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Abuse of the Law and "Abnormal" Law Versus Rule of Law

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Abuse of the Law and "Abnormal" Law Versus Rule of Law

Dedicated in Honor of Acad. Prof. Slobodan Perović Founder of the Kopaonik School of Natural Law

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> Посветена во чест на животот и делото на Акад. проф. д-р Слободан Перовиќ – основноположник на Копаоничката школа на природното право

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JUDICIARY INDEPENDENCE, IMPARTIALITY, THE COURT BUDGET: UNDERSTANDING OUTCOMES FROM ECONOMIC CONSTRAINTS TO COURT PERFORMANCE

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Abstract: Independent and impartial judicial system is one of the imperatives of democratic societies. It is vital that the judiciary should be free from any form of external or internal pressures and judges should rule solely on the bases of the Constitution, laws and ratified international agreements. Independence and impartiality of the judiciary is particularly important so that the parties and the general public can have confidence in the court system that the judgments will be broughtfairly and in accordance with law.

Court independence covers several aspects. Most important, courts should be independent from other branches of government, such as executive and legislative branch. This independence embraces that the courts should organize their own administrative matter, such as case management, freely and without external intervention, the judgments and decisions should be respected and accepted by all of the branches of the government, the judiciary has autonomous procedure about determining the standards for judges' competences and progress etc.

One of the crucial aspects of court independence is financial independence. Financial independence means that courts should have accesses to sufficient grants in order to perform their tasks. Lack of resources often can lead to poorperformancein court functioning, outside pressure or even lead to corruptive behavior or practices. The process of preparation and execution of the court budget is one of the areas where competences of executive and court branchesoverlap. Thus, one of the most delicate forms of pressure in the court system by the executive branch of the government is achieved through controlling the access to resources that the courts need.

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In this paper we examine how judiciary budget and judges remuneration as elements of judicial independence are relative to basic macroeconomic indicators, such astotal output of the country, public expenditures and average annual salaries.

Key words: court independence; court impartiality; financial independence; court budget; court performance

1. Introduction

Independent and impartial judicial system is one of the imperatives of democratic societies. It is vital that the judiciary should be free from any form of external or internal pressures and judges should rule solely on the bases of the Constitution, laws and ratified international agreements. Independence and impartiality of the judiciary is particularly important so that the parties and the general public can have confidence in the court system that the judgments will be brought fairly and in accordance with law.

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In this paper we examine how judiciary budget and judges remuneration as elements of judicial independence are relative to basic macroeconomic indicators, such as total output of the country, public expenditures and average annual salaries.

The rest of the paper is organized as follows. Section 2 reviews the empirical literature on the court impartiality and independence. The data

description and methods are presented in Section 3. The findings of the empirical study are presented in Section 4, while the discussion about the results follows in Section 5. In the last section, main conclusions from the research are highlighted.

2. Literature review

A lot has been said and written about the abundant benefits from independent, impartial and effective judicial systems. Court impartiality and independence is important standard in law theory, necessary precondition for objective legal system and foundation of free and democratic societies. Moreover, judicial independence is an important requirement for rule of law, and they are both are important determinants of economic development. The focus of the research agenda here, in this paper, lays on the economic benefits or advantages of functioning of independent and impartial courts.

The role of the judicial and the overall legal system on economic prosperity has been traditionally examined by the new institutional economics, particularly transaction cost economics. Institutions, including formal institutions such as the legal system, are crucial to the economic development in the countries worldwide, because they provide the environment and the framework within the economy and market function. Institutional framework concerning design and functioning of open market economies profoundly depend on effective judicial decision making system. Sherwood, Shepherd and de Souza (1994) explain that market supportive legal system provides the following outputs: equal access to courts by private parties, predictable outcomes of disputes, timely outputs and adequate remedies to the wrongs established by the court. In order to achieve this results several precondition need to be meet, including: existence of impartial and incompetent decision makers, allocation of adequate court resources, developed balanced procedures, access to full public information etc.

Courts play a crucial role in development of economies around the world as an enforcer of property rights and contracts. Enforcement of property rights is a vital factor for economic prosperity (North, 1993). In this process, a well-functioning court system has immense role in enforcing the right and settling disputes. Extensive work has been created in order to examine how to create and manage independent and impartial court system that will be efficient and accurate in securing property rights. For example, North provides a theoretical model for determining economic loss due to the poor formal institutional arrangements and judicial process (1990). One of the most prominent attempts to articulate judicial independence with regard to economic performance is the

creation of de jure indicators and de facto indicators (Feld & Voigt, 2003; Voigt, Gutmann and Feld, 2015). De jure judicial independence is represented by indicator based on information set in official documents and information about different legislation. On the other hand, de facto judicial independence indicator is based on 8 different aspects covering actual events from 1970s to 2010. The data is collected through surveys with local experts from countries worldwide. Both studies confirm that de jure judicial independence does not have significant influence on economic prosperity given as growth rates. However, de facto independence is proven to be robust statistically significant determinant of economic growth worldwide.

Even though some authors (Berg and Desai, 2013) think that it is difficult to prove direct causality between economic development and judicial independence, there is a clear positive relationship between them. For example, Nganunu (2015) recommends to the Commonwealth states to take appropriate measures that will guarantee the independence of the judiciary and to improve the accessibility and effectiveness of the court systems in order to stipulate growth. Wittrup (2010) discussed that there was an international consensus about the economic importance of judicial independence. He suggested that the governments should have taken this concept very seriously and should encourage actions that will increase the confidence in judiciary by the citizens, because the confidence generates faster economic growth rates. Moreover, valid and objective indictors of court workload and performance should be developed.

Judicial independence and impartiality have impact not only on macroeconomic level, but also rise microeconomic benefits for the organizations themselves. Thus, judicial independence has an impact on judicial accountability (Maskin and Jean Tirole, 2004; Hanssen, 1999). The organization of the court system has effect on the outcomes of how the institution is working. For example, the confidence of the public in the legal system and court ruling can be negatively affected by bringing inaccurate or personal decisions, which can ultimately lead to fall in economic activity (Hadfield, 2007). Furthermore, court impartiality is connected with the judicial experience, education and training, also known as "judicial human capital". Ball and Kesan (2010) examine how judicial human capital is associated with judicial accountability and impartiality and on judicial accuracy and efficiency. Their analysis is focused on litigation of patent infringement disputes in the United States. The authors conclude that judges' experience is decreasing patent cases duration, by improving management of patent cases and lower appellate reversal rate.

Important prerequisite in ensuring judicial and court independence is

overcoming the inevitable budgetary constraints. The Council of Europe's RecommendationCM/rec (2010) 12 of the Committee of Ministers to Member States onindependence, efficiency andresponsibilities of judges covers different aspect of judiciary independence, including both external and internal independence of judges. Judiciary independence is considered as vital guaranty for respecting fundamental human rights of each individual to be granted a fair trial solely on legal grounds without any inappropriate influence. Regarding resource allocation in the judiciary, the Recommendation proclaims that "[e] ach state should allocate adequateresources, facilities and equipment to the courts to enable them to functionin accordance with the standards laiddown in Article 6 of the Convention (for the Protection of Human Rights and Fundamental Freedoms) and to enable judges to workefficiently" (Paragraph 33).

European Network of Councils for the Judiciary in 2011 Vilnius declaration on challenges and opportunities for the judiciaryin the current economic climate acknowledge the economic value of an independent and efficient judiciary in providing sound investment climate (Article VI). Some of the recommendations included in this declaration, with regard to court economic independence and overcoming economic turbulences resulting from the European economic crises, foreseen design and implementation of long term judicial policies, continuous investment in administration of justice, modern technologies and human resources in judiciary, involvement of judiciary and judges in the reform processes, respecting principles of on openness, transparency, accountability, respect for the citizen in decision making processes. Most importantly, the Declaration contains straightforward position about the connection between judiciary independence and budgetary constraints: "The independence of the Judiciary and of every single judge is to be preserved as a prerequisite for the delivery of a fair and impartial justice in protecting human rights and fundamental freedoms. No necessity for cost cutting can be allowed to undermine judicial independence" (Article 10).

"Funding of the Judiciary" project by the European Network of Councils for the Judiciary (ENCJ) was initiated in 2015. The purpose of this project was to facilitate establishment of minimum judicial standards and to strengthen mutual trust between judges and other judicial authorities (ENCJ Report-Funding of the Judiciary 2015-2016, pp. 6). The project team within this initiative has formulated the following 12 recommendations with regard to court independence, with focus on overcoming budgetary constraints: (1) Courts should not be financed on the basis of discretionary decisions of official bodies but on the basis of objective and transparent criteria; (2) To ensure and strengthen the separation of powers, the Council for the Judiciary.

or a body on which the Judiciary is represented, should be closely involved and fully informed at all stages in the budgetary process and should have an opportunity to express its views about the proposed budgetto Parliament; (3) The preparation of the budget for the judiciary, including the administration of courts and the training of judges, should be wholly or at least partly under the control of a Council for the Judiciaryor of equivalent independent and autonomous bodies; (4) Each State should therefore allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rightsand to enable judges and court staff to work efficiently; (5) Courts should not be funded on an annual basis but should have the certainty of longer-term financial budgets and should be protected from fluctuations caused by politicalinstability; (6) Budgetary constraints may lead to the necessity for prioritization in the allocation of resources. Anyprioritization must be determined by the judicial authority itself;(7) To meet the present and future legitimate expectations of society, the judicial system must have theresources to innovate and modernize such as information and communication technology; (8) It is therefore necessary to make sure that budgetary constraints must not be the determining factor in: the case management of trials and the rules governing the right of appeal, the promotion of alternative dispute resolutions, and any attempt to diminish the role of the judge in the determination of disputes; (9) Any prioritization policy should be open and transparent; (10) In order to retain and attract the highest quality judges and maintain judicial independence, judicial remuneration must at all times be commensurate with their professional responsibilities, publicduties and the dignity of their office; (11) To guarantee the quality of justice, adequate funding must be made available to ensure that judges are appropriately trained, initially and continuously throughout their career; and (12) If members of the judiciary are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary resources in order to perform that function (ENCJ Report- Funding of the Judiciary 2015-2016, pp. 3-5).

Another, more recent report from the Council of Europe (Challenges for judicial independence and impartiality in the member states of the Council of Europe, 2016) analyses the economic basis of the judiciary, after the severe economic downturn in the 2010s in many European countries. According this report, chronic underfunding of the judiciary is a threat to the democratic capacities of the European states and thus should not be accepted. In order to meet the needs of the judicial systems, the country members must allocate appropriate funds for efficient work of the courts and the prosecutors' offices

and for remuneration of judges and prosecutors (Paragraph 24). Another aspect that is taken into consideration in this report is the budgetary autonomy of the judiciary. Usually budgetary control over the courts is devoted to the government or the parliament of the country, but there are still countries where government still has some influence over the budget creation and allocation (Paragraph 255, p.84-85).

3. Data and methodology

The data used for the purposes of this paper were collected through the European Commission for the Efficiency of Justice (hereinafter: CEPEJ) dynamic database. CEPEJ was established in 2002 by the Committee of Ministers of Council of Europe with purpose to assess the efficiency of judicial systems and proposes practical tools andmeasures for working towards an increasingly efficient service for the public (CEPEJ STUDIES No. 26, 2018, p. 5). The CEPEJ adopted new version of the Scheme (CEPEJ(2018)16rev5) in 2018 in order to strengthen the corpus of data collected at regular intervals and to making it easier to draw comparisons and assess trends.

The data used for the purposes of this research date back to 2010 and are published with biannual frequency (2010,2012,2014 and 2016). The database coverstotal 49 countries¹, from which 47 countries are members of Council of Europe plus Israel and Morocco.

Several variables were extracted from the CEPEJ database. First four variables are demographic and economic variable. These are later used in order to explore the economic importance of judiciary independence. These data were provided by all participating States and entities (CEPEJ Studies No. 26, 2018, p.13).

First variable in this subset is titled *Inhabitants*. The variable presents the number of inhabitants in a country in the reference year. The variable *Expenditures* presents the total annual amount of public expenditure covering all expenses made by the (federal) state or (federal) public bodies, including public deficits. If applicable, expenditures at federal level are excluded. Next variable titled *GDP* is the gross domestic product per capita. IT is given at

¹ Following states had participated in the process: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, North Macedonia, Turkey, Ukraine and United Kingdom. The results for the United Kingdom are presented separately for England and Wales and Scotland, because their different operating and independent judicial system.

current prices (nominal GDP). GDP is an indicator of economic activity which measures total consumption, investment, government spending and the value of exports minus imports. Variable *Salary* reflects the average gross annual salary in the country for all sectors of the economy (public and private) given in Euros. The gross salary is calculated before any social expenses and taxes have been deducted.

As an illustration of judicial independence, we retrieve three variables from the CEPEJ dynamic database. First one is referring to the judicial budget of the selected countries in the sample, and the second two are different measurements of the salaries in the courts. In absence other comparable details about court and judicial independence, we assume that the higher judicial budget per capita (or per inhabitant) in a country is, the courts are more independent. Same explanation applies to the salaries of the judges too.

Judiciary budget is a variable that presents sum of the budgets of the courts, prosecution system and budget for legal aid. The budget of the courts reflects the annual, approved and implemented, public budget allocated to the functioning of all courts. Funding from other sources is excluded. This variable is calculated as a sum of several categories, including salaries are those of all judicial and non-judicial staff working within courts, excluding, if appropriate, the public prosecution system (and the staff working for the prosecution services), expenses for equipment, investments, installation, use and maintenance of computer systems, expenses that the courts should pay out within the framework of judicial proceedings, courts buildings' budget, investments in new buildings, expenses arisen by trainings of judges and non-judicial staff, and other relevant costs.

With regard to the salaries in the judiciary and in the court system, two separate variables were taken into consideration. The variable Salary at the begging of career represents the salary at first instance court for a judge or a public prosecutor. Second variable, Salary at the end of the career indicates the average salary of a judge/prosecutor at the highest level and not the salary of the Court President/the Attorney General). Both of the variables are given as salary for full-time work. The gross salary is calculated before any welfare costs and taxes have been paid.

In Appendix 1 of the paper basic descriptive statistics (average values) of all of the variables included into the research are given.

4. Results

In this section of the paper, we present the results from our research. In order to describe the interconnectedness between judicial budget and judges'

salaries, on one hand, and the fundamental macroeconomic variables, on the other hand, we have constructed one correlation matrix and two sets of skater plots. Both descriptive techniques used in this section are used to present the possible relation between the variables included.

Table 1 presents the results of the correlation matrix. The matrix is includes four variables: judicial budget per capita, GDP per capita, total annual amount of public expenditures per capita and averageannual gross salaries. The sample utilized for this technique is balanced and is constructed by 134 observations. In the correlation matrix two results are reported: correlation coefficients and p-values

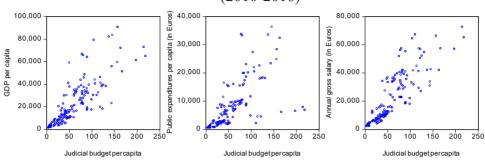
Table 1. Correlation matrix

	Judicial budget per capita	GDP per capita	Annual public expenditures per capita	Annual gross salary
Judicial budget per capita	1.00		•	
GDP per capita	0.836444*** (0.0000)	1.00 ()		
Annual public expenditures per capita	0.637898*** (0.0000)	0.865938*** (0.0000)	1.00 (0.0000)	
Annual gross salary	0.855549*** (0.0000)	0.905017*** (0.0000)	0.727222*** (0.0000)	1.00 ()

Source: CEPEJ dynamic database 2018, Author's calculation. Note: Values in parenthesis are p-values of correlation coefficients.*** correlation is significant at 0.01 level.

Secondly, Figure 1 presents three related scatter plots. Scatter plots are commonly used to visualize the connection between two variables. At all of the three cases presented at Figure 1, the x-axis represents the judicial budget per capita, while the y-axis shows GDP per capita, public expenditures per capita and annual gross salary in the sample countries, respectively. It can be noticed that scatter plots suggest existence of strong and positive correlation between judicial budget and the other variables.

Figure 1. Judicial budget and macroeconomic performance (2010-2016)



Source: CEPEJ dynamic database 2018.

Another important aspect of judicial independence is to be ensured an environment where judges can bring objective judgments and decisions, free from inside and outside pressure and influence. In order to achieve this goal, determining resource allocation, especially judges' remuneration has critical position. The next figure (Figure 2) presents the connection between the annual gross salary of judges in the selected countries, both at the beginning and at the zenith of the career, compared to the annual gross salary in the country. The two scatter diagrams plots biannual data from 2010 to 2016. The all of the salaries variables are given in Euros. In these cases, as well, the scatter plots suggest positive connection between the variables.

400,000 200,000 Salary at the begging of career 160,000 Salary at the end of career 300.000 120,000 200,000 80,000 100,000 40.000 0 20.000 40.000 60,000 80.000 40,000 60.000 80.000 Annual gross salary (in Euros) Annual gross salary (in Euros)

Figure 2. Average vs. judges gross annual salaries (2010-2016)

Source: CEPEJ dynamic database 2018.

5. Discussion

From the correlation matrix and scatter plots in the previous section, several things can be noticed. First, the results of the correlation matrix suggest that there is strong positive correlation between judicial budget, on one hand and GDP per capita, annual gross salary and annual public expenditures, on the other hand. The value of Pearson correlation coefficient between judiciary budget per capita and GDP per capita and annual gross salary, respectively, is above .8, suggesting a fairly strong positive linear correlation. In the case of the relation between judiciary budget and annual public gross expenditures, there is a moderate positive correlation. All of the correlation coefficients are statistically significant at 99% level of confidence. These results can be interpreted as a proof that countries of Council of Europe with higher judicial budget have higher realization of GDP and annual public expenditures, both per capita. Also, the average gross salaries in the countries with higher financial independence of the judiciary and courts are also higher.

First set of scatter plots visualize these connections. From the three diagrams in Figure 1, it is evident that the linkage between the selected variables is positive and strong. The p-values, previously calculated, suggest that the coefficients are statistically significant with highest precision.

The second set of variables explores the connection between the annual gross salary in the selected countries and the salaries of the judges. In these cases, as well, strong positive correlation can be noticed. The judges earn relatively more, both at the beginning and at the zenith of their career, in countries where there the annual gross salary is higher. Actually, in countries where workers earn relatively better gross salaries, the judges are also earning more.

6. Conclusions

It was already acknowledged that independent and impartial judicial system is one of the imperatives of democratic societies. Our research has proven that it also raises and correlates with valuable economic benefits. The analysis of the CEPEJ data regarding judicial impartiality and independence in Council of Europe country members prove that there is a clear connection between judicial independence and economic performance. Judicial independence expressed through judiciary budgets and judges' wages in all of the examined cases is positively correlated with fundamental economic indicators, such as GDP, public expenditures and average salaries.

The results from our research are in line with the broader conclusion that there is a clear connection between court impartiality and independence and economic prosperity, both on macroeconomic and individual, microeconomic or organizational level. Policy makers responsible for creating adequate and stimulating legal environment should take into consideration these conclusions when designing the institutional arrangements.

Appendix 1. Average values of variables (2010-2016)

Country	Inhabitants	Annual public expenditure (State level)	GDP	Average gross annual salary	Judicial System Budget	Gross annual salary in € (1st inst. Prof. judge, beginning of the	Gross annual salary in € (Supreme court professional judge)
Albania	2,945,086	2,901,885,750	3,420	4,292	25,422,844	8,283	15,041
Andorra	77,829	630,962,015	30,143	23,622	7,248,399	70,182	52,032
Armenia	3,071,545	2,104,956,676	2,708	3,142	20,586,986	10,458	21,122
Austria	8,541,084	168,415,771,000	37,378	30,211	799,756,646	49,897	120,916
Azerbaijan	9,353,850	14,694,367,205	4,956	4,334	104,568,469	15,244	23,493
Belgium	11,133,170	210,085,250,000	34,952	40,823	954,932,283	65,573	123,379
Bosnia and Herzegovina	3,752,938	5,754,438,076	3,752	7,818	108,192,059	23,623	40,601
Bulgaria	7,238,295	15,816,247,999	5,670	4,860	225,520,445	14,690	28,117
Croatia	4,263,452	13,625,056,875	10,453	12,520	227,148,757	25,069	54,089
Cyprus	844,184	8,174,001,564	20,954	23,215	51,123,728	74,462	133,242
Czech Republic	10,532,534	67,383,264,155	15,046	11,799	480,712,001	27,277	58,459
Denmark	5,642,935	89,051,159,990	45,101	45,943	456,599,743	112,671	188,087
Estonia	1,313,895	7,308,973,994	13,847	11,491	47,873,929	37,281	49,537
Finland	5,444,250	53,431,811,500	36,424	38,757	379,169,677	60,752	127,788
France	65,980,434	454,275,000,000	31,607	34,378	4,158,454,590	39,844	114,073
Georgia	4,100,175	3,104,443,028	2,639	3,026	30,645,333	15,609	24,608
Germany	81,235,279	357,164,000,000	33,614	46,217	9,592,848,054	43,754	98,011
Greece	11,000,780	126,192,630,395	17,418	18,982	503,066,991	31,556	82,614
Hungary	9,886,983	51,803,171,870	10,303	9,681	411,992,035	17,306	36,573

Iceland	327,100	2,187,797,904	30,065	40,800	21,315,633	87,206	111,112
Ireland	4,617,985	_	43,135	35,604	241,935,000	124,974	205,234
Israel						92,266	141,862
Italy	60,424,182	564,353,662,866	26,407	28,844	4,515,637,756	54,328	182,255
Latvia	2,061,210	5,062,158,118	10,945	9,173	68,198,407	18,270	35,308
Lithuania	3,004,352	7,900,047,939	11,313	7,957	94,986,634	21,058	31,343
Luxembourgh	547,635	17,658,966,667	86,225	49,200	79,939,574	77,438	151,574
Malta	430,063	3,498,902,000	19,452	15,836	13,917,863	53,601	57,248
Monaco	36,842	1,008,915,622	63,286	38,747	5,656,019	45,487	111,736
Montenegro	620,029	1,659,187,300	5,515	8,721	25,795,859	21,323	30,973
Morocco	34,852,121	24,856,000,000	2,768	12,972	559,746,097	22,408	47,975
Netherlands	16,854,757	305,064,500,000	39,530	55,250	2,098,790,625	74,000	128,900
North Macedonia	2,065,613	1,416,405,430	3,955	6,108	38,345,443	17,359	21,707
Norway	5,098,856	150,199,604,984	68,950	58,277	448,441,432	119,679	192,365
Poland	38,415,500	75,102,507,588	10,348	10,252	1,847,071,383	21,371	59,324
Portugal	10,452,166	84,415,025,000	16,599	16,888	612,425,978	33,950	80,916
Republic of Moldova	3,556,485	2,160,206,827	1,556	2,552	22,026,603	5,255	8,350
Romania	21,163,472	44,576,426,000	7,123	6,037	596,385,140	25,775	46,946
Russian Federation	142,914,136	249,891,324,751	7,766	6,210	3,953,130,968	15,988	47,265
Serbia	7,161,295	14,619,815,036	4,394	5,993		15,545	34,015
Slovakia	5,425,700	15,564,435,500	13,531	10,032	229,802,165	30,236	43,676
Slovenia	2,058,998	15,979,586,383	17,946	18,436	189,315,878	31,529	61,544
Spain	46,241,065	454,371,041,428	23,046	22,772	3,653,632,734	47,659	112,327
Sweden	9,678,493	209,809,267,725	43,050	40,232	1,027,894,966	61,899	111,369
Switzerland	8,140,072	55,533,087,693	62,555	63,073	1,628,949,154	136,389	296,543
Turkey	76,424,868	228,123,383,383	8,163	11,749	1,301,164,293	22,338	43,218

UK- England and Wales	56,889,439		30,268	33,422	5,033,445,906	127,358	255,964
UK-Northern Ireland	1,821,175		20,326	29,027	234,606,012	128,682	245,942
Ukraine	44,188,417	28,332,006,310	2,248	2,604	374,507,357	7,321	17,382
UK-Scotland	5 322 000		30 653	33 266	431 084 922	157 756	242 472