

**CONSIGLIO SUPERIORE DELLA MAGISTRATURA**

ITALY

European Network of Councils of Justice

ENCJ - RECJ

WORKING GROUP

JUDICIAL CONDUCT

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## 1. Foreword

The Working Group on "Judicial Conduct" was set up by a resolution of the Barcelona General Assembly on 3 June 2005. It was co-ordinated by the Italian High Council for the Judiciary and included, in addition to the representatives from Italy, representatives from the Councils of eight Network Members<sup>4[1]</sup> as well as from two observer countries.<sup>5[2]</sup>

The Group co-ordinators (Wladimiro De Nunzio and Giuseppe Salmè) prepared a questionnaire which was circulated to all members and observers in the Network, with a view to highlighting the meaning of judicial conduct in the legal systems of the different countries. In order to identify relationships with and differences from disciplinary liability and professional assessment, it was considered that it was more appropriate for the questionnaire to start with questions related to the more concrete, limited issue (disciplinary liability) and then shift to more general, theoretical aspects (professional conduct).

The Group is aware that the work done does not meet scientific requirements, however it should be stressed that it was not purported to do so. The aim of our activity is not a scientific one, as it is part of the purposes sought by the Network and relates directly to the issue addressed in this General Assembly. By gathering empirical information, albeit in a non-systematic fashion, on the rules and principles applying to judicial conduct, and by disseminating such information, we attempted, at all events, to contribute to the achievement of two main objectives: a) enhancing mutual trust among magistrates from countries with different cultural and institutional traditions, which is a fundamental precondition for the creation of an European area of freedom, security and justice pursuant to the conclusions of the 1999 European Council of Tampere as well as to The Hague Programme of 2004; and b) enhancing citizens' trust in the judiciary, since the demand for justice does not consist simply in the expectation that judicial decisions be issued expeditiously and in accordance with high quality standards: in fact, it also concerns the conduct of judges, who must always act impartially, independently, and in a balanced manner.

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<sup>4[1]</sup> Belgium, Finland, France, Hungary, Ireland, Netherlands, Slovak Republic, Spain.

<sup>5[2]</sup> Romania and Turkey.

The Working Group is also aware that the issue of judicial conduct has already been the subject of analysis, considerations and assessments both at international level and at European level. One of the first international studies on judicial conduct is contained in the "Bangalore Principles of Judicial Conduct" as adopted in 2002 within the framework of the UNO Human Rights Committee. It is a set of principles, often worded as negative statements, that are intended to apply to judges all over the world; however, their main feature is ultimately the markedly disciplinary nature of the ethical and professional rules, in line with traditional common law approaches.

In May 1996, the Lisbon Network - an organisation co-ordinating the national bodies in charge of the training of magistrates - held a meeting in Strasbourg on the training of magistrates with regard to professional duties and conduct. In the relevant conclusions, it was stated that "independence of the judiciary confers rights and imposes obligations on magistrates" - in particular, the obligation to be adequately skilled from a professional viewpoint and work diligently; to that end, training should contribute to raising the awareness of the rights and duties entailed by the discharge of judicial functions.

In July 1998, in Strasbourg, within the framework of activities fostered by the Directorate for Legal Affairs of the Council of Europe, the European Charter on the Statute for Judges was adopted; the Charter expressly provides for the duty of being available to and respecting individuals, keeping confidential the matters addressed, and acquiring the skills required to deliver correct judgments. Similarly, specific duties are envisaged (impartiality, objectivity, respect for human rights, timeliness of investigations) in the Recommendation on the role of public prosecutors that was adopted on 6 October 2000 by the Committee of Ministers of the Council of Europe.

Still within the framework of the activities carried out by the Council of Europe, special importance should be attached to the report of the Consultative Council of European Judges (CCJE) that was adopted in Strasbourg on 19 November 2002, concerning the principles and rules applying to judges' professional conduct, incompatible behaviour and impartiality. This Report contains two basic guidelines: a) principles of judicial conduct should be drawn up by the judges themselves; and b) a distinction should be drawn between professional conduct as a driver to achieve ever improved standards in the behaviour of magistrates, and the magistrate's personal liability as a means to punish the violation of the minimum ethical rules to be respected.

The questionnaire we prepared was meant to assess whether the above guidance was workable.

In this regard, it should be pointed out, first and foremost, that the circulation of the questionnaire raised considerable interest; this was shown by the circumstance that eighteen countries replied to it, i.e. the nine members of the working group (Belgium, Finland, France, Ireland, Netherlands, Slovak Republic, Romania, Spain, and Hungary, in addition to Italy) plus five EU Member States (Denmark, Poland, Portugal, UK and Sweden) and three observer countries (Cyprus, Germany, Latvia).

Furthermore, in the meeting held in Rome on 3 February 2006 with a view to the initial evaluation of the replies received, all the members of the Working Group were present.

During the said meeting, two main difficulties could be highlighted that were encountered in analysing the replies. The first one relates to language. Whilst all the replies to the questionnaire were worded in the official languages of the Network, i.e. French or English, some legal concepts that are typical of the languages of the individual countries are difficult to translate precisely in the said official languages exactly because they have to do with the peculiarities of the institutional systems in the individual countries. On the other hand, it was clearly to be perceived - merely by comparing the replies to the questionnaire at issue with those to the questionnaire circulated in 2004 to gather information on the structure, operation and main competences of the Councils of Justice within the framework of the Working Group on "Mission and Vision" - that the legislation on Councils is evolving quickly.

In Italy, an Act on disciplinary liability is expected to come into force that will be quite different from the one that applies currently. In Ireland and UK, the very governance of the judicature is being modified and getting closer to the pattern followed by the judicature in central Europe, i.e. the "Council of Justice" model, which will produce major effects in terms of autonomous governance by doing away with the control of the judicature by the executive power. This rapid evolution will require continuous monitoring and timely updating of the information in future years.

The analysis of the replies will be subdivided into three sections, of which the first one will address substantive law issues related to disciplinary liability, the second one the procedural law issues related to disciplinary liability, and the third one professional conduct as such.

## **2. Disciplinary Liability. A) Substantive Law**

Not all countries that replied to the questionnaire have specific rules on disciplinary liability of magistrates. In three countries (Finland, Ireland, UK) magistrates' liability is regulated by standard rules on administrative, civil and criminal liability; however, in the UK, as we will see later on, the Judges' Council adopted guidelines on professional conduct.

In most countries, disciplinary liability does not apply to the violation of specific legal provisions, whilst it applies in case of failure to abide by very general obligations as to conduct. In five countries (Latvia, Netherlands, Romania, Slovak Republic, Spain) as well as a provision imposing the obligation to pursue a conduct that is described in general terms (in Spain this provision applies to all civil servants), there are provisions envisaging specific duties and their violation gives rise to disciplinary liability.

In most cases the disciplinary liability provisions apply in the same manner to judges and public prosecutors; however, in a smaller number of countries judges' disciplinary liability is regulated differently from that of public prosecutors.

As for Italy, the legislation in force provides for liability in case of breach of a general duty; conversely, the Act expected to come into force after mid-June contains a list of over forty specific disciplinary wrongdoings.

In all countries there are different sanctions envisaged, ranging from the milder ones (warning or reprimand) to the more severe ones (removal, suspension from office, cutting of wages) up to dismissal.

Only in Spain and Belgium is a pecuniary sanction envisaged.

Apart from Cyprus and Switzerland (where it appears that disciplinary sanctions produce no further effects), in all countries disciplinary convictions produce effects both on advancements and remuneration, and on the eligibility to senior management offices.

The relationship between professional assessment and disciplinary liability is an issue addressed by the Working Group on Evaluation of Judges, which submitted its report to the Barcelona general assembly in 2005. In the report, the countries where a negative professional assessment could also entail the imposition of disciplinary sanctions were specified; additionally, the report raised the broader issue of the relationship between professional assessment and disciplinary liability, as one might wonder whether an effective, stringent assessment system could serve to prevent the recourse to disciplinary proceedings.

### **3. Disciplinary Liability. B) Procedural Law**

Ba) As for the institution of a disciplinary proceeding, in Romania there is an ad-hoc body (disciplinary council, composed of two members from the Inspectorate and either a judge or a public prosecutor elected by the Council every year). In Spain, disciplinary proceedings may be instituted both by an individual body, i.e. a judge in charge of reporting on the outcome of an inspection (in Spain the Council has its own Inspectorate), and by a collegiate body, which may also be a parliamentary one; conversely, the Minister of Justice is not empowered to bring a disciplinary action.

In five countries (Belgium, Cyprus, Germany, Latvia, Netherlands) disciplinary actions are brought by the heads of the offices the magistrates at issue are members of, irrespective of their being judges or public prosecutors.

In the other countries there a mixed system in place. As well as the heads of the offices, the public prosecutor, the Minister or other bodies (National Council in Hungary, Ombudsman in Sweden) are empowered to institute disciplinary proceedings. It appears that in Denmark such proceedings may also be initiated by "anyone", i.e. there is the possibility for any citizen to bring a disciplinary action.

In the UK, where - as already pointed out - there are no specific provisions applying to disciplinary liability, there is a judicial complaints office which is currently part of the Department for Constitutional Affairs; however, it will become independent according to the reformation Act that is being adopted. The said office reports to the Lord Chief Justice, who performs the investigations by appointing a senior judge.

In most countries the evaluation of disciplinary liability is committed to an ad-hoc division in the standard judicial authorities (courts, appellate courts, or supreme court). In some countries (France, with regard to judges, since the sanctions applying to public prosecutors are imposed by the Minister following an opinion rendered by the Council; Italy and Romania) the relevant competence lies with the Council of Justice or a section of the Council. In three countries (Sweden, Denmark, Latvia) there is an ad-hoc judicial authority, other than the standard one.

In France and Belgium there is a distinction to be drawn as to competence depending on the severity of the punishment. Milder punishments such as warnings are imposed by the head of the relevant office; more severe punishments are imposed by other bodies (in France by the CSM, in Belgium by a division of the court).

In most countries disciplinary proceedings are judicial in nature. In France and Spain, the nature of the proceeding depends on whether it concerns a judge or a public prosecutor. In four countries (Cyprus, Latvia, Netherlands, Sweden) it is an administrative proceeding.

In all cases, safeguards are envisaged for the accused magistrate, who has the right to defend himself with the assistance of another magistrate, or else of a lawyer. The decision may always be challenged.

In France and Italy a distinction is drawn between an investigational phase that is committed to inspectors, is administrative in nature and does not envisage the right for the accused magistrate to be assisted by defence counsel, and a pre-trial and trial phase where the magistrate is afforded the right to defence and the right to appear before the court and be heard. In France and Italy the hearing of the disciplinary proceeding is held publicly.

Bb) The clear-cut predominance of judicial disciplinary proceedings cannot be accounted for merely by the specific pattern of the applicable legislation; in fact, it results from the nature of the interests that are at stake when evaluating a magistrate's disciplinary liability. Such interests play a fundamental role in modern constitutional States based on the rule of law.

Indeed, the conceptual assumption is that the regular, appropriate performance of judicial functions and the prestige of the judiciary are closely related to the application of the legal rules to concrete experience that is worked by the courts, i.e. to the impartial, independent application of the law. Therefore, the goods at stake do not only concern the judiciary, perhaps regarded merely as a corporation of professionals; in fact, they belong to all and sundry and, just like the independence of the judiciary, can afford safeguards for the rights of all citizens. The concept of disciplinary liability as viewed in the light of the true import of the independence of the judiciary within a constitutional system, i.e. as the guarantee of citizens' rights and freedoms, is the outcome of a wide-ranging discussion that has led to overcoming the concept whereby the best way to protect the prestige of the judicature consisted allegedly in ensuring the confidential nature of disciplinary proceedings. The end-point of the political, institutional and cultural discussion mentioned above points quite clearly to the overcoming of the obsolete interpretation provided in the past, as well as highlighting

the close relationship that exists between the concept of prestige of the judiciary and the public credibility of the discharge of judicial functions.

Indeed, this concept holds true also from the standpoint of the person that is accused and that person's right of defence. The safeguards referred to above are also instrumental to the improved, more effective protection of the accused person's interests. Affording the most effective safeguards to a magistrate that is the subject of a disciplinary proceeding means, by necessity, to afford equally effective safeguards to the prestige of the judiciary and the appropriate, regular discharge of judicial functions. However, the need for ensuring the widest possible defences is actually more urgent in respect of magistrates, because their professional status rests, *inter alia*, on their independence. Whilst independence is a feature of the judiciary as a whole, it is particularised in the individual magistrate and is a feature of his/her position both inwardly and outwardly, *i.e.* with regard to the other magistrates and all other powers.

#### **4. Deontology**

The distinction to be drawn between disciplinary liability and judicial conduct was the main focus of the considerations contained in the report by the Consultative Council of European Judges.

The reference conceptual model is basically undisputed. Rules of conduct are usually aimed at setting out objectives for improving the conduct of magistrates; by nature, they are liable to rapidly evolve in order to adjust to cultural and social changes, and their violation does not entail legal consequences. The provisions on disciplinary wrongdoings, even when broadly general in scope as is currently the case in Italy, always entail legal consequences in case they are violated.

This distinction can be summarised quite effectively by quoting the French saying whereby every disciplinary wrongdoing entails the violation of a principle of judicial conduct, whereas the reverse is not true - *i.e.*, there are violations of principles of professional conduct that do not amount to disciplinary wrongdoings. That is to say, the difference between the two sets of principles is a quantitative one: less serious infringements are relevant to judicial conduct, whilst more serious violations are relevant to disciplinary rules.

Similar statements can also be found in the more recent case law related to disciplinary proceedings in Italy, whereby the circumstance that a given behaviour is forbidden by a judicial conduct rule points to and/or confirms the existence of a disciplinary wrongdoing.

This concept can also be worded differently: a rule of professional conduct sets out the maximum objectives of judicial ethics - think, for instance, of the duty to upgrade one's professional skills; conversely, disciplinary provisions punish any violations of the minimum ethical rules, such as the violation of the impartiality obligation.

This conceptual model can be inferred quite clearly from some of the replies to the questionnaire; however, in a significant number of replies there is no such clarity. For instance, some countries have replied that they do not have any codes of judicial conduct, but then listed some specific duties related to professional conduct.

## **5. Codes of Judicial Conduct**

Unlike disciplinary principles, the setting out of veritable codes of judicial conduct is not especially frequent in European countries. Written "codes", to be regarded as "self-regulatory codes" that, if violated, do not result into the imposition of legal sanctions, have been adopted at the initiative of associations of magistrates only in Italy, Slovak Republic, Czech Republic, and Slovenia. In the UK, a magistrates' working group within the Judges' Council recently published a Guide to judicial conduct.

The admissibility, indeed the desirability of drawing up a code containing principles of professional conduct, as proposed by a governmental committee, was the subject of a lively debate in France; both the CSM and associations of magistrates were against this proposal. The French CSM was in favour of the publication of disciplinary decisions as a means to disseminate awareness of judicial conduct rules.

In the Slovak Republic, a "code" of ethics was adopted by the Council of Justice.

The position of Italy is quite peculiar, in that a general Act regulating civil service provided for the obligation to draw up self-regulatory codes. The National Magistrates' Association adopted such a code in 1994.

Within the Working Group, though taking note of the circumstance that in some countries it was considered appropriate to include the principles of judicial conduct in a written instrument as is usually the case in common law countries, the prevailing view was that one should not start an exercise aimed at identifying a set of principles of judicial conduct that could be shared by the countries participating in the Network and possibly included in a written instrument; this stance was based on the multifariousness of the national situations as well as on the difficulties encountered by several countries in accepting the very concept of laying down the principles of professional conduct in writing.

All countries apart from Denmark, Poland, and the UK envisage the training of magistrates with regard to judicial conduct, in line with the stance long taken at supranational level (Lisbon Network, Report of the Consultative Council of European Judges).

## **6. Specific Duties Related to Professional Conduct**

In all countries there are professional duties, whether included in ad-hoc "codes" or not, applying both to the discharge of judicial functions (e.g. impartiality, diligence, confidentiality) and to the conduct to be held in one's own private life (e.g. need to ensure discretion or respectability, ban on the participation in political and/or business power centres).

Only in Spain is there a specific rule whereby the conduct held in one's private life is immaterial, except where it influences the discharge of one's functions.

The questionnaire addressed, in particular, some specific professional duties:

### **a) Impartiality and Independence: Reality and Appearance**

In almost all countries the ruling principle is that magistrates should not only behave in accordance with impartiality and independence criteria, but also prevent the very appearance of their acting with impartiality and independence from being endangered.

Accordingly, there is a general ban on membership of parties or, more generally, participation in initiatives of a political character. This ban is laid down in almost all Eastern European countries (Romania, Poland, Hungary, Latvia), however it also applies in Central European countries (Spain, Portugal, Belgium). In France it is forbidden to manifest any hostility towards the form of government and all manifestations of a political nature are also prohibited. In Italy, the Constitution envisages the possibility to forbid magistrates from becoming members of political parties, however no Act has ever been passed to enforce this prohibition.

In almost all countries there are incompatibilities both with the discharge of other legal professions and with the performance of entrepreneurial activities.

#### **b) Relationships with the Media**

Confidentiality is usually set out as a professional duty, and in a significant number of countries (Belgium, Ireland, Latvia, Poland, United Kingdom, Slovak Republic) this results into the prohibition against any public utterance of opinions and/or judgments in respect of pending judicial proceedings or matters.

In Italy, the Code of Ethics of the National Magistrates' Association provides that "in his contacts with press and other communication media, a magistrate shall not solicit publication of information related to his own official duties. Where a magistrate is not bound by secrecy or confidentiality rules in respect of information available to him on account of his office, and he considers that he should disclose information on judicial activities in order to ensure the appropriate information of citizens and the exercise of freedom of the press, or else in order to protect citizens' honorability and reputation, he shall abstain from setting up or using personal, confidential and/or preferential information channels. Without prejudice to the principle of freedom of expression, a magistrate shall follow a balanced, measured approach in delivering statements and/or giving interviews to newspapers and other mass communication media".

### **c) Safeguards Applying to Internal and External Independence**

As well as the confidentiality obligation and the ban on publicly commenting judicial cases, specific duties are laid down in several countries with regard to the heads of judicial offices with a view to preventing any interferences in pending judicial proceedings.

### **d) Extra-Judicial Activities**

The only extra-judicial activities considered to be compatible with the status of magistrate are research and teaching. Only in Finland is it forbidden to perform teaching for reward.

In Germany there is the possibility for a magistrate to be authorised to act as an arbitrator or sit as a member in an arbitration panel, or else to provide legal advisory services.

### **e) Constitutional Rights**

Being citizens, magistrates are entitled to the same constitutional rights as all other citizens; however, in all countries there are provisions whereby restrictions may be imposed on such rights to safeguard the credibility of jurisdiction and/or the image of independence and impartiality.

Reference has already been made to the limitations applying to participation in political discussions and to membership of political parties as well as to the restrictions imposed in many countries on the public utterance of judgments on judicial cases.

The replies to the questionnaire do not allow assessing the actual compliance with the said duties and prohibitions. An ad-hoc investigation should be started by having regard not only to the decisions concerning disciplinary matters in the individual countries.

Giuseppe Salmè