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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

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

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, individual performance evaluation of judges and court presidents is periodically conducted in Bosnia and Herzegovina.

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

Performance evaluation is carried out in order to objectively and impartially determine the success with which a judge or a court president performed his/her duties during the evaluation period.¹

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

In accordance with the existing laws, performance evaluation of judges is compulsory and applies to all judges and court presidents in the country, except for the judges and court

¹ Article 2 of the Criteria for Performance Evaluation of Judges in Bosnia and Herzegovina; Article 2 of the Criteria for Performance Evaluation of Court Presidents in Bosnia and Herzegovina.

presidents of entity constitutional courts and the BiH Constitutional Court, as well as judges and court president of the Court of Bosnia and Herzegovina.

4. How it is established and regulated:

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

Legal grounds for the performance evaluation of judges above all include the existing legal provisions², while the performance evaluation criteria and procedure are regulated through by-laws and other internal acts of the BiH High Judicial and Prosecutorial Council (HJPC).³

In that regard, it should be noted that, unlike the entity laws on courts or the Law on Courts in the Brčko District of BiH, the Law on the Court of BiH does not envision that judges and president of the court should be a subject of performance evaluation. It is for that reason, meaning the lack of any legal grounds, that there is no performance evaluation currently existing for Court of BiH judges and president.

Taking into account the aforementioned, it is necessary to bear in mind that responses to all questions from this questionnaire pertain exclusively to the procedure and method of performance evaluation of judges of entity courts and courts of the Brčko District of BiH.

B. Criteria for evaluation and assessment

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.

In accordance with the Criteria for the Performance Evaluation of Judges, one of the performance evaluation elements is to assess whether the orientation quota, set according to the rules laid down in the Rulebook on Orientation Criteria for the Performance of Judges and Legal Officers in Courts in BiH, has been met.⁴ The Rulebook sets forth distinct orientation criteria for monitoring the performance of judges for each level of judicial authority, and within that also for each department. The Orientation Criteria are set according to the principle of operation of courts in BiH, the type of court cases and the manner of completion of the court case within the particular type of cases, taking as a starting point the lawful, proper and timely completion of cases.⁵

² Law on the BiH HJPC, Law on Courts in the FBiH, Law on Courts in the RS, Law on Courts in the Brčko District of BiH.

³ Criteria for Performance Evaluation of Court Presidents in BiH, Criteria for Performance Evaluation of Judges in BiH, Rulebook on Orientation Criteria for the Performance of Judges and Legal Officers in BiH Courts, and the Rulebook on the Procedure of Performance Evaluation, Filing of Appeals and Deciding on Performance Evaluation Appeals and the Content of Performance Evaluation Forms for Judges, Court Presidents and Legal Officers (Rulebook on Performance Evaluation Procedure).

⁴ Article 14 of the Criteria for Performance Evaluation of Judges in BiH.

⁵ Article 2 of the Rulebook on Orientation Criteria for the Performance of Judges and Legal Officers in BiH Courts.

In other words, the Rulebook has precisely determined just how many court cases, of which type and with what manner of completion (decision on merits, procedural decision etc.) a judge needs to complete during a calendar year to satisfy the set quota.

In the performance evaluation procedure, depending on the percentage of the satisfied quota, a judge is allocated a number of points, which are then added to the points scored on account of other performance evaluation elements, so that the final evaluation is given based on the total points scored.

According to the Criteria for the Performance Evaluation of Court Presidents,⁶ in making performance evaluation of court presidents one takes into account not just the level of satisfied individual quota, but also the realization of the collective quota of the court he/she is the president of.⁷

Therefore, of all quantitative indicators listed in this question, in making a performance evaluation of judges one actually takes into account only the number of the decisions issued. Other indicators, such as, for instance, time spent working on each of the cases, average number of hearings per case, time needed to draft and issue a court decision, do not apply, which we believe is wrong (see response to Question 26).

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;
- the number of appeals vis-à-vis the number of the cases, where a decision has been made;
- the number of decisions reversed and/or cases remitted by the appellate court;
- the types of cases where decisions were reversed and/or cases remitted (criminal, civil, administrative or other);
- the grounds for reversal and/or remittal;
- any other qualitative indicators.

One of the performance evaluation elements for judges and court presidents is the quality of judicial decisions, evaluated according to the number of reversed decisions in relation to the total number of decisions issued.⁸ Performance evaluation of a judge under this ground is made by allocating to the judge, depending on the percentage of reversed decisions, a smaller or larger number of points, which are then credited towards the total sum of points, based on which the final performance evaluation is ultimately made.

Therefore, out of all qualitative indicators listed in the question, during the performance evaluation of judges one takes into account only the number of reversed/remitted decisions, while other indicators, such as the complexity of cases, number of appeals, type of cases or legal grounds for the reversal of the decision, are not considered.

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?

None of the foregoing indicators is taken into account during the performance evaluation of judges.

⁶ Pursuant to Article 3, the Criteria for the Performance Evaluation of Court Presidents in BiH do not apply to presidents of entity supreme courts and the President of the Brčko District Appellate Court. This Article stipulates that the HJPC shall set special criteria for their performance evaluation.

⁷ Article 16 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

⁸ Article 14 of the Criteria for the Performance Evaluation of Judges in BiH; Article 16 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

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

One of the performance evaluation elements is the evaluation of a judge's or court president's attitude towards work. Since some of the parameters based on which attitude towards work is assessed (such as, for example, timely dispatch of court decisions or compliance with judicial deadlines while scheduling hearings) are also indicators of judge's or court president's professionalism, one may say that compliance with the rules of profession is one of the criteria taken into account during performance evaluation.⁹

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

The Criteria for the Performance Evaluation of Judges and Court Presidents do not formally rank the performance evaluation elements according to their importance. However, since the performance evaluation elements that pertain to the quota fulfilment and quality of decisions carry a much larger number of points than other elements, and that because of that they have the greatest impact on the final performance evaluation, one may conclude that they are given higher level of importance in relation to the 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.

Performance evaluation of judges is made by the court president, while the evaluation of court presidents is made by the president of the immediately higher court. When it comes to presidents of the FBiH Supreme Court, RS Supreme Court and the Brčko District Appellate Court, their performance evaluation is made by the HJPC.¹⁰

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

As already mentioned, performance evaluation procedure for court presidents as compared to judges differs insofar as they are evaluated by the president of the immediately higher court, or the HJPC when it comes to presidents of entity supreme courts and the Brčko District Appellate Court.

Besides the foregoing, the laws on courts and in the RS and Brčko District of BiH stipulate that the performance evaluation of the newly-appointed judges should be carried out once a year over the first three years of their mandate, unlike other judges whose performance evaluation is made once in three years.¹¹

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

Performance evaluation of judges of courts at all levels of judicial authority in Republika Srpska and the Brčko District of BiH is carried out at least once in three years according to

⁹ Article 17 of the Criteria for the Performance Evaluation of Judges in BiH; Article 19 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

¹⁰ Article 67 of the Law on Courts in the RS; Article 42 of the Law on Courts in BD BiH.

¹¹ Article 67 of the Law on Courts in the RS; Article 42 of the Law on Courts in BD BiH.

the criteria set by the BiH HJPC, while performance evaluation for the newly-appointed judges is carried out once a year during their first three years in office. The Law on Courts in the FBiH stipulates that the performance evaluation of judges be carried out at least once a year.¹²

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

The existing legal provisions stipulate that performance evaluation is compulsory for all judges in entity courts and Brčko District courts, while specifically defining the time periods performance evaluation is supposed to cover.

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)

Performance evaluation procedure for judges is set forth by the Rulebook on the Procedure of Performance Evaluation, Filing of Appeals and Deciding on Performance Evaluation Appeals and the Content of Performance Evaluation Forms for Judges, Court Presidents and Legal Officers, issued by the BiH High Judicial and Prosecutorial Council (hereinafter: the Rulebook on Performance Evaluation Procedure).

According to the Rulebook, court president has the obligation to make a preliminary performance evaluation for judges in his/her court, as well as performance evaluation of presidents of immediately lower courts, within 60 days of the end of the evaluation period. Preliminary performance evaluation is conducted in accordance with the Criteria for the Performance Evaluation of Judges and Court Presidents, in line with the Performance Evaluation Form for Judges and Legal Officers, and the Performance Evaluation Form for Court Presidents, which make up an integral part of the Performance Evaluation Rulebook. The preliminary performance evaluation by way of filling out the relevant form is then made available to the evaluated judge within three days of the date of performance evaluation, together with a legal remedy note that he/she may file an appeal.

If the judge files an appeal from the preliminary performance evaluation, and the court president does not grant it, in whole or in relation to particular performance elements, the court president shall then provide the appealing judge, within eight days, with a reasoned response in writing.

If the judge is not satisfied or is only partially satisfied with the court president's response, he/she is entitled to file a reasoned written complaint against the final evaluation within eight days. If the court president does not grant the reasoned complaint against the final performance evaluation, he/she shall forward the complaint to the HJPC.¹³

Upon receiving the complaint against the final performance evaluation, the Judicial Administration Department of the HJPC Secretariat shall forward the complaint and all the available documentation to the Standing Committee tasked with assessing whether the complaint is well-founded, and with drafting an opinion on each individual complaint.¹⁴ The HJPC shall decide on the complaint within 30 days, and shall, within 15 days of the date when the decision was issued, provide the appellant with a written copy thereof.¹⁵ In deciding on the complaint, the HJPC may do the following:

- a) dismiss the complaint as untimely
- b) dismiss the complaint as deficient
- c) refuse the complaint as ill-founded
- d) grant the complaint in full and reverse the original evaluation, and

¹² Article 41 of the Law on Courts in the FBiH.

¹³ Article 4 of the Rulebook on the Performance Evaluation Procedure.

¹⁴ Article 6 of the Rulebook on the Performance Evaluation Procedure.

¹⁵ Article 7 of the Rulebook on the Performance Evaluation Procedure.

e) partly grant the complaint and increase evaluation marks by particular elements with a possible reversal of the original evaluation.¹⁶

The HJPC shall make the decision on complaint by majority votes, and such a decision is final.¹⁷

When it comes to the presidents of supreme courts in the FBiH and the RS, and the President of the Brčko District Appellate Court, the HJPC, which gives performance evaluation, shall provide them with the performance evaluation immediately after the performance evaluation procedure has been completed. If they are not satisfied with their evaluation, presidents of the above courts may file with the HJPC a complaint against the evaluation within eight days of the date when they received the evaluation.¹⁸

15. What are the ratings used during evaluations?

The Criteria for the Performance Evaluation of Judges provide for the following ratings:¹⁹

- a) unsatisfactory in performing judicial duties
- b) satisfactory in performing judicial duties
- c) good in performing judicial duties
- d) successful in performing judicial duties
- e) very successful in performing judicial duties.

The Criteria for the Performance Evaluation of Court Presidents provides for the following ratings:²⁰

- a) unsatisfactory in performing duties of the court president
- b) satisfactory in performing duties of the court president
- c) good in performing duties of the court president
- d) successful in performing duties of the court president
- e) very successful in performing duties of the court president.

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;
- a professional award to a judge;
- disciplinary or other measures;
- a requirement of further training;
- dismissal from office;
- any other actions or measures (positive or negative).

The criteria for the performance evaluation of judges or court presidents envision that performance evaluation be used in the procedure of appointment to other offices in judicial institutions, and also in considering their abilities, suitability and expertise for the purpose of career advance within the judicial system.²¹

¹⁶ Article 9 of the Rulebook on the Performance Evaluation Procedure.

¹⁷ Article 9 and Article 10 of the Rulebook on the Performance Evaluation Procedure.

¹⁸ Article 12 of the Rulebook on the Performance Evaluation Procedure.

¹⁹ Article 21 of the Criteria for the Performance Evaluation of Judges in BiH.

²⁰ Article 24 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

²¹ Article 2 of the Criteria for the Performance Evaluation of Judges in BiH; Article 2 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

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?

The existing laws and by-laws regulating the performance evaluation of judges do not include rules on the manner of keeping records.

The only thing that indeed is regulated in that regard is that HJPC decisions on complaints lodged by judges/court presidents, concerning final performance evaluations, shall be forwarded to the HJPC Secretariat's Appointment Department, and then put into the judge's personnel file.²²

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)

The existing laws do not provide for any informal evaluation system. However, there are no legal obstacles for the judges, at sessions of their divisions, to discuss ongoing problems they face in their daily work and exchange experiences.

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

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?

Legal provisions strictly define who is responsible for the performance evaluation of judges (see response to Question 10), while by-laws define in great detail the procedure and criteria according to which the performance evaluation of judges is carried out.

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

The criteria for the performance evaluation of judges or court presidents stipulate that the person conducting the evaluation is responsible for the accuracy of data and the objectivity of performance evaluation.²³

Besides, as explained in the response to Question 14, the objectivity of performance evaluation is ensured by defining the right to file appeals/complaints against preliminary performance evaluation (on which the person doing evaluation or court president decides) and complaints against the final performance evaluation (the final decision on which is made by the HJPC).

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

Judge's participation in the performance evaluation procedure is ensured exactly through the possibility to lodge a complaint against the preliminary or final performance evaluation.

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

²² Article 11 of the Rulebook on the Performance Evaluation Procedure.

²³ Article 7 of the Criteria for the Performance Evaluation of Judges in BiH; Article 7 of the Criteria for the Performance Evaluation of Court Presidents in BiH.

The existing legal provisions and by-laws in BiH do not provide for the possibility of self-evaluation by judges.

When it comes to the possibility of evaluation of a judge by his peers at the same hierarchical level, for the purpose of evaluating the judge's attitude towards work, the Criteria for the performance evaluation of judges leave to the court president the possibility to obtain the opinion from the president of the court division to which the judge whose performance is being evaluated has been assigned, or the opinion of the professional collegium of judges if the relevant court division has not been formed within the court.²⁴

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)

The existing legal provisions do not provide for such a possibility.

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?

The Rulebook on the Performance Evaluation Procedure provides for the possibility of reassessing the given performance evaluation.

In that regard, judges have at their disposal the option to lodge a complaint against the preliminary evaluation, and after that also a complaint against the final performance evaluation (see response to Question 14).

E. Achievements and problems

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

One of the key shortcomings of the existing performance evaluation system is related to the application of the orientation criteria for the work of judges. The orientation judicial quota has been set primarily according to the number of cases necessary to complete during a calendar year, without taking into account factors that directly affect the fulfilment of the quota, such as, for example, the type and complexity of cases, then the time judges spend in the courtroom, the length of trials in complex cases (e.g. war crimes or organized crime cases where trials last for years), and the time necessary to draft and issue judicial decisions in complex cases. Such a reduction of orientation criteria to exclusively quantitative indicators, without leaving any possibility to apply any corrective factors, makes the already unrealistic judicial quota almost unattainable, which results in an inadequate valorisation of the judges work, which in turn has a direct impact on the final performance evaluation.

²⁴ Article 6 of the Criteria for the Performance Evaluation of Judges in BiH.