

Strasbourg, 14 January 2014

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

**Questionnaire for the preparation of the CCJE Opinion No. 17 (2014)
on justice, evaluation and independence
Reply from Germany**

Introduction

The questionnaire aims at collecting information, as much as possible, about the evaluation of performance of functioning judges. Therefore, the questionnaire is not related to the process of selection and/or recruitment of judges. The replies to the questionnaire will serve to identify the prevailing practices in the member States, and they will be used in the process of preparation of the CCJE Opinion No. 17 (2014), indicated above.

A. Individual evaluation and assessment of judges: purpose and regulatory framework

1. Does individual evaluation and/or assessment of judges exist in your country?

Yes

2. If yes, what is its purpose and rationale?

The main purpose and rationale is to assess performance and aptitude of the judge, aiming at a comparative overview of the standing and ranking of all members of the judicial staff. This is necessary in preparation for decisions on judicial appointments, regardless whether they are promotions or transfers from one judicial position to another. Evaluations are especially essential if more than one judge applies for an open judicial position.

3. Is it compulsory or optional, and does it apply to all judges in the country?

It is compulsory in all federal states (Lander), applying to all judges. Judges who have reached a certain position or a certain age (over 50 or over 55) may be exempted. Invariably, evaluation is necessary in case of an application for promotion.

4. How it is established and regulated:

- by legislation;
- by subordinate legislation;
- by internal institutional regulatory instruments.

The basic necessity of evaluation is established by legislation, usually in the act regulating the law of civil service or in the Land legislation concerning the judiciary. Details (content, point systems, intervals of evaluation) are usually established by internal regulatory instruments.

B. Criteria for evaluation and assessment
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5. Are there quantitative performance indicators that have to be taken into account, such as:

- the number of cases in which a decision has been made by a judge;
- the average time spent on each of these cases;
- the average number of hearings per case;
- clearance rate (number of the cases, where a decision has been made, vis-à-vis the total of the cases forwarded to the judge);
- the average time to judgment (the time required to deliver a judgment by a judge after the completed hearing);
- any other quantitative indicators.

All of the above mentioned indicators are, as a rule, being taken into account. Such statistical data may also be mentioned in the evaluation. With respect to judicial independence, it is however inadmissible to formulate specific expectations, to compare individual data or to weigh the judge's performance against any kind of absolute aim. Only if a judge falls clearly short of what may be perceived as an average performance, this might be expressed.

Note: At present, a court case is pending where a president of a court of appeal has reprimanded a judge or at least indicated to him that he is not meeting average performance standards. The president maintains that the judge is in effect handling only 68 percent of the average number of cases handled by other judges. The judge claims that he can only handle this volume of cases if he applies standards which – in his judicial independence and conscience - he believes necessary. The judge lost his case in the judicial service court (Richterdienstgericht) at first instance. The appeal is now pending. It is likely that the case will finally be brought before the federal constitutional court should the judge not be successful in the courts below.

6. Are there qualitative performance indicators that have to be taken into account, such as:

- analysis of the type, subject and complexity of the cases dealt with by a judge and his/her decisions; - *generally, yes* -
- the number of appeals vis-à-vis the number of the cases, where a decision has been made; - *generally, not; the number of appeals is not in itself regarded as a significant quality indicator* -
- the number of decisions reversed and/or cases remitted by the appellate court; - *generally, not; with respect to judicial independence, it should be taken into account that the court below may be right and the appellate court could be wrong* -

- the types of cases where decisions were reversed and/or cases remitted (criminal, civil, administrative or other); - *no* -
- the grounds for reversal and/or remittal; - *generally not; in exceptional cases, e.g. severe procedural errors or grave misinterpretations of the law, this might be the case* -
- any other qualitative indicators.

Other qualitative indicators are, e.g.:

- *The judge's conduct vis-à-vis litigants, lawyers, witnesses, experts, officers of the court, other staff, lay judges, the public;*
- *the way hearings are conducted (approach, openness, structure of the hearing, use of professional language, ability to "translate" into language understandable for the layperson)*
- *ability to mediate and to reach settlements*
- *ability to legal research*
- *ability to draft clear and understandable judgments (structure, content, clear language)*

7. Are there any other indicators that are taken into account in assessing the judge, such as the opinions of the court users, the judicial hierarchy, court experts and others concerned in the judicial process, as well as press articles?

This is principally possible; the evaluator is under a duty to take into account all possible aspects of professional performance. Therefore, he has to consider all relevant information that comes to his notice. This may especially include information received from senior judges, from other colleagues, from members of the bar.

8. Does the evaluation take into account possible violations of ethical and professional rules/standards adopted for judges?

Yes

9. Is there any set scale of importance or of priority between various performance indicators? (please specify)

Some of the Lander use evaluation sheets where separate points are awarded for several specified criteria. Such points are usually aggregated to a final mark, but not in a strict mathematical sense. Again, it is usually the individual responsibility of the evaluator to decide whether - given the professional task which has been assigned to the individual judge - certain aspects of evaluation should be weighed higher than others.

C. Procedures and mechanisms

10. Who is responsible for individual evaluation and/or assessment of judges? Please specify all institutions and officials taking part in this process (including the Ministry of Justice, presidents of courts, Council for the Judiciary, bodies for the inspection of courts), and indicate their specific roles.

Invariably, responsibility for the evaluation lies with the president of the regional court; in cases of judges of a court of appeal, the president of this court is responsible. In some of the Lander, there is also a final competence of the Ministry of Justice. In cases of judges of courts of first instance, the president of the Court of Appeal as a rule has to express whether he follows the assessment of the president of the court below; this re-evaluation is established in order to guarantee well balanced and uniform standards (otherwise the

president of a court of first instance could award high marks to his judges with the result that the judges of his court might get promoted ahead of those of other courts).

11. Are there different evaluation procedures for different judges, depending on their position in the judicial hierarchy, their experience or any other aspect?

No, individual positions, experience and knowledge have to be taken into account, however. The procedure remains the same.

12. Is evaluation a continuous process or is it done periodically; if the latter, how often are judges evaluated?

As a rule, evaluation is a continuous process and done periodically, usually every 4 or 5 years. In most of the Lander, there exist regular "evaluation campaigns", in order to at a fixed date provide a comprehensive comparative view of performance and aptitude of all members of the judiciary.

13. Are the evaluations done routinely, or only or additionally for specific occasions and/or for specific reasons?

Routinely, cf. 12, above; also on specific occasions, e.g. applications for promotions, transfers, leave of absence.

14. How is the evaluation conducted? (please specify exact procedures, including possible pre-evaluation, interviews, hearings, oral and verbal submissions and the role of the evaluators and a judge)

The evaluator or a judge assisting him as a first step gathers all relevant information. This includes looking into court files, reading judgments, following court hearings or trials, receiving information from colleagues, court users etc..

As a second step, a draft evaluation is written and communicated to the judge, either solely in writing or in combination with an oral explanation.

The judge then has the opportunity to comment on the draft, present his objections and/or suggestions and to ask for a discussion with the evaluating court president.

Having taken possible objections into account, the court president decides on the final version of the evaluation which is then communicated in writing to the judge.

After this the judge is free to formally lodge his objections in writing and, if the evaluator does not follow his view, to challenge the evaluation in court. Such challenge can be done by bringing an action in the administrative court (for instance alleging that the evaluator has not diligently collected all relevant information, that he has erred in his conclusions, that he has not observed procedural rules). In the event that the judge feels that the content of the evaluation infringes his personal judicial independence, he may apply to the judicial service court (Richterdienstgericht) to have the matter reviewed.

15. What are the ratings used during evaluations?

The Lander use slightly different ratings. Usually there are rankings like "excellent", "good", "above average", "average", "not sufficient". Quite often, further rankings like "upper level" and "lower level" are used additionally. This equals a point ranking of between 10 and 15 levels.

16. What are the consequences of the evaluation and how may it affect the career of a judge? Can it result in:

- the promotion or demotion of a judge; - *promotion yes, demotion no (demotion is only possible in cases of severe misconduct and only on the basis of a disciplinary decision of the judicial service court (Richterdienstgericht) -*
- a professional award to a judge; - *no -*
- disciplinary or other measures; - *no -*
- a requirement of further training; - *no -*
- dismissal from office; - *no, except with junior judges not yet appointed for life -*
- any other actions or measures (positive or negative). - *selection of candidates for promotion -*

17. How are the evaluation and the recommended measures recorded, where are the records deposited, who may examine them and for how long they are kept?

Evaluations always become part of the personal staff file of the judge. They are continuously kept there throughout the judge's working life. The judge concerned may always examine them. They may also be examined by competent persons (court presidents, their assistants, the presidential staff council, the Ministry of Justice), e.g. in the context of decisions on promotion. Data, information and materials gathered in preparation of the evaluation have to be destroyed once it is clear that the evaluation itself is not being contested.

18. Apart from the formal evaluations referred to above, are any informal evaluations undertaken? (for example, in the form of informal consultations and advice from more senior judges)

Such informal evaluations do exist, on a voluntary basis. Peer review given by judges of seniority or of equal standing is fairly common.

19. Please provide, if possible, an example (anonymous) of an evaluation/assessment form/sheet/record filled out (if possible, in English or French).

See annex; some of the Lander also use point systems for specific criteria.

D. Evaluation and assessment vis-à-vis the independence of judges

20. By what means is the transparency of the evaluation process ensured? Is the evaluating body clearly defined? Are there published guidelines setting out evaluation criteria and the procedural rules to be applied?

Relevant regulations and guidelines are generally published and hence well known to all judges. Competences, procedural rules and, in so far as it is possible at all, criteria are clearly defined and transparent to all involved in the process.

21. Are there any protective measures during the evaluation process to avoid personalised opinions or political pressures?

All evaluation processes have a certain personalized component. External pressure is avoided because the evaluator, the court president, is himself a judge, because judges participate in the process and because, most important of all, all evaluations are subject to judicial review.

22. How is the participation of a judge in the evaluation procedure ensured and how are his/her views taken into account?

Cf. 14, above.

23. Is any self-evaluation by a judge or evaluation by his/her peer judges at the same hierarchical level possible?

No

24. Can a judge demand the dismissal or removal (temporary or permanent) of a member of the evaluation body from that body? (for example, where there are serious reasons to believe that such member may have an *a priori* negative attitude towards the evaluated judge)

Yes, under the same circumstances under which a party to litigation can demand that the judge be removed, i.e. if from the point of view of a reasonable person there is reason to believe that the evaluator may be prejudiced or biased.

25. What are the possibilities of review (including judicial) of an evaluation of a particular judge, if a judge does not agree with the evaluation and the measures taken as a result of its conclusions?

Cf. 14, above; there is always judicial review.

E. Achievements and problems

26. Please briefly describe achievements and problems of the evaluation system used in your country.

Achievements of the evaluation systems in Germany lie in the fact that an objective process is established, that there is a clear professional duty of the evaluator to consider all relevant facts and that he is under a duty to substantiate his judgment especially if it contains negative aspects. Judicial independence is clearly guaranteed. The right to judicial review is the cornerstone of this guarantee and also an efficient safeguard against arbitrary evaluations. In general, having such a system as a basis for decisions on promotion is regarded as superior to promoting on the basis of rumor or word of mouth.

Some judges, however, feel there is no necessity for regular evaluations. They feel watched and sometimes controlled by the court president whom they perceive as a distant person not sufficiently familiar with the problems of their daily work. They also feel that evaluations as such are already contrary to judicial independence (although the courts up to the constitutional court have long established that this is not the case). Another problem can be the practice of evaluation: evaluation systems do not make sense if they do not produce a sufficient and significant ranking of those evaluated. This necessitates establishment of a restrictive practice which avoids bringing to many judges in the highest ranking categories. To keep up such restrictive practice in the light of sometimes quite intensive pleadings and objections by individual judges is often quite difficult for evaluators. Decisions on promotions, however, could not possibly be based on evaluations if "friendly" evaluations would result in all those concerned being ranked "top" at the same level.