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Development of Minimal Judicial Standards III

Minimum Standards regarding evaluation of
professional performance and irremovability of
members of the judiciary

Report 2012-2013



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REPORT

Project Team on Development of Minimum Judicial Standards III

0. Abstract .-

This Report describes the proposals on minimum standards regarding the specific topics considered by the Project Team during the meetings held in Rome, Paris and Istanbul (evaluation of professional performance and irremovability of judges). The proposals, that have been discussed and agreed upon by the members of the Project Team, have been classified in two chapters depending on the topic to which they refer: a) proposals for minimum standards regarding evaluation of professional performance of judges and (where relevant) prosecutors; b) proposals for minimum standards in relation to irremovability of members of the judiciary.

The work of the current Project Team is a continuation of the work undertaken by the previous ENCJ Project Teams Minimum Judicial Standards and Minimum Judicial Standards II, which drew up proposals for minimum standards on the topics of judicial recruitment, selection and appointment; judicial training and judicial ethics and subsequently identified and collected a set of indicators referred to those minimum standards previously defined, specifically in the fields of recruitment, selection, appointment and -where relevant- promotion of members of the judiciary, including those related to the competent body to decide in this area. Like in the previous reports of the ENCJ Project Teams Minimum Judicial Standards and Minimum Judicial Standards II, the proposals of minimum standards are made in the conviction that mutual confidence in the judiciary of the various European countries may be undermined by a lack of understanding of the minimum standards applied by each country in the areas of evaluation of professional performance and irremovability of judges and that the adoption of minimum standards in these fields will support the development of independent Councils for the Judiciary and contribute to the attainment of a common European judicial culture.

1. Introduction.-

1.1. Background.-

The Project Team on the “Development of Minimum Judicial Standards III” was established by the European Network of Councils for the Judiciary (ENCJ) in September 2012 as a result of the ENJC Workplan 2012-2013 approved by the General Assembly held in Dublin on 10-11 May 2012. The members of the Project Team comprised representatives of 14 member institutions (Belgium, Bulgaria, England and Wales, France, Ireland, Italy, Lithuania, the

Netherlands, Northern Ireland, Poland, Portugal, Romania, Slovenia and Spain), as well as representatives of 7 observer institutions (Austria, Germany, Finland, Hungary, Serbia, Sweden and Turkey). The Project Team was chaired and coordinated by Judge Antonio Monserrat Quintana, a member of the General Council for the Judiciary of Spain.

The Project Team was established as a continuation of the work carried out by three former ENCJ Working Groups/Project Teams, the Project Team on “Development of Minimum Judicial Standards II” and Working Groups on “Development of Minimum Judicial Standards” and “Mutual Confidence”, in accordance with the conclusions and proposals made in the two former in their Reports 2011-2012 and 2010-2011 and by the latter in its Report and Recommendations 2009-2010. On the basis of the presentations by experts during their working group meetings, the replies to a questionnaire and the discussions in the working sessions, the Working Group on Mutual Confidence had drafted a set of conclusions, which included, among others, the following:

1. The Judiciary in Europe should understand and accept its role and responsibility in developing minimum standards for the Justice Sector. A set of representative standards should be developed by the ENCJ.
2. The Judiciaries of Europe should also be prepared to take the next step for evaluating compliance with these minimum standards. These common minimum standards and their evaluation will contribute to mutual confidence. Councils for the Judiciary through the ENCJ should take the lead in this (when appropriate in cooperation with others).
3. Subjects that could be taken forward are amongst others competences/judicial appointments criteria, judicial training; process of information; judicial ethics (deontology). The process of developing these common standards is a goal in itself as well. The evaluation of these standards should be on the basis of dialogue and reciprocity recommendations stated above.

The Report of the Working Group on Mutual Confidence also contained some proposals for future action by the ENCJ, including:

1. The ENCJ should develop a set of representative minimum standards for the Justice Sector.
2. The ENCJ should study the feasibility of evaluating the compliance with these minimum standards. These standards should be evaluated on the basis of dialogue and reciprocity.

For the purpose of drawing up the current report and its appendix (questionnaire) the Project Team held a kick-off meeting in Brussels on September 17 & 18, 2012 (together with other Project Teams established by the European Network of Councils for the Judiciary following the implementation plan for the period 2012-2013) and three additional meetings: in

Rome on December 3 & 4, 2012, in Paris on February 4 & 5, 2013 and in Istanbul on April 8 & 9, 2013.

During the kick-off meeting, the members of the Project Team discussed the goal of the project and the methodology to be followed. The members of the Project Team agreed to describe the main goal of the Project as the identification “of relevant minimum standards in the field of assessment of professional performance and irremovability of judges and prosecutors, in order to make it possible to evaluate those standards at a later stage by means of a set of indicators to be used as a tool for self-evaluation of the different judicial systems”, thus increasing “mutual confidence among judges and prosecutors from different jurisdictions within the EU as a contribution to the achievement of a European common judicial culture”. It was also agreed that, to further complete the work (of the previous Project Teams on Development of Minimum Standards), the Project Team would “carry out an in depth assessment of the professional performance by means of the identification of minimum standards and indicators applicable to judges (and prosecutors) within the judicial system in the context of the independence and irremovability of judges”, so that the standards and indicators could “become a tool to optimise the performance of the judges and prosecutors on the one hand and ensure mutual confidence in the judiciary of the various European countries on the other”.

Regarding the methodology and activities to be undertaken by the Project Team it was decided to structure these activities in the following way:

- 1) Collection of information by means of a questionnaire addressed to the Councils for the Judiciary represented in the Project Team and to other ENCJ members and observers. This questionnaire will complete and update the information already collected by the ENCJ in the context of the previous Projects on evaluation of judges, 2005, and performance management, 2006-2007, bearing in mind the expansion of the ENCJ membership and the legal reforms implemented in the different European jurisdictions since that time.
- 2) Analysis of the information collected in connection with each of the topics dealt with by the Project Team, considering any relevant information about existing reports or opinions issued by judicial unions and associations.
- 3) Discussions during the several meetings of the Project Team over the information collected from the Councils for the Judiciary. Discussions will be held during each of the meetings of the Project team focusing on each of the topics consecutively (standards for evaluation of professional performance of judges and prosecutors and standards concerning irremovability of judges).

The draft Project Fiche resulting from the discussions of the Project Team was presented by the coordinator of the working group, Judge Antonio Monserrat, during the plenary session of the Project Teams held on 18 September, 2012.

The Report will be presented at the General Assembly of the ENCJ on 6-7 June 2013.

1.2. The Report

The aim of the Report is to describe the proposals on minimum standards regarding the specific topics considered, which have been discussed and agreed upon by the members of the Project Team during the meetings held in Rome, Paris and Istanbul. The proposals of minimum standards have been classified in two chapters depending on the topic to which they refer.

Chapter 2 describes proposals for minimum standards regarding the evaluation of professional performance of judges and/or (where relevant) prosecutors. The proposals in this field have been included in four separate sub-chapters and take into account the two basic types of systems of evaluation of professional performance of judges identified by the Project Team: formal and informal systems of evaluation. The first sub-chapter (2.1) describes proposals for minimum standards on potential aims of the systems of evaluation. The second sub-chapter (2.2) deals with the proposals for minimum standards in relation to the criteria applied to the evaluation of professional performance, whereas the third (2.3) and fourth (2.4) sub-chapters are focused on the proposals for minimum standards regarding the competent body to conduct the evaluation of professional performance and the process for the evaluation of professional performance.

Chapter 3 of the Report explains proposals for minimum standards in relation to irremovability of judges and/or prosecutors

The work of the Project Team has centred on the conviction that mutual confidence in the judiciary of the various European countries can be enhanced by a better knowledge and understanding of the minimum standards applied in other jurisdictions as regards human resources management. Previously the Project Teams on Development of Minimum Judicial Standards made proposals for minimum standards in the field of recruitment, selection, appointment and (where relevant) promotion of members of the judiciary. To further complete this work, the present Project Team has carried out an in depth assessment of the professional performance by means of the identification of minimum standards and indicators applicable to judges (and prosecutors) within the judicial system in the context of the independence and irremovability of judges. The standards and indicators can become a tool to

optimise the performance of the judges and prosecutors on the one hand and ensure mutual confidence in the judiciary of the various European countries on the other. The members of the Project Team are also convinced that the adoption of minimum standards in these fields will support the development of independent Councils for the Judiciary, encourage timeliness, promote public confidence in both national and transnational judicial institutions and increase mutual confidence among judges from the different jurisdictions within the EU, thus contributing to the attainment of a common European judicial culture. Furthermore, it has to be taken into account that the issue of evaluation of professional performance of judges has been partially dealt with by the Opinion No.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (V.B at §§ 52 to 56) and by the Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Quality of Judicial Decisions.

1.3. The Questionnaire

In order to discuss and make proposals for minimum standards the Project Team decided to collect information on relevant national standards in the areas of evaluation of professional performance of judges and/or prosecutors and irremovability of judges and/or prosecutors from Councils for the Judiciary represented in the Project Team and from other ENCJ members and observers. The information was collected through a questionnaire on a series of topics, which was answered by the members of the Project Team and other ENCJ members and observers. The responses to the questionnaire and the additional documentation provided have been collected in a questionnaire report (which classifies by topics the information provided by each country), which is available on the web-site of the ENCJ and should be considered as a complement to this Report.

The Questionnaire provides detailed information on national standards regarding the different topics subject to analysis and subsequent proposals for minimum standards by the Project Team. The information covers the two main topics analysed by the Project Team (evaluation of professional performance and irremovability of judges) and responds to the following questions:

- a) Whether the respective legal systems have established any mechanism (formal or informal) for the evaluation of the professional performance of judges and/or (where relevant) of prosecutors.

- b) The aims of the system of evaluation of the professional performance of judges and/or (where relevant) of prosecutors if such mechanisms exist.
- c) The criteria (qualitative and/or quantitative) and eventually the indicators applied in each legal system for the evaluation of the professional performance of judges and/or (where relevant) of prosecutors.
- d) Whether there is any reference to data on the overall number of cases dealt with by the single judge/prosecutor and by the court/prosecutor's office to which they belong in the evaluation of the work and professional performance of judges and/or prosecutors.
- e) The competent body in each legal system in order to conduct the evaluation of the professional performance of judges and/or (where relevant) of prosecutors, including the composition of this body and the role played by the Ministry of Justice, the Council for the Judiciary, the Chief Prosecutor or Chairman of the Court, etc. in the process of evaluation.
- f) The competent body for the inspection of courts and/or prosecutors' offices, and the role played by the competent body in the field of judicial inspection concerning the evaluation of the professional performance of judges and/or prosecutors.
- g) The level of dependence of the body responsible for the inspection of courts and/or prosecutor's offices upon the respective Council for the Judiciary, the Supreme Court or the Executive (government).
- h) The procedure envisaged in each legal system in order to conduct the evaluation of the professional performance of judges and/or (where relevant) prosecutors.
- i) The involvement of the individual judges (and/or prosecutors) in the process of evaluation of professional performance, including the entitlement to be heard in the context of the proceedings.
- j) The judge's (or prosecutor's) entitlement to challenge/appeal the decision or findings issued in the context of the evaluation process and the body with jurisdiction to decide on the challenge/appeal.
- k) The safeguards in force in order to guarantee that the process for evaluation of professional performance of judges and/or (where relevant) of prosecutors is consistent with the principle of judicial independence.

- l) The consideration given to the merit of judicial decisions issued by the judges/prosecutors subject to evaluation, both in relation to the specific content of the ruling and to the outcome of subsequent levels of appeal of the decision.
- m) The relevance of the process for the evaluation of the professional performance of judges and/or (where relevant) of prosecutors in its different levels in terms of defining the professional career of the judges/prosecutors subject to evaluation.
- n) Whether the principle of irremovability of judges and/or prosecutors is enshrined in the Constitution or in any piece of primary legislation in each legal system.
- o) The specific safeguards of the principle of irremovability of judges and/or prosecutors in each legal system, and the way these safeguards operate in the context of the disciplinary process or transfer process of judges and/or prosecutors.
- p) The specific grounds for removal of judges and/or prosecutors from their offices in each legal system, and whether these grounds are related to disciplinary measures, to the evaluation of professional performance of judges and/or prosecutors, or to other circumstances (such as connection to the parties, advocates, other judges of the court, etc.).

The Questionnaire contains detailed information on these topics, including a description of the current status in each country and -in some cases- of the relevant initiatives already undertaken or to be undertaken in the fields subject to analysis, thus providing an overview of the situation in the countries concerned. Nevertheless, the aim of the Questionnaire was mainly as a guide -an easy reference- for seeking further information and not as a thorough comparison of the position in each jurisdiction on each topic. Furthermore, some contributions contained very detailed information on specific topics, whereas others did not. As a consequence, the contributions on each issue in the Questionnaire are various in style, length and number. When reading the Questionnaire the reader should keep this in mind, since the fact that some members left out information on an issue in the Questionnaire does not imply that the country in question does not have a regulation or a policy similar to that described in contributions from other countries. Further, more detailed information regarding the topics subject to analysis by the Project Team could be provided through the relevant national institution (whether the Council for the Judiciary, Court Administration or Ministry of Justice). On the other hand, keeping in mind that the aim of the ENCJ is to share experience between members and observers, the Project Team suggests that the Questionnaire could be completed with information from members and observers of the ENCJ who have not yet responded and also updated by the responding countries on a regular basis.

2. Proposals of Minimum Standards regarding evaluation of professional performance of judges and (where relevant) prosecutors.-

As a result of the activities of the Project Team two basic types of systems of evaluation of professional performance of members of the judiciary among European countries have been identified: formal and informal systems of evaluation. The evaluation of professional performance of judges in Common Law jurisdictions (England and Wales, Ireland, Northern Ireland, Scotland, Cyprus, Malta) and in some other countries (such as Norway, Sweden and the Netherlands) tends to be made in an informal way, which excludes a formal bureaucratic and predetermined procedure where a previously defined body with responsibilities in this area issues a decision on the professional performance of the judge subject to evaluation. In these jurisdictions, as regards professional (salaried) judges, there is within the courts and tribunals a judicial hierarchy under the head of the judiciary, who normally has sole responsibility for governance. This structure involves senior judges discharging management and mentoring responsibilities which inevitably lead to notice being taken of a judge's strengths and weaknesses. Knowledge of a judge's performance may lead to informal guidance or may be used to support references which may be provided for the bodies responsible for judicial appointments when dealing with a judge's application for other judicial office. Thus, the evaluation of judiciary is an informal process mainly undertaken through mentoring by the head of the judiciary and the senior presiding judges. The head of the judiciary normally sets published "standards" of performance in relation to the progression of cases across the various court tiers and main types of business which all judges endeavour to follow. The head of the judiciary may even review the relevant judicial statistics on a regular basis and may if he thinks necessary raise any issues of concern. The head of the judiciary may also receive regular audit reports on the accuracy of court records and sentencing decisions in the most complex areas of sentencing. If any concerns are identified the head of the judiciary may even speak to the relevant senior presiding judge or the tutor judge for the judicial training centre (Judicial Studies Board or Judicial College) to consider if any particular training would be helpful. Besides, there are a number of Judicial Committees which also monitor the throughput of judicial business and which would take an overview on general performance and report to the head of the judiciary as necessary. In these jurisdictions the judicial training centre (Judicial Studies Board, Judicial College) is also a forum in which judges can learn from each other and develop best practices across a range of court issues from the ranks of experienced legal practitioners (senior judges, advocates, solicitors, prosecutors, certain categories of civil servants, etc.). This informal system works well in small jurisdictions where the number of professional (salaried) judges is reduced and all the judges tend to be known personally to each other and to the head of the judiciary. The informal system of evaluation is

also consistent with one of the key features of Common Law judicial systems, where most professional (salaried) judges have been senior practitioners appointed to particular posts and remain in those posts until retirement, and in other jurisdictions, where a substantial number of judges belong to this category.

However, in recent years in many Common Law jurisdictions newly appointed judges are becoming considerably younger than before, because of the need to reflect equality and diversity within the judiciary. This factor, together with the emergence of the concept of a judicial career, involving progression and changes in jurisdiction, calls for some kind of evaluation to support it. Thus, for instance, some Common Law jurisdictions (e.g. England and Wales) are in the process of developing more formal systems of evaluation of professional performance that apply to some part-time judicial office holders represented mainly by fee-paid judges on the District Bench, in tribunals and lay Justices of the Peace (magistrates). During the first year of an appointment as a fee-paid judge in tribunals the system is geared to formal training and mentoring with no formal assessment. There is then an appraisal after this first year and again every third year or within shorter periods if there are concerns about the judge's performance. The triennial appraisals are carried out alternately by the salaried judge with responsibility in the fee-paid judge's locality and the next one by a different salaried judge. A similar scheme for professional evaluation, with a less rigid timetable, applies to fee-paid judges sitting on the District Bench. As regards magistrates, there has been a formal structure of mentoring and appraisal for magistrates for at least ten years. On appointment each magistrate is assigned to a mentor who supports them through at least the first year of sitting and must undergo an appraisal to consider if they are suitable to continue to sit. Thereafter magistrates are appraised every three years at whatever level they sit. To this purpose each bench has a Bench Training and Development Committee (BTDC) responsible for the training, mentoring and appraisal of magistrates and this committee decides whether individual magistrates are capable of being appointed as presiding magistrates.

In the same vein, in Scandinavian countries the evaluation of professional performance of members of the judiciary is done through informal models for voluntary evaluation among judges themselves on how to perform in a court hearing (such as the one worked out by the Norwegian Courts Administration) or through informal dialogues between judges and heads of courts (or other person with this delegated responsibility) in order to set performance targets and wages ("goal setting dialogue" or *medarbetarsamtal*; "wage setting dialogue" or *lönesättande samtal*), like in Sweden.

On the other hand, European continental countries in line with the tradition of Civil Law (for instance, Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Spain and Turkey) have developed formal and complex mechanisms for

the evaluation of the professional performance of judges (and often also of prosecutors), the basis of which tend to be regulated in primary legislation further developed in internal regulations of the respective Council for the Judiciary or Ministry of Justice. In all these jurisdictions the evaluation of judges' professional performance is made on a periodical basis through highly formalized procedures that normally entail a set of guarantees for the judge subject to evaluation and that lead to a decision assessing the professional performance against a set of criteria previously defined. This decision is issued by the competent body in order to conduct the evaluation (the Council for the Judiciary, the heads of the respective court or prosecutor's office, panels of judges, special evaluation commissions) and in some cases it can even be subject to challenge or appeal by the evaluated judge.

The differences in the two basic types of systems of evaluation of professional performance of members of the judiciary must be born in mind when trying to define minimum standards in this area, since most of the standards must refer necessarily to formal systems of evaluation of professional performance, where the determination of most of the aspects of the system (such, as criteria for the evaluation, methodology, procedure, competent body, entitlement to challenge or appeal) by a previously established legal framework (basic legislation and internal regulations) calls for the identification of some common or minimum standards. **Informal systems of evaluation of professional performance are, by essence, less adjustable to a set of minimum standards,** although they nevertheless offer effective checks and controls on the professional capacities of each and every member of the judiciary.

There are, however, some areas where the formulation of a minimum standard corresponds to a common ground shared by the two basic types of systems. **All systems of evaluation share the common premise that the professionalism of the judge represents both the main source of legitimacy of the judicial function and a strong guarantee of its independence.** The identification of potential aims of the systems of evaluation of professional performance is other of these areas.

2.1 Potential aims of the systems of evaluation.-

Irrespective of the specificities of each system of evaluation of professional performance of judges, **the following potential aims of the system of evaluation of professional performance have been agreed upon by the members of the Project Team:**

a) To improve the efficiency of the judicial systems. This specific aim links evaluation of professional performance of judges with the systemic evaluation of the judicial systems.

b) To safeguard of professional quality of judges, in order to improve the service provided by the judicial systems to the public.

c) Skill development of judges, including continuing training if this appears to be necessary in view of the outcome of the evaluation.

d) To prevent problems and malfunctions of the judicial systems.

e) To improve the motivation and satisfaction of judges in the development of their professional activities.

f) To improve management and leadership abilities within the judiciary and, indirectly, judicial accountability and public confidence in the judicial systems.

There are some additional potential aims of the evaluation of professional performance where it has not been possible to come to a full agreement on proposals for minimum standards, most notably where the practices of the various countries or jurisdictions differ significantly. This is true, for instance, for such aims as determining or mitigating the disciplinary liability of judges for delays (an aim that applies to the Spanish system of evaluation, where the disciplinary liability for delays of judges who achieve the predetermined performance targets is normally discarded or mitigated taking into account the fact that standards of performance defined by the Council for the Judiciary have been met) or enhancing the transparency of the judicial system. This potential aim is not a common to all jurisdictions represented in the Project Team, since in some jurisdictions the process of evaluation includes sensible information or data pertaining to members of the judiciary that cannot be published or disclosed to the public.

2.2 Criteria applied to the evaluation of professional performance.-

Mechanisms of evaluation of professional performance of judges should ensure the preparation and competence of judges through the substantive verification that the judge subject to evaluation possesses a professional background suited to the exercise of judicial functions. The actual adequate cultural background, in any case, must be treated as an indispensable requirement for tenure in the judiciary, and must be verified by means of the evaluation procedures. The verification also needs to address the capability of the judge (or public prosecutor) to perform the judicial functions with balance, independence, autonomy and impartiality. It may also take into consideration the functional contributions made by the judge (or prosecutor) to the court or office where he/she sits, in reference to the quality of the judicial work and the contribution to the resolution of organizational issues.

Consequently, **the criteria for the evaluation of professional performance of judges should be varied and comprehensive, including quantitative and qualitative indicators, in order to allow a full and deep assessment of the professional performance of judges.** The criteria used for the evaluation of professional performance in some of the jurisdictions represented in the Project Team, include, for instance, the efficiency and effectiveness of the actions taken in the exercise of judicial functions; the ability to organize the judicial work in identifying issues or carrying out other tasks and functions; the managerial culture, including the personal culture and culture of the work organization; the respect for the rights of the parties or the participants of proceedings while hearing the case or carrying out other tasks and functions; the manner of formulating statements on the issue and the reasoning of decisions; the process of professional development, including the compliance with training and development targets (keeping abreast of legal issues, new legislation, case law etc., expected attendance of continuing training activities, even if the attendance is not mandatory for the evaluated judge); the compliance with proper standards of courtesy and consideration towards judicial colleagues, court staff, lawyers, witnesses, victims and vulnerable parties, persons without legal representation, members of the public, etc.; and the compliance with performance targets set by the head of the judiciary, the council for the judiciary or the competent body in this area (taking account of the volume and complexity of the workload of the judge in question).

The issue of the examination in the context of the evaluation of professional performance of the contents of the decisions and rulings made in the exercise of the judicial functions is controversial, since the consideration of the merits of the decision concerning the assessment of evidence, the establishment of the facts and the interpretation of the law can transform the process of evaluation of professional performance into an audit of the decisions, thus undermining the independence and autonomy of the judge (or public prosecutor) in question. In this respect, Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) on the Quality of Judicial Decisions stresses the “basic principle that the assessment of the intrinsic quality of each judicial decision should only take place through the exercise of rights of recourse established by the law” (...) which “is a key consequence of the constitutional guarantee of independence of judges, regarded as one of the main features of the Rule of Law in democratic societies” (§ 5). The merits of individual judicial decisions are primarily controlled by the appeal or review procedures available in the respective national legal systems and eventually by the right of access to the European Court of Human Rights. Therefore, **any method of evaluating professional performance on basis of the quality of judicial decisions should not interfere with the independence of the judiciary either as a whole or on an individual basis.** The assessment of the quality of the judicial decisions in the

context of the evaluation of professional performance should be focused on the formal adequacy of those decisions and take into account the different types and levels of courts, the different kinds of disputes and the differing skills and expertise required to resolve them, in order to prevent judges from reaching their decision on the substance of a case in a uniform way, without taking into account the circumstances peculiar to each case. In other words, **the activities and decisions of judges should be evaluated strictly in accordance with the principle of the judicial independence without checking the legitimacy and validity of separate procedural decisions.**

The quantitative statistical criteria of evaluation of professional performance of judges involve taking statistics at the level of each judge or court (such as statistics on decided cases, pending cases, number of decisions issued, number of hearings or other procedural actions in each case, cancelled or adjourned hearings, the length of proceedings, etc.) and are used in some legal systems as the basic method for professional evaluation (e.g. Spain). **The quantity of the work done by a judge can be one of the criteria utilised in the evaluation of judicial performance**, and is in fact an important factor taken into account in most formal systems of evaluation. Besides, the work done by the courts is one of the tools available for measuring the capability of the administration of justice to meet citizens' needs, which is one of the key indicators of the quality of justice. However, quantitative statistical criteria alone can be insufficient to assess whether the actual professional performance of judge is of satisfactory quality and must therefore always be placed in context. **This method of evaluation of professional performance nonetheless allows an assessment of whether cases have been handled within an appropriate timeframe, or whether a backlog exists that may justify the allocation of additional resources and the taking of measures aiming at its reduction or elimination.** Quantitative statistical criteria can be complemented by qualitative statistical methods that classify decisions according to their type, subject and complexity. This methodology is followed in some of the jurisdiction represented in the Project Team (e.g. Spain) and allows a weighting of different types of cases in order to establish an efficient and correct distribution of work and the minimum and the maximum workload that can be expected from a judge or court. A feature of this methodology is that it takes into account the specificities of certain cases or types of matters, so as to make allowance for those where, although the number of decisions given is limited, a considerable amount of work is involved. The difficulty about qualitative statistical assessment lies, however, in defining which factors to take into account and in determining whether the authorities in charge of professional evaluation of judges are also competent to establish them.

Finally, the members of the Project Team also discussed whether the statistical information on the number of successful appeals can be a reliable quality indicator for the

professional evaluation of judges sitting in first instance courts, since this criterion is used in some of the jurisdictions represented in the Project Team (for instance Bulgaria, Lithuania or Romania). The conclusion reached is that **the rate of success of the appeals against decision should be used cautiously as one of the various criteria for the evaluation of professional performance, since it does necessarily reflect the quality of the decisions subject to appeal** (a successful appeal can be no more than a different evaluation of a difficult point of fact or law by the appeal judge, whose decision might itself have been set aside had the matter gone to a yet higher court) and might be perceived by first instance judges as an obstacle to the development of the case-law.

2.3 Competent body to conduct the evaluation of professional performance.-

In order to avoid political influence, **the procedures for the evaluation of professional performance of judges or (where relevant) prosecutors, ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved.** The membership of this body should comprise a majority of individuals independent of government influence. **The body in charge of evaluation of professional performance of judges could be the appropriate national Council for the Judiciary¹ (or a specific committee or department within the Council for the Judiciary), independent national or regional evaluation boards or committees, or the heads of the appropriate courts (or prosecution offices) or even the head of the judiciary.** The latter proposals would seem appropriate in those jurisdictions where a body such as the Council for the Judiciary does not exist but where other independent and autonomous bodies have the necessary competence for the administration and financial management of the courts and/or for the appointment and career of judges. It was furthermore agreed by the members of the Project Team that **the Ministry of Justice as a body of the executive branch of power should not directly deal with the evaluation of professional performance of individual judges as a unique body of evaluation, since it could pose a threat to judicial independence.**

The body in charge of the evaluation of professional performance of judges must be provided with the adequate resources to a level commensurate with the programme of work it

¹ Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) on the Quality of Judicial Decisions at § 48 states that *"national or international bodies in charge of the evaluation of judicial decisions should be composed of members who are fully independent of the executive power. In order to avoid any pressure, in the states where a Council for the Judiciary exists, this Council should be entrusted with the evaluation of the quality of decisions"*. Likewise, Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) on the Council for the Judiciary at the service of society recommends *"that the Council for the Judiciary ensures that the following tasks, to be performed preferably by the Council itself, or in cooperation with other bodies, are fulfilled in an independent manner: (...) § the evaluation of judges (see point V.B)"*.

is expected to undertake each year and must have independent control over its own budget, subject to the usual requirements as to audit. On the other hand, in order to guarantee that the system of evaluation of professional performance is independent, fair, open and transparent (see § 2.4), the body must create a sufficient record in relation to each judge subject to evaluation to ensure that there is a verifiably independent, open, fair and transparent process and to guarantee the effectiveness of the independent complaints or challenge process to which any evaluated judge should be entitled if he or she believes that s/he was unfairly treated in the evaluation process. If the Council for the Judiciary is the body in charge of the evaluation of judicial performance, data collection and processing and the other stages of the evaluation process should be undertaken by departments other than those responsible for judicial discipline, although it is acceptable that the department of judicial inspection under the Council for the Judiciary (independent from the Ministry of Justice) gets involved in the process of professional evaluation (as is the case in Portugal or Spain).

2.4 Process for the evaluation of professional performance.-

As it has already been stated in the Final Report Project Team on Development of Minimum Judicial Standards 2010-2011 (at 2.1), **the process of evaluation of professional performance of judges must be conducted according to the same criteria and with the same guarantees as those provided for the initial selection and appointment process of judges (and prosecutors, where relevant): it should be independent of political influence, fair in its assessment procedures, open to all members of the judiciary and transparent in terms of public scrutiny.** Moreover, **the process should be based on the judge's past professional performance, using different sources of reliable information** (for instance, the information provided by the head of offices/most senior judge where the evaluated judges performed his or her functions, or based on the analysis of the judicial decisions or other data related to the quantity and quality of the individual judge's performance). Information or evidence introduced by representatives of other legal professional categories (lawyers, for instance) may also be considered in the context of the professional evaluation procedure, as long as it has been gathered in a transparent manner and communicated to the interested party.

In case of a formal mechanism or system of evaluation of professional performance there is a need for a specific, formal procedure, whose basic rules should be established by primary legislation. The Council for the Judiciary or other body in charge of conducting the evaluation should have the power to adopt internal regulations on the secondary aspects of the process of evaluation. The procedure for evaluation of the activities of judges should comply with the principles of legal certainty and efficiency, and provide conditions for a

comprehensive and objective assessment of the judges' professional activities. **The legal acts and regulations concerning the evaluation of the performance of judges should stipulate in a clear and exhaustive manner all the relevant aspects pertaining to the evaluation**, such as: the frequency of evaluation of the activities of judges; the grounds for the extraordinary evaluation of the activities of judges, in case this extraordinary evaluation is envisaged in the respective legal system; the methodology, duration and procedure of evaluation of professional performance of judges, including the criteria of evaluation; the methods for gathering the data and information required for the evaluation; the rights of the judge subject to evaluation in the context of the evaluation process, including the possibility of challenge or appeal against the decision issued by the competent body; the possible outcomes of the evaluation together with its consequences concerning the subsequent performance of functions or the career development, the economic benefits, or the imposition of specific obligations related to the identified professional needs or shortages (additional professional training, for instance). In addition, **the procedure for evaluation (particularly if it is a formal one) should allow for the judge (or public prosecutor) in question to have access to the documents being examined and to actively participate or be heard in the process by expressing his/her own point of view about his/her professional performance and commenting on any critical remarks**. This could be done in writing (by way of a report on the professional activities developed by the judge subject to evaluation) or orally (by means of an interview in the context of the evaluation procedure). In summary, the judge should be treated as a subject, not as an object of evaluation.

Any judge subject to the evaluation of professional performance is entitled to know the outcome of the evaluation, especially if the decision on the evaluation entails negative consequences for the judge in terms of professional career, economic benefits, or the imposition of specific obligations. That implies the need for an independent complaints' or challenge process to which any judge subject to evaluation may turn if he or she believes that s/he was unfairly treated in the evaluation process. The body with jurisdiction to decide on the complaint or challenge by any judges subject to evaluation must be able to examine the evaluation process applied and to determine whether there was any unfairness shown to the evaluated judge.

3. Proposals of Minimum Standards regarding irremovability of judges.-

The importance of judicial irremovability in connection with the principle of judicial independence has been recognised in international instruments such as the UN Basic Principles on the Independence of the Judiciary, adopted in 1985, Recommendation No. R (94)

12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges, and the European Charter on the Statute for Judges (1998). It is one of the topics dealt with by Opinion No 1 (2001) of the Consultative Council of European judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges (adopted in Strasbourg, on 23 November 2001). This document recognises the judiciary as *"one of three basic and equal pillars in the modern democratic state"*, states that *"judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial"* and stresses that judicial independence is not a prerogative or privilege in the own interests of judges, *"but in the interests of the rule of law and of those seeking and expecting justice"* (at §§ 10 and 11). Judicial independence must exist in relation to society generally and to the particular parties to any dispute which judges have to adjudicate. It also requires a general institutional framework and guarantees securing judicial independence in society. Irremovability of judges is one of these guarantees, so as to be considered an express element of the principle of judicial independence.

Consistent with Opinion No 1 (2001) of the Consultative Council of European judges (CCJE), the Project Team shares the view that irremovability of judges is an ingredient of the principle of judicial independence and should be enshrined at the highest level in the domestic legislation. In fact, in most of the jurisdictions represented in the Project Team (and in other ENCJ members and observers) irremovability of judges is part of the Constitution or, failing that, of primary legislation regarding the Judiciary (like in the Czech Republic or in Slovenia). Even in those common law jurisdictions that do not have written constitution judicial irremovability is among the fundamental constitutional principles and the subsequent guarantees for tenure of judicial offices are enshrined in primary legislation with constitutional relevance (e.g. Act of Settlement 1701 and Constitutional Reform Act 2005 in England and Wales; Scotland Act 1998 in Scotland).

The members of the Project Team also agree that it is a fundamental consequence of judicial irremovability that tenure in a judicial office must be guaranteed until the mandatory retirement age or the expiry of a fixed term of office (in case of temporary appointments). In addition, **the principle of irremovability extends to the appointment or assignment of a judge to a different office or location without his/her consent (i.e. a judge may not be transferred to a different post or switched to other functions without his/her consent.** Nonetheless, there are acceptable exceptions to this general rule when a mandatory transfer of a judge to other duties, court or location has been ordered under specific circumstances as determined by law or otherwise established in a general, abstract manner, including by way of disciplinary sanction or in cases of ascertained inability to

perform the judicial functions at the current post in an adequate, independent and impartial manner. This could result, for instance, from disciplinary proceedings that establish improper and unlawful conduct by said judge in that post. It could also result from the presence of objective non-unlawful circumstances that raise questions about the impartiality in the exercise of the judicial function in the office (e.g., personal relationships or kinship with lawyers or other judges who deal with the same cases).

The irremovability rule may therefore be outweighed by important reasons connected to the best functioning of the judicial offices as a public interest. In other words, judicial irremovability should be understood and applied in accordance with the public interest or the public service of justice, the aims of professional evaluation, and the human resource policy regarding the judiciary. In any case **the principle of irremovability renders it imperative that the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external influences and whose decisions are subject to challenge or review.** This helps prevent the authorities from having the power to transfer a judge against his/her will as a means of threatening judicial autonomy and decision-making independence.

The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, immediately leads to consideration concerning the body, the process and the grounds upon which judges may be disciplined. **There is a need for a definition of disciplinary offences for which a judge may be removed from office and for disciplinary procedures to comply with the due process requirements, including the possibility of challenge, appeal or judicial review against the decision issued by the competent body in the area of judicial discipline.** Moreover the procedures for judicial discipline and the power to impose disciplinary sanctions that may lead to the removal from a judicial office ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved. **This independent body in charge of judicial discipline could be the appropriate national Council for the Judiciary (or a specific disciplinary committee or department within the Council for the Judiciary), independent national or regional disciplinary boards or committees, the heads of the appropriate courts or even the head of the judiciary.**

4. Summary of proposals

Proposals of Minimum Standards regarding evaluation of professional performance of judges and (where relevant) prosecutors.-

- 4.1.** As a result of the activities of the Project Team two basic types of systems of evaluation of professional performance of members of the judiciary among European countries have been identified: formal and informal systems of evaluation. The evaluation of professional performance of judges in Common Law jurisdictions (England and Wales, Ireland, Northern Ireland, Scotland, Cyprus, Malta) and in some other countries (such as Norway, Sweden and the Netherlands) tends to be made in an informal way, which excludes a formal bureaucratic and predetermined procedure where a previously defined body with responsibilities in this area issues a decision on the professional performance of the judge subject to evaluation.
- 4.2.** On the other hand, European continental countries in line with the tradition of Civil Law (for instance, Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Spain and Turkey) have developed formal and complex mechanisms for the evaluation of the professional performance of judges (and often also of prosecutors), the basis of which tend to be regulated in primary legislation further developed in internal regulations of the respective Council for the Judiciary or Ministry of Justice. The differences in the two basic types of systems of evaluation of professional performance of members of the judiciary must be born in mind when trying to define minimum standards in this area, since most of the standards must refer necessarily to formal systems of evaluation of professional performance.
- 4.3.** Informal systems of evaluation of professional performance are, by essence, less adjustable to a set of minimum standards.
- 4.4.** All systems of evaluation share the common premise that the professionalism of the judge represents both the main source of legitimacy of the judicial function and a strong guarantee of its independence.

Potential aims of the systems of evaluation.-

- 4.5.** The following potential aims of the system of evaluation of professional performance have been agreed upon by the members of the Project Team:
 - a) To improve the efficiency of the judicial systems.
 - b) To safeguard of professional quality of judges, in order to improve the service provided by the judicial systems to the public.
 - c) Skill development of judges, including continuing training if this appears to be necessary in view of the outcome of the evaluation.
 - d) To prevent problems and malfunctions of the judicial systems.
 - e) To improve the motivation and satisfaction of judges in the development of their professional activities.
 - f) To improve management and leadership abilities within the judiciary and, indirectly, judicial accountability and public confidence in the judicial systems.

Criteria applied to the evaluation of professional performance.-

- 4.7.** Mechanisms of evaluation of professional performance of judges should ensure the preparation and competence of judges through the substantive verification that the judge subject to evaluation possesses a professional background suited to the exercise of judicial functions.
- 4.8.** The criteria for the evaluation of professional performance of judges should be varied and comprehensive, including quantitative and qualitative indicators, in order to allow a full and deep assessment of the professional performance of judges.
- 4.9.** Any method of evaluating professional performance on basis of the quality of judicial decisions should not interfere with the independence of the judiciary either as a whole or on an individual basis.
- 4.10.** The activities and decisions of judges should be evaluated strictly in accordance with the principle of the judicial independence without checking the legitimacy and validity of separate procedural decisions.
- 4.11.** The quantity of the work done by a judge can be one of the criteria utilised in the evaluation of judicial performance. This method of evaluation of professional performance allows an assessment of whether cases have been handled within an appropriate timeframe, or whether a backlog exists that may justify the allocation of additional resources and the taking of measures aiming at its reduction or elimination.
- 4.12.** The rate of success of the appeals against decision should be used cautiously as one of the various criteria for the evaluation of professional performance, since it does not necessarily reflect the quality of the decisions subject to appeal.

Competent body to conduct the evaluation of professional performance.-

- 4.13.** The procedures for the evaluation of professional performance of judges or (where relevant) prosecutors, ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved.
- 4.14.** The body in charge of evaluation of professional performance of judges could be the appropriate national Council for the Judiciary (or a specific committee or department within the Council for the Judiciary), independent national or regional evaluation boards or committees, or the heads of the appropriate courts (or prosecution offices) or even the head of the judiciary.
- 4.15.** The Ministry of Justice as a body of the executive branch of power should not directly deal with the evaluation of professional performance of individual judges as a unique body of evaluation, since it could pose a threat to judicial independence.

Process for the evaluation of professional performance.-

- 4.16.** The process of evaluation of professional performance of judges must be conducted according to the same criteria and with the same guarantees as those provided for the initial selection and appointment process of judges (and prosecutors, where relevant): it should be independent of political influence, fair in its assessment procedures, open to all members of the judiciary and transparent in terms of public scrutiny. Moreover, the process should be based on the judge's past professional performance, using different sources of reliable information.
- 4.17.** In case of a formal mechanism or system of evaluation of professional performance there is a need for a specific, formal procedure, whose basic rules should be established by primary legislation.
- 4.18.** The legal acts and regulations concerning the evaluation of the performance of judges should stipulate in a clear and exhaustive manner all the relevant aspects pertaining to the evaluation.
- 4.19.** The procedure for evaluation (particularly if it is a formal one) should allow for the judge (or public prosecutor) in question to have access to the documents being examined and to actively participate or be heard in the process by expressing his/her own point of view about his/her professional performance and commenting on any critical remarks.
- 4.20.** Any judge subject to the evaluation of professional performance is entitled to know the outcome of the evaluation, especially if the decision on the evaluation entails negative consequences for the judge in terms of professional career, economic benefits, or the imposition of specific obligations. That implies the need for an independent complaints' or challenge process to which any judge subject to evaluation may turn if he or she believes that s/he was unfairly treated in the evaluation process.
- 4.21.** The principle of irremovability extends to the appointment or assignment of a judge to a different office or location without his/her consent (i.e. a judge may not be transferred to a different post or switched to other functions without his/her consent. Nonetheless, there are acceptable exceptions to this general rule when a mandatory transfer of a judge to other duties, court or location has been ordered under specific circumstances as determined by law or otherwise established in a general, abstract manner, including by way of disciplinary sanction or in cases of ascertained inability to perform the judicial functions at the current post in an adequate, independent and impartial manner. The principle of irremovability renders it imperative that the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external influences and whose decisions are subject to challenge or review.
- 4.22.** There is a need for a definition of disciplinary offences for which a judge may be removed from office and for disciplinary procedures to comply with the due process requirements, including the possibility of challenge, appeal or judicial review against the decision issued by the competent body in the area of judicial discipline.
- 4.23.** This independent body in charge of judicial discipline could be the appropriate national Council for the Judiciary (or a specific disciplinary committee or department within the Council for the Judiciary), independent national or regional disciplinary boards or committees, the heads of the appropriate courts or even the head of the judiciary.

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