Public Hearing

«IMPROVING CRIMINAL JUSTICE SYSTEMS IN EUROPE:
THE ROLE OF E-TOOLS AND PERFORMANCE INDICATORS»

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"Which criteria of evaluation for justice systems: quality or performance?"

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In recent years, the debate on the implementation of a quality model in the justice sector has grown increasingly intense at EU level. This debate is linked to the process of reform and modernisation undertaken by most of the EU Member States in order to tackle the critical number of problems faced by their judicial systems, among which in particular: **a considerable case backlog, unbalanced caseloads of individual courts and judges, and excessive length of court proceedings.**

Although it may be true that judicial systems have been late to adopt the principles of performance measurement, the endorsement by the judiciary administration of new jargon such as 'efficiency and effectiveness', 'transparency', 'quality care', 'benchmarking', 'result orientation' and 'accountability' **demonstrates that these principles have become one of the cornerstones of their updated management policies**.

At different levels of the judicial chain, numerous useful experiences and methods can already be highlighted in the area of quality of justice evaluation systems. All of these initiatives are designed to achieve a better organisation of justice that is capable of restoring and reinforcing the diminished confidence of citizens in the courts.

Comparing national experiences also enables to highlight **the core challenges or tensions at work between the managerial objective of evaluating judicial performance and the preservation of an autonomous judiciary**.
Under the classic theory of division of powers, the judiciary should indeed be independent from the other branches of government, in order to guarantee its specific constitutional mission: the protection of citizens' rights. **The independence of the judiciary is thus a fundamental element of a democracy based on the rule of law**.
The key question in this respect is: how can such fundamental requirement be combined or reconciled with quantification, standardisation and control which are the basis of most performance management instruments?
When defining the objective to be achieved by the judiciary as a public administration, should one favour the 'effectiveness' or the 'quality' of its outcomes?

Until recently, the traditional and primary method of controlling the effectiveness of courts relied on **legal accountability mechanisms**, whose most typical elements include holding

open proceedings, and publishing judges' reasonings, which allow public scrutiny, as well as appeals procedures and other methods permitting internal scrutiny carried out by the judiciary. In this framework, **judicial accountability is imposed by the judiciary itself**, and may consequently be seen as a way of **avoiding the risk of external influence**.

A separate approach, whose application has increased substantially in recent years, consists in **applying performance indicators** to measure the ability of courts to attain the results for which they are mandated. This approach refers to the concept of managerial accountability and tends to define administration of the judiciary as the management of resources that are necessary to ensure the proper functioning of the justice system, including human resources, budget and infrastructure.
In this framework, the evaluation of judicial systems performance is based on **a cost-benefit analysis** and is generally **carried out by third parties,** such as **High Judicial Councils** or **Councils for the Judiciary** (regulatory bodies).

In Belgium, for example, the High Council of Justice, which was established partly as a result of the "Octopus" agreement in the wake of the notorious "Dutroux" case, is empowered to give opinions and make proposals on the functioning and organisation of the courts. Likewise, it is responsible for the auditing and general supervision of the courts, and above all empowered to take action on complaints concerning the functioning of the courts.

The diversity of national experiences clearly illustrates that **there is no single model for managerial accountability** of the judiciary and **many countries are still very much within an experimental phase** in this field.

Several types of performance measuring tools have been or are being implemented in the EU Member States. Different countries have different challenges with regard to improving judicial performance and different judicial traditions, and the performance measurement system should be tailored to cope with these particular challenges. Furthermore, there is **no perfect or ideal set of performance indicators**, also because figures or statistics alone will never provide a fully accurate picture of court or judicial system performance.

Despite this lack of unitary approach, several common trends can be identified regarding the **levels and the criteria adopted** for measuring the performance of judicial systems.

Among the **classical main indicators** used to benchmark or measure the performance of judicial systems can easily be identified as follows:

- number of pending cases, or the caseload;
- duration of the procedure, or the time necessary to close a case;
- indicators concerning the quality of the case handling procedure;
- available resources in the system, as per the number of cases to be handled: human resources, equipment, courts (and their respective budgets and organisation of courts).

Most of the tools developed in the EU Member States have been designed to measure performance at the three following different levels:

- at a "micro-level": to measure the productivity of judges or employees,

- at a “meso-level”: to measure the performance of each court,
- at the “macro-level”: to measure costs and means of the judicial institution as a whole up against its global output or outcome.

These different levels of performance measuring serve different purposes.

Ideally, **the formal evaluations of individual judges enable to measure the quantity (results) and to evaluate the quality of the judges’ work**, i.e. their competence and capabilities, as well as their commitment and integrity. The results of such individual assessments are generally not made available for public scrutiny and are very specific focusing on the evaluation of each magistrate’s career. Therefore, **these results are of limited value with regard to the comparative assessment** of either courts or the judicial system as a whole.

Consequently, several countries have also developed **specific tools and procedures to measure and benchmark judicial performance at the court level**, which enables to support a process of continuous evaluation and learning, provide a foundation for more efficient budgeting and allocation of resources, as well as useful documentation for its main stakeholders. The results of the evaluation provided at this level can help to **devise appropriate caseload and workload policies**.

In **Denmark**, for instance, the allocation of resources and benchmarking of court performance has been a major focus of the judiciary since the establishment in 1999 of the independent Judicial Council to administer the courts. Since 2000 the performance with regard to timeliness and productivity of each district court is recorded in an annual court report which compares the court’s performance with average performance, top-performance and national targets. The introduction of this type of performance measurement, like in Finland, aimed at **stimulating courts to improve performance**, which according to the available documentation seems to have been the case since 2000.

Finally, it has also become customary for national judiciaries to provide some data about the **performance of the entire judicial system**. Providing information at system level responds to the vision of the judicial system as a public service that should respond for its effectiveness, **even though the data provided might sometimes be too general to act upon**.

Which criteria of evaluation: quality or performance?

The approach often privileged by governments consists **in equating performance with efficiency or timeliness**, that is, the capacity of an organisation to maximise productivity and achieve its goal at a minimal cost. This means that the evaluation of the performance of courts is done through a mere ratio between their output and their budget or between their output and the number of their staff (judges or other employees). This approach might imply **the risk of reducing the complexity of the core of judicial decisions**, by using a few indicators as guidelines for budget downsizing or as arguments in political debate.

The quality of a judicial proceeding’s outcome depends to a large extent on the quality of the prior procedural steps (as initiated by the police, prosecutor’s office, or parties), so an evaluation of the judicial performance is impossible without an evaluation of every distinct

procedural context. Judicial performance therefore involves more than just the work of judges and other legal professionals acting in courts.

A converse approach, which is generally adopted by judges, lawyers and human rights organisations, is **to link performance to the "quality" of proceedings and judicial verdicts**. This means that the quality of justice should not be semantically reduced to the judicial system's 'productivity'. **As far as justice is concerned, the criteria of quality are defined by the law, jurisprudence or international conventions** such as the European Convention on Human Rights: conformity of verdicts to the law, fair trial, independence of the judge, transparency, reasonable length of proceedings.

According to these actors, the development of efficiency-driven performance measurement instruments would lead to the standardisation of proceedings and de-humanisation of the judicial work, as well as affect the balance of power inside the courts and between the judiciary and political authorities.

In the framework of this quality-based approach, **citizens as primary beneficiaries of judicial systems** are considered to have a **legitimate interest in holding them accountable**.

This is why several EU Member States have also started to develop social indicators (via user surveys at the court level or broad polls at system level) in order to evaluate the level of public trust and institutional legitimacy in the judiciary demonstrated or generated by the way courts operate. However, the results of these surveys focusing on society's satisfaction, due to the use of too abstract indicators, have proven to be a weak operational path for performance evaluation and do not generally provide any reliable guidelines for decision-making on new reforms. Therefore specific efforts should be done to design scientific and transparent indicators of public trust and institutional legitimacy in order to help devising, tracking and evaluating criminal justice policies.

The necessity to ensure judicial systems' accountability is also linked to the following fundamental principle of any state based on the rule of law: **citizens are entitled to legal certainty**.

As stated by Art. 6, para. 1 of the European Convention on Human Rights, '[i]n 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**'.

One could reasonably argue that effective or efficient judicial administration constitutes a necessary element to guarantee this fundamental right.