

Strasbourg, 24 October 2014

## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

### OPINION N° 17 (2014)

#### ON THE EVALUATION OF JUDGES' WORK, THE QUALITY OF JUSTICE AND RESPECT FOR JUDICIAL INDEPENDENCE

##### PART ONE: INTRODUCTION

###### A. Objects of the Opinion

1. The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality. The Consultative Council of European Judges (CCJE) has paid constant attention to two fundamental matters. First, the protection of judicial independence<sup>[1]</sup> and secondly, ways of maintaining and improving the quality and efficiency of judicial systems<sup>[2]</sup>. The individual evaluation of judges is relevant to both these issues. In this Opinion, the phrase “individual evaluation of judges” comprises the assessment of individual judges’ professional work and their abilities.
2. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the CCJE resolved to focus on how the individual evaluation of judges’ work can improve the quality of justice without infringing judicial independence. This Opinion mainly addresses the individual evaluation of judges who have already been appointed to office for their period of tenure; it does not discuss either judges’ first appointment<sup>[3]</sup> or their initial training<sup>[4]</sup>. Though it touches upon the relationship between disciplinary proceedings and evaluation, the Opinion does not primarily address questions of discipline or criminal responsibility<sup>[5]</sup>. Nor does it discuss the evaluation of the performance of a country’s judicial system as a whole or of constituent courts in a judicial system. Those are major topics on their own which raise separate important issues and perspectives.
3. This Opinion has been prepared on the basis of previous CCJE Opinions and the Magna Carta of Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter Recommendation CM/Rec(2010)12). It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002), the General Report<sup>[6]</sup> of the International Association of Judges (IAJ) (2006) (hereafter IAJ General Report), the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter Kyiv Recommendations), and the Report of 2012-2013 of the European Network of Councils for the Judiciary (ENCJ) on minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary (hereafter ENCJ Report). The Opinion takes account of the member states’ replies to the

questionnaire on the individual evaluation and assessment of functioning judges and of a preparatory report drawn up by the expert appointed by the CCJE, Ms Anne SANDERS (Germany).

## **B. The key tasks of the judge as the object of the evaluation**

4. Judges perform indispensable duties in each democratic society that respects the rule of law<sup>[7]</sup>. Judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution<sup>[8]</sup> and decide cases in a timely manner and independently and must be bound only by the law. They must give cogent reasons for their decisions<sup>[9]</sup> and must write in a clear and comprehensible manner<sup>[10]</sup>. Moreover, all binding decisions of judges must also be enforced effectively<sup>[11]</sup>. Judicial independence does not mean that judges are not accountable for their work. The CCJE has laid emphasis on maintaining and improving the quality and efficiency of judicial systems in the interest of all citizens<sup>[12]</sup>. Where it exists, the individual evaluation of judges should aim at improving the judiciary while ensuring the highest quality possible. That exercise must be done in the interest of the public as a whole.

## **C. Primacy of independence: the problem of reconciling evaluation with judicial independence**

5. Judicial independence is a pre-requisite for safeguarding the rule of law and the fundamental guarantee of a fair trial<sup>[13]</sup>. As the CCJE has indicated in its previous Opinions, judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice<sup>[14]</sup>, such as a lack of financial resources<sup>[15]</sup>, problems concerning the initial and in-service training of judges<sup>[16]</sup>, unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges<sup>[17]</sup>.
6. Accordingly, the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence<sup>[18]</sup>. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges<sup>[19]</sup>, including presidents of courts.

## **PART TWO: CURRENT PRACTICE IN MEMBER STATES**

### **D. Why have evaluation at all and what types of evaluation are currently there?**

7. Evaluation of judges is undertaken in order to assess the abilities of individual judges and the quality and quantity of the tasks they have completed. Evaluation is used, for example: to provide feedback, to identify training needs and to determine "performance based" salaries. It can also be used in order to seek out suitable candidates for promotion. It is argued by some that, in these ways, individual evaluation can, in principle, assist in improving the quality of a judicial system and can thereby also ensure the proper accountability of the judiciary towards the public.

8. The ENCJ Report distinguishes between countries using “formal” and “informal” evaluation systems. In summary, these systems are:

(I) Formal

9. In the case of most formal evaluations, the aims of the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are all clearly set out in advance of any evaluation exercise. If evaluation is conducted in such a formal way, the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation.

(II) Informal

10. An informal evaluation will not use either formalised ratings or criteria. It will usually have no direct consequences for the evaluated judge. An informal evaluation might be conducted by way of a discussion which will allow the evaluated judge to address problems, show his or her abilities and agree on career goals<sup>[20]</sup>. An informal gathering of information about a judge who is a candidate for promotion<sup>[21]</sup> might also be regarded as an informal evaluation.

## **E. Evaluation as practiced in member states**

(I) Where it is used

11. Twenty four member states explained in their answers to the questionnaire that they evaluate judges in a more or less formal way (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Republic of Moldova, Monaco, The Netherlands, Poland, Romania, Slovenia, Spain, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine). Estonia and Ukraine evaluate judges only before their permanent appointment. Nine member states (Czech Republic, Denmark, Finland, Iceland, Luxembourg, Norway, Sweden, Switzerland, United Kingdom) stated that they did not use a formal system of individual evaluation. However, Sweden uses certain evaluation tools in order to ascertain a small part of a judge’s wages according to his/her performance<sup>[22]</sup>, Finland and Switzerland use them in preparation of career development discussions. In the United Kingdom, informal evaluation takes place when a judge’s application for promotion is under consideration.

(II) The aims of the countries that use it: quality of judges; promotion; remuneration and discipline

12. In the majority of countries that use some form of individual evaluation, it aims at assessing, maintaining and improving the quality of the work of judges and the judicial system. Many countries explained that the aim of evaluation is not only for assessing achievements and skills but also in order to identify training needs and to provide feedback. Many member states use evaluation as a basis for decisions on the promotion of judges. For some member states, evaluation is especially important when deciding on the lifetime appointment of recently appointed judges<sup>[23]</sup>. Other member states use evaluation to ascertain any elements of remuneration or pension based on the individual performance of a judge<sup>[24]</sup>.

(III) Criteria used

13. In most member states, a number of quantitative and qualitative criteria are used for individual evaluation of judges. Thus factors such as the number of cases decided by the evaluated judge, the time spent on each case and the average time to complete a judgment are frequently taken into account as “quantitative” criteria. Many member states consider as important the number of decisions issued by the evaluated judge and/or the number of cases otherwise concluded (e.g. by settlement or withdrawal)[\[25\]](#). In some member states, the productivity of a judge is measured against a fixed quota[\[26\]](#) or against the average number of decisions handed down by other judges[\[27\]](#). As “qualitative” criteria, the quality of a judge’s analysis and the way in which the judge handles complex cases is considered of great importance in the evaluation process. In many member states, the number or percentage of decisions reversed on appeal are factors that are considered of great importance in the evaluation process[\[28\]](#). In others[\[29\]](#), because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor the reasons for the reversal are taken into account, unless they reveal grave mistakes. Other factors considered are the ability to mediate between parties, the ability to draft clear and comprehensible judgments, the ability to cooperate with other colleagues, to work in areas of law that are new to the judge and the readiness to take on extra activities within the court’s administration such as mentoring and educating recently appointed judges or lawyers[\[30\]](#). Organisational skills, work ethic[\[31\]](#) or scholarly activities such as publications and lecturing[\[32\]](#) are also treated as factors. Violations of ethical and professional rules/standards are considered in the evaluation process in almost all member states where there is an evaluation of judges and such principles are laid down. All member states which completed the questionnaires differentiate between the process of evaluation and disciplinary measures.
14. The way criteria are assessed in the evaluation process differs widely. Most member states report assigning ratings to evaluated judges. The rating systems used are roughly comparable and use grades such as “very good”, “good”, “sufficient” and “insufficient”[\[33\]](#) or A, B, C[\[34\]](#). Some countries refer to the evaluated judge’s suitability for promotion in their ratings[\[35\]](#). Other member states deny using formal ratings[\[36\]](#). In some member states, data such as the number of cases a judge has decided will be turned into a percentage or into a figure which reflects the performance of each individual judge compared to other judges[\[37\]](#). In some states, judges whose work has been studied are ranked from the best to the least good judge according to their evaluation[\[38\]](#). Hungary determines the respective grade of a judge by matching a judge’s performance against a “productivity factor”. In other states, such quantitative and qualitative factors only provide the starting point for an individual assessment[\[39\]](#). In some member states, the opinion of bar associations[\[40\]](#), litigants, colleagues and more senior judges[\[41\]](#) are taken into account.

#### (IV) Types of evaluation and methods/procedures used

15. In most countries, evaluations are conducted routinely and regularly. But member states have adopted different degrees of formality of procedure. Thus Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, France, Georgia, Germany, Greece, Hungary, Italy, Republic of Moldova, Monaco, Poland, Romania, Slovenia, Spain, “the former Yugoslav Republic of Macedonia” and Turkey all use formal evaluation systems. Finland, The Netherlands, Switzerland and the United Kingdom use more informal evaluation systems.
16. In some countries, the evaluation process is in the form of a career development discussion which may be more or less formal in nature. In that discussion, the evaluated judge and the evaluator/the evaluating commission consider career and development

goals[42]. In some cases, the evaluation process starts with a self-assessment of the evaluated judge[43]. In other countries, a Council for the Judiciary or a subgroup of it gathers information on the work of the evaluated judge and will decide on the evaluation[44].

17. In other member states, a single evaluator, usually the president of the court where the evaluated judge performs his or her duties, gathers the relevant information on the judge's work[45]. This will often involve reading the judge's decisions, visiting hearings chaired by the judge and interviewing the individual judge. Often, the evaluator makes the final decision after the judge has had the opportunity to comment on a preliminary draft. In some member states, other professionals take part in the evaluation process[46]. In Poland, individual evaluation of judges is undertaken in the course of regular court inspections carried out by inspector judges from other courts[47].
18. Under most systems, the evaluated judge can comment on the draft opinion and is able to challenge the final decision.
19. Some countries reported that though there was no formal peer review procedure, judges were free to assist each other by giving advice and feedback informally[48]. In Austria, a voluntary peer evaluation project was initiated by the Austrian Judges' Association. Judges visit each other's hearings and provide informal feedback.

#### (V) Consequences

20. In most member states, the individual evaluation of judges is an important factor in relation to a judge's chances for promotion and – in particular for a recently appointed judge - of obtaining security of tenure[49]. In some member states, evaluation also plays a role in determining performance related salaries and pensions[50]. Moreover, in some member states, poor performance can lead to the initiation of disciplinary procedures[51], pay cuts and even a judge's dismissal from office[52].

### **PART THREE: ANALYSIS AND RECOMMENDATIONS**

#### **F. Why are there different types of evaluation?**

(I) Judicial structure of a country (how judges are chosen, age, training, promotion etc.)

21. The decision of whether and, if so, how to evaluate judges is inextricably linked to the way in which the judicial structures of different member states have evolved. In particular the stage in their career at which a person is appointed a judge and the criteria by which they may be promoted to higher office would appear to be especially important in determining the type of evaluation that is used. For example, if newly appointed judges have had successful careers as practicing lawyers before appointment as judges (as in the Nordic countries, the United Kingdom and Cyprus) a judicial system might find less need for formal individual evaluation than a system where judges are appointed immediately or soon after finishing their legal education (as in France, Germany and Spain). In a legal system where promotions are made according to seniority (as, for example, in Luxembourg), a judge's qualifications have less need to be assessed by means of individual evaluation.

(II) Culture of the country concerned

22. The decision whether and how to evaluate judges is also inextricably linked to the history and culture of a country and those of its legal system. Consequently, the assessment of the need for judicial evaluation differs widely in the member states. Romania and “the former Yugoslav Republic of Macedonia” explained that judicial independence<sup>[53]</sup> and the trust of the public in the judicial system<sup>[54]</sup> could be promoted through the individual evaluation of judges. Slovenia stated evaluation ensured judicial accountability and with it the quality of the judicial service. Spain argued that ascertaining a variable part of the salary according to the number of cases a judge had decided would respect judicial independence, whilst the evaluation of judges according to qualitative criteria<sup>[55]</sup> would endanger it. France and Germany, on the other hand, stated that evaluating only quantitative performance might compromise judicial independence. However, other countries, for example Norway and Switzerland, find evaluation unnecessary to ensure a legal system of high quality. Denmark, Luxembourg and Switzerland stated that individual evaluation of judges was simply incompatible with judicial independence. Here, a judge’s conduct may only be judged in the course of disciplinary procedures. Thus, it appears that what is regarded as imperative for judicial independence in one country is seen to be counterproductive for it in another.

#### **G. The choice in principle: to evaluate or not to evaluate**

23. Two key requirements of any judicial system must be to produce justice of the highest quality and proper accountability in a democratic society. Some form of evaluation of judges is necessary to meet these requirements. The fundamental question is whether such evaluation must be of a “formal” character. The CCJE encourages all member states to consider this question. The answer each member state gives will be in accordance with its judicial system, traditions and culture. If a member state decides that these two key requirements can be met by means other than formal evaluation of individual judges, it could decide not to have such a formal evaluation. If it concludes these requirements cannot be met by other means, the CCJE recommends the adoption of a more formal system of individual evaluation of judges as discussed below.
24. All evaluation should aim at maintaining and improving the quality of the work of judges and thereby the whole judicial system.
25. Informal assessment can take the form of assisting judges by giving them an opportunity for self-assessment, providing feedback and determining their training needs. All these can be effective ways of improving the skills of judges and thereby improving the overall quality of the judiciary. Informal peer review, self-evaluation by judges and advice among judges can also be helpful and should be encouraged<sup>[56]</sup>.

#### **H. If there is formal evaluation: how to do it?**

- (I) Possible aims and their effect on judicial independence
- (a) Assisting with the problems of working conditions
26. Judicial systems should use information gathered in evaluation procedures not only to evaluate individual judges but also to provide material which can assist in improving the organisational structure of courts and the working conditions of judges. It would be particularly unjust that an individual judge be evaluated negatively because of problems caused by poor working conditions that he or she cannot influence, such as for example

delays caused by massive backlogs, or because of lack of judicial personnel or an inadequate administrative system.

(b) Promotion

27. The CCJE<sup>[57]</sup> and the UN<sup>[58]</sup> both state that the appointment and promotion of judges should not be based on seniority alone but on objective criteria, in particular ability, integrity and experience. If promotions are made according to such objective criteria, it follows that when judges apply for promotion, they must, at that stage at least, be evaluated in some form. Therefore, gathering information on the suitability for promotion of a judge can be an important objective for the individual evaluation of judges.

(c) Remuneration

28. In a few member states, it is the fact that a judge's remuneration is influenced by his/her evaluation results<sup>[59]</sup>. However, the CCJE endorses the Recommendation of the Committee of Ministers Rec(2010)12 that "systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges"<sup>[60]</sup>. The CCJE also endorses the view that a judge's pension should not depend on performance.

(d) Discipline

29. Although violations of ethical and professional rules/standards can be considered in the evaluation process, member states should clearly differentiate between evaluation and disciplinary measures and processes. The principles of security of tenure and of irremovability are well-established key elements of judicial independence and must be respected<sup>[61]</sup>. Therefore, a permanent appointment should not be terminated simply because of an unfavourable evaluation. It should only be terminated in a case of serious breaches of disciplinary or criminal provisions established by law<sup>[62]</sup> or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged. In all cases there must be proper procedural safeguards for the judge being evaluated and these must be scrupulously observed.

(II) Framework for formal evaluation

30. Where a system of formal individual evaluation is applied, its basis and main elements (criteria, procedure, consequences of the evaluation) should be set out clearly and exhaustively by primary legislation. Details can be regulated in subordinate legislation<sup>[63]</sup>. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria.

(III) Criteria for formal evaluation

31. The formal individual evaluation of judges must be based on objective criteria published by the competent judicial authority<sup>[64]</sup>. Objective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favouritism, conservatism and cronyism, which exists if appointments/evaluations are made in an unstructured way or on the basis of personal recommendations<sup>[65]</sup>. These objective standards should be based on merit, having regard to qualifications, integrity, ability and efficiency<sup>[66]</sup>.

32. The CCJE notes that the ENCJ Report recommends that the criteria for the evaluation of professional performance of judges should be comprehensive, and should include both quantitative and qualitative indicators, in order to allow a full and deep assessment of the professional performance of judges[\[67\]](#).
33. The CCJE notes that the Kyiv Recommendations[\[68\]](#) state that there should be evaluation according to the following criteria: professional competence (knowledge of law, ability to conduct court proceedings, capacity to write reasoned decisions), personal competence (ability to cope with the workload, ability to decide, openness to new technologies), social competences, i.e. ability to mediate, respect for the parties, and, in addition, the ability to lead for those whose positions require it.
34. In general, the CCJE agrees with the qualitative criteria identified in the Kyiv Recommendations. The CCJE considers that evaluations should not be based solely on quantitative criteria. Further, although the efficiency of a judge's work can be an important factor for evaluation, the CCJE considers that a heavy reliance on the number of cases a judge has decided is problematic because it might lead to false incentives.
35. The quality of justice cannot be understood as if it were a synonym for mere "productivity" of the judicial system[\[69\]](#). The CCJE cautions that insufficient funding and budget cuts might result in a judicial system overemphasising "productivity" in the individual evaluation of judges. Therefore, the CCJE stresses again that all the general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different judicial systems[\[70\]](#). The CCJE believes that the quality, not merely the quantity, of a judge's decisions must be at the heart of individual evaluation. In the Opinion No. 11 (2008), the CCJE discussed the importance of high quality judgments. In order to evaluate the quality of a judge's decision, evaluators should concentrate on the methodology a judge applies in his/her work overall, rather than assessing the legal merits of individual decisions[\[71\]](#). The latter must be determined solely by the appeal process. Evaluators must consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, evaluators should consider the whole breadth of a judge's work in the context in which that work is done. Therefore, the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal[\[72\]](#), unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure. It is noted that the Kyiv Recommendations[\[73\]](#) and the ENCJ Report[\[74\]](#) reach the same view.

#### (IV) How to evaluate?

##### (a) Who does it: managers/judges/other professionals?

36. Evaluators should have sufficient time and resources to permit a comprehensive assessment of every judge's individual skills and performance. The evaluated judge should be informed who the evaluators are and the judge must have the right to ask for the replacement of any evaluator who might objectively be perceived as biased.
37. In order to protect judicial independence, evaluation should be undertaken mainly by judges. The Councils for the Judiciary (where they exist) may play a role in this exercise[\[75\]](#). However, other means of evaluation could be used, for example, by members of the judiciary appointed or elected for the specific purpose of evaluation by other judges. Evaluation by the Ministry of Justice or other external bodies should be



avoided<sup>[76]</sup>; nor should the Ministry of Justice or other bodies of the executive be able to influence the evaluation process.

38. In addition, other professionals who can make a useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges. It is also essential that their role is solely advisory and is not decisive.

(b) How is it to be done: sources of evidence

39. Sources of information used in the evaluation process must be reliable<sup>[77]</sup>. This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such an evaluation is based on sufficient evidence. The evaluated judge should have immediate access to any evidence intended to be used in an evaluation so it can be challenged if necessary<sup>[78]</sup>. Individual evaluation of judges and the inspection assessing the work of a court as a whole should be kept entirely separate. However, facts discovered during a court inspection can be taken account in the individual evaluation of a judge<sup>[79]</sup>.

(c) When is it to be done – regularly? Promotion only? Other bases?

40. A member state that decides to introduce individual formal evaluation must decide whether to evaluate judges regularly or only for special occasions, for example when a judge is a candidate for promotion<sup>[80]</sup>. Regular evaluations permit a full picture of a judge's performance to be created. They should not take place too often, however, in order to avoid an impression of constant supervision which could, by its very nature, endanger judicial independence.

(d) Procedural fairness for the evaluated judge

41. As the CCJE has stated before, all procedures of individual evaluation should enable judges to express their views on their own activities and on the assessment that is made of these activities<sup>[81]</sup>. Any procedure should also enable them to challenge assessments before an independent authority or a court. The evaluated judge must therefore have the opportunity to contribute to the evaluation process in a way that is useful, for example by commenting on a preliminary draft or by being heard in the evaluation process. Moreover, the evaluated judge must have an effective right to challenge an unfavourable evaluation, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The more serious the consequences of an evaluation can be for a judge, the more important are such rights of effective review.

(e) Consequences for judges and others

42. The CCJE cautions against expressing evaluation results only in terms of points, figures, percentages or numbers of decisions made. All such methods, if used without further explanation and evaluation, can create a false impression of objectivity and certainty. The CCJE also considers detailed permanent ranking of judges as a result of their evaluation<sup>[82]</sup> as undesirable. Not only does such a ranking give a false impression of objectivity and certainty; even worse, it is inflexible and difficult to change without engaging in an exercise that "re-ranks" all judges of a similar level. Thus, such a system

is impractical and, particularly if it is made public, is unjust. It does nothing to improve either the efficiency of the judges or their independence.

43. However, a system of ranking for specific purposes, such as promotion, can be useful. For example, if two or more judges have applied or are being considered for appointment to one position, it is likely that the candidates will be put in some form of "ranking" for that purpose.
44. The results of an individual evaluation will probably have a direct effect on a judge's career and particularly on his/her chances for promotion. Moreover, training needs and the allocation of additional resources<sup>[83]</sup> may be determined according to evaluation results. As already noted, except in exceptional circumstances, dismissal from office should not be the consequence of an unfavourable evaluation alone but only in the case of a serious breach of disciplinary rules or the criminal law, following a proper procedure and based on reliable evidence<sup>[84]</sup>. However, as already also noted, dismissal may be the consequence if the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged. In all such cases, the need for procedural safeguards for the judge is particularly important and these must be scrupulously observed.
45. Using individual evaluation to determine the salaries and pensions of judges should be avoided<sup>[85]</sup>. Such a process could plainly influence judges' behaviour (to the detriment of the parties in individual cases) and also endanger judicial independence<sup>[86]</sup>.

#### **I. Reconciliation of independence and evaluation in the light of this discussion; public accountability**

46. The reconciliation of the principle of judicial independence with any process of individual evaluation of judges is difficult. But the correct balance is of crucial importance. Ultimately, judicial independence must be paramount at all times.
47. In summary, the means of achieving this balance include the following: (1) There must be plain and transparent rules with respect to the procedure, criteria and consequences of evaluation. (2) The evaluated judge should have the right to be heard in the process, and to challenge an unsatisfactory evaluation, including the right of immediate access to material relating to the evaluation. (3) Evaluation should not be based solely on the numbers of decided cases but should focus primarily on the quality of a judge's decisions and also his/her judicial work overall. (4) Some consequences, such as the dismissal from office because of a negative evaluation, should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances.
48. The formal individual evaluation of judges, where it exists, should help to improve and maintain a judicial system of high quality for the benefit of the citizens of member states. This should thereby help maintain public confidence in the judiciary. This requires that the public must be able to understand the general principles and procedure of the evaluation process. Therefore, the procedural framework and methods of evaluation should be available to the public. Moreover, in the view of the CCJE, the individual evaluation process for career or promotion purposes should not take account of public views on a judge. They may not always be the result of complete or fully understood information or such views may possibly even be based on a misunderstanding of the judges' work overall. The process and results of individual evaluations must, in principle, remain confidential and must not be made public. To do so would almost certainly endanger judicial independence, for the obvious reason that publication could discredit

the judge in the eyes of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks.

## **J. Recommendations**

49. The CCJE makes the following principal recommendations:

1. Some form of evaluation of individual judges is necessary to fulfill two key requirements of any judicial system, namely justice of the highest quality and proper accountability in a democratic society (paragraph 23).
2. If, after careful analysis a member state decides that these key requirements cannot be met by other means (e.g. "informal" evaluation), the CCJE recommends the adoption of a more formal system of individual evaluation (paragraph 23).
3. The aim of all individual judicial evaluation adopted by a member state, whether it be "formal" or "informal", must be to improve the quality of the work of the judges and, thereby, a country's whole judicial system (paragraph 24).
4. The CCJE encourages all member states to use informal evaluation procedures that help improving the skills of judges and thereby the overall quality of the judiciary. Such means of informal evaluation include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review (paragraph 25).
5. The basis and main elements for formal evaluation (where it exists) should be set out clearly and exhaustively in primary legislation. Details may be regulated by subordinate legislation which should also be published. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria for evaluation (paragraph 30).
6. Evaluation must be based on objective criteria. Such criteria should principally consist of qualitative indicators but, in addition, may consist of quantitative indicators. In every case, the indicators used must enable those evaluating to consider all aspects that constitute good judicial performance. Evaluation should not be based on quantitative criteria alone (paragraphs 31-35).
7. Expressing evaluation results by numbers, percentages or by ranking judges without further information should be avoided as this could create a false impression of objectivity and certainty. The CCJE opposes any permanent ranking of judges. However, a system of ranking is acceptable for certain specific purposes such as promotion (paragraphs 42-43).
8. In order to safeguard judicial independence, individual evaluations should be undertaken primarily by judges. The Councils for the Judiciary (where they exist) may play a role in the process. Evaluations by the Ministry of Justice or other external bodies should be avoided (paragraph 37).
9. The sources of evidence on which evaluations are based must be sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation (paragraphs 39, 44).

10. Individual evaluation of judges should - in principle - be kept separate, both from inspections assessing the work of a court as a whole, and from disciplinary procedures (paragraphs 29, 39).
11. It is essential that there is procedural fairness in all elements of individual evaluations. In particular judges must be able to express their views on the process and the proposed conclusions of an evaluation. They must also be able to challenge assessments, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (paragraph 41).
12. An unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard. These conclusions must follow a proper procedure and be based on reliable evidence (paragraphs 29, 44).
13. The use of individual evaluations to determine the salary and pension of individual judges is to be avoided as this process could plainly influence judges' behaviour and so endanger judicial independence and the interests of the parties (paragraphs 28, 45).
14. The principles and procedures on which judicial evaluations are based must be made available to the public. However, the process and results of individual evaluations must, in principle, remain confidential so as to ensure judicial independence and the security of the judge (paragraph 48).

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[1] See the CCJE Opinion No. 1(2001).

[2] See the CCJE Opinions No. 3(2002), No 4(2003), No. 6(2004), No. 11(2008), No. 14(2011).

[3] See the CCJE Opinion No. 1(2001), paras 17-56.

[4] See the CCJE Opinion No. 4(2003), paras 23-30.

[5] See the CCJE Opinion No. 3(2002), para 51-77.

[6] This Report is entitled "How can the appointment and assessment (qualitative and quantitative) of judges be made consistent with the principle of judicial independence?", see at <http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2006-conclusions-E.pdf> .

[7] See Recommendation CM/Rec(2010)12, paras 59 – 65.

[8] See the CCJE Magna Carta of Judges (2010), para 15.

[9] See the CCJE Opinion No. 11 (2008), para 36.

[10] See the CCJE Opinion No. 11 (2008), para 32.

[11] See the CCJE Opinion No. 13(2010), Conclusion A; the CCJE Magna Carta of Judges (2010), para 17.

[12] See the CCJE Opinions No. 1(2001), No. 3(2002), No 4(2003), No. 6(2004) and No. 11(2008).

[13] See the CCJE Opinion No. 1(2001), para 10; Recommendation CM/Rec(2010)12, paras 3 and 11; the CCJE Magna Carta of Judges (2010), para 2.

[14] See the CCJE Magna Carta of Judges (2010), paras 3 and 4.

[15] See the CCJE Opinion No. 2(2001), para 2.

[16] See the CCJE Opinion No. 4(2003), paras 4, 8, 14 and 23-37.

[17] See the CCJE Opinion No. 3(2002), para 51.

[18] See the CCJE Opinion No. 1(2001), especially para 45, the CCJE Opinion No. 6(2004), para 34.

[19] See the CCJE Opinion No. 1(2001), para 66, Recommendation CM/Rec(2010)12, paras 22-25.

[20] See e.g. the system in Finland and the Netherlands.

[21] As in the United Kingdom.

[22] However, stringent safeguards are in place to protect a judge's independence in the process.

[23] Bulgaria, Estonia, Germany, Hungary, Ukraine.

[24] Spain, Sweden (however, only a very small percentage of the salary is set individually and stringent safeguards are in place to protect the judges' independence). In Belgium and Bulgaria, a judge's salary can be reduced because of poor evaluation results. In Turkey, salaries and pensions may be increased because of evaluation results.

[25] Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Poland, Romania, Slovenia, Spain (when performance based salaries are determined), "the former Yugoslav Republic of Macedonia", Turkey.

[26] Bosnia and Herzegovina, Spain.

[27] Germany, Poland,

[28] Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Greece, Hungary, Republic of Moldova, Poland, Romania, Spain, "the former Yugoslav Republic of Macedonia", Turkey.

[29] France and Germany.

[30] Austria, Germany, Slovenia.

[31] Germany, Poland, Sweden.

[32] Croatia, Germany.

[33] Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, France, Germany, Greece, Italy, Republic of Moldova, Monaco, Romania, Slovenia, "the former Yugoslav Republic of Macedonia".

[34] Georgia, Turkey.

[35] Hungary, Slovenia.

[36] Cyprus (with productivity factor), Estonia, Finland, The Netherlands, Sweden, UK.

[37] Bulgaria, Croatia, Estonia, Spain, "the former Yugoslav Republic of Macedonia", Turkey.

[38] Croatia.

[39] Austria, France, Germany.

[40] Greece.

[41] Austria, Germany, Hungary, Monaco, United Kingdom.

[42] Belgium, Finland, France, Monaco, Romania, Switzerland.

[43] Belgium, France, Romania.

[44] Albania, Austria, Bulgaria, Austria, Croatia, Estonia, Italy, Republic of Moldova, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey.

[45] Germany, Greece, Hungary, The Netherlands.

[46] Legal academics and Bar Associations in Estonia; Bar Associations in Greece and psychologists in certain circumstances in Romania.

[47] Greece uses a roughly comparable system.

[48] Bosnia and Herzegovina, Finland, Germany, Greece.

[49] Bulgaria, Estonia, Georgia, Germany, Greece, Ukraine.

[50] Bulgaria, Sweden (however, only a very small percentage of the salary is set individually and stringent safeguards are in place to protect a judge's independence in the process), Spain, Turkey.

[51] Belgium, Bulgaria, Croatia, Cyprus, Greece, Hungary, Poland, Slovenia.

[52] Austria, Estonia, only in rare cases: Greece, Hungary, Italy, Republic of Moldova, Poland, Romania, Slovenia, “the former Yugoslav Republic of Macedonia”.

[53] “The former Yugoslav Republic of Macedonia”.

[54] Romania.

[55] However, in Spain, qualitative criteria are taken into account when a judge’s promotion is in question.

[56] See the CCJE Opinion No. 11(2008), para 70.

[57] See the CCJE Opinion No. 1(2001), paras 17 and 29.

[58] See UN Basic Principles on the Independence of the Judiciary (1985), para 13.

[59] Spain, Sweden (however, only a very small percentage of the salary is set individually).

[60] See Recommendation CM/Rec(2010)12, para 55; see also the IAJ General Report (2006), Conclusions, para 12.

[61] See Recommendation CM/Rec(2010)12, para 49.

[62] See Recommendation CM/Rec(2010)12, para 50.

[63] See the ENCJ Report 2012-2013, sections 4.17-4.18.

[64] See Recommendation CM/Rec(2010)12, para 58.

[65] See the CCJE Opinion No. 1(2001), para 24.

[66] See the CCJE Opinion No. 1(2001), para 25.

[67] See the ENCJ Report 2012-2013, section 4.8.

[68] See the Kyiv Recommendations (2010), para 27.

[69] See the CCJE Opinion No. 6(2004), para 42.

[70] See Recommendation CM/Rec(2010)12, para 32, and CCJE Opinion No. 2(2001), para 4.

[71] See the CCJE Opinion No. 11(2008), para 57.

[72] See the CCJE Opinion No. 11(2008), para 74, and CCJE Opinion No. 6(2004), para 36.

[73] See the Kyiv Recommendations (2010), para 28.

[74] See the ENCJ Report 2012-2013, section 4.12.

[75] See the CCJE Opinion No. 10 (2007), paras 42 and 52-56.

[76] See the ENCJ Report 2012-2013, sections 4.13-4.15.

[77] See the ENCJ Report 2012-2013, section 4.16.

[78] See the ENCJ Report 2012-2013, section 4.19.

[79] As in Austria or Bulgaria.

[80] As in Croatia or United Kingdom.

[81] See Recommendation CM/Rec(2010)12, para 58. See also the ENCJ Report 2012-2013, section 4.19.

[82] As in Albania.

[83] See the ENCJ Report 2012-2013, section 4.11.

[84] See Recommendation CM/Rec(2010)12, paras 49 and 50.

[85] However, in Sweden only a very small amount of a judge's salary is determined by evaluation results and stringent safeguards are in place to protect a judge's independence.

[86] See the IAJ General Report (2006), Conclusions, para 12. See also Recommendation CM/Rec (2012)12, para 55.