn't know well the subject matter of the case, asked not targeted questions)
  - you feel that the judge is not competent, professional;
  - you feel that the judge lacked the ability and experience to conduct the procedure and to decide the case properly;
  - you feel that the proceedings are not transparent (some of the parties or their representatives may have had an inappropriate impact on the decision);
  - you believe that the whole judicial system is corrupt.
9. On a scale of 0 - 10 (where 0 means "not independent at all" and 10 means "the highest possible degree of independence), I rate the independence of the judge in my case:
10. My trust of the judicial system changed when I had come to court.
11. If you agree or strongly agree, with 10:
  - your experience was better than you expected or;
  - you were disappointed.
12. What is the outcome of the case (this is a usual question in user surveys, but particularly relevant in this context).

Before the ENCJ could suggest Members and Observers to incorporate these questions in a customer survey, the questions need to be tested in a pilot. Also, similar questions need to be developed for a lawyer survey. This could be usefully combined with the development of a lawyer and user survey from the perspective of the quality indicators.

## 7. Next steps on Independence & Accountability

To strengthen the Independence and Accountability mechanism that has been developed by the ENCJ, it is proposed to:

1. Reconfirm the continued necessity to protect and expand the independence and accountability of the judiciaries of Europe, by means of a structured cycle of improvement.
2. Adopt the improved indicators of independence and accountability and agree to organise at the national level an expert group to validate the measurement of the indicators. The so-called hard data about the functioning of the judiciary will be gradually expanded.

Next steps in 2019/2020

1. Application (measurement) of the improved indicators by all Members and Observers, as the start of the next cycle of improvement, beginning in September 2019. The national expert groups will be used to validate the outcomes.
2. Further development of a court user survey that covers aspects of independence and accountability as well as quality.
3. Analysis by all judiciaries of the outcomes of the judges and lawyers surveys for their countries and communication with the judges of outcomes and lessons to be drawn.
4. The perceived increase of lack of respect for judicial independence by the other State Powers makes the Strategic Plan in which the ENCJ has taken it upon itself to initiate a dialogue with these State Powers on the EU level more urgent. The Executive Board is in charge of this action.

## Part 2. Quality of Justice

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### 1. Background

The extension of the indicators to quality of justice started at the General Assembly in 2015. The logical follow-up to the establishment of indicators relating to judicial independence and accountability would be to consider the establishment of indicators for the quality of justice, since the objective of an independent and accountable judiciary is to produce quality justice for society. Accordingly, it was decided that work should be done on the creation of a methodology to produce indicators for the quality of justice.

In 2016/2017 a set of indicators was developed and applied in a pilot for three judiciaries. The pilot indicated that that set of indicators would provide a good basis for a system for all Members and Observers, and it was agreed at the General Assembly in 2017 that, after refinement of the indicators, the indicators would be applied by all Members and, where possible, Observers. The refinement of the indicators would be based on a critical review of the indicators and the way that these are measured and scored. Also, this was to lead to more precise concepts, definitions and explanations to improve the uniformity of the interpretation of the indicators. In addition, it had to be discussed how the questionnaire should best be answered, allowing for input from the judges.

It was intended that this would all take place in the second half of 2017. Once this had been done, the questionnaire based on the indicators would be answered by all Members and Observers. It was envisaged that this would take place in the first half of 2018.

This work was carried out, but some complications were encountered during the implementation of the indicator system. Those complications were addressed in some detail in last year's report and are not repeated here.

It was, accordingly, decided at the General Assembly in Lisbon in June 2018 that the following activities should be undertaken:

1. All Councils should adopt a framework that defines their involvement in guaranteeing and promoting quality of justice and their approach to it, and to improve quality of justice by examining their country profiles, taking the general recommendations into account.
2. Improvement of the quality indicators by a thorough analysis and reflection on the outcomes so far and the issues encountered.
3. Incorporation of quality in the development of the format for a court user survey.
4. Analysis of existing, external data about quality of justice for their use in the indicator system.

It quickly became apparent that the priority was the work described at 2 (indeed, that the activities described at 1 and 4 could not realistically be carried out until 2 had been accomplished) and, furthermore, that 2 would require a substantial amount of time and effort - so making it impracticable to perform 1 and 4 in 2018/2019. As for 3,

this was work which was carried out by a different sub-group chaired by the Judicial Council of Lithuania.

At the sub-group's meeting in Rome, the content of a revised quality questionnaire, including the scoring of answers, was agreed. The revised questionnaire was then "piloted" by being completed by the members of the sub-group for their respective judicial systems. The results of that pilot were then discussed at the sub-group's final meeting in Vilnius and shared with the other members of the project group. At the same meeting a draft of this report (including the questionnaire) was discussed and agreed.

## 2. Vision on Quality

### 2.1 Principles

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (art 6 ECHR). Article 6, as well as Article 47 of the Charter of Fundamental rights of the European Union stipulate the centrality of the person in judicial procedures and that everyone has a right to an effective remedy and to a fair trial. Councils for the Judiciary need to take into account the perspective of the person seeking justice in all their tasks and from that perspective they need to focus on quality of justice. At its General Assembly in 2017 the ENCJ agreed that Councils for the Judiciary should indicate their responsibility for standards setting on the quality of justice - their definition and evaluation - for the sake of quality but also because of the links and sometimes trade-off between quality, independence and accountability.<sup>12</sup> While some Councils have clear responsibilities regarding quality of justice, others still have to assert these responsibilities. Section 2.2 elaborates the responsibilities of Councils.

The ENCJ has over the years emphasized the paramount importance of judicial independence in combination with accountability. Independence is a pre-condition of quality of justice and at the same time the key component of quality. Other quality aspects lose their meaning if independence is compromised. Independence is necessary but obviously not sufficient for quality of justice. The ultimate goal of the judiciary is to dispense quality justice within a timeframe consistent with the demands of society by judges that are and are seen to be independent and impartial in a fully transparent manner. Generally, independence, accountability and quality reinforce each other. In some instances tensions may occur between these aspects and these will need to be reconciled.

The choice of methodology of the ENCJ in the field of quality has been to extend the indicators about independence and accountability to quality of justice. As was explained in the report already quoted, this step is important for two central reasons:

- First, because independence, accountability and quality are linked and need to be considered together.

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<sup>12</sup> ENCJ (2017). Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017, ENCJ Report 2016-2017.



- Secondly, whilst independence and accountability are not goals in themselves, quality of justice is.

For the judiciary to play its role in society, quality in relation to the changing demands of society require permanent attention.

It is essential for the ENCJ to address these matters, building on the earlier reports it has made before such as those on judicial reform.

## 2.2 Roles of Councils for the Judiciary in delivering quality justice

Councils for the Judiciary and other governing bodies need to maintain, explain and, when needed, defend the independence of the judge and the judiciary as a whole vis a vis the other branches of government and private actors. The best defence of independence is a judiciary that provides quality justice. Quality depends on many matters for which Councils for the Judiciary and equivalent governing bodies are responsible. Depending on the scope of their responsibilities, selecting and promoting judges and support staff, securing budgets and innovating/digitalizing the courts are examples. Consequently, even if their responsibilities in the area of quality have not been made explicit in the law, Councils affect the quality of justice in many ways and therefore need to define and maintain quality standards, together with and respecting the professional role of the judges and in consultation with the users of the courts.<sup>13</sup> It is the duty of Councils to secure appropriate funding of the courts to allow the courts to implement the standards, again whether or not this is statutory task of Councils. Standards that cannot be implemented in practice create expectations with courts users that cannot be fulfilled. The funding of the judiciary is, in practice, a major bottle-neck.<sup>14</sup> Councils need to be involved in budgetary and financial processes.

Quality standards can be part of approaches such as:

Integral systems:

- Quality systems that incorporate quality standards, processes (PDCA cycles) and measuring instruments.
- Funding systems that incorporate aspects of quality and associated reporting systems, such as annual reports of the judiciary, that include Quality Indicators.

Standards for judges:

- Selection, promotion and evaluation of judges: all these actions require criteria. These criteria should be based on a quality framework including quality standards.
- Principles of ethics: these principles, whether in the form of codes of ethics or ethical guidelines, incorporate many quality aspects related to the proper functioning of judges. Again, an implicit or explicit quality framework underpins these codes. It is advisable to make this framework explicit.

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<sup>13</sup> See also CCJE: « *it is very important that, in each Member State, the Council for the Judiciary holds a vital role in the determination of the criteria and standards of Quality of the judicial service on the one hand, and in the implementation and monitoring of the qualitative data provided by the different jurisdictions on the other.* » (CCJE Opinion 10, paragraph 53).

<sup>14</sup> See ENCJ (2017). Independence, Accountability and Quality of Justice, p20 and ENCJ (2016). Funding of the judiciary.

Depending on its formal responsibilities, each Council should adopt an approach that fits within its mandate, but all should develop quality standards. In the view of the ENCJ all Councils for the Judiciary, if they have not done so yet, need to strive to define a quality framework for the judiciary that at least incorporates:

1. Standards for the courts that define quality of justice.
2. Indicators to measure performance against the standards.
3. Good practice guides for the courts on how to implement the standards, to be developed with the assistance of relevant institutions such as the judges' training institution.
4. Periodic reporting about the quality of justice by means of the indicators to increase public confidence in the judiciary.
5. Creating conditions to avoid any interference with judges' and judiciary's independence by mechanisms to evaluate quality of justice.

It should be emphasized that quality justice is not only created by judges, but by the contributions of all employees of the courts. For instance, the way parties are received, assisted and, if necessary, protected is very important for their experience.

### **2.3 Quality in relation to independence and accountability**

#### ***Quality standards***

Independence has a major external dimension, but also an internal dimension. Judges must judge their cases independently from their colleague judges and from court management, apart from the appeal system. This leads to a tension between independence and some aspects of quality, in particular the uniform application of the law and consequently the consistency and predictability of judicial decisions that benefit from a common approach by judges. A related issue is timeliness: while a judge is autonomous in her or his handling of specific cases, court users are entitled to know what procedure the courts normally follow in categories of cases and how long this will take. In this respect internal independence is not absolute, and a balance needs to be achieved between judicial autonomy and predictable procedures. The articulation of this balance in general is a governance issue and thus Councils for the Judiciary are in the lead, while the judges are autonomous in their cases.

In the view of the ENCJ, quality standards (including timeliness) that relate to aspects for which judges are responsible and that may affect their independence, cannot be binding. These standards provide aspiration levels. Judges should, however, be expected to explain their reasons to the parties when they diverge from the standards. To guarantee the acceptance of such standards by the judges, the standards need to be developed in a process involving the judges of a jurisdiction and taking into account the needs of society. Broad support by the judges is essential for standards to be effective.

#### ***Assesment of the Quality of judicial decisions***

A complex area is the quality of judicial decisions. Judicial decisions are at the heart of what independence is about. At the same time the quality of decisions is the most important aspect of the quality of justice and the judiciary. Promoting and guarding the quality of decisions foremost by the judges themselves but also by others involved is, therefore, essential. Training, especially, of new judges, but also permanent education to keep knowledge and skills state of the art, is an important tool, and should be used by judges to learn from each other. The methodical assesment of the quality of actual judicial decisions, outside appeal, can be useful, if done properly. The

assessment should never be about the merits of the judgments (whether judgments are ‘correct’), as this would fundamentally interfere with judicial independence. It should be confined to their professional quality (sometimes called “craftsmanship”). Assessment of the quality of judgments may take the form of peer review, confined to the discourse among professionals. In this approach outcomes are not used in individual performance reviews. This approach creates least tension with independence, but is used rarely in a systematic manner.

Assessment of the quality of judgments may also be part of performance review or evaluation of individual judges, as is often the case in Eastern and Southern Europe, on a regular basis or for the purpose of career decisions. A sample of judgments is taken and evaluated by those responsible, often judges themselves. When performance reviews take place, Councils for the Judiciary should be in the lead, and not Ministries of Justice or other organizations such as inspections that are part of other state powers than the judiciary.<sup>15</sup> Also, performance reviews may focus either on rewarding/punishing performance or on developing skills. The latter approach can be reconciled more easily with judicial independence than the former. In career decisions it is impossible to ignore the history of judgments<sup>16</sup>, but also in these decisions it is crucial to focus on professional quality and not on the alleged ‘correctness’ of decisions.

The CCJE argues in Opinion 17 that ‘some form of evaluation’ is needed to deliver justice of the highest quality and for the judiciary to be accountable. Evaluation can be formal or informal, and the CCJE urges its Member States to consider what is needed.<sup>17</sup> In this context the ENCJ endorses the assessment of judgments but only under the conditions mentioned above.

In many countries appeal rates are used as a proxy of the quality of judgments. Many international bodies such as CEPEJ do the same. The ENCJ is critical about using appeal rates for this purpose, as reversals are often based on other aspects than quality such as new evidence.<sup>18</sup>

## 2.4 Quality in relation to timeliness and efficiency of procedures

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<sup>15</sup> This demand is incorporated in indicator 5, item 5d (evaluation, promotion and training of judges) of the ENCJ Indicators on independence and accountability.

<sup>16</sup> This also follows from the Indicators on independence and accountability: appointment and promotion should only be based on merit (knowledge and experience). See CCJE, opinion 17, section 27 for the original argument.

<sup>17</sup> CCJE (2014). Opinion 17, section 23.

<sup>18</sup> In its opinion number 17 (2014) upon the evaluation of judges’ work the CCJE states that it is “problematic to base evaluation results on the number or percentage of decisions reversed on appeal, unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure” (‘paragraph 35). If appeal rates are used, the percentage of judgments left standing is probably the most relevant criterion. This combines appeal rate and reversal rate. In its opinion number 17 (2014) upon the evaluation of judges’ work the CCJE states that it is “problematic to base evaluation results on the number or percentage of decisions reversed on appeal, unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure” (‘pararaph 35).

The timeliness and efficiency of procedures are also important dimensions of quality of justice. Excellent judicial decisions often lose much of their relevance if they take a long time, relative to the societal processes the decisions are about, to arrive at. In many instances there is not a real contradiction between timeliness/efficiency and other aspects of quality such as the quality of the decision, as the duration of cases is generally determined by waiting times and hardly by the time the judge works on the case.

Final resolution of disputes is delayed when cases are appealed, in particular if these are subsequently referred back to the first instance court. The finality of judicial decisions is a major issue, and appeal courts need to decide cases swiftly and finally, whenever possible. While appeal is a fundamental right applying to legal as well as factual matters, it should be used in appropriate cases and not to delay or frustrate procedures or to vent anger. This implies that selection mechanisms for appeal are acceptable and even necessary. These mechanisms should take into account the interests of all parties and that of society that eventually foots the bill.

## 2.5 Measurement of Quality: Quality Indicators

While some believe that the quantitative measurement of quality contradicts the essence of quality, many aspects of quality are observable, if not in objective data then by the professionals and others involved. In this field, indicators can take the following forms:

1. Quantitative scoring of the formal characteristics of judicial systems. This requires a normative framework of what is good and what is bad practice.
2. Quantitative data on quality delivered, such as the length of procedures. Again, this requires a normative framework on good and bad practices: shorter is often, but not always better.
3. Quantitative survey data about opinions and experiences of judges, parties, their lawyers, the population in general, etc. As above, a normative framework is needed.

The choice of indicators needs to be based on shared concepts among Councils and other governing bodies, reflecting the views of the judges of Europe. These shared concepts can only be developed by intense debate. It needs to be accepted that quality indicators remain open for debate, as legal cultures differ and conditions may change over time. Given the subjective nature of the concepts, the process by which indicators are developed is important.

Quoting the CCJE:

*“As it is impossible at the moment to rely upon widely accepted criteria, quality indicators should at least be chosen by wide consensus among legal professionals, it being advisable that the independent body for the self-governing of the judiciary play a central role in the choice and the collection of "quality" data, in the design of the data collection procedure, in the evaluation of results, in its dissemination as feed-back to the individual actors on a confidential basis, as well as to the general public; such involvement may reconcile the need for a quality evaluation to be carried out with the need for indicators and evaluators to be respectful of judicial independence.”*  
(Opinion 6, paragraph 43)

Although this is obviously a difficult task, Councils for the Judiciary should take responsibility for developing indicators for the quality of justice, delivered by the courts, as does the ENCJ on the international level.

### 3. Areas of Quality to be covered by the Indicators

As also explained in last year's report, starting from a broad perspective on quality, quality is linked with the essential tasks the judiciary is deemed to fulfil under the Rule of Law.

These tasks range from maintaining fundamental rights to practical matters such as the service provided to the public. The following areas are distinguished. Key aspects of these areas are briefly enumerated and explained. Obviously, each aspect of an area would require an extensive discussion to do it justice. This is, however, not the place to do that, as our focus is on developing indicators.

#### *Maintaining the Rule of Law*

**Key aspects:** constraints by judiciary on government, upholding human rights, upholding the constitution and the division of power.

**Explanation:** the judiciary is one of the three state powers, and needs to play its role in upholding the constitution, international covenants and national laws in individual cases in which the interests of the other state powers or other major interests are at stake.

#### *Providing public access to the law to guide society*

**Key aspects:** precedence, shadow of law (impact of a judgment beyond the case on behaviour), knowledge of law, access to legal and court information, also in minority languages.

**Explanation:** the judiciary is not just concerned with conflict resolution in individual cases. It provides guidance to society how to apply the law, thereby clarifying the rules for economic and social interaction. The better it succeeds in this function, the less reason for conflict. At the same time the law must be re-interpreted to allow for changes in society. This and the previous function set the judiciary aside from private mechanisms for conflict resolution.<sup>19</sup> The provision of information is increasingly important due to the rise of "big data", while the provision of information about court procedures in general and for groups in society remain important.

#### *Guaranteeing due process from the perspective of accessibility*

**Key aspects:** hearing parties, giving voice, justice for vulnerable groups, equality of arms, proportionality, effective and efficient appeal process.

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<sup>19</sup> See: John Thomas (2015). The Centrality of Justice: its contribution to society, and its delivery. The Lord Williams of Mostyn Memorial Lecture.

**Explanation:** this aspect covers to what extent the courts can provide for a fair trial (art. 6 ECHR, art. 47 of the Charter of Fundamental Rights of the EU and art. 13 of the UN Convention on Fundamental Rights of Disabled People), and together with the actual decision constitutes the legal core of the work of the courts. Accessibility is a major concern, as citizens cannot avail of even an excellent court if access to that court is not assured. Accessibility can only partly be guaranteed by the courts themselves, as, for instance, court fees and the judicial map are generally determined by government and parliament and not the judiciary. Still, other aspects are under the remit of the judiciary.

#### *Adjudicating cases in a timely and effective manner*

**Key aspects:** no unnecessary delay, length of procedures proportionate to the importance/complexity of the case, active monitoring and control of process, pre-trial conferences, policy re delay tactics, size limits to presentations from lawyers/parties.

**Explanation:** “Justice delayed, is justice denied.” The ENCJ leaves the measurement of the duration of cases to CEPEJ, in particular. It focuses on the methods to control the duration of procedures. For that purpose case management can be distinguished from due process. The crucial issue is whether or not the judge leads the trial and by what means.

#### *Delivering judicial decisions*

**Key aspects:** fairness, knowledge, uniformity, predictability, well-reasoned, resolves conflict, judgments reflect views in society, appropriate sentences.

**Explanation:** the decision is central to any court case. The way in which a decision is delivered is crucial: reasoning, clarity, length and enforceability are all important topics in this regard.

#### *Providing services to the court users*

**Key aspects:** court rooms, administrative procedures, waiting rooms, waiting times.

**Explanation:** the experience of people going to court is also determined by practical aspects such as the way they are received on entering the court, the time they have to wait and the adequacy of waiting rooms (have victims and defendants to wait in the same room?)

#### *Enforcement of judicial decisions*

**Key aspects:** enforceable judgments.

**Explanation:** obviously for litigants it is vital to assess whether judgments can in practice be enforced. It does not make much sense to go to court if a favourable judgment has no practical effect. However, enforcement is generally not within the power of the judiciary, and the judiciary is dependent on other parties to enforce. Courts do play a role by providing clear, enforceable decisions.

The ENCJ intends to develop indicators for all these areas. For some areas this is easier than for others, as areas differ in conceptual complexity and also in the work that has been done already. The choice has been made to focus on four of these areas in this version of the indicators. These areas were seen as the most pressing ones, either because they come first (for instance, without high quality decisions the other areas lose much of their meaning) or because performance falls evidently short. Most participants in the project team still see timeliness as the most vulnerable aspect of the performance of their judiciaries. The other areas of quality can be addressed at a later stage. The next table sets the scene.

Table 4. Areas of quality and planning of the design of indicators

	<b>Description of objective characteristics</b>	<b>Subjective assessment of performance</b>
<b>Maintaining the Rule of Law</b>	Next phase	Next phase
<b>Providing public access to the law to guide society</b>	Included	Next phase
<b>Guaranteeing due process from the perspective of accessibility</b>	Included	Some aspects
<b>Adjudicating cases in a timely and effective manner</b>	Included	Some aspects
<b>Delivering high-Quality judicial decisions</b>	Included	Some aspects
<b>Enforcement of decisions</b>	Next phase	Next phase
<b>Providing services</b>	Next phase	Next phase

In this table a distinction is made between the description of objective characteristics and the subjective assessment of performance. Quality is in part determined directly by the arrangements stipulated by law. In addition some aspects of quality such as the duration of cases are objectively measurable. However, there are also many aspects that can only be assessed subjectively, at least at this stage. Subjective assessments can be given by the councils/courts/judges and by court users/lawyers/observers.

Currently, little is known about the perceptions of court users, as was also noted in the context of independence and accountability. Subjective assessment is therefore limited to the views from within.

## 4. Substantive exploration of the selected areas of Quality

In this section the areas of quality that were selected are elaborated upon. Special attention is given to the quality of judicial decisions.

### 4.1 Adjudicating cases in a timely and effective manner

Both timeliness and case management are topics that have been discussed extensively within the ENCJ. The balance between timeliness and other quality aspects is an important issue, as indicated in the first recommendation of the 2010-2011 Timeliness Report: *‘Justice delayed is justice denied’ is a true statement that underlines the importance of delivering justice without undue delay. However, in striving for timeliness it must be remembered that the drive for expedition should be balanced with other quality aspects, of which the quality of the decision should have the highest priority. The demands of society require processing without undue delay, but drive for efficiency must not lead to inferior quality decisions.’*

After the publication of the report, regional timeliness seminars were organised to increase awareness of the issue of timeliness, to deepen the understanding of causes and remedies, and to discuss the recommendations and the cooperation between stakeholders, and thus to further the implementation of the recommendations. The seminars have been organised with participants from countries within a region with comparable culture and legal traditions.

The ENCJ has developed case management guidelines, as presented in the 2012-2013 report ‘Judicial Reform in Europe - Part II’. The guidelines are:

- Every judiciary should set up a structure on how to establish methodologies for case management, including the associated standards for the (average) duration of cases, for specific categories of cases/jurisdictions. These structures should be guided by the judges and should allow for discussion with stake holders such as lawyers.
- The methodologies for case management need to establish a balance between the importance of a case and the attention the case is given in terms of procedural steps allowed.
- In the methodologies an important place should be given to pre-trial conferences to establish the proper method to resolve the case and to sort out differences of opinion about procedure.
- The case load of judges and support staff should allow for sufficient time for proper case management. It should be carefully considered whether judges can delegate some administrative aspects of case management to support staff.
- Case management requires a change of attitude and culture of many judges, which needs to be promoted by training and/or other tools to disseminate knowledge.

These guidelines provide a normative framework to evaluate good practices in this area. We distinguish between what the courts do and expect the judges to do on the



one hand and what the courts expect the parties to do on the other hand to conduct procedures in a timely fashion.

Timely adjudication is effected not only by case management, but also by legal and organizational matters, such as the availability and use of summary procedures, digitalization of procedures and specialisation of judges. These issues are taken up here, despite the fact that these phenomena have wider implications.

#### **4.2 Guaranteeing due process from the perspective of accessibility**

The extent to which the courts can provide for a fair trial as stipulated by article 6 ECHR and article 47 of the EU Charter of Fundamental Rights in practice depends on a range of factors. Here the focus is on factors that are related to access to justice in a broad sense. At the most basic level, due process and accessibility require that parties can understand what is said and written. This implies that procedures are available in the official languages of a country and that for other languages translation facilities are available. People with disabilities require specific attention. Apart from physical arrangements, their full participation may require specific procedural arrangements. Also, information about the courts and justice system must be made available for people with disabilities (i.e. for visually impaired).

Assuming these basic conditions are met, matters arise from the adversarial nature of judicial procedures. From this perspective a key issue is equality of arms. When there is a big gap between parties in knowledge of the law and of procedure and experience in litigating, one of the parties is potentially seriously disadvantaged unless the disadvantage is compensated in one way or the other. The issue will then be whether parties get adequate legal representation. If they cannot afford adequate legal representation and public funding is insufficient, or if they do not want legal representation, can judges order or offer legal representation? If that possibility does not exist or does not have the desired result, have judges the duty to compensate for the difference in knowledge and experience when hearing the case? And, more practically, do they have the time to do so? A related matter is abusive conduct. If parties or their lawyers misuse proceedings to delay the conclusion of cases or to otherwise drive up the costs for the other parties, a fair trial may become illusory if judges do not have the authority or do not use it to prevent such behaviour.

Another issue is whether judges can and do spend sufficient time on all cases. As cases differ in the effort they demand from judges or panels of judges, judges must be able to muster the time that is needed for each individual case, irrespective of the parties or the matter at stake.

The availability of appeal is an important aspect of access to justice. Parties should be allowed to appeal not only on the law, but also on the facts. At the same time appeals takes time and resources, and without some prospect of success merely delays justice and drives up costs for the parties and for the judiciary. The implication is that an adequate balance must be found between access to appeal and its limitation. A similar situation arises with respect to the impact of an appeal on the execution of the order appealed against.

The ENCJ has developed guidelines on appealing in the report about judicial reform mentioned above ('Judicial Reform in Europe - Part II'). The guidelines are:

- The law should state that the decision on meritorious cases<sup>20</sup> is a judicial decision based solely on the merits of the case.
- Filters should be defined to reduce the unnecessary use of court time on unmeritorious cases so allowing more timely access to justice for those who have a meritorious appeal.
- Filters should be defined to provide criteria by which the judiciary can evaluate the merits of the appeal in each case and exercise judicial discretion in the final decision.
- Procedures should be in place to avoid repetition and a re-hearing of the first instance trial and to require applications for appeal to focus on the outstanding issues.
- To limit the number of appeal judges<sup>21</sup> is not recommended, as more effective measures are available to reduce the burden of appeal and court time.
- Decisions on meritorious cases should normally and primarily be taken through a paper exercise rather than any court hearing.
- The appeal procedure could be simplified by setting limits to the length of written and oral presentations of parties.

In this area of quality the identification of good practices is more ambiguous than in the other areas, as guidelines are lacking or, where these do exist, not very specific. The work is ongoing, and the indicators presented below preliminary.

#### **4.3 Delivering high-quality judicial decisions**

As argued in opinion n° 11 of the CCJE “To be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable”. To achieve these aims, a number of requirements must be met.

##### ***Reasoning of judicial decisions***

Judicial decisions must in principle be reasoned. According to the ECHR case law, courts should give sufficient reasons for their judgments, both for civil and criminal decisions. This raises the question whether all decisions rendered by courts should be reasoned. This depends on the provisions of each domestic law but, as a general guideline, it may be considered that, unless otherwise stated, decisions involving the management of the case (for example: a decision adjourning the hearing) do not need a specific reason. In principle, the obligation to state reasons should be reserved to the final decision of the trial.

Jury decisions give rise to specific considerations. According to Recommendation n° R (95)5 of the Committee of Ministers of the Council of Europe to Member States concerning the appeal process (civil and commercial cases), "in principle, reasons need not to be given... for decisions made by juries". This leads to issues such as the kind of civil or commercial cases that can be judged by a jury and what means can be used to

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<sup>20</sup> Whether a case is meritorious or not.

<sup>21</sup> For instance, by hearing cases by a single judge instead of a panel of judges.

make the reasons or the verdict understood by the litigants and, if necessary, by the court of appeal.

A further issue is whether the reasons should be written or a judge can render his decision orally. Recommendation n° R(87)18 of the Committee of Ministers to Member States concerning the simplification of criminal justice states ( III, c, 3 ) that in less serious cases, or if the parties agree, the tribunal should be allowed not to make a written decision, but an oral decision "which should be limited to a mention in the record".

If a recommendation is to be made, it seems necessary to put the parties in a position to know, by whatever means, the reasons for a judgment pronounced by a judge, even if delivered orally.

An issue is also whether the practice consisting of giving the reasons of the judgment only if a party appeals against this judgment is acceptable. This practice has been condemned by the European Court of Human Rights because the litigants must be able to understand, as soon as the decision is rendered, the reasons why they won or lost their case. However, this practice still exists.

Reasoning takes a different form if it is done by a single judge or a panel. This choice depends on the culture and the system of each country. Whatever the system is, even in countries of which traditionally favour judgment by a single judge, informal discussions among judges dealing with similar cases should be encouraged in order to ensure predictability of decisions and legal certainty.

The ENCJ recommends that whenever it is possible, judges should provide this reasoning at least orally.

#### ***Clarity of decisions***

The judicial decision should, not only be reasoned, but also be intelligible, drafted in clear and simple language. This issue depends on the audience of the decision. Is the decision aimed at the litigants, the lawyers, the professors of law, the media or the public in general? In the view of the sub-group, the optimum position is where a judicial decision is expressed in language which is accessible not only to one audience but to every audience.

The judicial authorities of each country should set up a guide of good practices in order to facilitate the drafting of decisions (See opinion n° 11 of the CCJE).

#### ***Length of decisions***

It is desirable that a judicial decision is as concise as possible. For a decision to be read, understood and have impact it has to be sharp and focused and to refrain from unnecessary detail and academic excursions.

#### ***Enforceable decisions***

A judicial decision needs to be written in clear and unambiguous language to be readily capable of being given effect. The decision should be effectively enforceable for the benefit of the successful party, which is a component of the right to a fair trial. As argued by the European Court, the Convention and the Charter does not establish theoretical protection of Human Rights, but aims to assure that the protection they provide is given practical effect.

### ***Assessment of the quality of judgments***

Given the difficulty of ascertaining the quality of judicial decisions, a complementary approach which is followed here is to map what judiciaries are doing to guarantee and/or improve the quality of judgments. Education is part of this, but also the assessment of the quality of judgments. Following from that discussion, the major aspects to be covered include the existence of a mechanism to sample judgments and evaluate these judgments, the context (peer review or performance evaluation) the scope of the assessment and who is responsible. As to the scope of the assessment, a major distinction is whether the assessment is about the professional quality of the decision or about the merit of the judgment. In view of the independence of the judge, it is inappropriate to assess the merit (“correctness”) of the judgment, and, in the view of the ENCJ, it causes the mechanism itself to be inappropriate. This is the case if a party outside the judiciary is responsible for the mechanism, which is anyway undesirable, but also if the responsibility lies within the judiciary.

As to the responsibility for the mechanism, according to the law, some Councils have no competence in the field of quality of justice. However, because it is a duty of the Councils to ensure that the principle of independence of judges is preserved, the CCJE expressed in its opinion number 11 that the “Council should be entrusted with the evaluation of the quality of decisions”. The CCJE added that “where there is no Council for the Judiciary, the evaluation of the quality of decisions should be undertaken by a specific body having the same guarantees for the independence of judges as those possessed by a Council for the Judiciary”. The ENCJ shares this view.

To conclude, the ENCJ believes that the assessment of the quality of judicial decisions, which likely is the most critical aspect of the quality of Justice, is important, if one takes the improvement of quality seriously. However, any assessment system must respect the independence of judges. Necessary conditions are that the assessment is not about the merit of cases and the judiciary itself is responsible for the system.

### ***Education of judges***

Another method to improve the quality of judicial decisions is education, in particular initial training of newly appointed judges, but also ‘education permanente’ may help to maintain and improve their skills .

## **4.4 Providing public access to the law to guide society**

Judicial decisions give - to some degree - guidance to behaviour of the members of society (“shadow of the law”). A prerequisite is that judicial decisions of the courts are published. In addition to passive publication, the reach of decisions can be enlarged by efforts of the courts to draw the attention of the public to decisions that have high impact and/or set precedent. This can be done directly by means of the judiciary’s websites and use of social media and indirectly by the official media. Also, given the worldwide development of ‘big data’ it may become increasingly important or even necessary for the courts to make statistical information available about the outcome of cases.

At a more general level the moral authority of the courts - and thereby the impact of judicial decisions - could be promoted by providing information to the public about

core judicial values such as independence, impartiality and application of the law. This could be further helped by inviting the public to visit the courts and see judges at work.

Finally, new technologies to improve access to justice, such as on-line dispute resolution mechanisms, are important to retain or broaden the reach of the judiciary, but also to keep in touch with a society that experiences rapid technological change. This has been recognized by the ENCJ before. The already mentioned report on judicial reform contains the recommendation:

- Judiciaries should learn from on-line dispute resolution mechanisms and applications that are currently available on the internet.

The work on this area of quality is still in its first phase. The indicators presented below are therefore preliminary.

## 5. Formulation of Quality Indicators – 2017/ 2018

In 2017-2018, a Questionnaire was prepared in which questions were asked in relation to four areas:

- Indicators of Timeliness and Efficiency of Procedures;
- Indicators of Due Process from the Perspective of Accessibility;
- Indicators of Quality of Judicial Decisions: and
- Indicators of Public Access to the Law to Guide Society.

In total, 23 Members and Observers completed the 2017/2018 questionnaire.

The questionnaire proved much more difficult to fill in than the questionnaire on independence and accountability.

These difficulties stemmed, in particular, from:

- 1) Inherent subjectivity of some questions. While quantitative data could resolve some of the ambiguities, these data are generally not yet available.
- 2) Non-linearities occurred: for instance, access to appeal is important, but very many baseless appeals are harmful.
- 3) Some questions allowed only binary answers, while the answers were often more nuanced.
- 4) Interpretation of questions in different legal/judicial systems: what is clear in one system, may be ambiguous in another.
- 5) Differences between courts and areas of law. The generally applied distinction between first instance and appeal courts and between civil and criminal law is helpful, but does not resolve all differences.

- 6) Where differences in legal systems exist within a country and this is not reflected in the ENCJ participation, these problems became apparent, for instance in Germany.

In its report to the Project team, the expert group highlighted some ambiguities with regard to the scoring of the answers.

The scoring rules reflected what was good and what was bad practice, and in some instances differences of opinion still existed. Nonetheless, nearly all Members and Observers were able to fill in the questionnaire with the desired involvement of judges, leaving few blanks. Only one judiciary (Germany) had to leave so many answers open that a meaningful country profile could not be constructed. However, resulting from the difficulties mentioned earlier, various Members and Observers felt the results did not accurately reflect the reality of their national system and suggested the indicators should first go through another stage of development before (provisional) results could be published per judiciary. When comparing the country profiles (which is not the main purpose of the indicators), differences come to light that are difficult to explain. Some of the Members and Observers thought they were doing quite well as to the quality of justice, but came out negatively. Such unexpected outcomes could not be disregarded without a thorough analysis.

In view of these observations, it was decided that it would not be appropriate at that stage to publish the country profiles.

As the exercise was seen as informative and useful, it was generally agreed, however, that the work should continue.

As a first step, it was agreed that each participant would examine its profile, report back on the problems/ambiguities it had encountered before summer, and at the same time establish for itself issues about the quality of justice that needed to be addressed. Work would then continue on the four activities set out in the introduction to this Report.

## 6. Analysis and Review of the Quality Indicators – 2017/ 2018

At its meetings during 2018-2019, the following tasks were undertaken:

- to reduce, and in most cases remove, questions which required subjective judgment in order to answer them;
- to identify and remove ambiguities and uncertainties in some questions;
- to simplify the questionnaire in order to make it more understandable and easier to complete across the wide range of judicial systems that operate in ENCJ Member and Observer states;
- to review the scoring of the answers.

The work was divided into two phases: amendment of the formulation of the questions was discussed and agreed before the sub-group went on to look at scoring of the answers.

However, review of the scoring resulted in some further review of the need for some of the questions, as well as their relative weighting.

It should be noted that the sub-group did not make any alteration to the indicators themselves. The group's work was concerned with the detail of the questionnaire rather than with the principles which had been agreed in the light of the work of the sub-group in previous years. As many of the alterations were minor matters of detail, it would be of little value to attempt to list them all in this report. The following examples will give a flavour of the work carried out:

- (i) In many questions, the number of options was reduced. For example the five options "*all types of cases, most types of cases, half of the types of cases, some types of cases and no*" were reduced to three options "*most types of cases, some types of cases and no*". (The sub-group was of the view that "*most*" was preferable to "*all*" in this context because use of "*all*" might suggest an unachievably perfect system.) The four options "*all courts, most courts, half of the courts and some courts*" were also reduced, in this case to two options "*all courts and some courts*". These changes have resulted in a significant simplification of the questionnaire.
- (ii) The matrices entitled "*Assessment of impact*" have been omitted as they invited subjective judgment and would therefore be unduly influenced by the view of the person who happened to complete the questionnaire in a particular year.
- (iii) A definition of "*standards*" has been provided to make clear that this is intended to refer to targets or guidelines which can be implemented in diverse ways ranging from law to custom.
- (iv) Certain questions were removed either because it was not apparent that they identified a quality issue, or because the answer was controversial. An example of the latter was the question whether parties in civil or criminal cases are obliged to be represented by a lawyer. Some national systems, while not encouraging litigants in person, consider it important that unrepresented parties can obtain effective access to the courts, and it cannot therefore be regarded as a universal indicator of quality that unrepresented parties are excluded.
- (v) The earlier version of the questionnaire included the question "*Is there a requirement for permission to appeal?*". There may be scope for disagreement as to whether a system that imposes a requirement for permission is of greater or lesser quality than a system that does not. The question was therefore both broadened and clarified, and now asks "*Is there a filtering system to prevent appeals which are without merit from proceeding to a full hearing?*". The sub-group were in agreement that an affirmative answer to this question was indicative of higher quality than a negative one.
- (vi) Scoring rules were revised to avoid double penalisation where a negative answer to a question resulted in the country concerned being unable to obtain any score for a supplementary question.

- (vii) In some places the questionnaire contemplates that more than one answer may be given. An example is Question 15.2 in relation to which, as previously mentioned, the sub-group considers that it is good if a judgment is expressed in language which is accessible to more than one audience.

As previously mentioned, the questionnaire in its final revised form was piloted among a few members of the sub-group and has been demonstrated to produce results which appear, at first sight and albeit only a very provisional basis, to be broadly realistic.

Specifically, although the results should not be treated as definitive since the pilot was carried out on the basis that participants would not be bound by the results, the pilot demonstrates that the indicators succeed in being distinctive in a meaningful manner in the sense that the scores of countries differ from each other in an understandable manner. As such, the methodology would appear to work.

It follows from this that the outcomes of the questionnaire once answered next year by all Members and Observers should be useful to judicial councils, courts and/or judges in improving the quality of justice.



## 7. The revised list of Quality Indicators

### INDICATORS OF TIMELINESS AND EFFICIENCY OF PROCEDURES

#### 1. Standards for judges about the duration of cases:

- Existence of time standards in first instance and in appeal courts;
- Scope of the standards (total procedure or particular phases of the procedure);
- Realisation of standards in practice at first instance and appeal courts;
- Public access to information on the realisation of standards

#### 2. Standards for parties about the duration of cases

- Existence of time standards for parties in first instance and in appeal courts, e.g. to present documents;
- Power of the court to impose sanctions on parties who fail to comply with time standards;
- Authority of judges to issue case management directions (to fit the procedure to the case) in first instance and appeal courts;
- Authority of judges to enforce the determined procedure if a party does not conform;

#### 3. Summary procedures:

- Existence of summary procedures in appropriate cases in first instance and appeal courts;

#### 4. Digital case filing and digital procedures:

- Possibility of digital case filing;
- Possibility of digital procedures, in the sense that all communications are digital except for the hearing;
- Possibility for litigants to inform themselves digitally about the progress of their cases;
- Availability and development of online dispute resolution mechanisms ;
- Availability of track and trace systems for parties using online dispute resolution mechanisms.

#### 5. Specialisation of judges

- Existence of specialised judges in first instance and appeal courts

### INDICATORS OF DUE PROCESS FROM THE PERSPECTIVE OF ACCESSIBILITY

#### **6. Equality of arms (funding and costs):**

- Existence of a system under which public funding is provided to litigants without means to fund litigation themselves
- Existence of a system to shift the costs of litigation of the successful litigant to the unsuccessful litigant

#### **7. Commensurate effort of judges:**

- Existence of rules or regulations to determine whether a case is decided by a single judge or a panel of judges in first instance and appeal courts
- 

#### **8. Dealing with abusive conduct**

- Authority of the judge to take action to prevent abuse by parties and/or their lawyers
- Instruments available to the judge to intervene:
  - o Stop or stay the proceedings
  - o Order expedition of the proceedings
  - o Impose fines
  - o Shifting of litigation costs
  - o Report to a disciplinary body

#### **9. Availability of appeal**

- Existence of right of appeal for an unsuccessful litigant;
- Existence of filtering system to prevent appeals which are without merit from proceeding to a full hearing;
- Impact of appeal on the execution of the order appealed against.

#### **10. Communication**

- Existence of procedures in all official languages of the country;
- Existence of facilities at the court to provide translation when necessary.

#### **11. Access for people with disabilities**

- Existence of special procedural and physical arrangements for people with disabilities;

#### **12. Arrangements for vulnerable people**

- Existence of special procedural and physical arrangements for vulnerable people.

## **INDICATORS OF QUALITY OF JUDICIAL DECISIONS**

### **13. Format of judgments**

- Existence of templates for judgments in standardised types of case.

### **14. Reasoning of judgments**

- Existence of the requirement to reason judgments dealing with substantive issues in civil cases and verdicts in criminal cases ;
- Possibility for judge to give only summary reasons where appropriate (e.g to speed up procedures);
- Requirement for oral judgments (if permitted) to be recorded and made available to parties.
- Requirement of transcription of oral judgments in civil cases and oral verdicts in criminal case

### **15. Clarity of judgments**

- Existence of an obligation to use clear and simple language
- Primary recipients for whom reasons are written:
  - o Litigants
  - o Public in general
  - o Other judges (such as appeal courts or Supreme Court)
  - o Evaluation authorities

### **16. Assessment of Quality of judicial decisions**

- Existence of an instrument to assess the quality of judicial decisions on a regular basis
- Body in charge of the assessment
- Link with Court User Satisfaction Survey

### **17. Education of judges**

- Existence of initial training of judges on writing judicial decisions
- Existence of the requirement for judges to participate in training courses annually

## **INDICATORS OF PUBLIC ACCESS TO THE LAW TO GUIDE SOCIETY**

### **18. Access to case law**

- Degree to which judicial decisions in civil, criminal and family law are published at first instance and appeal courts
- Efforts of the courts to point out decisions that have high impact and/or set precedent to the public
- Efforts of the courts to make statistical information available about the outcome of cases

### **19. Opening up to the public**

- Degree to which the courts provide information to the public through official sources (e.g., publications, websites) about core judicial values such as independence, impartiality and application of the law
- Degree to which the public gets the opportunity to visit the courts and see judges at work.

In Annex 2 of this report the results of the pilot performed amongst members of the working group are presented in the form of figures.

In the Annex 5 of this report, the indicators are presented in detail in the form of the revised questionnaire piloted in advance of the final meeting of the sub-group in Vilnius in April 2019.

In the Annex 6 the applicable scoring rules referable to the revised questionnaire are set out.

## 8. Next steps on Quality of Justice

The next steps which are recommended should now be taken are these:

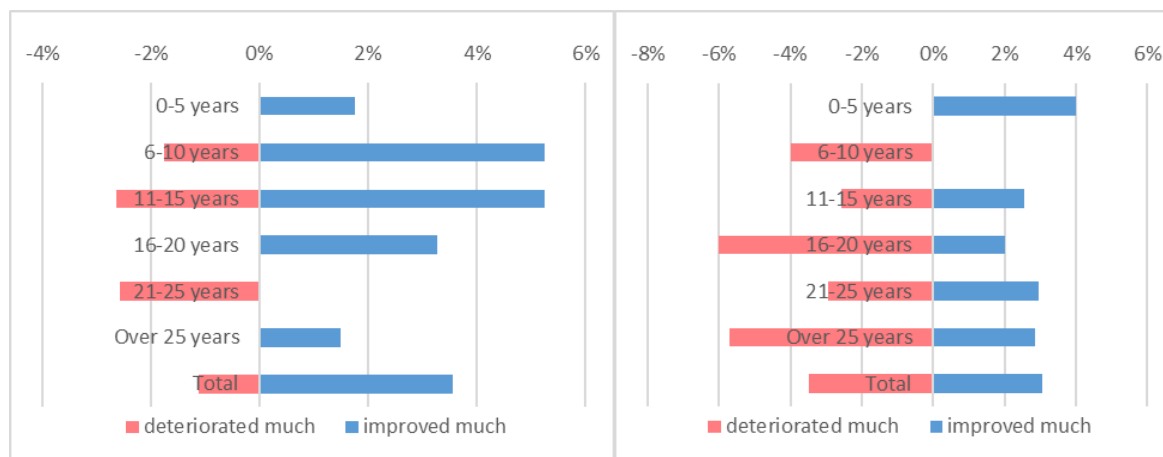
### **Completion and analysis of revised questionnaire**

- Next year (2019/2020) the revised questionnaire should be completed by all Members and Observers with a view to the results being analysed and reported upon the General Assembly which takes place in May/June 2020.
- The questionnaire results should be analysed against existing, external data about quality of justice for their use in the indicator system.
- All Councils should adopt a framework that defines their involvement in guaranteeing and promoting quality of justice and their approach to it, and to improve quality of justice by examining their country profiles, taking the general recommendations into account.
- The indicators may be subjected to further review by the Project Group – as well as, perhaps, by external sources in, say, March 2020, as part of a validation process - in the light of the questionnaire results and any further comments received from Members and Observers when submitting their completed questionnaires.
- Although not necessarily work to be performed next year, consideration should also be given to the sub-group doing work on the quality aspect of a court-user survey.

The ENCJ has made significant progress towards developing a vision on quality of justice. Following the analysis of the results of the revised questionnaire that will be contained in next year's report, it will be up to individual Councils to identify the areas in which there is potential to improve quality, and to take appropriate steps to achieve such improvement.

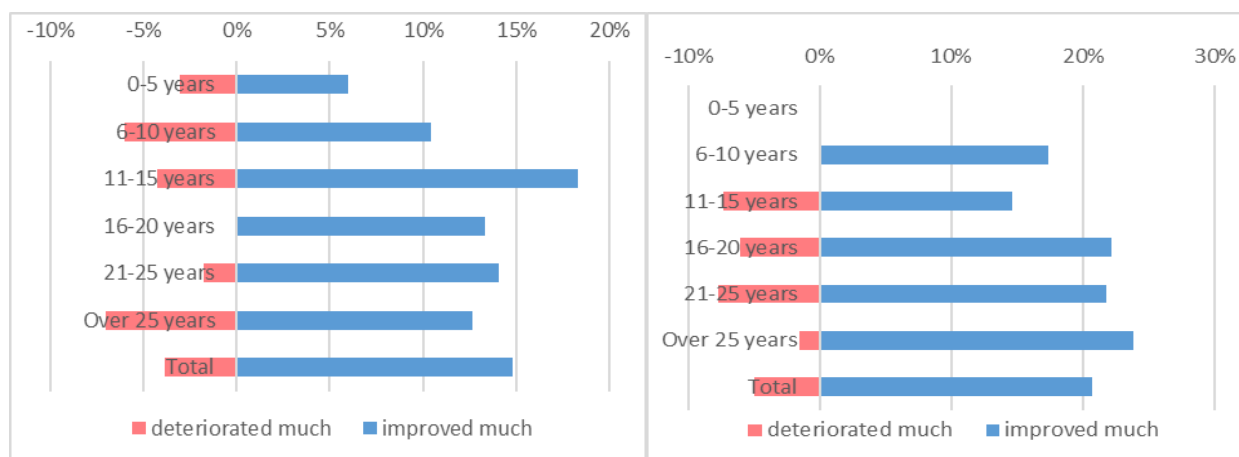
## Annex 1 Figures change of independence per country

The figures below give the percentages of judges per band of years of judicial experience (see figure 4) that believe that since they started to serve as a judge their independence has deteriorated (left red) much or improved much (right, blue).



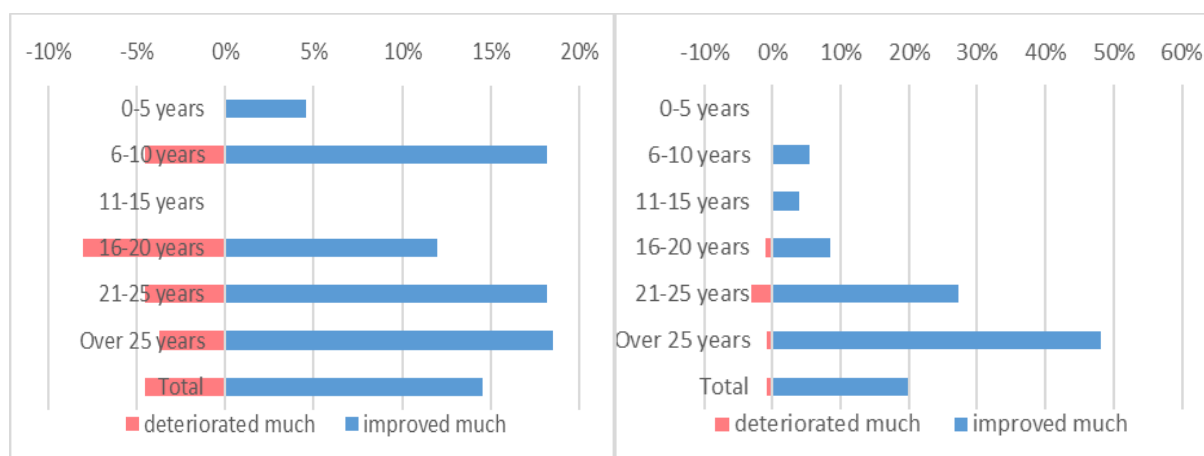
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country 2 Belgium



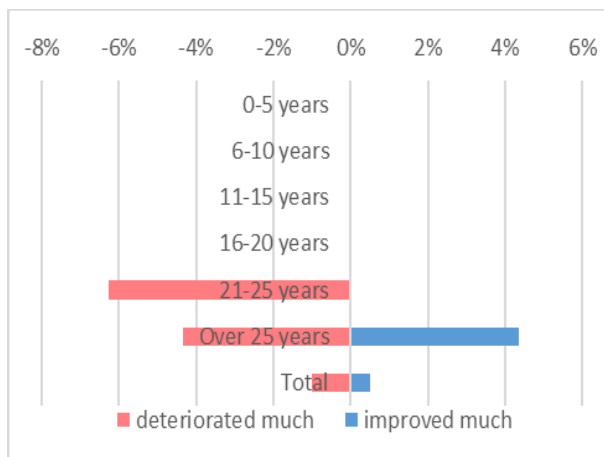
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country 4 Bulgaria

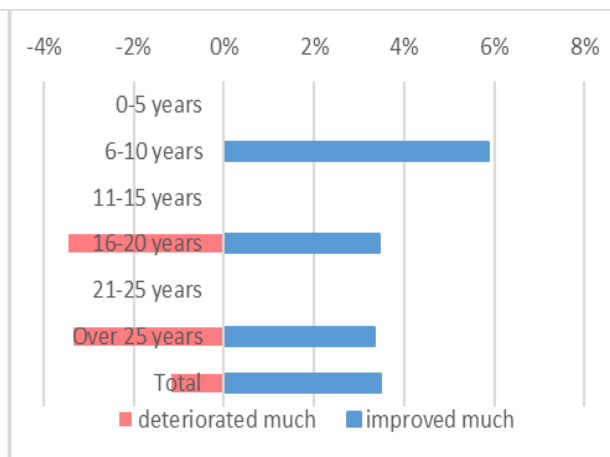


country 5 Croatia

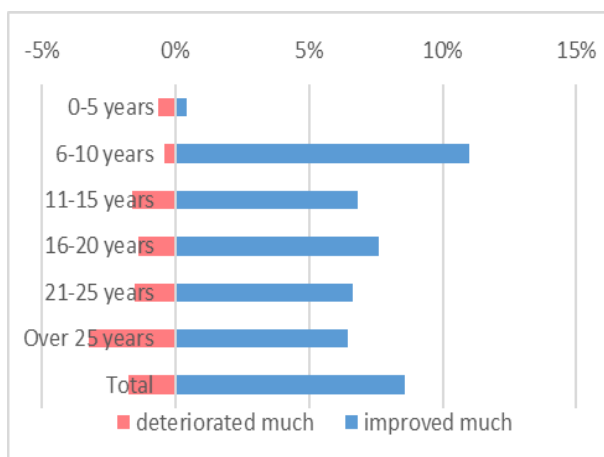
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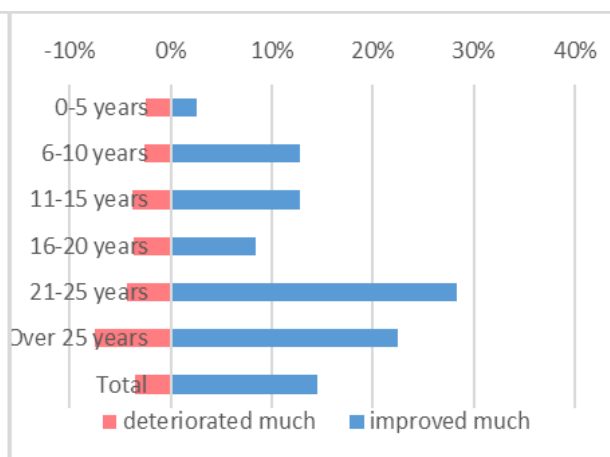
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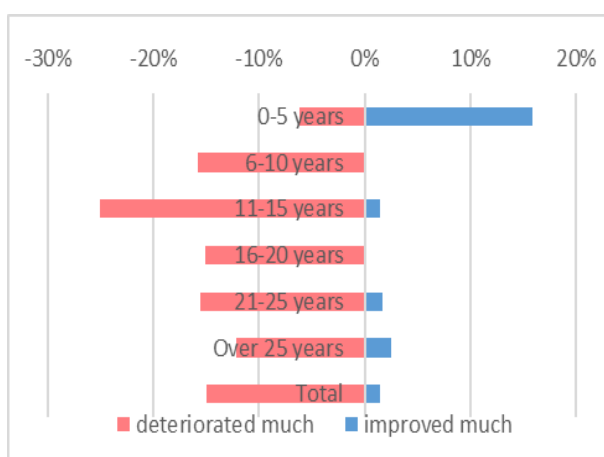
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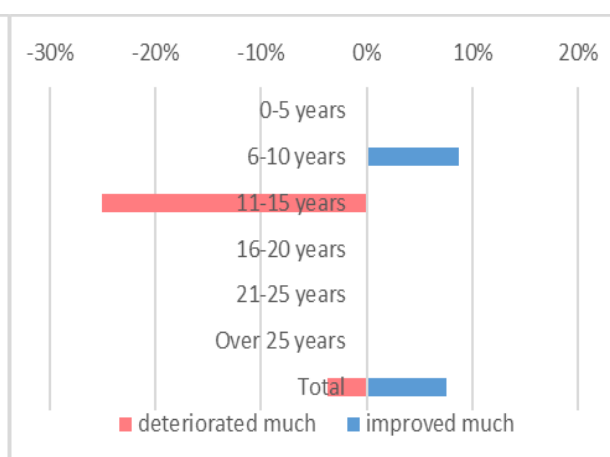
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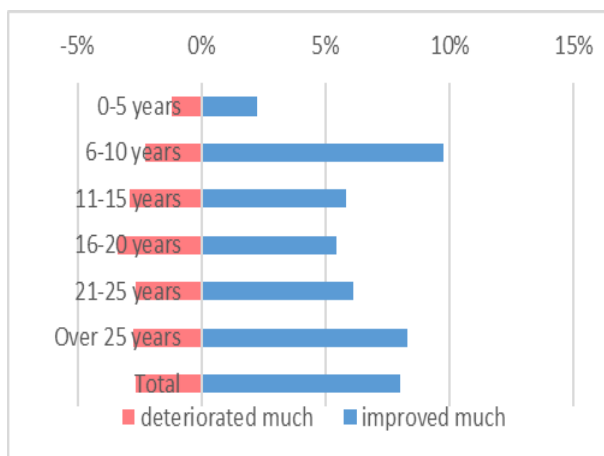
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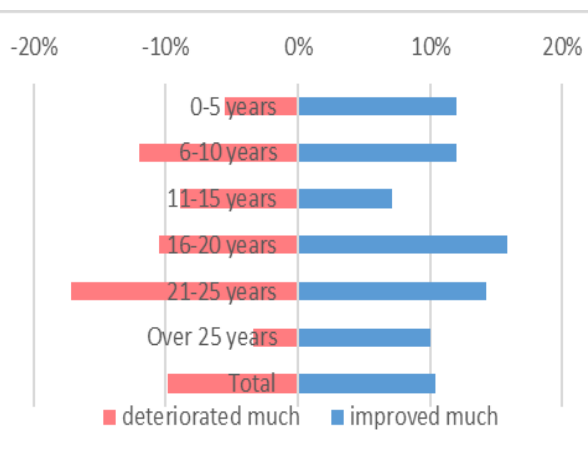
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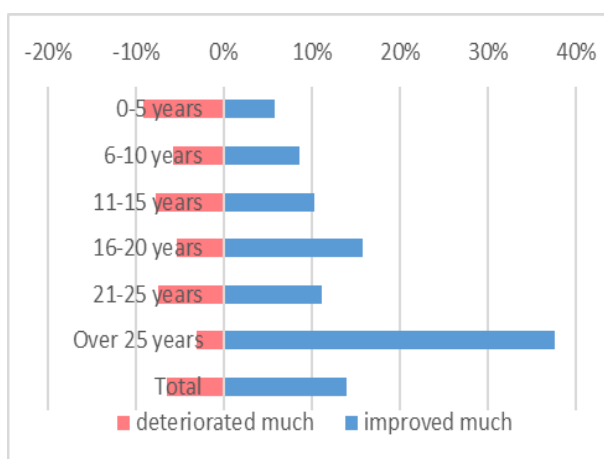
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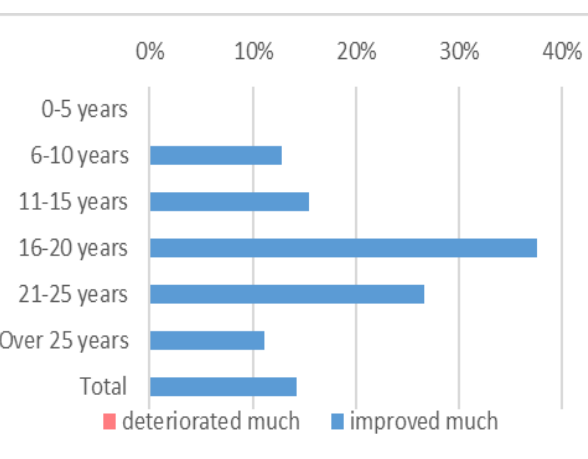
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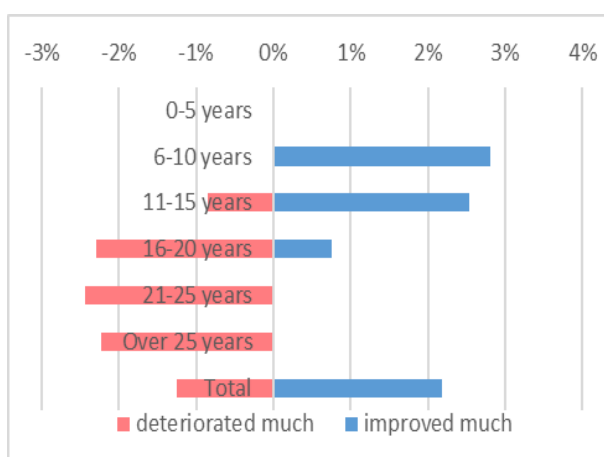
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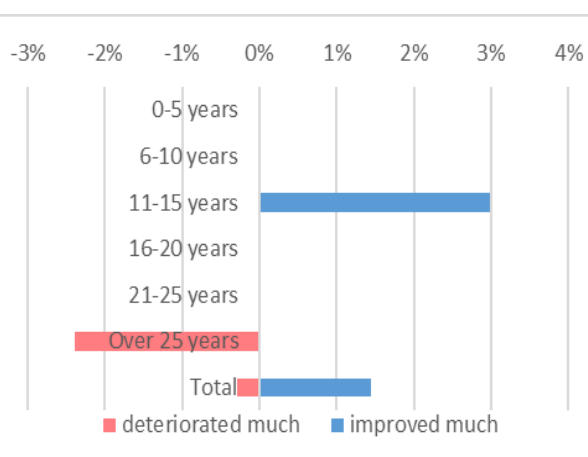
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country 16 Montenegro

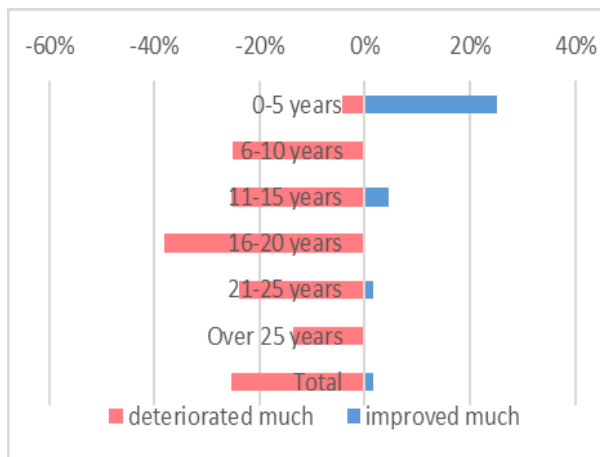


country 17 The Netherlands

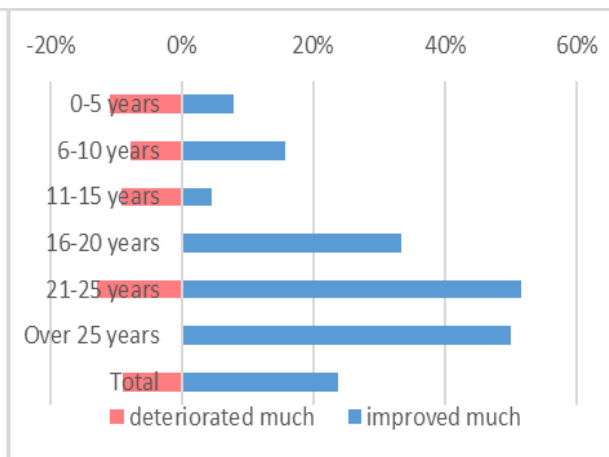


country 18 Norway

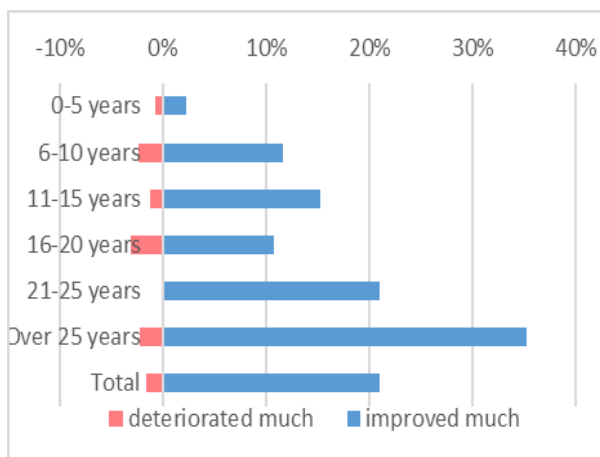




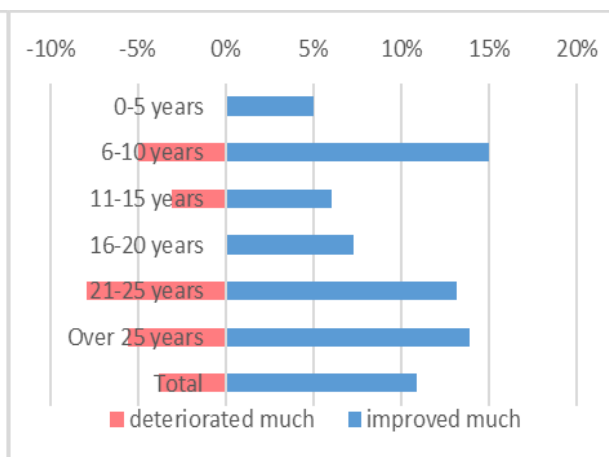
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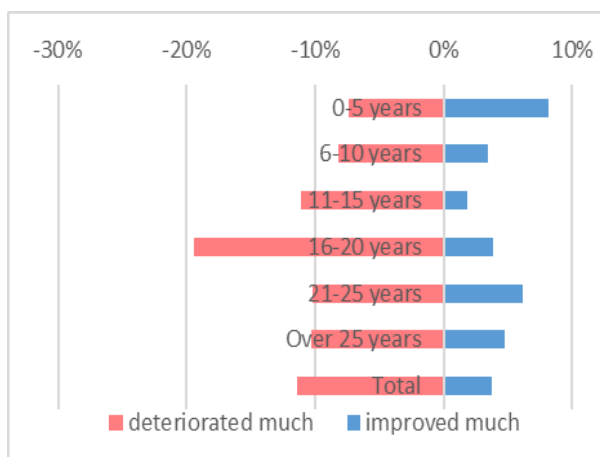
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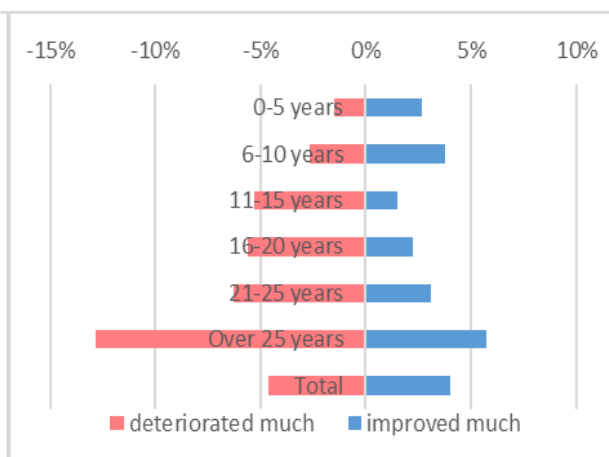
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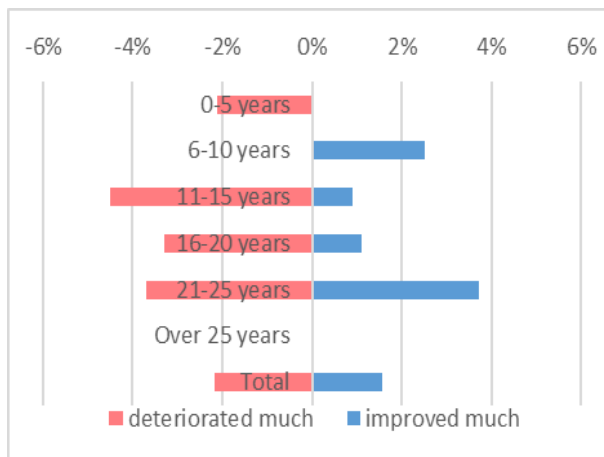
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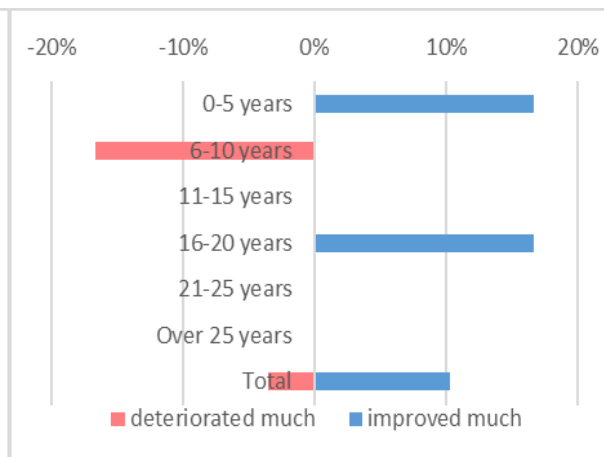
country 23 Spain



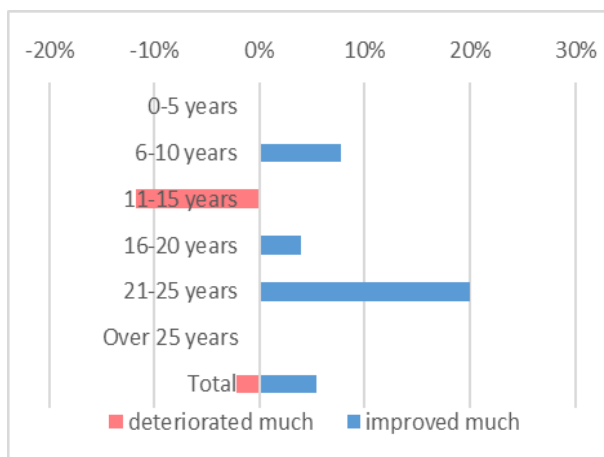
country 24 Sweden



country 25 UK: England and Wales



country 26 UK: Northern Ireland



country 27 UK: Scotland

## Annex 2 Figures pilot quality indicators 2018-2019

Timeliness and Efficiency of Procedures	Due Process from the perspective of Accessibility	Quality of Judicial Decisions and its Improvement	Providing Public Access to the Law to Guide Society
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