

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

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 purpose of the assessment procedure is to “describe with due completeness the qualities of each judge, in order to highlight in detail his or her professional features, the types of work carried out and his or her real aptitudes, framing such data within the parameters that are provided for under the existing provisions of law” (Resolution of the Italian High Council for the Judiciary – Consiglio superiore della magistratura, hereafter CSM - of 8 Oct. 2007, hereafter also quoted as Resolution of 2007).

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

The discipline to be described is applicable to all ordinary professional judges; this means that the procedure applies to judges active in the civil and criminal sectors of Tribunals, Court of appeals and Court of cassation, Juvenile courts, Penitentiary supervision courts and some other jurisdictions, as well as to members of public prosecution offices attached thereto

(please consider that in Italy prosecutors belong to the same career as judges). The described procedures do not apply to justices of the peace, that are non professional judges, as well as to members of special professional jurisdictions, such as Administrative Tribunals, Council of State, Court of Auditors, Military tribunals, and to public prosecutors attached thereto; these special jurisdictions have their separate regulatory framework. Constitutional Court judges, serving a high constitutional office for a limited period of time, are not assessed.

4. How it is established and regulated:

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

The assessment procedure is established by law (art. 11, paragraph 3, of Legislative Decree no. April 5, 2006, n. 160, as amended by art. 2, paragraph 2, of the Law of 30 July 2007, n. 111, entered into force with effect from 31 July 2007). According to this article, the CSM, by October 30, 2007, was to issue a resolution governing "the bases on which assessments must be conducted on the judiciary, the parameters to be used to allow homogeneity of the evaluations, documentation that the Presidents of courts and prosecution offices shall submit to the local Judicial Councils ... ". Therefore, the law is implemented by way of an administrative regulatory instrument issued by CSM.

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.

Statistics relating to the work of the judge, compared to the work of other judges of the same chamber or court, are attached to assessment forms. Such statistics either directly show, or allow to calculate, the above quantitative indicators (please see chapter V of the Resolution of 2007).

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.

Analysis from a qualitative point of view of the work of the judge, compared to the work of other judges of the same chamber or court, has to be included in assessment forms. Reversal rates are kept into account, although such rates are not yet the object of statistics everywhere. Grounds for reversals are not usually considered.

Chapter V of the Resolution of 2007 expressly clarifies that evaluations were kept “objective”, so as to “prevent the reexamination of judicial and investigative activities and the merits of decisions or choices relating to investigations: the evaluation of professionalism, in fact, must be designed to only assess the quality of the methodology used, since otherwise it would interfere with constitutionally recognized independence of each judge.”

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?

The present discipline is characterized by the absence of a principle of typicality of sources and documents usable for assessment. So the Resolution of 2007, in order to ensure maximum completeness of the evaluation, allowed “the use of all documents that provide objective and relevant data related to professional activity and behaviours material to the professionalism of the magistrate”. The Resolution, on the one side, provides for a procedure necessarily including some sources (e.g., statistics): among those, reports formed within the judicial hierarchy. In particular, chief judges and prosecutors, on the basis of internal reports to them by chamber presidents and adjunct chief prosecutors, send a report to local Judicial Councils, composed of magistrates elected for a 4 yr. term in each district, which on their turn make an assessment proposal, then subjected to CSM for approval.

For what concerns other sources of information, Resolution of 2007 introduces some caution: “Obviously, to avoid any possible misunderstanding, in order to protect indisputable needs of the judge under scrutiny and to guarantee the objectivity of the evaluation, the absolute prohibition of use of anonymous sources and hearsay was established. It was deemed useful to provide a detailed indication of the sources of knowledge and documentation that can be acquired during the procedure, so as to provide the bodies responsible for the professional assessment of a list of acts, in relation to each parameter, allowing proper evaluation. It was therefore made clear what the relevant documentation that can be used is: among documents found at the CSM, only data placed in the personal file of the magistrate are relevant, as well as those existing at the offices of the First Committee and at the disciplinary section, obviously if not covered by secrecy, while the relevant documentation available from the Ministry of Justice consists in the inspection reports”. Therefore, claims from citizens etc. can be used for assessment only if CSM or the Ministry has deemed them material to at least start an action protecting the functionality of the Judiciary by way of a disciplinary action or the like. Lawyers’ claim can become relevant if the Bar association has given them relevance in writing.

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)

In general, no. Obviously, some indicators must necessarily be positive (impartiality etc.).

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.

Ministry of Justice, through the clerk serving in the court, provides statistics and inspection reports. They also provide a selection of decisions, taken randomly according to criteria objectively established "ex post" by local Judicial Councils (see below). The judge is then formally asked to submit a self-assessment (see below).

On the basis of such data, Presidents of Courts provide reports (on standard assessment forms) to local Judicial Councils (a Council is also established at the Court of Cassation); these bodies are composed of judges elected for a 4-yr. term.

Judicial Councils send their assessment proposals to CSM, which may approve, amend or ask to clarify assessment.

A new source of information may come from Committees established in each district to supervise case management and flow of cases.

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

In general, no. Please see above, for what concerns judges that are subjected to different or no assessment.

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

It is a periodical process, dealt with every 4 years.

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

They are done routinely. Should an assessment be negative, the next one will be performed in a set delay (see below) and must be positive. Assessments are kept separate from investigations and other inspections, that may be performed out of any periodical basis, should discipline be at stake.

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).

Please see above for the procedure and the roles of actors. One should add that the judge submits a self-drafted report as a starting point of the evaluation procedure, by which he or she may comment on the work done, difficulties, etc. Also, the judge may add to decisions selected randomly for the purposes of evaluation other decisions of his or her choice. The evaluation is substantially done in writing. Hearings are provided for upon request, both before local Councils or CSM, should any of the indicator be not positive.

15. What are the ratings used during evaluations?

Art. 11, paragraph 9, of Legislative Decree no. n. 160/2006 provides that the assessment must be carried out analytically, with reference to each of the parameters of the assessment referred to in paragraph 2 (capability, laboriousness, diligence and commitment), without adding any further specification; legislation then only states the consequences in cases in

which the feedback referring to each of the aforementioned parameters is 'sufficient', 'insufficient' and 'seriously insufficient'. In light of this provision, the Resolution of 2007 by CSM distinguished, first, between three parameters, on one side (independence, impartiality and balance), which arguably are essential elements in the evaluation, and assessment regarding other parameters, on the other side (capability, laboriousness, diligence and commitment). The first three parameters, grouped in a single heading of the assessment form, are necessarily to be present in order for the evaluation to be positive and, should they not be, a motivation should be provided in the assessment (so the choices are "nothing to observe" or, as an alternative, an express inclusion of observations); for the other parameters, 'positive' (including sufficiency and degrees above), 'insufficient' and 'seriously insufficient' are the evaluations to be expressed in short, with motivation. The Resolution includes subparameters (see chapter VIII) and states that when some are missing the assessment is insufficient, when more are missing it is seriously insufficient.

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 Resolution states clearly the consequences of assessments:

a) *Positive Rating* . The assessment is positive when the assessment is positive in respect to all parameters examined. In this case, the judge passes the assessment, resulting in increased salary and acquisition of legitimacy to carry out higher functions (appeal judge, president of chamber, president of tribunal, etc.).

b) *Insufficient Rating*. If there are any deficiencies, in accordance with Chapter X of the Resolution, the whole assessment is not positive . In this case, after a year, the CSM conducts a new assessment of professionalism, acquiring a new opinion of the Judicial Council .

c) *Seriously Insufficient Rating*. If there are serious shortcomings within the meaning of the Chapters VIII and XI , the assessment will end with a negative opinion. In this case, the decision of CSM shall state explicitly the parameters missing and establishes whether the magistrate should eventually participate in additional training, indicating the nature and number of training initiatives, and whether the judge is unfit to carry out particular functions; in that case, CSM imposes assignment to another function until the next assessment, and decides whether exclusion should be applied from access to court or chamber president positions, or other specific functions. Copy of the decision must be forwarded to the School for the judiciary.

The CSM, in the case of a first negative assessment, proceeds to a new one two years after the expiry of the four-year period for which the assessment is given as negative. If the second evaluation is also negative, the magistrate is dismissed from service .

Against all assessments, the magistrate may request judicial review by the Regional Administrative Tribunal, the decision of which is subject to appeal before the Council of State.

For what concerns relationships between disciplinary procedures and assessment:

- 1) when a disciplinary proceeding is pending, depending on several circumstances the Resolution of 2007 establishes when the assessment is suspended necessarily and when it is suspended optionally;
- 2) when an assessment is negative, the CSM may initiate a disciplinary proceeding.

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 decision of CSM, relating to the status of the judge, is kept with no provision of any limitation, in the personal dossier of the judge; it is sent to the Minister of Justice. Access to the decision is governed by general regulations on access on public data.

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)

No.

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

An empty form is enclosed, as provided by a Resolution amending Resolution of 2007. Both Recommendations are also enclosed.

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?

Seatings of local Judicial Councils and CSM are usually public; data are accessible; guidelines are published (above mentioned Resolutions, enclosed).

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

The above mentioned rules concerning filters for use of non judicial data for evaluation represent safeguards against personalized opinions and external pressures. Judicial review is always guaranteed.

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

The described role of a self-assessment, the possibility of hearings in front of local Councils and CSM, the possibility to submit observations in writing both on local reports and Judicial Council reports, as well as judicial review guarantee full participation of the judge.

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

For self-evaluation, see above. Judicial Councils are composed of peer judges, with the addition of the president of the Court of Appeal and the local Prosecutor General.

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)

No.

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?

See above for what concerns, during the assessment proceedings, the possibility to file written observations and to request hearings. After the proceedings, judicial review is possible.

E. Achievements and problems

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

Whereas the assessment process is still criticized on the press as being too lenient (on the basis of lack of information on actual data), the Reform introduced in 2006-2007 has now realized a very serious assessment procedure, against which many judges raise opposite objections of excessive severity, especially for what concerns negative assessments based on lack of respect by the judge of acceptable time to draft decisions, which may be cause by objective difficulties in organization of courts, backlogs and excess of caseloads. A recent Resolution of CSM is now effective, by which Court Chairs may provide a judge, in order to avoid negative assessments, specific programmes to deal with backlog of cases, e.g. by suspending assignment of new cases.