

## **Recommendations for amendments of the Rules on Criteria, Standards, Procedure and Bodies for Performance Evaluation of Judges and Court Presidents**

### **Background:**

On 22 July 2014, the High Judicial Council (HJC) adopted the Rules on criteria, standards, procedure and bodies for performance evaluation of judges and court presidents (the Rules). The Rules are based on the Law on Judges and the Law on High Judicial Council, which establish the framework for evaluation. The Rules were initially envisaged to enter into force on 15 January 2015 following a 'pilot phase' aimed at assessing the feasibility of the Rules and identifying potential problems in their application.

On 23 December 2014, the HJC decided to postpone the entering into force of the Rules for to allow sufficient time for amendments deemed necessary in light of the findings of the pilot phase as well as in view of the Opinion No. 17 of the Consultative Council of European Judges (CCJE) adopted on 24 October 2014.

Upon request of the HJC, the OSCE monitored the pilot phase by conducting interviews with members of 8 evaluation commissions and a number of judges who had been subjected to evaluation. On 20 January 2015 the Mission presented the findings of OSCE's monitoring of the pilot phase to the HJC. This paper sets out recommendations derived from the findings of the monitoring as well as from international standards regarding the evaluation of judges, in particular the Opinion No. 17 of the Consultative Council of European Judges of 24 October 2014.

### **A) General remarks**

#### **1) Possibility of dismissal**

The Law on Judges stipulates that judges be graded 'outstandingly successful', 'successful' or 'not successful'. Judges assessed as 'unsuccessful' have to be dismissed (article 61 of the Law on Judges). This is contrary to international standards. Opinion No. 17 of the CCJE states (para 29): *'The principles of tenure and of irremovability are well-established key elements of judicial independence and must be respected. Therefore, a permanent appointment should not be terminated simply because of an unfavorable evaluation. It should only be terminated in case of serious breaches of disciplinary or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is unwilling or incapable to perform his/her judicial duties to a minimum acceptable standard, objectively judged'*.

**The High Judicial Council should advocate for changes to the Law on Judges to the effect that judges rated as unsuccessful do not have to be dismissed and that more than three grades can be awarded to allow for a more differentiated view on a judge's performance.**

#### **2) Evaluation of judges of the Supreme Court of Cassation**

The Law on Judges provides that all judges are subject to evaluation. Contrary to this provision, the Rules do not foresee any evaluation of judges of the Supreme Court of Cassation. While the technical difficulties in appraising the performance of the highest judges are conceivable, there is no legal basis for exempting them.

**Efforts should be made to develop a system to assess the performance of judges of the Supreme Court of Cassation.**

### **3) Gathering of data**

The monitoring of the pilot phase has shown that not all necessary data are readily available in all courts. In addition to that, the approach to gathering these data is not consistent in all courts.

**Efforts should be made to allow for gathering uniform statistics, e.g. by issuing clear guidelines applicable in all courts. This particularly concerns the standard of labelling a judgment as finalized for the purposes of evaluation, since the practice varies by courts.**

## **B) Specific provisions**

### **1) Criteria (article 4)**

The Rules stipulate that criteria for the evaluation of judges are quality and quantity. Quality is reflected by the percentage of quashed decisions and the time period required to finalize judgments. While 'quality' and 'quantity' are commonly recognized criteria to assess the performance of judges, it should be noted that the time needed to complete a judgment is considered a quantitative criterion in most Council of Europe member states.

Both quality and quantity of the work of an individual judge are established on the basis of statistical material. In that respect, it is noteworthy that the Opinion No. 17 of the CCJE states (para 34): *'The CCJE considers that evaluations should not be based solely on quantitative criteria'*.

The Opinion also cites with approval the Kyiv recommendations which suggest 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)*. This is in line with frequent comments in the pilot phase that the Rules do not capture all relevant aspects of judicial work.

**The Rules should be amended in such a fashion that the evaluation is not a mere counting exercise, but rather an assessment of all aspects of the professional performance of judges. Qualitative aspects of judicial work should be included.**

## **2) Evaluation bodies (articles 8 through 13)**

The pilot phase showed that work done in the an Evaluation Commission requires a significant amount of time, that Commission members are not always sure how to handle certain rules and rules are not always applied consistently.

**The Rules should be amended to foresee a deduction of workload for members of commissions; there should also be a possibility of having more than one Commission in courts in which large numbers of judges have to be evaluated. In order to avoid different interpretations of the Rules in practice, the members of the evaluation commissions should be trained.**

## **3) Quality of a judges' performance (article 15)**

### **a) Quashed decisions**

Measuring a judge's performance on the basis of overturned decisions is problematic in light of international standards. Paragraph 35 of Opinion No. 17 of the CCJE reads as follows: *'...the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal'*. The Kyiv recommendations state in article 28: *'Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal).'*

**The criterion of reversal rate and/or the weight attached to it should be reconsidered. It should be clarified how to treat judgments which are partially upheld and partially quashed.**

### **b) Time used to finalize judgment**

The second parameter for the performance of first-instance judges is the time they need to finalize their judgments. For second-instance judges, this is the only criterion on the basis of which their performance is assessed. Opinion 17 of the CCJE states as follows: *'...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'*.

Judges who finalize a certain number of decisions outside of the time limit indicated in the Rules will be assessed as not successful in the category quality. This impacts their entire evaluation in such way that they are rated not successful (with the consequence of a mandatory dismissal).

**The Rules should be amended so as to attach less weight to the criterion of timely finalization of judgments.**

## **4) Quality for second-instance judges (article 16)**

The quality of the performance of second-instance judges is measured by the time they need to finalize judgments.

**Timely finalization should not be the only criterion to evaluate second-instance judges.** It should be considered to add qualitative criteria (see above under 3) b)).

#### **5) Quantity (efficiency) of judicial performance (article 17)**

The quantity of judicial performance is to be evaluated based on the number of cases disposed by a judge over a period of one month in relation to the number of cases he should finish - defined as a monthly caseload quota. It is unclear how the monthly case load is determined; the Rules do not differentiate between different types of cases - every case is counted as one case regardless of its complexity. It is worthwhile to consider introducing in the future a system of weighting cases.

**Clear and transparent rules setting out the calculation of the cases to be resolved in a certain period of time should be developed. A differentiation between different categories/types of cases ('case weighting') should be considered. The Rules should be amended to clarify that the total amount of cases completed by a judge should be viewed in the context of effective work time during one year.**

#### **6) Evaluation of Court Presidents (articles 27 through 31)**

The only criterion for the evaluation of court presidents is the percentage of irregularities in the work of the particular court administration identified by the president of the higher.

**The Rules should be amended to reflect the reality and daily work of court presidents based on their job descriptions.**

#### **7) Monthly caseload quota (article 18)**

**All types of judicial work and assignments should be reflected in the case load quota (e.g. including supervision of the enforcement of sanctions, recognition of judgments of foreign courts, pre-trial judges).**

#### **8) Evaluation of judges in special division for organised crime and war crimes (article 26)**

The Rules stipulate that judges working in the organized and war crimes department of the Higher Court should be evaluated only according to the criteria of quality: conducting proceedings in a timely fashion and time period of rendering decisions in writing. However, the Rules do not set any parameters as to what is to be considered timely fashion of conducting proceedings or timely fashion in writing judgments.

**The Rules should be revisited to include suitable standards for judges in the specialized departments.**

## **9) Interviews**

The Rules stipulate that the Commission shall conduct an interview with the judge to be evaluated prior to awarding grades. However, the interview cannot impact the outcome of the evaluation in any way. Paragraph 41 of the Opinion No. 17 of the CCJE states '*...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... 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*'.

**The Rules should be amended for the interview to have an impact on the final evaluation and to allow judges to contribute to the evaluation process in a useful way.**