European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Brussels, 1 October 2018

Dear Mr Trócsányi,

As President of the European Network of the Councils for the Judiciary, I was honoured to receive your letter of 20 July 2018. I regret the delay in reply, but I wanted to consult my colleagues at the ENCJ before responding to your questions.

I was able to do this and the members have subsequently seen this letter in draft.

The European Union is a union based on common values such as respect for human rights, democracy and the Rule of Law. The ENCJ unites the judicial powers of the Member States of the European Union and promotes judicial cooperation with the aim to enhance the common area for justice. However, it is a common area for justice built on mutual trust and confidence. It is therefore of the greatest importance to us all that the judicial power in each state operates fairly, impartially and independently so that this mutual trust and confidence is maintained. There are certain general principles, which should be taken into account in each member state when the position of the judiciary is being considered.

1. The independence of each judge in each state is a fundamental right; its purpose is to enable every person to have his or her case decided fairly according to law.

2. To enable a judge in each state to reach his or her decision fairly, the judge
   a. Must be independent of any improper influence from any person and in particular the legislative and executive powers of the state.
   b. Enjoy certain privileges such as security of tenure and a fixed level of remuneration (see paragraphs 7 and 6.1 of the European Charter on the Statue for Judges).

3. Ensuring the independence of each judge also requires a judiciary that is institutionally independent of the executive and legislative powers.

4. Institutional independence is best achieved through a Council for the Judiciary, which is properly financed itself and can ensure a judicial system that is properly financed and resourced and delivers judicial decisions of quality. It must be able to provide leadership for the judiciary: see the Budapest Resolution of the ENCJ of May 2008.

European Network of Councils for the Judiciary i.n.p.a, ENCJ Office Rue de la Croix de Fer 67, B-1000 Brussels.
office@encj.eu 0032 2 535 16 05

5. Self-governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice and therefore all or part of the following tasks should fall under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies:
   -the appointment and the promotion of judges
   -the training
   -the discipline and judicial ethics
   -the administration of the courts
   -the finances of the judiciary
   -the performance management of the judiciary
   -the processing on of complaints from litigants
   -the protection of the image of justice
   -the formulation of opinions on judicial policies of the State
   -setting up a system for evaluating the judicial system
   -drafting or proposing legislation concerning the judiciary and/or courts

6. At least half of the members of the Council for the Judiciary should be judges elected by their peers. The Council for the Judiciary should control its own finances independently of both the legislative and executive branches of government and should control its own activities independently of both the legislative and executive branches of government.

7. In short, a Council for the Judiciary must be an independent body, which operates in a transparent and an accountable manner. The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence and an efficient judicial system. If adequate checks and balances are not in place, the Council for the Judiciary may become a pawn in the hands of the executive, legislative or powerful groups, thereby undermining judicial independence. Councils for the Judiciary must be granted adequate human and financial resources.

8. As to the reform of the Judiciary, the ENCJ has considered the role of the Judiciary in these procedures. The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation. The reason behind this is that reforms should strengthen judiciaries, and not be an excuse to weaken their independence. When planning any judicial reform it is important that it is done step by step, and safeguards against excessive political interference in the judicial governance are to be put in place.

9. Reforms should not be done to judges or justice systems. On the other hand, judges should not be hostile to modernisation and reform of the justice system, again provided that the reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. Judges can and should insist on a meaningful voice in how limited resources are deployed so as best to safeguard a high quality of justice.
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10. A reform should never be seen as an isolated event, but against the background of other reforms in the field of the judiciary and the system already in place.

I have set out these general principles and replies in consultation with my colleagues on the Board of the ENCJ, as I believe that they are uncontroversial and represent core principles on which mutual confidence and trust must be based in the development of the common area for justice with the European Union.

Yours sincerely,

Kees Sterk

President of the ENCJ

Annex: ENCJ replies questions Minister of Justice, Hungary

Annex: ENCJ replies to question Minister of Justice Hungary

Question 1
In some countries the administration of justice is carried out by a single court system, while in other countries the court system is divided into two (e.g. France) or more (e.g. Germany) branches. Can it be affirmed that the separation of the ordinary court system and the administrative court system is not contrary to international standards?

Reply ENCJ

This particular issue has never been scrutinised by the ENCJ, but we think it is fair to conclude that the separation of the ordinary court system and the administrative court system is not uncommon in the European Union Member States. See also the "Tour of Europe" page on the website of ACA-Europe. However, a transition from a single court system to a system of two or more branches may be contrary to international standards, for instance in case the cases which are transferred to a branch are not followed by a transferral of the judges who decided the transferred cases in the single court system, to that same branch. Such a transition, which should be classified as a major judicial reform, needs to be justified and aimed at improving the quality of the justice system for the benefit of those that it serves.

The transition from a single court system to a multiple court system is clearly against the trend in quite a number of European Union Member States where it is believed that the different branches of law have more substantive interconnections than they used to have, as a result of the the law becoming more complex. In countries with a multiple court system, mechanisms are being developed to safeguard the unity of the law. These additional mechanisms are not necessary in a single court system. In view of all this, a departure from a single court system needs to be very well reasoned.

Question 2
In a system based on the division of powers, how can the role of the legislative and the executive branches be defined in relation to the judiciary? Who may or shall bear political responsibility for the functioning of the judiciary?

Reply ENCJ

In the ENCJ, we adhere to the separation of powers and the independence of the judiciary, because it is the foundation of our legal order. These principles serve best the interests of the citizens and society. Furthermore, we have established common ground that, in democratic states there should be a proper understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together – a form of interdependence. In order to make this work the other state powers should accept that the judiciary is also a state power, an institution, and not merely a group of individual judges, only independent in the specific case being judged. Therefore, it is important that each judiciary should have a structure of governance that can protect its institutional

independence and, in doing so also the independence of individual judges. Councils for the Judiciary are the obvious answer.

The judiciary is responsible for the effective delivery of justice, and that is a grave responsibility. To achieve it, it must work with the government to understand the necessary barriers between the pillars of state, but first and foremost to provide what is imperative in every state – a fair and impartial decision-making process, in which citizens from all parts of society and the state itself has absolute confidence. This will only happen when there is a healthy measure of mutual respect between the judiciary on the one hand and the executive and the legislature on the other hand. The relations between the state powers is one of mutual respect and cooperation to uphold the well functioning of the state (e.g. by safeguarding the independence of the judiciary). By way of illustration, whilst the judiciary is necessarily independent of the executive, the executive nonetheless has responsibility for providing sufficient funds in order for the judiciary to perform its duties well.

See also CCJE opinion no. 18, 2015 on the position of the judiciary and its relation with the other powers of state in a modern democracy and CM/Rec (2010)12.

Question 3
Can it be confirmed that, in a model based on the separation of the branches of the court system, the administration of the different judicial branches or sub-systems (e.g. that of ordinary courts and specialised administrative courts) can be separated and operate according to different models?

Reply ENCJ

The most important issue to be taken into account when designing any system is that the independence of the judiciary is sufficiently guaranteed.

It is important to note that when planning judicial reform, it should be absolutely clear that the reform is aimed at improving the quality of the justice system for the benefit of those that it serves. See also the answer to question 1.

Question 4
Considering that the central element of the legal status of judges is adjudication and that the safeguards of judicial independence are generally connected to this activity, the legal status of judges can be considered uniform even in a system of several judicial branches. Is this interpretation correct? Are there such elements of their status in which different requirements can apply to judges based on their specialisation in the different branches (e.g. preference for experience in public administration for the appointment of judges in administrative courts)? What might be these?

Reply ENCJ

Which ever system is put into place, the selection and appointment of judges should meet the European Standards (Council of Europe and ENCJ Standards). These standards can be found in the ENCJ report on Selection, Appointment and Promotion of Judges (2012) and in the ENCJ Dublin Declaration.

These Standards include that:

1. *Judicial appointments should only be based on merit and capability.*
2. *Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.*
3. *The intellectual requirement should comprise the adequate cultural and legal knowledge, analytical capacities and the ability independently to make judgments.*
4. *There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.*
5. *Whether the appointment process involves formal examination or examinations or the assessment and interview of candidates, the selection process should be conducted by an* ***independent judicial appointment body****.*
6. *The procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved and that the membership of this body should comprise a majority of individuals independent of government influence.*
7. *The body in charge of selecting and appointing judges must provide the utmost guarantee of autonomy and independence when making proposals for appointment.*
8. *It must be guaranteed that decisions made by the body are free from any influences other than the serious and in-depth examination of the candidate's competencies against which the candidate is to be assessed.*
9. *The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.*
10. *An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process.*

Question 5
The efficient functioning of the courts includes several administrative responsibilities. The external administration of courts comprises, among others, responsibilities related to the budget, IT systems and statistics. How can the exact content of the external administration of courts be determined; what further tasks should be added to such a list?
Question 6
The Fundamental Law of Hungary – in line with the international standards – provides that the bodies of judicial self-government shall participate in the administration of the courts, including administrative courts as well. What are the fields where the bodies of judicial self-government should have an influence on the administration of courts?

Reply ENCJ to questions 5 and 6

In ENCJ we distinguish a number of elements of court administration all or most of which be administered by the judiciary it self (see ENCJ report on Independence and Accountability 2013-2014, the framework for Independence and Accountability). See also point 5 above in the introductory letter.

"Governance of the Judiciary"

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

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

The degree of responsibility of the Judiciary itself for court management depends on whether or not the Judiciary is in charge of the following tasks:

a) General management of a court;

b) Appointment of court staff (other than judges);

c) Other human resource management decisions in relation to court staff;

d) *Decisions regarding the implementation and use of IT in courts;*

e) *Decisions regarding court buildings;*

f) *Decisions regarding court security;*

g) *Decisions regarding outreach activities.*

Question 7 How should the external and internal administration of courts be coordinated? How can the different actors involved in the administration of courts cooperate efficiently (in fields such as budget planning, planning of training programmes or other aspects of court administration)?

Reply ENCJ

In ENCJ we generally do not make a distinction between external and internal administration of courts. It is the view of the ENCJ that the independence of the judiciary is best served by self-governance. The funding of the Judiciary is a vulnerable aspect in the relations between state powers. To remedy this vulnerability, the Judiciary should be involved in the determination of budgets, in the way budgets are constructed and should have a certain degree of freedom to allocate budgets once these have been determined. Furthermore, there should be guarantees in place to ensure that the outcome of the budget process is sufficient for the Judiciary to fulfil its responsibilities.

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

8. What responsibilities are covered by the professional administration of courts related to adjudication (e.g. developing a case distribution system)? Along what principles should these tasks be organised?

Reply ENCJ

The allocation and distribution of cases is essential to uphold the independence of the judiciary. That is why there must be objective and transparent rules to do so. These rules must be applied by the judiciary itself, so it can safeguard its own independence.