



# **Assessment of the Performance Evaluation of Judges in Moldova**

27 June 2014

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## Executive Summary

1. This report presents the findings of the assessment of performance evaluation of judges in Moldova which OSCE/ODIHR conducted between February and May 2014 in response to a request from the Superior Council of Magistracy (SCM) of Moldova of 20 September 2013. Responding to the same request, OSCE/ODIHR also provided a legal opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova. This report complements the legal opinion with findings and recommendations on the Moldovan system's practice in implementing the law.
2. When assessing the functioning of the system for performance evaluation of judges newly introduced in 2012, OSCE/ODIHR considered international standards relevant for judicial independence and accountability contained in OSCE commitments, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities. The interpretation of these standards throughout this report is guided by other documents such as the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, and the Venice Commission opinion on the draft legal provisions establishing an evaluation system for judges in Armenia.
3. In addition to analyzing the normative and institutional framework, the methodology of the assessment included examining the decisions on performance evaluation passed by the Evaluation Board, and collecting views on the practice and implementation of the new evaluation system in interviews and meeting with those undergoing and those conducting the performance evaluation of judges. All aspects of the system and practice were examined in light of the international standards mentioned above, and measured against the system's own aims and objectives, as stated in the relevant legislation.
4. The report provides findings and recommendations regarding the regulatory and institutional framework, on indicators, means of verification, and the grading system. Furthermore, the report highlights a number of challenges in the practice of the Evaluation Board in implementing the legislation on this relatively new system.
5. One important concern for compliance with international law is the fact that relatively high rates of reversals of judges' decisions can lead to lower points, which

can ultimately lead to dismissal if the scores are not high enough to enable the judge to pass the evaluation. Dismissal is problematic in light of the principles of security of tenure and irremovability of judges. The right to tenure is not unlimited in international law, but legal systems must provide formal and clear standards as to when a judge may be removed for failing to meet the standards required of him/her (either ethical or professional). However, this assessment concluded that there are a number of concerns with the fairness and transparency of the system, such as a lack of consistency in grading, insufficient reasoning of Board decisions, and a perceived subjectivity of grading. In the short and medium term, stakeholders need to clarify and ensure transparency and understanding regarding the operation of the whole evaluation procedure, the indicators and grading policies as well as any role the evaluation results play in connection to promotions and any eventual dismissals. This would help minimize the risks to judicial independence.

6. Stakeholders also need to ensure that the system meets its own aims and objectives. This assessment concluded that the evaluation procedure and results currently miss some of the original aims of performance evaluation. Given the lack of consistency and insufficient reasoning by the Board in its decisions, it is not easy to establish a judge's level of competence and skills. Without this, it is impossible to create formal recommendations, or connect the process to measurable outcomes, other than grades which will hardly be perceived as objective when they are not comprehensible. Without fully understanding where a score comes from, it is also then difficult to understand what needs to be improved. Some decisions showed very clear and concrete examples of either poor or very good practices, and some were very vague in their praise. Furthermore, there is no connection to training, and very few actual concrete recommendations for judges to improve where they need to.
7. Whilst the new system is commendable in its attempt to introduce concrete criteria in the evaluation of judges, and the system has generally been welcomed as an improvement over the old system, the SCM, the Board, and the judges themselves are strongly encouraged to thoroughly consider short, medium and long term goals using the recommendations throughout this report in order to bring the system in line with international standards as well as to achieve the goals set out in Moldovan laws and regulations on performance evaluation of judges.
8. ODIHR wishes to thank the Superior Council of Magistracy for making this assessment possible and for supporting and contributing to it. ODIHR also expresses its gratitude to the Members of the Evaluation Board and all judges who participated in the assessment by agreeing to meet or be interviewed and by sharing their experience and views.

# A. Introduction

## 1. Background

Performance evaluation of judges was introduced in Moldova by Law nr. 154 on the selection, performance evaluation and career of judges of 5 July 2012, in force since 14 December 2012.<sup>1</sup> The system became operational in 2013.

Prior to this, judges in Moldova were subject to continuous attestation throughout their tenure. Attestation was a theoretical exam that judges had to take every three years to confirm their qualification grades and whenever they wished to obtain a qualification grade, promotion to another court or to a managerial position within the same court, as well as when the judge him/herself requested attestation. The system of attestation was criticized by both judges and experts as being an administrative burden rather than helpful to judges in carrying out their work.

Since 2010 the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the OSCE Mission in Moldova have continuously supported discussions with judicial reform stakeholders on judicial independence in Moldova, and in particular on the attestation system. The OSCE/ODIHR Kyiv Recommendations state that attestations that may lead to dismissal or other sanctions are not appropriate for judges with life tenure.<sup>2</sup> At roundtables in Chişinău in October 2010 and November 2011 on judicial independence in Moldova, ODIHR experts recommended measures to review the existing attestation system and introduce a system for performance evaluation of judges.<sup>3</sup> On 20 September 2013 the Superior Council of Magistracy (SCM) of Moldova requested the OSCE/ODIHR to assess the legislative and normative framework regarding the new judicial performance evaluation system in Moldova with a view to further improving the legal framework and the practice of evaluating the performance of judges.<sup>4</sup> ODIHR therefore provided a legal opinion on the Law on Selection, Performance Evaluation

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1 Official gazette no. 190-192/636 of 14.09.2012.

2 OSCE ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, June 2010, para. 28. The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia were developed by a group of independent experts at a regional expert meeting organized by ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, in June 2010. Available in English and Romanian at <http://www.osce.org/odihr/KyivRec>.

3 The conclusions from the 2011 roundtable were adopted by decision of the Superior Council of Magistracy on 20 December 2011; see <http://www.csm.md/files/Hotaririle/2011/46/686-46.pdf>.

4 The Moldovan Strategy for Justice Sector Reform 2011-2015 places the responsibility of analysing the implementation of the new system on the SCM, intervention area 1.3.5.

and Career of Judges (hereafter ODIHR legal opinion),<sup>5</sup> and conducted an analysis of the functioning of the new system in practice. This assessment took place between February and May 2014, and examined the system against international standards of judicial independence as set out by international treaties, such as the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR). Generally, judicial performance evaluation is a relatively recent phenomenon of the 21st century, and the main concern from the perspective of international standards is that it not be used as a tool for political or executive actors to control judges, or for hierarchical control of individual judges within the judiciary. The key issue at stake, on the one hand, is the protection of judicial independence by ensuring that no institution interferes with access to a fair trial by an impartial tribunal; and on the other hand, to ensure that any policy holding judges accountable is proportionate and in no way interferes with a judge's decision making in a particular case.

The objectives of the assessment were:

- i. To evaluate whether the system for performance evaluation of judges meets international standards;
- ii. To assess whether the aims of the evaluation and the supporting policies for skills improvement in the judiciary have been achieved; and
- iii. To provide recommendations for improvement of the current system, both for the laws and implementation of the system for performance evaluation of judges.

This report outlining the results of the assessment has eight main sections. Following the introduction (A.), the first part (B.) provides a theoretical framework that first analyses performance evaluation of judges in general and its scope, using comparative examples, and international norms concerning judicial performance evaluation. Then follows a description of the Moldovan legal and institutional framework (C.) and an analysis of judges' perception of the new evaluation system (D.). The next section (E.) analyses the criteria and indicators used in performance evaluation. This part examines each of the criteria, how they are being applied, and offers recommendations for improvement. The following section (F.) looks at procedures, especially for methods of gathering data to verify the indicators. After this, the report examines decision making by the bodies involved in the evaluation process, and fairness and transparency of the procedure itself (in Section G.). Following that is a brief analysis of the role of the SCM and appeals in the evaluation procedure (Section H.). The report then analyses the need for transparency and publicity to improve public confidence and protect judicial independence (I.). Finally, the report deals with overarching issues (J.) and offers conclusions (K.).

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5 ODIHR Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova, Opinion Nr. JUD -MOL/252/2014 [RJU] of 13 June 2014, hereafter ODIHR legal opinion.

## 2. Methodology

The methodology of the assessment included an analysis of laws, the regulatory and institutional framework (regulations, decisions, bodies) and practices in light of international standards (taking into consideration recommendations and opinions that further define those international standards such as the OSCE/ODIHR Kyiv Recommendations and CoE Venice Commission opinions),<sup>6</sup> complemented by interviews/meetings with 12 judges, two judge members and two civil society members of the Evaluation Board (hereafter: Board) and three judge members of the SCM. The interviews followed a list of questions developed by the assessment team<sup>7</sup> on the basis of the analysis conducted (legislative review, decisions of the Board and additional research). These interviews served to support a detailed analysis of the system's functioning in practice, clarify inconsistencies and better understand the concerns identified during the desk analysis of laws, regulations and randomly selected decisions of the Board.

Interviews were conducted with seven female and five male judges from every judicial level (first instance, court of appeal and Supreme Court of Justice– hereafter SCJ), who had received different grades, including judges who had challenged the decision of the Board but also one judge who had not yet been through an evaluation. Additionally, the assessment team met with four members of the Board and three members of the SCM. Both these meetings were conducted as focus group discussions. During the meeting with the SCM, the assessment team also consulted the present members on some of their initial draft recommendations to test their relevance and potential acceptance. Finally, the assessment team also consulted the Report on the new system of performance evaluation of judges, elaborated by the Moldova NGO “Institute for Penal Reform” in 2013 (hereafter IPR Report).<sup>8</sup>

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6 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, see at note 2; among Venice Commission opinions, in particular one that concerns the draft legislation introducing a system with comparable features in Armenia: Venice Commission and Directorate of Human rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe, 'Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia', CDL-AD(2014)007 [hereafter: VC Opinion Armenia].

7 The assessment team was comprised of Dr. Gar Yein Ng, international legal expert, and Nadejda Hriptievschi, legal expert from Moldova.

8 The report is available in Romanian only at <http://irp.md/library/publications/416-raportul-priv-ind-noul-sistem-de-evaluare-a-performanelor-judecatorilor.html> [hereafter: IPR Report].

## B. International Framework and Use of Performance Evaluation

### 1. General performance evaluation: an introduction

Performance evaluation of public services has developed as a by-product of developments within requirements of good governance as well as new public management and information technologies. Performance evaluation of courts has been used to hold courts accountable for public spending and efficient delivery of justice. Performance evaluation of individual judges on in contrast, is a relatively recent phenomenon, used for different purposes than performance evaluation of courts. Whereas evaluation of courts takes into account performance of all staff and how efficient a court has been, performance evaluation of judges looks only at the individual judge. In practice, evaluation of judges has developed in the last decade across Europe (among others Belgium, France, Netherlands, Italy, Spain, Austria and Germany - all of which have statutes allowing for evaluation) and the United States of America. The purpose of a particular system for performance evaluation of judges affects the type of criteria used for evaluation and the way data is collected.

The purposes of performance evaluation systems found worldwide can generally be divided into three main groups: namely for self-improvement purposes, i.e. to enhance the performance and professional accountability of judges; to increase public confidence; and to aid judicial institutions in deciding upon issues of career and promotion within the judiciary. In some rare cases, performance evaluation has also been linked with disciplinary proceedings. These purposes are not exclusive to each other, and any model may have more than one purpose.

There is recognition at an international level of the fact that performance evaluation of individual judges is important on the one hand to strengthen capacity and professionalism, and on the other hand to lend transparency and accountability to judges and their work.<sup>9</sup>

The evaluation of individual judges' performance is however still subject to debate, and even avoided in some countries due to the risks attached to it in encroaching upon the independence of judges in their decision-making. International standards on judicial independence require that judges' positions must be protected against out-

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9 See e.g. OSCE/ODIHR; Max Planck Institute for Comparative Public Law and International Law, 'Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Challenges, Reforms and Way Forward' 2010 para 28; and United Nations Office on Drugs and Crime, 'Resource Guide on Strengthening Judicial Integrity and Capacity' 2011 p.5.

side influence, in order to ensure that judgments are fair and unbiased<sup>10</sup> but also that performance evaluations should never be used as a vehicle for political influence, i.e. as means to sanction, dismiss or demote politically “inconvenient” or “non-obedient” judges. In some jurisdictions institutionalized systems of performance evaluation are even considered incompatible with the status of independence of a judge. In devising or implementing a performance evaluation system, one therefore needs to bear in mind the implications of international standards on judicial independence and to strike a balance between legitimate aims of a performance evaluation system and protecting the independence of the individual judge.

## 2. International norms on judicial independence

International norms, such as article 6 of the ECHR, article 10 of the Universal Declaration of Human Rights, and article 14 of the International Covenant on Civil and Political Rights emphasise the right to an independent and impartial tribunal as part of the right to a fair trial:

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>11</sup>

The principle of judicial independence has been further fleshed out by the Council of Europe in documents such as the Recommendation CM/Rec(2010)12, or the OSCE, in the Kyiv Recommendations. The purpose of this principle is to protect the right to a fair trial, be it in civil, criminal or administrative law, by protecting judges from improper influence, both external and internal to the judiciary.<sup>12</sup>

The content of international standards, as reflected in the OSCE/ODIHR Kyiv Recommendations,<sup>13</sup> and the CoE Venice Commission’s Opinion on Armenia’s draft law on judicial performance evaluation, will be examined further below and used as a backdrop for assessing the performance evaluation system of Moldova.

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10 See UN Basic Principles on the Independence of the Judiciary; for domestic examples, see Constitution of France article 66, Constitution of USA, article III; Germany’s Basic Law article 97 etc. In the OSCE, according to Ministerial Council decisions of Copenhagen (1990), Moscow (1991), and Helsinki (2008) there is a political commitment to respect judicial independence as recognized in international standards such as the UN Basic Principles, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights. A compilation of all OSCE human dimension commitments is available at <http://www.osce.org/odihr/76902>.

11 Article 6 ECHR.

12 Council of Europe Recommendation 2010/12. Para 22.

13 The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia were developed by a group of independent experts at a regional expert meeting organized by ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, in June 2010; available also in Romanian at <http://www.osce.org/odihr/KyivRec>.

### 3. The implications of international standards on judicial independence for performance evaluation of judges

#### i. Aims

There is increasing international recognition for the need to develop merit based systems of judicial promotion to create legitimacy and confidence in judges and courts, and to lend legitimacy to the procedures of promotion within courts and to higher courts.<sup>14</sup> The aims of such systems may vary, as discussed above, between promotion and careers, self-improvement, and more rarely: discipline. These various aims and how they can be met while upholding judicial independence was discussed at an expert meeting organised by OSCE/ODIHR in Kyiv on “Judicial Independence in Eastern European, South Caucasus and Central Asia: Challenges, Reforms and Way Forward” in June 2010 that led to the adoption of the OSCE/ODIHR Kyiv Recommendations.<sup>15</sup> The CoE Venice Commission has also examined these aims and how they interact with the principle of judicial independence. Concerning using the results of performance evaluation to decide on issues of careers and promotions, the Venice Commission finds that it is a controversial issue, and suggests that promotion decisions do not rely solely on the results from performance evaluation.<sup>16</sup>

If the primary focus of the evaluation system is skills building, it has been argued that it will more likely have the co-operation of judges. “If it is seen as leading to consequences such as exclusion from promotion, that co-operation may not so willingly be given. Evaluation should not be seen as a tool for policing judges, but on the contrary, as a means of encouraging them to improve, which will reflect on the system as a whole.”<sup>17</sup> Performance evaluation of judges should be clearly separated from the system of disciplinary responsibility of judges. In its opinion on the draft legislation of Armenia on their proposed evaluation system, the Venice Commission has also highlighted that “The fact that a negative result in the evaluation procedure could lead to a disciplinary sanction, including dismissal, is problematic.”<sup>18</sup> In line with international standards for judicial independence, performance evaluation should never be used to assess the content of decisions and verdicts and certainly not as a basis of sanction.<sup>19</sup>

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14 UN Basic Principles on the Independence of the Judiciary, article 13; Council of Europe Recommendation on Judicial Independence, 44-48 & 58; and European Charter on the Statute for Judges, article 4.

15 OSCE/ODIHR; Max Planck Institute for Comparative Public Law and International Law, 'Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Challenges, Reforms and Way Forward' 2010.

16 VC Opinion Armenia para. 94.

17 VC Opinion Armenia para 23.

18 Ibid. para 9.

19 Kyiv Recommendations, para 28.

## ii. Criteria

The OSCE/ODIHR Kyiv Recommendations<sup>20</sup> highlight that performance evaluation of judges should be primarily qualitative in nature, and focus on the skills required to be a judge. The following can be considered as qualitative skills: professional competence, which assesses knowledge of both procedural, substantive and evidentiary law, the ability to conduct trials, and the capacity to write reasoned decisions; personal competence, referring to a judge's ability to cope with workload, the ability to decide cases, and an openness to using new technologies in their function; and social competence, which assesses judges' ability to mediate and show respect for parties. These are not controversial and go to the heart of the judicial function.

Quantitative performance evaluation is more controversial as there is a danger that there will be a focus only on productivity, compromising quality in favour of quantity of judges' work. The OSCE/ODIHR Kyiv Recommendations state that this benchmark is only to be used for self-improvement for judges, and should not be focussed on as the main element of evaluation of a judge's overall performance. Furthermore, it is the opinion of the CoE Venice Commission that "quality, within a reasonable period of time and fairness are the necessary prerequisites that the judge should meet when rendering a decision."<sup>21</sup> It echoes the reasoning underlying the OSCE/ODIHR Kyiv Recommendations that counting cases and reversal rates "should not be used to the detriment of the individual judge", but rather as a tool of judicial administration.<sup>22</sup>

A number of international recommendations approve of evaluating the quality of conducting hearings and writing decisions.<sup>23</sup> In evaluating the quality of decisions, a practice evolved of measuring the level of reversals, alongside other qualitative criteria such as reasoning and legibility. The danger of calculating the numbers or rates of reversals is that it "... is likely to produce a timid judiciary which looks over its shoulder all the time..."<sup>24</sup> One consequence of this is that judges could start asking judges of the higher court how to decide their cases in a way that would avoid reversals. This limits access to justice at first instance, and creates interference in the decision-making of higher courts.<sup>25</sup> A further extreme consequence of this would be sanctions against judges for

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20 Paras 27-29.

21 VC Opinion Armenia, para 12.

22 Ibid. para 34 and 39. See report on the regional expert meeting organized by ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, in June 2010, that led to adoption of the Kyiv Recommendations at <http://www.osce.org/odihhr/71178?download=true>.

23 Kyiv Recommendations, para 31; VC Opinion Armenia, para. 49 on quality of reasoning and para. 72 on conduct of hearings.

24 VC Opinion Armenia. para 40.

25 Ibid. paras 18 and 39.

the content of their decisions. However, sanctions for the content of judges' decisions and their interpretation of the law must be avoided<sup>26</sup> or strictly limited.<sup>27</sup>

All statistical data, whether pertaining to reversal rates or settlement rates also needs to be read in context; for example, in terms of reversal rates, there are situations which are not attributable to the judge. The Venice Commission also questions the assumption that the higher court always gets it right, highlighting that the first instance court decision quashed by the court of appeal could well be supported by a court of cassation, constitutional court or the European Court of Human Rights.<sup>28</sup> Also, when analysing statistics for settlement rates and duration of trials, data should be analysed in light of the complexity of cases, case loads of judges (also between courts), and sudden increases in caseloads, amongst other things.<sup>29</sup> The CoE Venice Commission acknowledges that problems with efficiency are of concern when it comes to the right to a fair trial. Nevertheless, statistics on efficiency and settlement rates should only be used as a starting point to identify any possible problems for a judge.<sup>30</sup> If a system is over-reliant on such statistics, this may tempt judges to "disregard what would normally be seen as necessary under the law and his or her interpretation of it".<sup>31</sup>

### **iii. Transparency and fairness of evaluation procedures**

International standards also provide recommendations on the transparency and fairness of performance evaluation systems. Recommendations on transparency relate to the need to publish the criteria, and to conduct the procedure of evaluation in a transparent manner.<sup>32</sup> In most countries that have a system of performance evaluation of judges, it is governed by publicly accessible laws and regulations, specifying the criteria, indicators and how to measure them, and procedures for reaching evaluation decisions. Such transparency makes the evaluation and possible consequences foreseeable for judges and therefore more fair and credible. Transparency is also important where evaluation is conducted to enhance public trust in the judiciary, and to counter perceptions of dependence, undue influence and corruption. Recommendations on the fairness of procedures include the judges' rights to be heard and to appeal.<sup>33</sup>

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26 Kyiv Recommendations, paras 25 and 28.

27 Council of Europe Recommendation on Judicial Independence, CM 2010(12), paras 66 and 68.

28 VC Opinion Armenia, paras 39-40.

29 Ibid. para 37.

30 Ibid. para 37.

31 Ibid. para 43.

32 Kyiv Recommendations, paras 29 and 31; VC Opinion Armenia, para. 70.

33 Kyiv Recommendations para 31. VC Opinion Armenia, para 86.

## 4. Examples from jurisdictions worldwide on the use of performance evaluation

As mentioned above, the purpose of a particular system for performance evaluation of judges affects not only criteria used for evaluation but also how the system is used and implemented.

In the United States of America, performance evaluation is used for different purposes in different states. Among others, four states, including the District of Columbia, use performance evaluation in the process of and as a basis for reappointing judges, two states use them to enhance public confidence in the courts and judges and therefore publish the outcome of performance evaluations, and five states only use them for self-improvement and capacity building of judges.<sup>34</sup> Other countries, such as France and Germany, use performance evaluation of individual judges for career advancement and promotion purposes.<sup>35</sup>

Whilst the Netherlands do not have a formal system of performance evaluation of individual judges that is linked to promotions, their system enables self-improvement and general administration of justice by identifying capacity building needs. This allows court chairs to see which judges are under-performing and to adjust resources to support such judges.<sup>36</sup>

As stated above, it is rare for performance evaluation of judges to be linked to, or used as, a precursor for sanctions. Examples here are Belgium and Austria. If a judge receives a mediocre or bad evaluation in Belgium, it may result in a temporary reduction of a judge's remuneration or it can slow down career progression.<sup>37</sup> In Austria, it can "lead to financial losses" or the judge can "be asked to retire".<sup>38</sup> Sanctioning poor outcome of a performance evaluation can in some instances also be used as a way of avoiding initiating formal disciplinary procedures (which are more time-consuming and hence usually reserved for more serious problems and to be used as a last resort).

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34 National Centre for State Courts 'Guidance for Promoting Judicial Independence and Impartiality-Revised edition' 2002. The National Centre for State Courts' mission is to improve judicial administration in the courts of the United States and courts throughout the entire world, see <http://www.ncsc.org/>.

35 United Nations Office on Drugs and Crime, 'Resource Guide on Strengthening Judicial Integrity and Capacity' 2011.

36 Ng, Gar Yein, 'Quality of judicial organisation and checks and balances', Intersentia, Antwerp 2007 p.94.

37 Sudre, Jean-Paul, *Working Group on Evaluation of Judges: Final Report*, at European network of councils for the judiciary BARCELONA 2005 available at [http://www.coe.int/t/dghl/cooperation/cepej/quality/EvalJuges\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/quality/EvalJuges_en.pdf).

38 United Nations Office on Drugs and Crime, 'Resource Guide on Strengthening Judicial Integrity and Capacity' 2011, page 13.

In transitioning democracies, there are examples of performance evaluation being used, or attempted to be used, as a tool for disciplinary purposes. For instance, Armenia's draft legislation on performance evaluation<sup>39</sup> provides for potential disciplinary liability if judges fail to participate in mandatory training or fulfil other duties as set out by the probationary supervisor.<sup>40</sup> In Croatia an evaluation may lead to disciplinary proceedings, if the judge does not meet the 'quantitative criteria'.<sup>41</sup>

In relation to the disciplinary responsibility of judges, it should be noted that any imposed sanction or disciplinary measure must be regulated by primary law (either legislation or constitution<sup>42</sup>), proportional and there must be a recourse to appeal, in order to meet the requirements of judicial independence.<sup>43</sup> It will be shown below that the use of performance evaluation as a tool of discipline sits somewhat uneasily with international standards.

## C. Framework for Performance Evaluation in Moldova

### 1. Law on Selection, Performance Evaluation and Career of Judges

Performance evaluation of judges is governed primarily by the Law on Selection, Performance Evaluation and Career of Judges, Title II (hereafter the Law nr. 154).<sup>44</sup> This law sets out the broad objectives of evaluation of judges, and the institution responsible for the evaluating procedures.

Primarily, the aim of performance evaluation of judges as defined by Law nr. 154 is to determine the "knowledge and professional skills of judges, as well as the ability to

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39 See VC Opinion Armenia.

40 See VC Opinion Armenia, para 112.

41 Council of Europe: Consultative Council of European Judges, 'Evaluation Of Judges Performance in Croatia -When, How And Why.' 2014, at page 6; available at ([http://www.coe.int/t/DGHL/cooperation/ccje/Onenparle/Sessa\\_Association\\_swiss\\_judges.pdf](http://www.coe.int/t/DGHL/cooperation/ccje/Onenparle/Sessa_Association_swiss_judges.pdf)), last accessed 23/04/2014.

42 Sudre, Jean-Paul, *Working Group on Evaluation of Judges: Final Report*, at European network of councils for the judiciary BARCELONA 2005; see for examples Romania Consiliul Superior al Magistraturii; Italy Consiglio Superiore Della Magistratura; European Union, 'Increase the Efficiency of the System for the Professional Evaluation of Magistrates' 2007.

43 Romania Consiliul Superior al Magistraturii; Italy Consiglio Superiore Della Magistratura; European Union, 'Increase the Efficiency of the System for the Professional Evaluation of Magistrates' 2007.

44 Law on selection, performance evaluation and career of judges, nr. 154, of 5 July 2012.

apply theoretical knowledge and necessary skills in practice of the profession of judge, determining weak and strong aspects in the work of judges, boosting the trend of improving professional skills and increasing the efficiency of individual judges and at court level".<sup>45</sup>

Law nr. 154 provides that results of the evaluation can be used for various purposes that lead to improved capacity and professionalism: to organise appropriate professional training (both as a general policy and by judges themselves); to determine compliance with judicial standards, ensure an objective comparison for promotion, improve court administration, and to ensure that the curriculum for judicial training is current and relevant to professional requirements.<sup>46</sup>

The law further provides the institutional setting for carrying out performance evaluation, regulating the composition and functions of the Board and the ways to appeal its decisions. The law further provides the criteria for performance evaluation of judges, leaving it to the Superior Council of Magistracy to develop rules of operation for the Board and indicators and sources of verification for each criterion of performance evaluation. It further provides for the types of evaluation and the qualification grades judges can receive when passing performance evaluation and the respective consequences.

As mentioned above, ODIHR provided a legal opinion on Law no. 54 in a separate document, where it described some concerns with the Law from the perspective of its compliance with international standards.<sup>47</sup> The opinion also provides concrete recommendations for addressing these concerns.

## **2. Regulation on Criteria, Indicators and Procedures for judges' performance evaluation**

Whilst the Law on the Selection, Performance Evaluation and Career of Judges was passed by parliament, the regulation on criteria, indicators and procedures was passed by the Superior Council of Magistracy (hereafter the SCM regulation). Therefore primary responsibility for evaluation and its legal framework is placed within the judiciary, thus ensuring institutional independence from parliament or government.

In line with the general framework provided in the Law no. 154, the SCM regulation's stated aims are the analysis of efficiency, quality of work, integrity, and lifelong learning amongst all judges. Further appraisal shall be made of managing judges at all levels, focussing on leadership abilities, communication and supervision.

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45 Law on the selection, performance evaluation and career of judges 2012, Article 12,1.

46 Ibid. article 12,2.

47 ODIHR legal opinion.

Evaluation is defined as “the process by which the performance (quality level), at which the judge fulfils his/her duties in court, is assessed in relation to a frame of reference that defines the relevant indicators for evaluation criteria.”

Whereas, the evaluation process “...involves analyzing how a judge fulfils current professional activities, in order to assess professional behaviour and actions performed at a level appropriate for professional requirements and to identify ways of professional action in which the judge needs improvement and self-development.”

Evaluation criteria “are guiding fields according to which the judges’ performance shall be assessed” and performance indicators are “... a set of values, quantitative and qualitative, based on which the judges’ performance will be measured”.

According to the aims described by article 1, evaluation is to establish “professional knowledge and skills... ability to apply theoretical knowledge and skills in practice... determine weak and strong aspects in the work of judges... [and to] stimulate a trend of improving professional skills and increase the efficiency of judges’ activities...” which are in accordance with the aims stated above in the law to boost capacity and improve professionalism.

The results of this should first and foremost lead to the organisation of training for judges that matches their needs.<sup>48</sup> Furthermore, they should be able to determine the “objective level of judges’ compliance to the position held or claimed during their careers,” to be able to “ensure an objective comparison among several judges in case of promotion”, to stimulate judges “to improve their level of professional training and skills”, “to improve court administration” and to grant qualification grades or ranks to judges.<sup>49</sup> The Regulation also elaborates on the types of evaluation foreseen in the law, namely regular/ordinary evaluations for judges every three years,<sup>50</sup> and for court chairs an additional regular evaluation as a manager at the same time. Extraordinary evaluations may be used in the following cases: first, to appoint a judge to life tenure after a five year period; where a judge seeks promotion (to a higher court or to a managerial position of court chair or deputy chair); where a judge seeks transfer to a court of the same or lower level and finally where a judge has been given an insufficient grade during a regular evaluation.<sup>51</sup> Evaluation may be initiated by a judge seeking promotion or transfer, the Board, the SCM, the judicial inspector (ex officio) and court chairs for the judges of their respective courts.<sup>52</sup>

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48 SCM regulation article 2.

49 See for these qualification grades and ranks art 13 of the Law on the Status of Judges. These grades and ranks are titles of honour without influence on promotion or salary.

50 Ibid. article 4.

51 Ibid. articles 4-5.

52 Ibid article 6.

The regulation further specifies the following criteria for evaluating judges' performance:

1. Efficiency of activity (rate of settlement, reasonable time, timeliness of publication of decision etc.); 2. Quality of judges' activity, including the examination of the rate of reversals/upheld decisions; clarity of reasoning; organization of professional work, and training; and 3. Professional integrity (including compliance with ethics, professional reputation, misconduct and absence of ECHR violations). This report assesses these three criteria and their indicators in light of their application in practice (section E below).

The Regulation also provides in more detail the procedures to be applied by the Board: firstly, the Board gathers data on these criteria, receives the opinion of the chair of the court amongst other data collected, and interviews the judge. Each Board member fills in a score sheet for the evaluated judge, and the final score is determined following the interview with the judge. The score determines the grade from failed (less than 40 points) to excellent (91- 100 points for all judges<sup>53</sup>, except the judges of the SCJ, who have a separate score<sup>54</sup>). As discussed above in the international framework, this is actually not a helpful system if the aim is mainly to improve the skills of a judge. In a system to help improve skills and professionalism of a judge, recommendations are more important than points. The CoE Venice Commission pointed out that a rating scheme with exact points is not necessary, and that it is more important to know whether judges fulfil the criteria and where their strengths and weaknesses lie.<sup>55</sup>

Although such a system is intended to be very exact and reduce to a maximum the impact of subjective opinions and the Board's discretion, the analysis of Board decisions and the results of the interviews do not suggest that having the exact points per each indicator helps to achieve this goal in practice.

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***Recommendation to Parliament, Ministry of Justice, SCM and the Board:*** *reconsider the approach chosen for performance evaluation of judges, namely assigning points per indicator and ultimately the qualification grades based on accumulated points. Instead of going through a very exact mathematical exercise per indicator, the Board could assign*

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53 Article 14 of the SCM regulation provides the following grades for all judges, except SCJ judges: less than 40 points = failed; 41-60 points = insufficient; 61-75 points = good; 76-90 points = very good; 91-100 points = excellent.

54 Article 14 of the SCM regulation provides the following grades for the SCJ judges: less than 40 points = failed; 41-60 points = insufficient; 61-70 points = good; 71-80 points = very good; 81-90 points = excellent.

55 VC Opinion Armenia, para 77.

*qualification grades per criteria and then assign an overall qualification grade to the judge. The recommended qualification grades could be the following: insufficient or weak, sufficient, good, very good and excellent.*<sup>56</sup>

### 3. Institutions

Both the SCM and the Board play various roles in the area of judges' performance evaluation. The law is not entirely clear on the exact relationship between the two bodies, namely whether the Board is a body under or rather beside the SCM.<sup>57</sup> The SCM is tasked (amongst other things) with judicial evaluation under the Law on the Status of Judges.<sup>58</sup> They are to establish indicators and procedures through regulations.<sup>59</sup> Under the SCM regulation, paragraph 6(C), the SCM may initiate evaluation procedures against judges. Under the regulation<sup>60</sup> the SCM may also receive complaints about judicial comportment (which can later be used within the evaluation itself as part of the grading system).<sup>61</sup> Furthermore, under article 24 of Law nr. 154, the SCM is tasked with hearing appeals against decisions of the Board. Finally, the SCM may enact a procedure to dismiss a judge based on the evaluation under certain circumstances.<sup>62</sup> The possibility to both initiate an evaluation procedure against judges as well as hear appeals is cause for concern for the fairness of proceedings regarding the right to an independent and impartial tribunal, especially where the consequence of failing an appeal is the loss of tenure.

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56 Considering that this recommendation means amending the Law nr. 154 and the SCM regulation, this report also includes recommendations to improve the system currently in force, based on points for each indicator, in case the decision-makers decide to continue it.

57 The status of the Board is not very clearly regulated. The law on SCM, article 7, provides that the Board is one of the "bodies subordinated to the SCM". The SCM regulation on the activity of the Performance Board also mentions in article 1 that the Board is created "under the subordination of the SCM". However, Law nr. 154 provides in article 15 that the Board is created "alongside/besides" the SCM. The use of the expression of "subordinated body to the SCM" is misleading, since the Board is independent in its daily activity and none of the SCM members should be able to influence their decisions. The selection of Board members and their professional status (judges and civil society representatives) rules out any possibility of hierarchical control by the SCM members of the Board members. In practice the SCM has not yet accepted any appeal, as all were declared inadmissible / rejected. In theory, given the fact that they only can look at the procedure of adoption of decisions, they should only be able to annul the Board's decision and send it back for the Board to adopt a new one.

58 Law on the Status of Judge, no. 544-XIII of 20 July 1995; official gazette no.15-17/63 from 22.01.2013; no.117-119/946 from 15.08.2002; no. 59-60/664 from 26.10.1995.

59 Ibid., article 12(2).

60 Para 20(5).

61 Para 20(5).

62 Law on the selection, performance evaluation and career of judges 2012 article 23(3); para 23.

The Board is the main body conducting the performance evaluation of judges. It has seven members all serving for four years, five are judges and two are members of civil society. Judicial members of the Board are appointed for four years through election by the General Assembly of Judges and the SCM, and public competition is used to select the civil society members.<sup>63</sup> The Board is further governed by the Regulation on Organizing the Activity of the Board for Performance Evaluation<sup>64</sup> which goes into more detail on the transparent nature of the evaluation procedure, and the possibility of challenging the independence of any board member.

Furthermore, the Board has the possibility of initiating dismissal procedures under certain circumstances.<sup>65</sup> Recalling the discussion from the international norms framework, that dismissal and discipline and evaluation should be kept separate through independent bodies and procedures, this assessment analysed the practice and perceptions related to this particular point.

***Recommendation to Parliament:*** clarify in the relevant legislation that the Board is an independent body operationally, with the SCM only being able to review its decisions. Consider excluding the right of the SCM members to initiate performance evaluation of judges (on their own initiative or at the proposal of judicial inspection) in order to ensure a clearer separation of powers between the SCM and the Board.

## D. Perceptions of the New System of Performance Evaluation

From this section onwards, the report will assess how the performance evaluation of judges in Moldova operates in practice, drawing from the results of interviews conducted and analysis of randomly selected decisions of the Board.

Various questions were asked to gauge the perception of judges on the new system of performance evaluation, e.g. whether it was an improvement compared with the

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63 Law on the selection, performance evaluation and career of judges 2012 chapter 2.

64 Approved by SCM decision no. 59/3 of 22 January 2013.

65 Article 26: Circumstances are found under article 25.1: Decision on failure in performance evaluation shall be adopted by the Board in case if:

a) the obvious non-conformance of judge to his/her position;  
b) court chair / vice chair improperly fulfils his/her management duties.

old attestation system; whether it is having the expected impact on skills improvement and objective assessment for promotions; how they understood the criteria and procedures; and whether they felt any ownership of the new system for their performance evaluation.<sup>66</sup>

When asked about the new system of evaluating judges' performance in comparison to the old system of attestation, the overwhelming verdict was that it was much better than the old one. The old system was considered too theoretical and made judges feel as if they were still students rather than trained and experienced judges. It also left some with a feeling of humiliation in front of Board members, who were professors specialised in narrow fields, while most judges are generalists. Some also expressed that they did not feel like they needed to learn the law by heart in order to be able to do analytical work. It is clear that knowledge of the law is important, but that university style oral examinations are not necessarily the most appropriate way to test judges' knowledge of the law. The new method of evaluation tests knowledge through assessing other skills and competencies of the judges, such as quality of decisions, comportment, reputation, organization, training and other professional activities. These criteria were considered more appropriate by the majority of respondents.

Amongst the judges interviewed, there appears to be a general understanding that the new system aims to improve their skills through the application of performance evaluation criteria. Judges understand that they would need to meet these criteria in order to pass the evaluation, therefore, the very existence of these criteria helps judges improve their work. For example, issues that interview respondents identified for self-improvement included: managing time for examining cases, to be more disciplined regarding certain aspects of their duties, such as keeping clear and orderly files for their reversed cases (and more generally), and re-reading their decisions before finalisation to ensure their legibility, amongst others.

However, when asked if training organised for judges matched their needs as described by the evaluation results, the majority of respondents said this was not the case.<sup>67</sup> The Board also confirmed that the link between performance evaluation outcomes and training offered by the National Institute of Justice (NIJ) has not been discussed and addressed yet: performance evaluation has so far been about the past rather than the

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66 Ownership is important when introducing a new system such as performance evaluation: it leads to cooperation, motivation to participate, and trust.

67 One respondent said that the law changes too quickly for training to have any particular impact for knowledge of the law. Others stated that the National Institute of Justice (NIJ) asks for feedback from judges, and organises a lot of training also jointly with international organisations, but not necessarily matching the needs of judges on the basis of their evaluations. Judges can also choose what courses will help them most based on what is available from the NIJ, or choose to study independently.

future. This means that in practice, there is currently no link between the results of performance evaluation and the training judges are receiving.

Performance evaluation of judges has also been perceived as being helpful with promotion to life tenure, giving clearer criteria, fairness and transparency of the whole process of promotion. On the other hand, there has been some frustration expressed that promotions are in fact not based on the results of performance evaluation, because the opinion of the selection board is not binding on the SCM, and that if the motivation letter for promotion is considered good, then it does not matter how many evaluation points are received. Providing a fair and objective basis for promotion decisions by evaluating the performance of judges only makes sense where the selection is actually merit-based and other factors are excluded. For example, one respondent alleged that specific judges are earmarked prior to a promotion process, and there is peer pressure on those not earmarked for it to withdraw their candidacies. This is problematic as it suggests that promotions are not transparent, and not based on merit.

Moreover, interviewed judges highlighted problems such as the inconsistency in assigning points on different indicators and a lack of reasoning in the decision-making of the Board. The Board's decisions are often perceived as subjective, rather than well-grounded and objective assessments, which in turn creates the perception of corrupt practices, e.g. inflated or reduced grades, noticing or ignoring some problematic aspects of judge's work, depending on who the judge is. Some judges felt that the Board had a predetermined grade in mind and only tried to play with the points to reach the respective grade.

Some respondents also highlighted that not all judges were treated equally because the rules on the procedure and criteria changed halfway.<sup>68</sup> The way the criteria have been interpreted and applied was also an issue of concern for several respondents. It could be interpreted as giving an advantage to judges who work less, because the less they work, the fewer decisions they have and the fewer decisions are appealed and possibly reversed. Furthermore, there has been strong concern that this system is used to suppress inconvenient judges.<sup>69</sup>

The Board acknowledged the importance of transparency and well-reasoned decisions as essential factors for building the confidence of both judges and the public in the new evaluation system. However, they highlighted that the period of two years imposed by the law for evaluating all the judges is a very short term, coupled with the status of the

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68 The SCM regulation was amended by SCM decision nr. 796/34 on 5 November 2013.

69 The IPR Report 2013 also indicates a concern among judges. In particular, within the survey conducted for the study, only 48% of judges consider that the system includes sufficient guarantees for protecting judges' legal interests, while 49% of judges are skeptical regarding the existence and use of guarantees to protect judges' legal interests in the performance evaluation system, see note 8, page 54.

members of the Board as non-permanent members and very limited secretarial assistance. Both individual judges and members of the Board have in interviews recognized that the Board itself has a limited amount of time to assess each evaluation in-depth.

The Board members highlighted benefits of the new system compared to the previous system of attestation, namely that it propagates competition between judges to do better in evaluations which in turn motivates the judges to enhance performance and improve their work. The CoE Venice Commission has however emphasized (in the context of the system envisaged in Armenia), that competition between judges within an ongoing ranking scheme can have negative repercussions for judicial independence and comportment.<sup>70</sup> The interviews also reflected that competition for higher points and grades could lead to demoralisation of some judges.

On the issue of ownership, opinions differed among the interviewed judges. Also, according to the survey of the IRP Report of 2013, only 22% of respondent judges indicated that they superficially knew the new system.<sup>71</sup> Whilst a working group had been set up by the SCM to develop the criteria and indicators for the evaluation system, meetings organised and drafts sent to all courts for feedback, some respondents felt that it was difficult to see the added value of their contribution if involved only sporadically at one occasion during the entire development of the system. Furthermore, a high workload for those in Chişinău also did not allow many to get involved. If events and information had been better organised, there may have been better participation, they argued. By contrast, the SCM mentioned that interested judges had all the chances to participate in the drafting of these indicators and many judges were engaged.

In conclusion, the assessment team noticed that building public confidence in the judiciary is an implied aim of the new performance evaluation system, although not expressly stated in the law. This aim should be better communicated to the judges. This aim explains the approach to greater transparency and is important for a better understanding of the criteria and indicators of performance evaluation. The Board and the SCM should also ensure that judges have confidence in the performance evaluation system as well, if it is to be a successful tool for improving the skills and competences of judges.

***Recommendation to the Board:***

- *Enhance communication with judges regarding the expectations from judges, as well as the Board's evaluation methods.*
- *Strive for consistency and adequate reasoning in decisions as this is crucial for ensuring the trust and the buy-in to the new system, both on behalf of the public and the judges.*

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70 VC Opinion Armenia, para 88.

71 IPR Report, see note 8 (p. 7 and 21).

- *Consider means for identifying training needs of judges based on performance evaluation and initiate discussions with the NIJ on how to adjust the initial and continuous training of judges based on identified needs.*

**Recommendation to the SCM:**

- *Provide clear reasoning on any decision to promote someone with a lower evaluation grade rather than someone with a higher grade, to avoid losing judges' trust in and co-operation with the performance evaluation system.*

**Recommendation to the NIJ:**

- *Consider focussing training programmes on the standards that judges are expected to meet, and develop programmes that improve the skills of judges and that help them achieve the highest possible standards throughout their careers. For this purpose, there should be some communication mechanism between the evaluators and the NIJ on the most recurring weaknesses in judges' performance.*

## E. Criteria, Indicators, Means of Verification and Allocated Points/Weight

This section will look into individual criteria and indicators, as well as the sources of verification and allocated points for the respective indicators used during performance evaluation. The chapter will analyse in more detail those indicators that raise issues of concern from the perspective of the independence of the judiciary or relevance to the role of a judge. Its analysis serves to highlight the aspects that raise concern and make recommendations for their improvement.

### 1. Overview and approach to criteria, indicators and sources of verification

The Law nr. 154, does not establish the criteria for performance evaluation or performance indicators for judges, leaving it to the SCM to establish these.<sup>72</sup> The SCM has developed the Regulation on evaluation criteria, indicators and evaluation procedure

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72 Art. 14 para (2) of the Law nr. 154.

of judges' performance (hereafter: SCM regulation).<sup>73</sup> The general approach the SCM took in the regulation was to establish three broad criteria for evaluation and detailed indicators for each criteria, assigning points (how much a specific indicator weighs) for each indicator and providing the range of sources of verification (the means of obtaining information relevant for the respective indicator) per indicator. This approach was, arguably, meant to regulate the process of evaluation as detailed as possible in order to reduce the discretion of the members of the Board to a minimum. While this is understandable in a context where perceived subjectivity and allegations of corruption are issues of great concern, such an approach carries a risk as well.

The risk is that the system of performance evaluation can turn either into a means of control over judges, especially by higher courts, or it can turn into a formality that brings no value to the individual judges or the judiciary altogether. This is a risk generally in systems of performance evaluation, but it is particularly valid if the indicators and the sources of verification are not chosen appropriately or too much weight or focus is placed on assessing quantity rather than quality, and if the decisions of the Board are not sufficiently well-reasoned.<sup>74</sup> Arguably an approach of calculating exact points may reinforce the risk that the evaluation turns into a formality (see in this context also the above analysis and related recommendation to reconsider the assigning of points, section C.2.).

The remarks below are meant to help the SCM and the Board reconsider some of the indicators and sources of verification that might be harmful or counterproductive as to the stated goals of performance evaluation of judges in Moldova.

The SCM regulation provides the following three criteria for judges' evaluation: efficiency of judge's work, quality of work and professional integrity. In addition, court chairs and deputy court chairs are evaluated based on the following criteria: leadership capacity, capacity to manage and communication skills. Each criterion is assessed based on the indicators listed underneath and is assigned a certain number of points.

### **Judge's evaluation:**

Efficiency of work<sup>75</sup>:

- Case files' clearance rate (maximum 10 points),
- Respect of reasonable terms<sup>76</sup> in the process of delivering justice (maximum 10 points),

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73 Superior Council of Magistracy decision nr.212/8 of 5 March 2013, which approved the Regulation on evaluation criteria, indicators and evaluation procedure of judges' performance.

74 See more analysis on decision-making of the Board in section G of this report.

75 Annex I of the SCM regulation establishes the maximum amount of points assigned per each indicator and the total per criteria. Regarding the first criterion, efficiency of work, there seems to be a clerical error in the annex, which assigns a total of 38 points to this criterion, while the sum of the maximum points allocated per each indicator included in this criterion is 40.

76 Terms is used in this context as 'timelines' or time.

- Respect of the term for drafting the judgment<sup>77</sup> (maximum 8 points),
- Execution of other functions within the deadline provided by law (maximum 6 points),
- Knowledge and application of information technology (maximum 6 points);

Quality of work:

- Percentage of upheld judgments/court orders out of the total number of appealed judgments/court orders, except the judgments reversed due to reasons not attributable to the judge (maximum 10 points),
- Number and percentage of reversed judgments/court orders out of the total number of examined cases<sup>78</sup> (maximum 6 points),
- Clarity of drafting and the quality of reasoning of the judgments (maximum 10 points),
- The way of organising judge's professional activity (maximum 10 points),
- Continuing professional development of the judge (maximum 10 points);

Professional integrity<sup>79</sup>:

- Respect of professional ethics (maximum 7 points),
- Professional reputation (maximum 7 points),
- Committed disciplinary offences (up to minus 5 points),
- Violations of the ECHR established by the European Court of Human Rights (up to minus 5 points);
- Optional criteria (mentioned only in annex 1 of the SCM regulation): knowledge of working languages of the ECtHR, information technology knowledge (MS Word, Excel, internet skills and use of e-mail) (maximum 4 points).

This report will not analyse each of the indicators provided in the SCM regulation on performance evaluation criteria, but only those that raise issues of concern and have a potential negative impact on judicial independence and accountability, and those that are not appropriate for a judicial performance evaluation system. The report does not focus on the evaluation of managerial positions. Therefore, the analysis below includes only the problematic indicators regarding judges' evaluation.

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77 This indicator was amended by SCM decision nr. 796/34 of 5 November 2013 by excluding the phrase "and of publication of judgments on the court's website". This amendment was welcomed by judges interviewed for this assessment, in particular for the fact that publication on the court's website of judgments is not a judicial obligation.

78 This indicator was introduced by SCM decision nr. 796/34 of 5 November 2013. The opinion of the interviewed judges is split regarding this indicator, more details are provided below.

79 Similarly with the first criteria, the total numbers allocated for this criterion might need revision, since Annex I indicates 23 points, while there are only two mandatory indicators, each appreciated with maximum 7 points and one optional indicator appreciated with maximum 4 points, which make up a total of 18 points. The other two indicators included in this criteria, namely the one on disciplinary offences and the one on ECHR violations, are appreciated in the following way: the points are deducted up to 5 points per each indicator, in case they are relevant for the judge, hence, the total amount of allocated 23 points per this criteria is not clear and should be revised.

## 2. Analysis of problematic indicators, including sources of verification

### i. Case files clearance rate

The SCM regulation provides that the case files' clearance rate "represents the number of examined cases by the judge, in panel or individually, presented in percentage compared to the total number of cases assigned to the respective judge or panel. This number is determined depending on the average case files' clearance in Moldova generally and in the court where the evaluated judge works. The data regarding the case files' clearance rate are obtained from the Integrated Case Management System (ICMS)"<sup>80</sup>. As a temporary solution, where data are not available from the ICMS, the clearance rate is calculated based on data kept by the record-keeping unit of the court. This indicator is appreciated with 10 points maximum. However, its application by the Board is not very clear.

In particular, it is not clear which percentage of the clearance rate triggers which number of points. For example, in one decision the average clearance rate for three years was 83,65% and the Board assigned 6 points, while in another decision the average clearance rate for three years was 71,82% and the Board assigned 7 points.<sup>81</sup> These numbers do not show a particular logic followed by the Board, but rather an inconsistency in grading. Moreover, in some decisions the Board includes the clearance rate in percentage, which is the correct way of calculating and presenting it, according to para. 9.1. of the SCM regulation, while in others only the number of examined cases is given. Also, in some decisions the Board indicates the backlog of cases from the previous year, while it does not in others.<sup>82</sup>

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80 ICMS provides for a completely electronic case record available in "real-time" to judges and court staff, and an integrated business management information system with the capability to sort and analyse case statistical data and produce statistical reports. It was developed in 2007-2008 and started being implemented in Moldova in 2009. According to Rule of Law Institutional Strengthening Program (ROLISP), in 2014, although installed at every court, some courts are unable to effectively use all ICMS features because of Internet connectivity and bandwidth challenges, building electrical problems, and other technical equipment problems. Reference available at [http://www.rolisp.org/images/publications/ghid\\_gestionarea\\_judecata\\_en\\_res.pdf](http://www.rolisp.org/images/publications/ghid_gestionarea_judecata_en_res.pdf).

81 See for details decision nr. 15/2 of 26 April 2013 (<http://csm.md/files/Hotaririle%20Evaluare/2013/2/15-2.pdf>), where the Board assigned 6 points for the following clearance rates: 84,46% (97,5% per court) for 2010, 79,65% (112% per court) for 2011 and 86,84% (117,7% per court) for 2012; in decision nr. 58/5 of 19 July 2013 ([http://csm.md/files/Hotaririle%20Evaluare/2013/5/Blesceaga%20Stella,%20hot\\_%2055\\_5%20din%2019\\_07\\_2013\\_%20evaluare.pdf](http://csm.md/files/Hotaririle%20Evaluare/2013/5/Blesceaga%20Stella,%20hot_%2055_5%20din%2019_07_2013_%20evaluare.pdf)), the Board assigned 7 points for the following clearance rates: 80,81% for 2010, 66,73% for 2011 and 67,92% for 2012 (in this decision the clearance rate per court is not indicated).

82 See for example, decision nr. 144/12 of 24 January 2014, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2014/12/144-12.pdf>; decision nr.132/11 of 20 December 2013, available at [http://csm.md/files/Hotaririle%20Evaluare/2013/11/132\\_11.pdf](http://csm.md/files/Hotaririle%20Evaluare/2013/11/132_11.pdf); decision nr. 130/10 of 29 November 2013, available at [http://csm.md/files/Hotaririle%20Evaluare/2013/10/130\\_10.pdf](http://csm.md/files/Hotaririle%20Evaluare/2013/10/130_10.pdf).

Inconsistency in grading may negatively affect the trust of the judges and of the public in the system of performance evaluation as it can raise suspicions that the Board favours some judges over others. Inconsistency in grading and insufficient reasoning of decisions were also highlighted as concerns in the IPR Report.<sup>83</sup>

## **ii. Respect of reasonable terms in the process of delivering justice**

This indicator is assessed, according to the SCM regulation, on the basis of the terms for the examination of cases throughout the country and per the respective court. It is assessed with 10 points maximum. The Board should appreciate this indicator using data from ICMS, a judge's explanations, the written opinion of the court chair and judgments that specifically refer to breaches of reasonable term requirement. The practice of the Board regarding this indicator is also not very clear.

From a random review of several Board decisions, it seems that the Board is only looking into ongoing cases that have been pending for more than 12, 18, 24 and 36 months. However, from the decisions it is not explained how the points are assigned. For example, in one decision<sup>84</sup>, the Board assigned 8 points to a judge who had no cases pending longer than 24 and 36 months, but 18 cases pending for more than 12 months. By contrast, in another decision<sup>85</sup>, the Board also assigned 8 points to a judge who at the time had no case pending longer than 12, 24 or 36 months. In both decisions, the Board does not explain the reasons for assigning the respective points. In absence of such reasoning, it can only be speculated whether the Board possibly looked into the nature of the cases of the judge with 18 pending cases or has looked into other aspects not included in the decision. Without a detailed explanation, the reader is left confused, e.g. why 10 points were not assigned to the judge that had no pending cases longer than 12 months, or, why both were assigned 8 points for rather different situations, if judging only by numbers.

The interviews with judges confirmed that many of the evaluated or to be evaluated judges also lack clarity regarding the grading policy of the Board. Moreover, some judges stated that during the interview, members of the Board had not even asked about the reasons for periods of 12, 18, 24 and 36 months that cases have been pending or the typology of these cases, and judges only learnt about the number of points assigned to this indicator when the Board's decision was published.

The assignment by the Board of points regarding the indicator on reasonable terms raises concerns from the perspective of judicial independence. Judges are not routinely given the chance to explain reasons of delay in the cases that last longer than 18, 24 and 36 months. In the long term, if this indicator is applied without care and consider-

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83 IPR 2013 Report, see note 8, page 64.

84 Decision nr. 144/12 of 24 January 2014.

85 Decision nr. 132/11 of 20 December 2013.

ation of judges' explanations, it may lead to judges trying to finalize cases quicker at the expense of the quality of examination and reasoning of court judgments.<sup>86</sup> Such numerical data also needs to be read in context, for example, data should be analysed in light of the complexity of cases, caseloads of judges (also between courts), and increases in caseloads, amongst other things.<sup>87</sup> In this light it is of utmost importance that the Board's decisions reflect that this is actually done.

### **iii. Execution of other functions within the deadline provided by law**

According to the SCM regulation, this indicator may refer to "supervising an intern or other assigned person, involvement in drafting normative acts, generalisation of judicial practice, participation at meetings and training sessions of representatives of law enforcement where issues of justice delivery were discussed etc." This indicator is assessed with maximum 6 points.

While this indicator is important for motivating judges to get involved in extra-judicial tasks and therefore contribute to improving the justice system, the explanation of the indicator in the SCM regulation and the practice of the Board raise some important questions. Firstly, the SCM regulation only lists several examples of duties, without providing any guidance as to how these should be weighed in support of the indicator. This creates difficulties for the Board to apply them consistently. Secondly, some aspects of this indicator put some judges of first instance courts at a disadvantage, for example because first instance courts play less of a role in generalising (harmonizing) judicial practice than higher instance courts. Similarly, judges based outside Chişinău, may also face bigger challenges and have fewer opportunities in getting involved in the drafting of various normative acts, as compared to those based in Chişinău, since the most common way of involvement in drafting of normative acts is through participation in working groups organized by the Ministry of Justice or the SCM and travelling from outside to attend such working groups is quite uncommon.

The practice of the Board is not very consistent and may be perceived as arbitrary and subjective, if its decisions do not provide sufficient reasoning for assigned points. For example, in one decision the Board assigned 3 points for this indicator, providing the following explanations: "during the assessment period [the judge] did not get involved in drafting of normative acts, did not participate at meetings and training sessions of law enforcement agencies during 2011-2012, did not participate in the generalisation of judicial practice. The judge has supervised the internship of 6 students."<sup>88</sup> In another decision, the Board also assigned 3 points to a judge, providing the following explanation: "during the last 3 years, the judge did not get involved in drafting normative acts,

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86 See for similar concerns the VC Opinion Armenia, paragraph 43.

87 Ibid. paras 41-42.

88 Decision nr. 144/12 of 24 January 2014.

generalisation of judicial practice and did not have interns”.<sup>89</sup> In contrast, in another decision, the Board provided 0 points to a judge who “supervised 2 interns, did not get involved in drafting normative acts, did not participate at meetings or training sessions of law enforcement bodies.”<sup>90</sup> Or, in one decision the Board assigned 4 points, mentioning only that the judge “supervised 12 students”,<sup>91</sup> while in another decision the Board assigned 3 points for a judge that “supervised 32 interns and participated at 3 specialized seminars”.<sup>92</sup> Furthermore, the assessment revealed that in some decisions the Board included participation at the training sessions organised by the NIJ in this indicator, although professional development of judges is a separate indicator (indicator 10.4).<sup>93</sup>

The above examples are described here to illustrate how varied the practice and the interpretation of this indicator are. During the interviews judges confirmed both an inconsistent practice and a lack of clarity for judges regarding what is expected from them to fulfil this indicator. Such an inconsistent practice may affect the trust of the judges in the evaluation system. At the same time it should be acknowledged that it is useful to encourage a judge to get involved in other functions that, whilst not considered purely judicial, cannot be done by anyone else, such as intern training, or commenting on draft laws that will have an ultimate impact on judicial independence.

#### **iv. Knowledge and application of information technology**

The SCM regulation specifies the indicator on knowledge and application of information technology (IT) as knowledge and usage of MS Word and Excel programs, the internet and e-mail, as well as the ICMS and the “Femida” Program.<sup>94</sup> Further, the regulation provides that the Board members evaluate fulfilling this indicator by assessing the information from ICMS regarding the cases examined by the judge, certificates or other documents confirming the attendance of training courses on information technology, and interviews with court staff. This indicator is graded with a maximum of 6 points.

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89 Decision nr. 44/4 of 21 June 2013.

90 Decision nr. 41/3 of 21 March 2014.

91 Decision nr. 130/10 of 29 November 2013.

92 Decision nr. 15/2 of 26 April 2013.

93 See, for example, decision nr. 114/9 of 8 November 2013, in which the Board assigned 4 points for the judge who “participated at all training seminars organized by the National Institute of Justice”. Or, decision nr. 52/5 of 19 July 2013, in which the Board assigned 3 points for the judge who “participated at all training courses organized by the Chişinău Court of Appeal and SCJ”.

94 Along with the Integrated Case Management System (ICMS), the hearings audio recording system “SRS Femida” is intended to enhance the efficiency and efficacy of the justice delivery through automating the organization of work in Moldovan courts. The special recording equipment was introduced in 2009 as part of a USAID project, see [http://justice.gov.md/public/files/file/reforma\\_sectorul\\_justitiei/pilonstudiu1/Rezultatele\\_evaluarii\\_sistemului\\_de\\_inregistrare\\_audio\\_SRS\\_Femida\\_si\\_a\\_dictofoanelor\\_in\\_instantele\\_judecatoresti-ROLISP-2013\\_eng.pdf](http://justice.gov.md/public/files/file/reforma_sectorul_justitiei/pilonstudiu1/Rezultatele_evaluarii_sistemului_de_inregistrare_audio_SRS_Femida_si_a_dictofoanelor_in_instantele_judecatoresti-ROLISP-2013_eng.pdf).

Curiously there is also a reference to information technology knowledge listed in the table included in Annex 1 of the regulation, as an optional indicator of the criteria on professional integrity along with knowledge of working languages of the ECtHR. If the points included in the respective table are used, it would mean that judges are assessed twice regarding their knowledge and use of information technology. Arguably, the reference to IT knowledge was retained in Annex 1 as a result of a technical error that occurred during the process of amending the SCM regulation.<sup>95</sup> Examined Board decisions issued after the amendments of 5 November 2013 did not use this optional indicator included in point 15 of the table in annex 1 of the SCM regulation any longer. However, IT knowledge (point 15) should be excluded from annex 1 of the SCM regulation to ensure clarity of regulations and to avoid assessment of the same type of skills twice.

**v. Percentage of upheld judgments/court orders out of the total number of appealed judgments/court orders, except the judgments reversed due to reasons not attributable to the judge**

This indicator is defined as follows in the SCM regulation: “percentage of upheld judgments/court orders out of the total number of appealed judgments/court orders, except the judgments reversed due to reasons not attributable to the judge (for example, examination of new circumstances by the appellate court, retroactivity of the new law, amnesty etc.). For this indicator, only final judgments will be taken into consideration. The percentage will be calculated out of the total number of appealed judgments/court orders”.

This indicator can be questioned from the perspective of compliance with international standards on the independence of judges. As was emphasized above, the main risk of such an indicator is that its application may in the long term lead to a hierarchical control of lower court judges by higher courts.

It is understood that this indicator was introduced as a means to encourage the development of uniform judicial practice in the country, which is crucial for ensuring the principle of legal certainty. This is a worthwhile cause, but it can justify the usage of this indicator only as long as it is clear to the judges, and only if the Board applies this indicator consistently. Most importantly the Board needs to provide judges with an opportunity to explain the reversal rates. It is strongly recommended to make it very clear that this indicator is meant to support the development of a uniform judicial practice that leads to legal certainty (a key factor in access to justice and equality before the law) and that “reasons not attributable to the judge” include situations where a judge’s decisions that departed from previous jurisprudence were well-reasoned.

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<sup>95</sup> Before the amendments of 5 November 2013, the SCM regulation included an optional indicator regarding the working languages of the ECtHR. This optional indicator was excluded by decision nr. 796/34 of 5 November 2013 of the SCM.

However, the interviews with judges revealed that many judges do not keep their own statistics on appealed judgments/court orders and their reasoning. Moreover, several judges mentioned that they were not asked to explain the percentage of upheld judgments during the interview with the Board. Furthermore none of the analysed Board decisions contained any explanations regarding the modality by which the Board takes into consideration the reasons why the judgments have been upheld or changed. Rather, the decisions only contain the number of upheld judgments and the equivalence in percentage. Although the members of the Board explained that they do not take into account the reversed decisions due to reasons that are not attributable to the judge, this is not at all obvious from the reasoning provided in the Board's decisions, which only include the total number of upheld judgments/court orders.

**vi. The number and percentage of reversed judgments/court orders out of the total number of examined cases**

This indicator was introduced when the SCM amended the SCM regulation on 5 November 2013. The assessment could not establish the rationale behind introducing this indicator in addition to the almost identical one on upheld decisions described above. The opinions of the interviewed judges and Board members are split regarding this indicator; some criticized it fiercely for the fact that it indirectly punished judges for reversed judgments/court orders for reasons not attributable to them.

Above concerns about indicators that rely on reversed judgments apply equally to this indicator. The arguments for excluding such an indicator are all the more applicable in the context of this indicator that does not take into consideration whether the reversals are attributable to the judge.

**vii. Clarity of drafting and the quality of reasoning of the judgments and way of organising judge's professional activity**

The indicators provided in p. 10.2 and 10.3 of the SCM regulation do not raise issues regarding their formulation and explanation in the SCM regulation, but their application by the Board leaves much room for improvement. Similar with other indicators, it is strongly recommended that the Board take these indicators more seriously and provide detailed analysis of its assessment of judgments, rather than using only general phrases.<sup>96</sup> It is also important regarding both these indicators that the Board phrase the decision's reasoning in such a way as to be clear about the basis on which the Board reached the decision, for example by mentioning the observed court hearings, or the opinion of the court chair.

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96 For example, in decision nr. 132/11 of 20 December 2013, the Board assigned 8 of the maximum 10 points for this indicator, providing the following explanation: "the judgments were drafted correctly, well and objectively reasoned, as a result of a thorough examination under all aspects of the evidence presented".

#### **viii. Professional development / continuous professional education of the judge**

Regarding the indicator on professional development of the judge, the SCM regulation states: “professional development of the judge during the period of evaluation will be considered. Both professional development within the NIJ and outside will be considered. Judges that have accumulated 40 hours of continuous training will be assigned 5 points. In case continuous training will exceed 40 hours, for each additional 8 hours of continuous training judges will be assigned 1 point, but not more than 5. In case the number of accumulated continuous training is less than 40, 1 point for each 8 missing hours will be deducted”.

The opinions regarding this indicator are split. On the one hand, it seems that this indicator was introduced in order to motivate judges to attend the NIJ continuous training and fulfil the legal obligation of undergoing annually 40 hours of training. On the other hand, it seems that judges are rewarded 5 points for simply attending the 40 hours of training, which they are required to attend. This indicator does not attest to the effectiveness of the training, since it only considers the mere attendance of the training hours, without taking into account if the judge had in fact learned anything. On the other hand it is not possible for the Board to look into the results of training, since the NIJ does not conduct any evaluation of judges at the end of continuous training.

Interviews revealed that this indicator is considered necessary to motivate the judges to attend the NIJ training and performance evaluation cannot be linked with the results of the training, since there is no system of evaluation of continuous training yet. In this context, it is recommended that this indicator is assessed similarly with the ones regarding disciplinary offences and ECHR violations, namely that the fulfilment of the 40 mandatory hours be considered as minimum and 0 points assigned, and for any missing 8 hours, 1 point to be deducted up to -5. This system will encourage judges to undertake the mandatory 40 hours of annual training of judges, but it will avoid giving the impression that points can be collected simply by fulfilling a legal obligation. There is a risk that judges will lose motivation to attend more than the minimum required training for skills building. However, in the longer term this system may have other positive benefits, such as prompting judges to become more interested in using the mandatory 40 hours for training that is useful and relevant for their professional development, rather than collecting points for the evaluation. If judges become more interested in better training, this may also positively influence the quality of training provided by the NIJ.

### **ix. Respect of professional ethics**

The SCM regulation defines this indicator as the respect by the judge of the provisions of the Code of Ethics of Judges, to the extent that this does not constitute a disciplinary offence. The Board evaluates this indicator (1) on the basis of an information note of the judicial inspection regarding the verifications carried out and complaints submitted concerning the evaluated judge, and (2) by observing court hearings held by the judge or hearing the audio-records of at least five court hearings held by the judge, randomly selected by the Board members. The maximum assigned points for this indicator are 7 (6 until the amendments of 5 November 2013).

Regarding the number of complaints submitted, the assessment revealed some concern with the way this indicator is included in the Regulation, and the modality by which the Board applies and explains their grading for this indicator in its decisions. The mere reference to the number of submitted complaints, as suggested by the wording of the Regulation, does not divulge much about the professional ethics of a judge. Judges should not be punished for the mere fact that complaints have been submitted, nor should they be rewarded for lack of complaints, since this is entirely outside of judges' sphere of influence. What matters are the results of the complaints and the verification by the judicial inspection, as well as the conclusions of the Board.

Another problematic aspect is the fact that in some decisions the Board refers to the absence of disciplinary procedures against the evaluated judge, although the regulation expressly excludes disciplinary procedures from the realm of this indicator (indicator 11.1 in the SCM regulation).<sup>97</sup> According to the SCM regulation, disciplinary offences should only be taken into account when assessing the indicator related to the presence of disciplinary offences (indicator 11.3 in the SCM regulation). This gives the impression that the judge may be assigned points for two indicators (professional ethics and presence of disciplinary offences) based on the same fact: the lack of or committed disciplinary offences by the judge. Another issue of concern is the fact that in the majority of decisions the Board only mentions the number of complaints submitted to the judicial

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97 See for example: decision nr. 114/9 of 8 November 2013, available at <http://csm.md/files/Hotaririle%20CEvaluare/2013/9/cojocari.pdf>; decision nr. 19/2 of 26 April 2013 available at <http://csm.md/files/Hotaririle%20CEvaluare/2013/2/19-2.pdf>.

inspection and usually that these are ill-founded, while in some decisions it adds some details.<sup>98</sup> Furthermore, there is inconsistent grading and lack of reasoning by the Board, a problem highlighted regarding other indicators as well.<sup>99</sup>

#### **x. Professional reputation**

The SCM regulation states that for assessing the judge's professional reputation, the Board will take into account "the general opinion about the judge, as well as the authority of the judge in the justice sector." This indicator is evaluated on the basis of the court chair's written opinion, taking into consideration whether the judge has a position in the judicial administration bodies or bodies that promote judges' interests, and information from other sources, such as mass-media.

The assessment concludes that it is problematic to use as a source of verification for this indicator the fact that a judge holds a position in the judicial administration bodies or bodies that promote judges' interests. It provides automatic credit to such judges and puts at a disadvantage the other judges. Moreover, the fact that a judge was appointed or elected into a judicial administration body is not an unquestionable sign of good professional reputation.

#### ***Recommendations to the SCM:***

- *Exclude "holding a position in the judicial administration bodies or bodies promoting judges' interests" from the SCM regulation as source of verification.*
- *Remove point 15 from the table in annex 1 of the SCM regulation to exclude the possibility of giving points twice for the same skills set in Information Technology.*

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98 For example, in decision nr. 41/3 of 21 March 2014, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2014/03/41-3.pdf>, the Board mentions, besides the number of submitted petitions, that the judge "does not have a correct attitude, during the exercise of his duties, regarding his colleagues, lawyers, experts, witnesses, other participants of the trial, violating the Code of Ethics of Judges". Or, in decision nr. 144/12 of 24 January 2014, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2014/12/142-12.pdf>, the Board mentions that "from confidential information obtained from civil society, court users and lawyers, the judge has a behaviour that lacks respect and ethics regarding the participants at the court hearings".

99 See for example decision nr. 13/1 of 21 February 2014, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2014/01/13-1.pdf>, in which the Board assigned the maximum of 7 points to a judge against whom "41 complaints were submitted, ill-founded" or decision nr. 23/2 of 28 February 2014, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2014/02/23-2.pdf>, in which the Board assigned the maximum 7 points to a judge against whom "5 complaints were submitted, ill-founded". On the other hand, in decision nr. 30/3 of 31 May 2013, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2013/3/30-3.pdf>, the Board assigned 5 points out of 6 maximum to a judge against whom "21 complaints were submitted, ill-founded". Or, in decision nr. 44/4 of 21 June 2013, available at <http://www.csm.md/files/Hotaririle%20Evaluare/2013/4/44-4.pdf>, the Board assigned only 3 out of 6 points to a judge against whom "16 complaints were submitted, ill-founded".

- *Amend the SCM regulation to clarify that the indicator on percentage of upheld judgments aims to reduce disparities of judicial practices. Carry out a periodic review (every 3 years) of the application of the indicator on percentage of upheld judgments, to ensure that it is not used to the detriment of judicial independence, in line with international commitments, with a view to ultimately eliminating it altogether once the disparity of judicial practices is considered less of a concern in Moldova.*
- *Exclude the indicator for percentage of reversed judgments, as it runs counter to international standards and recommendations regarding the use of reversed judgments in evaluating judicial performance.*
- *Amend the SCM regulation regarding the assigned points for the indicator on continuous professional education of judges to include a similar assignment system to the indicators regarding disciplinary offences and ECHR violations, as described above.*
- *Amend the wording related to the number of submitted complaints as a source of verification for this indicator, referring instead to “the outcomes of the submitted complaints regarding the judge”.*
- *Consider measures to provide opportunities for all judges to earn points in the area of execution of other functions, as described above. Discuss institutional solutions to addressing those problems, such as ensuring equal opportunities to all judges to train interns, provide training at the NIJ, or contribute to policy discussions.*

**Recommendations to the Board:**

- *Harmonize evaluation practices and include the data on clearance rates in both numbers and percentages, which will be clearer for the judges and the readers.*
- *Develop (or publish if already developed) a scale to show how points are distributed to a range of clearance rates. This will increase the transparency of decision-making by the Board, but also help the Board itself maintain a consistent grading policy. Ensure that the grading policy or scale makes reference to factors such as the complexity of cases.*
- *State in the reasoning of decisions when taking into account any other information than the clearance rate for this indicator (such as backlog of cases from previous years, and the complexity of cases), and explain why and how it is weighed.*

- *Explain in more detail the facts considered and how they are weighed when assigning points for the indicator on the respect of reasonable terms to a particular judge.*
- *Provide an opportunity and expressly encourage judges to offer explanations during the interview or in writing regarding the indicator on respect of reasonable terms, given the fact that the length of cases often depends on a series of other factors than the judge and his/her management of the case.*
- *Develop guidelines regarding the application of the SCM regulation, explaining among other things the types of activities that are considered by the Board when evaluating judges based on the indicator for the execution of other functions. Consider adding more examples of activities of judges that can be considered when evaluating this indicator. Emphasize that various activities are taken into account, accommodating judges from different court levels.*
- *Related to the indicator on the execution of other functions, consider developing a grading policy regarding the activities that can be quantitatively measured, such as the number of supervised interns in order to both ensure consistency in grading, but also clarity for judges regarding what is expected from them.*
- *Explain to judges, through a separate instruction or decision, the methodology for assessing the indicator on percentage of upheld judgments, in particular the need to keep account of the reasons for reversed judgments/court orders and provide these explanations to the Board prior to the interview.*
- *Use the interview to discuss the statistics regarding the indicator on upheld judgments in order to ensure that judges are not unfairly assessed for reversed judgments/court orders for reasons not attributable to them. Consider as a judgment reversed for reasons not attributable to the judge any judgment that is well-reasoned, even though it departs from previous practice / precedent, as long as the reasons for departure are adequately explained.*
- *On the indicator for respect of professional ethics, provide detailed reasoning regarding this indicator and mention the sources used;*
- *On the indicator for respect of professional ethics, refrain from including disciplinary actions in this indicator.*

## F. Methods of Gathering Information

The performance evaluation process for judges involves various methods of gathering information,<sup>100</sup> looking at different sources, on how judges carry out their professional activities and whether they meet the standards required by the new regulation. All indicators for each criterion describe how they are to be measured or evaluated, i.e. sources of information or evidence. For each indicator information is collected from different sources. Statistical data, and data on issues of efficiency, can either be taken from the ICMS, or if not available, from the Chancellery (archives) of the court where the evaluated judge works. To get more details, and for other criteria, the Board can collect information from documents confirming knowledge or activities, written opinions of court chairs, interviews with evaluated judges, as well as other court staff and observation of court hearings by members of the Board.

Moreover, for indicators such as those that serve to assess judges' professional integrity, the Board receives information about complaints and disciplinary offences from the Disciplinary Board and the Judicial Inspection, and about violations of European Convention rights from the Government Agent Division within the Ministry of Justice. The remainder of this section will describe some issues of concern associated with the various ways of gathering information within the system, and offer recommendations to address the concerns expressed here.

### 1. Case archives

Case files are the basis for measuring a number of indicators related to the efficiency of judges' work (especially the clearance rate and respect of reasonable term requirement) and related to the quality of judges' activity (especially on case reversals and organisation of professional work). Therefore (digital) case archives<sup>101</sup> are useful sources of data and information regarding the quantity and quality of judges' work. Using data and information from (digital) case archives for the evaluation of judges also helps the Board stimulate the judges to organise their work, and it serves the Board to understand the judges' progress and improvements, as well as the problems they faced during the three year evaluation period.

The assessment revealed that some judges are very well organised and keep records of their decisions that were upheld or reversed, and who are therefore equipped with

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100 This includes not only statistical or numerical data, but also value judgments, explanations, opinions from court actors and judges themselves.

101 ICMS is a more recent innovation, and many cases are still in physical format, see reference above.

examples of good practice for their work in other cases. For other judges, who were less organised, it took a lot of time to prepare for the evaluation, researching in the archives going back three years for their decisions that were reversed and upheld, to carefully choose judgments for review by the Board regarding the quality of their reasoning, and to consider them in light of the indicators. Whilst there are complaints that this preparation takes a lot of time from judges' regular duties, it can be expected and it is a desirable effect of the evaluation process that all judges will be better organised, generally and for the next evaluation.

The Board stated that judges were given time to gather the appropriate data for the evaluation procedure themselves, but that it also encountered a lack of motivation to do so on the side of some judges. With the first round of performance evaluation of judges, the Board had expected better preparation and motivation by the judges.

## **2. Board interviews with the evaluated judge**

Interviews with evaluated judges are an important method for gathering information because they serve to clarify any gaps or concerns the Board members might have in evaluating the judges. Most importantly these interviews should be used to clarify any possible reasons and circumstances related to rates of reversals (quality of decisions). Judges may be asked to comment on any reversal that they do not agree with, or why they consider that the reversal was not attributable to them. The Board may also ask evaluated judges about problematic relationships with colleagues (both clerical and judicial) or litigants (lawyers and parties), issues of ethics and reputation, or issues of professional activity.

The assessment of past evaluation practice revealed that the interview, as it is currently conducted, does not cover many of these important issues. The issue that appeared to be discussed more often was the rate of reversals. However, the judges interviewed during this assessment mentioned that the Board members did not ask them to explain the rate of reversals and whether the reversed decisions were due to reasons not attributable to them. Occasionally judges were asked about issues of conflict in the workplace. However, some judges complained that Board members referred to "negative feedback" by colleagues and other professionals, giving no further details about the feedback so that they could not defend themselves.

Furthermore, the assessment revealed that there is no one particular format and interviews are adapted to each judge and the specific concerns of the Board.<sup>102</sup> Judges interviewed during this assessment reported about interview durations ranging from

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<sup>102</sup> Article 21(5) of Law no. 154 requires that minutes of the interviews are taken, and that they are signed by the meetings' chair and secretary, but it is not specified by whom they are taken. The interviews are also audio recorded.

7-20 minutes. One judge experienced the interview as a very short and superficial formality, to an extent that the judge even wondered why there was a need for the judge's presence. The Board members stated that interviews last an average of 30 minutes. The Board acknowledged that the interviews do not yield very useful information yet. The main justification of the Board was the fact that they are under extraordinary time pressure, giving the deadline to finalize the first cycle of ordinary evaluation of all judges by the end of 2014. Besides ordinary evaluation, the Board also needs to deal with extraordinary evaluations, in particular related to promotions and appointments for life tenure.

The interview should be retained as an essential basis for the decision making of the Board as it is the occasion to clarify any outstanding issues, both qualitative and quantitative. The interview should not be a mere formality. It should also be used for discussing challenges faced by the judge and the recommendations provided by the Board to the judge.<sup>103</sup> The judges should know that the interview is the final stage before the Board takes its decision and it is the place where they can provide and ask for any clarifications of issues that appeared during the evaluation process. For a qualitative interview, the duration should not be less than 30 minutes.

### **3. Court chairs' opinion**

An important part of the file submitted to the Board about the evaluated judge<sup>104</sup> is the opinion of the chair of the court where the judge works. The Board needs an opinion from the court chair for the evaluation of judges against various indicators: firstly for the observance of reasonable timeframes in the process of delivering justice.<sup>105</sup> Secondly, the Board needs the court chair's opinion for assessing the judge's 'fulfilling within the legal framework the other duties established by law'.<sup>106</sup> The third indicator where the

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103 The Board does not currently make specific recommendations to the evaluated judges, except one decision that the assessment team has identified that contains a recommendation. It is strongly recommended that the Board consider making recommendations to the judges, especially the ones that receive other than excellent evaluation grades. Recommendations are important for ensuring that performance evaluation helps judges improve their skills and competencies. See for more on this issue in section G.

104 The assessment team understood that the file of the evaluated judge includes information submitted by the court, which includes the information provided by the court chair and the judge, the information / evidence collected by the Board members and the information/evidence presented by other agencies, for example the judicial inspection or SCM note, or the Government Agent note.

105 SCM regulation, para 9.2. Along with the court chair's opinion, the Board also assesses this indicator based on data from the ICMS, explanations of the judge, and court decisions which state violation by the judge of the reasonable timeframe.

106 Ibid. para 9.4. The Board assesses this indicator, not only on the basis of the chair's opinion, but also on the basis of documents submitted by the judge that illustrate the fulfilment of these tasks.

chair's opinion is needed is on the organisation of professional work.<sup>107</sup> The fourth indicator needing the chair's opinion is the professional reputation of the judge.<sup>108</sup>

One concern that was raised with the Board during this assessment is the weight of the court chair opinion compared with other information collected for the purpose of judges' performance evaluation. This concern is raised from the perspective of the potential indirect effect of the performance evaluation system on increased unjustified powers of court chairs and court chairs' undue influence over judges in their courts. The Board assured that the chairs' opinions are read in light of other data provided by the court and do not carry special weight. The Board seemed aware of the potential misrepresentation of judges' work by the court chair; therefore it corroborates the opinion with other gathered information and evidence. Similarly, interview respondents have not been overly worried about negative opinions of their chairs. One concern for the Board is that some court chairs may give untruthful opinions to get rid of a judge, by helping the judge gain a promotion elsewhere.

The assessment concluded that there is no uniform approach or guidelines from the Board for court chairs on how to issue the draft opinion and whether and how to consult the evaluated judge. It is also unclear whether the judge has a right to familiarize him- or herself with the opinion, and a right to reply if the court chair gives a poor evaluation. The results of the interviews during this assessment suggest that in general, the opinion is drafted by the chair and then discussed with the judge. According to the respondents, the court chair opinion appears to be based on a general assessment over the three year period, as well as weekly meetings the court chairs hold with all judges in their respective courts. Respondents described the opinions as very general, occasionally with some statistics.

It is important in general, that the Board highlights the position of the chair's opinion in light of the other sources of data for these indicators and how each has contributed to the number of points that have been given.

#### **4. Evaluation Board observation of hearings and gathering of other information**

**i. Observation:** Generally speaking, the Board sends members to observe some hearings. Judges are informed that someone will attend hearings. This does not always happen, however, and the Board has said that they have difficulties and time con-

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107 This indicator is further assessed based on 5 cases randomly selected through the ICMS, and direct observation by the Board of hearings or audio recordings of hearings.

108 SCM regulation para 11.2. This indicator is also assessed based on information from other sources, such as mass-media.

straints to get to all of the courts, especially those outside of Chişinău. The SCM regulation provides for a good alternative to court observation, namely auditing the audio recording of court hearings (different numbers for different indicators).

**ii. Confidential interview with other judges and personnel of the court where the evaluated judge works:** The Board conducts interviews with other members of the court, both clerical and judicial. The nature of these interviews is confidential, which is understandable in order to get unbiased information. However, where these interviews have resulted in obtaining negative information and assessments of judges, respondents of interviews during this assessment have complained about the lack of opportunity to respond or defend themselves against such complaints.

The fact that these interviews are confidential is not sufficient to justify that judges are not informed of the negative feedback received and not given a chance to reply. This is not in line with due process.

### ***Recommendations to the Board:***

#### ***For the benefit of judges:***

- *Issue a guideline for judges on what information to collect and store to be prepared for the performance evaluation procedure.*
- *Issue a guideline on the SCM regulation to detail the purpose of the interview and the fact that the judge should be prepared to answer the Board's questions, as well as provide any explanations to any of the indicators, as relevant. In the guidelines highlight the judge's right to be heard and to contradict arguments against her or him and that the Board has a responsibility to confront the evaluated judges with the main issues that negatively affect their performance evaluation.*
- *Ensure that the impact of any statements on the overall evaluation is clearly motivated in the final decision.*
- *Discuss during the interview the Board's recommendations to the judge, which will later on be included in the Board decision.*

#### ***For Board procedures:***

- *Ensure equal treatment by making time for observation of hearings of all evaluated judges. Ensure unified procedures for the observation of court hearings in order to reduce subjectivism or varying approaches by different members of the Board. This may include a protocol or guideline that will include the goal of observing court hearings, the aspects to be observed (for example in the form of a checklist) and a template for conclusions.*

- *If the Board members do not become full-time members and their burden does not allow them proper observation of court hearings, a possibility could be hiring senior student interns from university or assign members of the SCM/Board's secretariat to do in court observation of judges' performance, or ask for NGO cooperation, strictly in compliance with the above-mentioned protocol or guideline and under the responsibility of the Board. If such an approach is accepted, sufficient guarantees should be put in place to eliminate potential abuse or misinterpretation. Such guarantees could include but would not be limited to developing a protocol for court hearings observation, describing the procedure and the checklist for court observation, as well as the status of court observers.*
- *Conduct interviews that are more substantial, to give opportunity for in depth conversations with evaluated judges. An average duration of longer than 30 minutes appears reasonable.*
- *Consider adding a second interview, before the final decision of the Board, in cases where the judge might get an "insufficient" or "failed" grade. This interview can be used for clarifying the points assigned to the judge and the recommendations made by the Board to the judge.*
- *Issue guidelines to court chairs on their opinions on judges' performance, including the process recommended that court chairs should follow when putting them together. The judge should be given the chance to see the draft opinion, discuss it with the chair before the latter signs it off and the judge should at least be provided with the chance to submit a written explanation to the Board.*

**Recommendation to NIJ:**

- *Consider including in judges' continuous training (organized by the NIJ) aspects related to data storage and organization of data / data management.*

**Recommendation to Court Chairs:**

- *Organize training or meetings for exchange of experience at the court level to share good practices among judges on performance evaluation.*
- *When considering their role in performance evaluations seriously, bear in mind the performance evaluation's overall impact on the delivery of justice by the court as a whole. Any opinion given must be complete, accurate, concrete and objective whatever the personal likes or dislikes for a judge. Opinions can also reflect on what support has been offered to the judges under evaluation to maintain high standards and efficiency at court.*

## G. Fairness in Decision Making of the Evaluation Board

### 1. Procedure of the Board

The overall score for an evaluated judge should be formed from an average of scores given by individual Board members independently, providing a basis for a fair decision. This section examines issues related to reasoning and transparency that contribute to the fairness of grading and the overall consequences of a decision, such as dismissal. The decision-making procedure of the Board is regulated by section B of the SCM regulation, especially article 12.

“Each member of the Board fills in the evaluation form and grants to the evaluated judge the score, according to their own beliefs, for each indicator mentioned above, but not more than the maximum score set out in Annex 1 to the Regulation. The final score is determined after the interview with the evaluated judge, after which the evaluation form is signed and sent to the secretary of the Board. After the evaluation form is transmitted to the secretary of the Board, the member of the Board cannot amend it. The final score obtained after the evaluation represents the total points assigned by the members of the Board and divided by the number of members of the Board that have evaluated the judge. After the determination of the score, the members of the Board adopt a decision in which the Board indicates the main findings of the evaluation, including professional, administrative or organizational deficiencies related to judge’s work. The Board should include in the decisions the recommendations for the evaluated judge in order to eliminate the identified deficiencies and improve the professional performance of the evaluated judge. This decision shall be taken by a majority vote of the Board members.”

**Article 14(3) of the Law no. 154 further prescribes:**

*“The procedure of judicial performance evaluation must observe the principle of legal correctness, the principle of legitimate expectations and other fundamental principles, to create conditions for an objective and multidimensional evaluation of judges’ professional activity.”*

What has become clear during this assessment is a lack of inclusion of judges in the process. All data exists independently of them; the only real time for a judge to be heard is during the interview - which has already been established as a superficial formality. Whilst the Board gathers data from many sources, the judge is rarely able to participate - either to explain certain results or to defend themselves. This puts into question the fairness of the procedure.

## 2. Independence and fairness in the reasoning of decisions

The Board members' integrity, objectivity and responsibility in giving a clearly motivated and honest evaluation is key in any performance evaluation system, however these characteristics are even more important, and harder to attain in a country that is so small that most people from similar walks of life such as the judiciary know each other, and giving an objective evaluation can be difficult.

For this reason, the appearance of impartiality and objectivity is extremely important, and one way this can be achieved, as with judicial accountability normally, is through clear and thorough reasoning of each decision. The results of the analysis of evaluation decisions conducted during this assessment confirmed that there is a lack of reasoning and there is inconsistency in giving points for supposedly similar performance. For example, one can see a difference in the way that the points for ethics are given, where a similar number of unfounded petitions against a judge have been made, between a judge, who got 3 points for 16 unfounded petitions,<sup>109</sup> and other judges, who got 6 points for 12 unfounded petitions against them.<sup>110</sup> None of these decisions have indicated reasons that would explain such a difference in points.

Large differences in assigned points can also be seen in the indicator for IT knowledge, between a judge who got 4 points for being "knowledgeable" regarding email, internet, word and excel, with some problems using ICMS,<sup>111</sup> and another judge, where the Board gave 7 points and mentioned only knowledge of email, internet, word and excel, without reference to any other software used in courts (such as ICMS or Femida).<sup>112</sup> The Board also inconsistently distinguishes between advanced knowledge, intermediate knowledge, and basic knowledge without explaining what the requirements are and how this impacts on the quality of judges' work, yet still gives inconsistent scores, for example, 7 points for basic knowledge having missed training for it<sup>113</sup> and 8 points for a judge with "advanced knowledge".<sup>114</sup>

Whilst the evaluation is only supposed to examine three years of activity of the judge, one example exists where the Board goes further back, and refers to an award given to the judge in 2007.<sup>115</sup> It is not evident whether the Board looks only at those three years, or whether it looks at performance and reputation from further back, which could affect the decision.

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109 Decision nr. 44/4 of 21 June 2013.

110 Decision nr. 46/5 of 19 July 2013 and decision nr. 32/3 of 31 May 2013.

111 Decision nr. 44/4 of 21 June 2013.

112 Decision nr. 34/3 of 31 May 2013.

113 Decision nr. 5/1 of 5 April 2013.

114 Decision nr. 62/6 of 27 September 2013.

115 Decision nr. 34/3 of 31 May 2013.

Inconsistent motivation can also be seen on the criterion for efficiency of activity, looking at whether cases are examined within a reasonable time. Occasionally, the Board adds that it takes into account concrete aspects such as complexity of cases, number of participants, participant behaviour and sudden increase in workload, but not always. Out of 13 Board decisions examined, only two decisions had such detailed reasoning. Others simply looked at the numbers of cases examined exceeding the limits of 12, 24 and 36 months before giving points.

Another striking example of inconsistent motivation can be seen in the indicator for organizing the judge's professional activity. Usually, the Board gives concrete examples of where the judge has reached the standard required, where the judge is properly prepared, the litigants are fully informed of deadlines and schedules, documents have been sent to interested parties, appeals are directed immediately to the court of appeal, hearings are conducted on time, and judges are respectful. However, occasionally, decisions fail to describe concrete examples of meeting these standards and give away high points for less concrete instances, such as "appropriate degree of professionalism", or for showing "solemnity" and merely avoiding "dilatory practices."<sup>116</sup> These are good characteristics for a judge to have, but when reading motivations for the evaluations, judges need to see where they can improve, such as timely hearings, or proper scheduling.

Having consistent reasoning and points goes a long way towards creating a fair and transparent procedure of evaluation. According to the Venice Commission, having an explanation will also "allow the judge to have a reasoned decision on the attribution of his or her grade that he or she may then challenge...".<sup>117</sup> This is all the more important where a decision of the Board may ultimately lead to dismissal of the evaluated judge. The Board itself has admitted that it needs to reason its decisions better, but complained of a lack of time to make motivated decisions due to its workload. The judge members of the Board complained that in practice the reduced workload policy for judge board members does not work very well.<sup>118</sup> Civil society members mentioned that they are only paid for the day that the board is in session, while the work related to preparing for judge's evaluation interviews (such as visits to the courts to observe hearings, collecting

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116 See for example decision nr. 62/6 of 27 September 2013 and decision nr. 46/5 of 19 July 2013.

117 VC Opinion Armenia, para 76.

118 According to Law nr. 154, the judges members of the Board remain in their position as judge and do not receive any payment for being a member of the Board. Instead, to allow them carry out their function as Board members, they should have a reduced workload. The SCM decision nr. 613/26 of 20 August 2013 provides that the ICMS should assign to judges that are members of the Board cases in proportion of 75% of the workload of an ordinary judge. On 5 November 2013, the SCM adopted a new decision, based on the request of the Board that mentioned that the judge members of the Board cannot cope with their high workload as members of the Board and as ordinary judges. The SCM decision nr. 811/34 lowered the workload of judges-members of the Board to 50% compared to other judges in the respective courts.

information, analysing the judge's file) are not covered. Furthermore, the Board has only one secretary to assist its members.

**Recommendation to the Parliament and the SCM:**

- *Analyse the workload of the Board at the end of the first cycle of performance evaluation of judges (end of 2014) and consider amending the status of the Board members by making them permanent/full-time members (this means that judges would be suspended from their function as judges, similar to the judge-members in the SCM), and the civil society representatives would be able to carry out only activities that are compatible with their full-time membership, as is the case for any public office.*

**Recommendations to the Board:**

- *Ensure clear reasoning of decisions that explains where the judges have fallen short of the standard expected of them. Board members should have some training on reasoning evaluation decisions, not only on the job, but also from judges and/or experts from countries where performance evaluation of judges is successful and experiences could be useful to Moldova. Seek assistance of international organisations and civil society actors for capacity building activities of the Board, if external support is required.*
- *Create clear and concrete characteristics of each indicator, and create guidelines as to how the standards may be met. The characteristics and guidelines should be proportionate and realistic and clearly related to the indicator.*
- *Develop a grading policy (if the system with grades is retained) for the quantitative indicators. The Board should develop a guideline on the SCM regulation, which would include detailed explanations on each indicator, relevant sources of verification and the process of evaluation. This will provide guidance for judges on what to expect and how to prepare for performance evaluation. In section E recommendations are provided for some indicators that raise specific concerns. In addition, develop a grading policy for quantitative indicators. Make these documents (or one document if both aspects are merged) public, disseminate to all judges and organize regional meetings to explain them.*
- *Finally, develop annual analytical reports that would not only provide statistics, but also identify the positive and negative trends within the system, based on conducted performance evaluation, and recommend potential solutions. This would help the public develop an informed opinion about the system and will inform the relevant actors about the challenges and requirements of the system.*

## H. Role of the Superior Council of Magistracy

Under article 24 of the Law no 154, a decision of the Board may be appealed to the SCM, exclusively on issues of procedure. Where judges wish to appeal because they disagree with points given on any indicator, such as organising their professional activity, the SCM will not be able to give any opinion on this substantive issue. Only if there was some irregularity in the procedure itself, for example, in collecting data, or failure to recuse a Board member, would the SCM be able to accept and act upon the appeal. Given that this is the case, the general consensus among judges interviewed during this assessment has been that there is no point in appealing.

A performance evaluation system for judges that is solely focused on improvement would only really require a system of appeal, where the decision has profound consequences for the judge or judicial independence. This is the case in Moldova, as a decision can lead to dismissal, which, as discussed earlier, goes against the principle of irremovability. Therefore, limiting the scope of appeal to procedural issues is not sufficient to protect judicial independence in the Moldovan case. This is a view shared generally, by the SCM, the Board and the respondents to the interviews, who all believe that the right to appeal to the SCM on substantive issues should also be granted.

The classical division between procedural and substantive issues raises some questions such as how a judge can prove that the Board has interpreted something wrongly; and what is a procedural issue as opposed to a substantive one in performance evaluation. However, if there is a consideration to increase the scope of the SCM decision making powers on appeal, the same concerns expressed about motivating decisions by the Board would also apply to the SCM in terms of procedures, motivation and confidentiality. If the SCM was to take on substantive issues, the question is raised, whether it should be able to take a new decision (replace the Board's decisions with its own), or only annul the Board's decision and send the decision back for reconsideration by the Board, giving a detailed outline as to what needs to be re-examined and what needs to be added. This is a conceptual issue that decision-makers should decide on. If it is decided that the SCM can adopt new decisions on performance evaluation, the procedure should be provided and the decisions of the SCM should be well motivated. If it retains the power to take a new decision, then the SCM should also have the time and resources to collect information and reassess the indicators that are contested. Lastly, there is a question of the SCM's own independence and capacity. In a country so small, there are bound to be personal relationships found amongst the small network of judges, and this may raise questions as to impartiality during an appeals process. Clear motivation, transparent procedures that meet international standards of due process, and impartiality are all key factors to a successful appeals procedure to the SCM.

An additional problem for increasing the scope of appeals is the capacity of the Board. It has limited institutional support, limited time, and limited resources. If it gets, in addition to the current workload, to review the decisions of the SCM that annuls the Board's decision and sends it for a new decision, this means additional workload. However, in a system that runs correctly, with transparent procedures and well-reasoned decisions, there should not be so many appeals. Therefore, it seems more important to provide a right to a meaningful appeal than exclude it due to considerations of limited resources.

***Recommendation to the Parliament:***

- *Amend the Law nr. 154 to provide the right to full appeal of the Performance Board decisions. Consider one of the following alternative options in this regard:*
  - *Allow SCM to hear an appeal on both issues of substance and procedure, and enable it to change the grade/recommendations or*
  - *Allow SCM to hear an appeal on both issues of substance and procedure, identify the gaps in the Board's decision and send the decision back for a new procedure by the Board itself.*

## **I. Publicity of Decisions of the Board versus Judicial Independence**

Although improving public confidence in the judiciary is not an explicit aim of performance evaluation of judges in Moldova, it is implied that any policy of this kind seeks to improve the standing of judges in society. This has been reflected in the regulation in Moldova by providing that the Board holds interviews with judges in public, and that decisions of the Board are published.

During the interviews conducted as part of this assessment, none of the respondents complained that the Board was conducting evaluation interviews with judges in public and publishing its decisions. Judges recognize that they are public servants and should answer to the public. Moreover, some judges mentioned that they support a transparent system, with the decisions of the Board regarding each individual judge being published, as an important guarantee against subjective decisions and potential abuse by the Board. They maintained that a closed / confidential system is not appropriate in

the Moldovan context, where reportedly subjectivism and corrupt practices are not yet an exception.<sup>119</sup>

However, as stated in the ODIHR legal opinion, "...‘transparent’ and ‘public’ are not necessarily synonymous in matters of judicial performance evaluation. Although it is in and of itself commendable that the legislature has sought to ensure maximum publicity by making the meetings and decisions on the evaluation of judges public, it is noted here that public evaluations may also reduce confidence in judges that get lower marks, which may in turn affect the authority of those judges and by extension the authority of the wider judicial system."<sup>120</sup>

The degree of transparency should be weighed against the need for effective administration of justice, which would be affected if judges lost some of their authority to hear cases because of poor evaluations. It may be felt that one judge’s failing is not all judges’ failing, however, it can have an impact on the authority of the wider judicial system. Furthermore, the ranking that occurs as a natural result of publicising grades “could have serious consequences for the administration of justice. How is a litigant expected to react if his or her case is assigned to a judge who has been ranked in the low group?”<sup>121</sup>

Indeed, the assessment revealed that there have already been complaints to the SCM by litigants that their cases are being heard by judges with a grade of “insufficient”. In the discussion with both the SCM and the Board, some thought was given to eliminating the grades “insufficient” and “excellent”- the former because no one would want to be heard by a judge who received an insufficient grade, and the latter because at the moment, there aren’t that many who fulfil the criteria. However, eliminating these two grades would not necessarily address the core of the concerns raised.

People deserve to have judges who are competent, and knowing that judges are held accountable to professional standards may contribute to increasing public trust in the judiciary in general. However, the system as it functions presently may not be capable to generate this public trust, as Board decisions are rather superficial and not reasoned to an extent that would explain and justify the grades given to judges. These performance evaluations, at this time, cannot be considered an accurate reflection of professional activity or competence. Public confidence is important, but for the sake of administration of justice, and also of judicial confidence in the evaluation system, the public only needs to know that the judges are competent to hear the cases. Moreover,

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119 According to the IRP Report of 2013, 39% of respondent judges consider that the Board sittings where judges are interviewed should be open, with no possibility of deciding on close sittings, while 61% consider that there should be a possibility for declaring close sittings at the motivated request of the evaluated judge, see note 8, page 54.

120 ODIHR legal opinion, para 37.

121 VC Opinion Armenia, para 89.

the public has an interest in knowing that judges are held accountable to professional standards and how, but it is not necessarily appropriate that court users may know the detailed results of the judges' performance evaluations.

Whilst some interview respondents did not mind the grades and even believed that it could stimulate them to do better, grades in themselves can have consequences, especially if "insufficient" or "failed" is given - which can lead to dismissal. Furthermore, a grade can also have an impact on the prospects of promotion.

Moreover, the lack of consistency shown in the decisions that have been made public also has had a demoralising effect for some judges, and creates competition among them, which, as discussed above in the theoretical framework, could compromise decision making by judges. This could eventually create problems for the evaluation process in terms of trust and cooperation. Performance evaluation in Moldova risks becoming a bureaucratic exercise, whereby judges will not fully cooperate with the evaluation, and therefore not fully benefit from its potential results (such as recommendations for improvement, and even achieve standards required for promotion).

To meet both aims, that of public confidence and trust in the system by the judges, as well as mitigate any potential negative effects on judicial independence, the assessment concluded that the current system needs change. There could be different options to pursue, such as replacing grades with passed/failed qualifications or consider a limited publication of the Board's decisions.

The issue of public confidence, and subsequent issues of concern connected to judicial independence, have appeared to have taken the focus away from improving the skills of judges. Litigants have been more concerned with being heard by judges with insufficient grades, than with the overall purpose of the system to improve judicial skills. Some respondents, including the Board and SCM members hold the belief that any grade below "excellent" is a stimulant to improve. However, as highlighted earlier, the CoE Venice Commission has stated that grading is not in line with the spirit of judicial performance evaluation, and does not serve its overall objective well: skills improvement.<sup>122</sup>

Even though it is stated in the regulation that recommendations for skills improvement should be given, the Board members admitted that they had not really given them much thought. This is reflected in the fact that among the many decisions examined there was only one with a formal recommendation, namely to improve knowledge of the state language.<sup>123</sup> This was written within the optional criteria for knowledge of ECHR language and IT skills. Interestingly, nowhere else in the decision was it indicated that this judge had any language problems, and it did not impact on the overall grade that was 'very

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122 VC Opinion Armenia, para 77.

123 Decision nr. 46/5 of 19 July 2013.

good'. The Board acknowledged the problem that grades given are seen more as a punishment and humiliation than an aid to skills improvement.

However, the general consensus amongst those interviewed was that recommendations, though they would be useful, may not be realistic given that the evaluation itself is too short and superficial. It was felt that too much was based on quantitative rather than qualitative criteria, and more observation would help. The CoE Venice Commission also highlights the importance of using qualitative criteria on a practical level because it includes "the most important aptitudes that a judge should have, such as knowledge and personal skills."<sup>124</sup>

Skills improvement and public confidence are not mutually exclusive goals of performance evaluation of judges. In practice it appears that focussing on transparency has led to problems of public confidence and how to manage that, and has highlighted the fact that one of the aims it was supposed to achieve i.e. skills improvement has not actually been achieved.

**Recommendation to the SCM:**

- *Amend the SCM regulation to mitigate the negative effects on judicial independence and public confidence in the judiciary as a result of the publication of all decisions of the Board, including the grades and points assigned to judges. Consider the following alternative options:*
  - *Replace qualification grades with passed/ failed qualifications. This means changing the assessment approach; or*
  - *Publish the Board decisions, excluding the names of the judges. Make available the decisions with the names only to judges (for creating internal checks and balances) and for research purposes, upon approval of the SCM and condition of keeping the individual judges' names confidential.*
  - *Both alternative options meet the need for transparency and maintaining public confidence, without at the same time reducing confidence in the judiciary, which is what could and does happen where people complain about being heard by a judge who has received insufficient grades.*

**Recommendation to the Board:**

- *The Board should make individual and concrete recommendations to each judge as to how they can improve.*

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124 Ibid, para 78.

## J. Overarching Issues

From this analysis, there are several overarching issues that can affect the achievement of the aims and goals of performance evaluation in general: First is the possibility of hierarchical control that may see judges influenced in the content of their decisions, which would set a dangerous precedent. Sub-sections two and three briefly touch on the issue of gender mainstreaming and whether there is any discernable discrimination against women, and upon the requirement of the knowledge of the state language. Lastly, the section raises concern related to article 13 on the Law on the Status of Judges which makes an unclear reference to performance evaluation of judges.

### 1. Hierarchical control

In Moldova hierarchical control of judges and their judgments has not been highlighted as a problem. The main concern to consider is the use of the rate of reversals as an indicator for quality, and how it potentially affects judges' decision-making (it has already been stated in this report that this indicator is inappropriate for judicial evaluation in general).<sup>125</sup>

Higher courts only verify the legality of the judgments of the lower courts upon appeal in individual cases, but never instruct them how to rule on an individual case. Instances where judges would check with the higher instance judges before taking a decision, in order to avoid an overturn are not heard of in Moldova.<sup>126</sup> Some have said that it is too early to say whether the evaluation system will lead to such hierarchical control. Whilst courts can hold meetings about correct interpretations of the law, these meetings never focus on individual cases and thus there is no risk that judges are instructed on how to decide in these cases.

### 2. Gender mainstreaming

Gender mainstreaming examines whether there are policies and measures in place to ensure equal opportunities for all judges, and the different impact that any new law or policy - such as performance evaluation - may have on men and women (i.e. whether it brings about equality and equal opportunities). The picture in Moldova is actually quite interesting, if numbers of men and women in judicial positions are assessed: Whereas at the first instance level, there are less than half as many women (97) than men (220),

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125 See section E of this report.

126 Such practice is described for Armenia in VC opinion Armenia, para. 18.

there are more women judges (48) than male judges (31) at the second instance courts, and at the SCJ where there are 20 female to 27 male judges. It would appear, to date, that women are not discriminated against for promotion and appellate positions. The numbers suggest a different trend at the level of court presidents: there are almost three times as many male (34) than female (12) at the first instance level, and five times as many men (5) than women (1) at the second instance level.<sup>127</sup>

In order to understand to what extent performance evaluation may impact differently on women and men for instance in obtaining managerial positions, the source of the disparity in numbers in appointments to these areas needs to be investigated first.

This report could not analyse the relation of this disparity and performance evaluation practices, as evaluation for court managers was not covered. None of the respondents in the interviews saw any problem in the evaluation system (criteria, indicators, sources of verification, interview) that would affect women disproportionately. The SCM regulation includes a provision that judges on maternity leave or leave for taking care of children are evaluated for the past 12 months before or after that leave (art. 231, introduced in November 2013). This provision was included perhaps for clarifying art. 13 para (6) of the Law no. 154, according to which judges that are on maternity leave or leave for taking care of children are not subject to performance evaluation. The assessment team did not identify any indicator in the criteria for assessing judges that would raise problems from a gender perspective. The numbers of court chairs suggest that there might be a problem for women to be promoted to such functions. However, this is mostly linked to the system of promotion of judges, of which performance evaluation is only a part.

### 3. Language issues

Moldovan law states that all judges must have an active understanding of the state language. However, according to information received from the Board, there are courts in Moldova where some judges speak only Russian and/or Gagauz (mostly judges that serve in the courts located in the autonomous territorial unit of Gagauzia<sup>128</sup>). Under article 6 of the Law on the Status of Judges, in order to be appointed as a judge, the candidate must know the 'state language'.<sup>129</sup> However, whilst this is part of the selec-

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127 European Commission for the Efficiency of Justice, "CEPEJ 2012 Report on the Evaluation of European judicial systems – efficiency and quality of justice (data 2010)"; available at the following link: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf).

128 The special status of this territorial unit is regulated by Law on the special status of Gagauzia (Gagauz-Yeri), nr. 344 of 23 December 1994.

129 This assessment does not examine the compatibility of this article with the Moldovan constitution and international standards regarding non-discrimination.

tion criteria for a judge, it does not appear to be part of the performance evaluation criteria. As such, the Board has no real means of dealing with a situation where a judge does not speak fluent Moldovan/Romanian. This was reported as problematic in several evaluations, where judges could not communicate with the Board during the interview portion of the evaluation.

The question on judges' mastering the state language could affect the quality of justice because their inability to read in Moldovan/Romanian can prevent them from keeping up with the SCJ jurisprudence, given the fact that usually only general explanations are translated into Russian. Therefore it is necessary that conditions are created that enable all judges to learn the state language. The Board could consider recommending to judges that they improve their language skills. However, only one judge received a formal recommendation to improve knowledge of the state language in an otherwise very good evaluation.

#### **4. Article 13 Law on the Status of the Judges**

The following provision in article 13 para (4) of the Law on the Status of Judges seems problematic:

*“Judges may be subject also to extraordinary performance evaluation if judicial decisions taken by them raise doubts about their qualification level and professional skills”*  
*During the interviews with judges, SCM and the Board, the assessment team was informed that this provision is not used in practice. It has not appeared in the SCM regulation and has not been used in decisions concerning any judge to date. One reason given for it not being used is that no one seems to understand what it exactly means.*

#### **Recommendations:**

##### **Recommendation to the SCM and civil society:**

- *Have a periodical review of judicial practice (by SCM and / or local NGOs and international organisations) to ensure that there is no move towards hierarchical control of judges on how to decide cases.*
- *Conduct a separate analysis / research on gender mainstreaming in the Moldovan judiciary, which would look at the selection, promotion and performance evaluation of court chairs and deputy chairs.*
- *Consider addressing the issue of judges' “sufficient knowledge of the state language” within the framework of performance evaluation in*

*a manner that provides targeted support to those judges who need to improve their state language skills through training that should be offered by the NIJ, and not in a manner that would disproportionately affect judges belonging to national minorities on the grounds of insufficient knowledge of the state language.*<sup>130</sup>

**Recommendation to the Board:**

- *Where a judge is already appointed for life, make formal recommendations on following a course to improve his/her knowledge of the state language, and assess the language skills, as appropriate at the next evaluation.*

**Recommendation to NIJ:**

- *Design special courses for legal terms in the official State language (see e.g programme at Passau University<sup>131</sup>).*

**Recommendation to the Parliament:**

- *Abrogate article 13 para (4) of the Law on the status of judges.*

## K. Conclusions

These conclusions will briefly assess the compliance of the system against international standards (as set out in the theoretical framework), and the effectiveness of the performance evaluation of judges in Moldova against its own set of objectives: to establish and improve professional knowledge skills improvement, compliance with the standards of being a judge, and objective system of comparison for promotions.

### 1. International standards

For concerns relating to compliance of Law nr. 54 with international standards, reference is made to the ODIHR legal opinion, especially with regard to the possibility of dismissing a judge as a consequence of performance evaluation.

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<sup>130</sup> State language skills can only be introduced as an indicator if the grading/points system is abolished. Also, consideration should be given to any circumstances that may affect certain judges disproportionately due to their national or regional background. It should also not be applicable to judges who were hired at a time before the state language requirement was introduced as legal requirement for selection of judges.

<sup>131</sup> <http://www.uni-passau.de/en/international/coming-to-passau/7-reasons-for-studying-in-passau/language-centre/>.

One important concern for compliance with international law is the fact that reversal rates against judges can lead to lower points, which can ultimately lead to dismissal if the scores are not high enough to enable the judge to pass the evaluation. Dismissal is problematic in light of the principles of security of tenure and irremovability of judges. The right to tenure is not unlimited in international law, but legal systems must provide formal and clear standards as to when a judge may be removed for failing to meet the standards required of him/her (either ethical or professional). However this assessment concluded that there are a number of concerns with the fairness and transparency of the system, such as the lack of consistency in grading, insufficient reasoning of Board decisions, and connected with it the perceived subjectivity of grading. In the short and medium term, stakeholders need to clarify and ensure transparency and understanding regarding the operation of the whole procedure, the indicators and grading policies as well as any role the evaluation results play in connection to promotions and any eventual dismissals. This would help minimize the risks to judicial independence.

## **2. Moldovan objectives**

On the basis of this report, the assessment concludes that the evaluation procedure and results currently miss some of the original aims of performance evaluation.

Given the lack of consistency and poor quality of reasoning by the Board in its decisions, it is not easy to establish a judge's level of competence and skill. Without this, it is impossible to create formal recommendations, or connect the process to measurable outcomes, other than grades- which are also going to be superficial at best. Without fully understanding where a score comes from, it is also then difficult to understand what needs to be improved. As highlighted earlier, some decisions of the Board showed very clear and concrete examples of either poor or very good practices, and some were very vague in their praise. Furthermore, there is no connection to training, and very few actual concrete recommendations for judges to improve where they need to.

Whilst the new system is commendable in its attempt to introduce concrete criteria in the evaluation of judges, and the system has generally been welcomed as an improvement over the old system, the SCM, the Board, and the judges themselves need to thoroughly consider short, medium and long term goals using the recommendations throughout this report in order to bring the system in line with international standards as well as to achieve the goals set out in its own laws and regulations on performance evaluation of judges.