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**UPGRADING THE  
EFFECTIVENESS (EFFICACY AND QUALITY) AND  
INDEPENDENCE OF JUDGES  
THROUGH EVALUATION OF THEIR PERFORMANCE**

**EVALUATION OF JUDICIAL PERFORMANCE**

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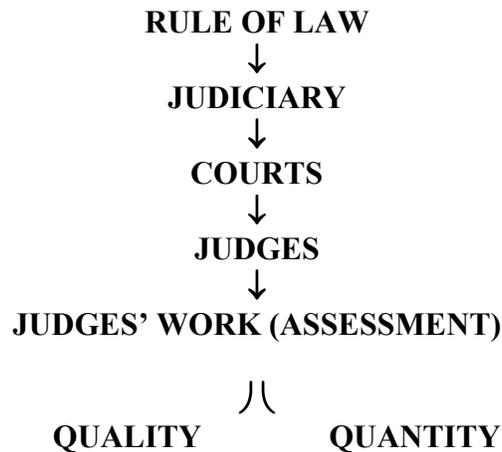
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## 1. INTRODUCTION

A good judicial system is achieved through political will and the skill of politicians who heed the opinions and recommendations of the professional public, in particular a judiciary willing to implement a reform during the adoption of feasible, reliable and mutually harmonised laws. Such laws must on the one hand reflect tradition, and on the other set achievable aims complying with contemporary democratic standards. Proper implementation of laws requires a precise plan of activities, capable and functionally linked implementing entities, and considerable resources. It is important to stress at the start that exorbitant and unrealistic aims discourage those tasked with their realisation – attempts to implement them often turn into a simulation of changes.

The efficacy of a judicial system depends largely on its regulation in law. It is affected by organisational laws, which define the foundations of the judicial system, types of courts, their jurisdictions and territorial arrangement, procedural laws, which regulate diverse judicial procedures, substantive laws, which legally regulate various social relations, and laws defining financial and technical requirements for the work of courts.

Besides laws, the effectiveness of a judicial system is also influenced by politicians' attitude towards the law and that of other public authorities and social institutions to courts, by public opinion, living standards, a competitive economy, and the level of development of democratic relations in society<sup>1</sup>.

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<sup>1</sup> The Framework Programme of the Commission for Efficacy of the Council of Europe points to three basic principles in assessing the performance of the judiciary:

But judges themselves, as the exponents of judicial authority, also considerably influence the efficacy of the judicial system through their personal capabilities, their eligibility and professionalism.

A society may guarantee for itself judges of high integrity and capacity<sup>2</sup> only if it can secure the following simultaneously: appropriate education in law, selection and training, supervision, assessment and evaluation of their work (by means of comparison, encouragement, sanctions) if it establishes an optimal number of judges and courts and an equitable burden of work for them, and by appointing judges to posts best matching their performance and abilities so they can utilise them in the best possible manner, training of

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- the principle of equity and overall quality according to which all member-states must find a balance between on the one side resources which can be provided to the judiciary and good management of those resources, and on the other the aims set to the judiciary
  - the principle of a necessity for efficient means of measurement and analysis which will be defined by all key factors by consensus, on the basis of properly harmonised methods of collecting data and developing common indicators.
  - the principle of a necessity for reconciling all requirements which contribute to a fair trial by aspiring towards a fine balance between procedural guarantees, which by necessity implies the existence of time-limits which cannot be shortened and the need for quick justice, on the basis of certain criteria applied in a clear, transparent and fair manner, and communicated from the very start of proceedings, and if needed also with the consent of the opposed parties.

The programme indicates that judicial systems are faced with manifold and sometimes contradictory requirements, on account of which the state must find a compromise between different objectives, wherein there is no magic formula or universal solution as regards improvement of the functioning of the judiciary. Therefore, for example, measures implemented to achieve the (positive) goal of preserving access to courts for everyone may cause an increase in the number of unresolved cases. If at the same time funding for the judiciary is not increased, such measures lead either to longer case-processing times or poorer-quality court decisions. Application of the three principles listed above as well as the general approach make possible better definition of the overall policy, also taking into consideration the effects of the anticipated measures.

Judicial systems contain various elements: - the quantity of cases to be resolved, - resources available to the system for this purpose: staff, equipment, courts (including budget funds and manner of organisation of the courts), - time taken to process cases, and – the quality of resolving cases (reflected both in the substantive quality of the verdicts and observance of procedure). Shortening case-processing times implies taking steps in connection with three other elements: the quantity of cases to be resolved, resources available to the system and quality of processing cases. For example, a judgement's reasons may be seen as a factor extending the duration of proceedings, but also the opposite. Drafting the verdict in a clear and comprehensible manner and weighing reasons carefully does take time, and some think that the demands in connection with reasons should be reduced, but there is a contrasting argument according to which only a clearly-reasoned decision makes it possible for the parties to accept it more willingly and good first-instance decisions often reduce the number of appeals.

<sup>2</sup> “10. Persons who are elected judges must be persons of integrity and capacity, with appropriate training and education in law” – UN Basic Principles of Judicial Independence, 1985

“2.3 The nature of the judicial function which demands of a judge to intervene in complex situations, often difficult as regards respecting human dignity, makes ‘abstract’ testing of capacities for such a job insufficient.

Candidates elected to perform a judicial function must be prepared for such duty by means of appropriate training which must be funded by the state.

In preparing judges to issue independent and impartial decisions, care must be taken to guarantee professionalism, impartiality and an ‘open-minded’ approach in the content of programmes of training and activities of bodies which implement the training.” – European Charter on the Law for Judges, 1998.

judges, thereby establishing benchmarks for the quality of the judges it has – the best of them become a model to which other judges should aspire, and the average ones a boundary below which judges with poorer performance should not be acceptable. In short, high-quality judges are created by upgrading the conditions in which they work so as to ensure that each individual judge as well as the entire judicial system achieve optimal results, i.e., by advancing the entire judicial system.

Both selection of judges and assessment of their work require clearly defined and objectivised criteria and their reliable and comparable measurement standards. Although a number of points of contact exist between them, criteria and measuring standards for the selection of judges and assessment of their work are not identical. Clearly-defined criteria and objectivised parameters have been set in this paper as a desirable target, albeit one clearly never possible to achieve in full.

The focus of this project is on judges and the assessment of their work in the performance of their judicial duty (with a reflection on an appropriate applicable system of measuring their performance), whereby are created the necessary conditions for citizens to get independent, impartial and professional legal protection in a reasonable and foreseeable timeframe.

## **2. GENERAL REMARKS**

### **2.1. EVALUATION OF JUDICIAL PERFORMANCE – COMPARATIVE OVERVIEW**

No evaluation of the work of judges is performed in Canada and the United States. In the U.S. judicial system no performance assessment is done for individual judges, while workload figures are used to calculate the need for additional judges and other court personnel rather than for assessing the speed and quality of judges' work. Here the main question is the number of judges, assistants and other court personnel required for proper functioning of courts. The number of adjudicated cases indicates the volume of the work performed by judges currently engaged in a court, but an increase in this figure does not automatically show greater performance by volume, but may also be a consequence of higher participation of judges' assistants, counsel and associate staff, or a combination of those factors. It also follows that the number of unresolved cases cannot always be attributed to poor performance of a judge, as some cases are more complex than others and require more time to process. It is for these reasons that no fewer than 18 U.S. states have given up using the number of adjudicated cases per judge also as a criterion for calculating the need for judges. However, this criterion is used for that purpose in combination with other indicators.

Federal courts employ a system of weighted total number of cases as the principal factor in assessing a need for additional judges' positions. The current weighing calculation was done in 1979 and updated in 1984 and 1993. The process called for individual judges to note timings in their diaries. The latest weighing in 2004 was done by using working groups of professionals (judges) for certain cases in order to estimate the amount of time needed for various actions in processing cases and for different types of cases, summarise data and information on objective times from statistical reports submitted routinely by district federal courts to the Federal Judicial Center. Most state courts have adopted the standards of the results of the work of courts. Some states determine target case percentages, for example percentages of certain types of cases a court should process in a given period of time, say 85% of civil matters within nine months with an extended target deadline for a small percentage of the same type of case which should be processed within a year, or 15 months. Other states have targets determining a concrete number of days in which a certain type of case should be processed, for example 240 days for a civil matter. In both these systems the inflow of cases is monitored and data published on the quantitative results of work for every court in the state, but usually not for individual judges. The system is not used as an instrument for bringing every court and judge in conformity with it.

Neither does individual assessments of the work of judges exist in **Ireland or Great Britain and the Scandinavian countries (Denmarks, Finland, Sweden)**, but the work of courts is monitored according to quantitative and qualitative criteria. Courts' performance is assessed in Finland on the basis of indicators measuring productivity, cost-effectiveness and courts' competences. Since 1995 the judiciary has employed a performance-based management system. Productivity is measured by the number of decisions issued per judge or number of verdicts in proportion to court personnel figures. Cost-effectiveness is the ratio between funds spent and decisions issued. One way to measure efficiency of courts is the time spent to process cases. Officials of the Court Administration Department in the Ministry of Justice interview each court about annual performance figures, in whose improvement all courts are actively engaged, and negotiate on permanent staff figures and possible employment of judges and/or other personnel for a certain period of time, determine case-processing deadlines, discuss various issues and problems in connection with improving efficiency of courts and agree on funds need for courts' work. In approving the state budget, the parliament determines concrete performance targets for every public authority, including courts (for example, target time-limits for processing various types of cases and for various courts, as well as key areas which need to be upgraded). In its annual report the Ministry of Justice specifies fulfillment of these aims. The quality of judicial processes and decisions is assessed by observation of procedural rules, application of the European Convention on Human Rights, proper implementation of substantive law and organisation and quality of services provided to clients, including active provision of information and supervision of the inflow of cases and volume of work.

In **Italy**, no general assessment of the quality of work of judges is done. Activities are now under way, on the basis of the work of a joint commission set up by the Ministry of Justice and the High Judicial Council, on drafting a proposal for

comprehensive assessment of “efficiency”, as supervision of the performance of judges is currently very limited in scale due to inappropriate available statistical data, collected by hand and based on written materials (number of cases admitted, number of unresolved and completed cases, usually for a six-month period). The High Judicial Council, which has a consultative role and no competences in this area, proposed in 2002 an integrated system of supervising the inflow of cases, with the aim of establishing the “real time” of the main variables which have a direct or indirect effect on the processing of cases and the overall performance of the judiciary, so as to make possible adoption of decisions on systemic organisational measures.

In **Germany**, the federal entities are empowered to define the criteria and parameters for the election of judges and assessment of their work; particular progress has been made by Lower Saxony and North Rhine-Westphalia. In Lower Saxony, the criteria evaluated and professionalism, eligibility and level of training achieved, as well as readiness for work and endurance (workload), level of identification with the aims of the judiciary, negotiating skills, ability to cope with conflict situations and ability to make decisions, co-operation and social comprehension abilities, sense of justice, responsible exercise of power. Especially indicative is the manner of evaluating the work proposed in 2003 in North Rhine-Westphalia according to which a descriptive assessment is made according to several criteria: professional training (encompassing professional qualifications, perception of service, argumentation and persuasion abilities, interviewing and debating skills and ability to transmit knowledge and educate), personal abilities (general personal characteristics, awareness of duty and responsibility, engagement and ability to take on a high workload, independent management and organisational skills, strength and readiness to make decisions, openness to innovation and flexibility), social capacities (team-work abilities, communication skills, conflict-resolution and mediating skills, attentiveness) and leadership capacities (implying provision of feedback on results of work, respecting others’ abilities; establishment of a positive working climate; provision of clear instructions; cooperativeness, openness for questions from associates).<sup>3</sup>

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<sup>3</sup> **Real (procedural) and professional competence**

**Professional qualifications** (possession of broad legal knowledge as well as an ability to apply it in practice; good knowledge of legal methodology, ability to autonomously ingest new areas of law and rapidly assess relations and differentiate between the important and the unimportant; well-structured and thorough work with the use of case-law and other literature, an ability to think analytically, reason and comprehend law; good understanding of broader contexts: social, economic, technical and political; a good overall educational level and knowledge of topical events; IT proficiency; constant professional and all-round educational development; experience in professional and social life; good understanding of service (active support for the Constitution and its fundamental values; impartiality and comprehension of opportunities for or appearance of being biased; rejection of pressures or the possibility of influence; comprehension of the consequences of private activities for the judicial service; assuming responsibility for one’s own actions towards the outside and inside; possession of personal civic courage; maintenance of a proper distance from others and restraint; perceiving parties and their intentions seriously; awareness of internal and external independence; readiness for career changes); **ability to present argument and persuade** (clear and comprehensible formulation of complex relations and perception of their essence; reasoned and methodically correct argumentation; thorough reasoning, individual and concrete; avoidance of excessive scientific encumbrances; openness to criticism and ability to respond to it in a well-argued manner); **debating and listening skills** (careful preparation; thorough and fresh knowledge of cases; structuring the course of cases in advance; good reaction abilities; understanding and support,

In **Portugal** the criteria for assessing the work of judges are personal attributes and qualities, including those required for performing the judicial function (dignity, independence, ethics, acceptance and comprehension of the environment in which the judge is serving, maintenance of good professional relations, a sense of justice)

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perceptiveness and patience, creating a constructive and trusting atmosphere; propriety and politeness at hearings, objectivity; respecting the interests of the participants; an ability to relate to various situations in life; protection of participants from unjustified attacks; early recognition of a possibility of an amicable resolution); **educational competency** (helping trainees to master their jobs; provision of advice in respect of their advancement in service, careful correction of draft decisions; constructive criticism; offering assistance and supporting positive properties, readiness to work with several trainees)

**Personal abilities: general personal characteristics** (wide-ranging interests also outside the profession; recognition of the achievements of others; innate authority; a self-assured, polite and relaxed bearing, confrontation with serious challenges; judiciousness and a relaxed manner; good self-control in all situations, including critical ones; good self-awareness and perception of personal strengths and weaknesses and personal development); **a sense of duty and responsibility** (awareness of social responsibility and role of a model; assuming responsibility also for internal organisation and a positive public image of the judiciary; an ability to forecast the consequences of decisions; careful and professional performance of duty; a responsible approach to large workloads; personal accessibility for officers of the court and participants in proceedings and, if and when needed, immediate personal response to their calls; efficient utilisation of personal and real resources; openness for problems faced by other members of the judiciary; a capacity for clarification, with good definition of foundations, being thoroughly informed at all times; admission of mistakes and learning from mistakes); **commitment and a high capacity for work** (good physical and mental capacities and awareness of personal limitations; readiness to take on additional work; fast and accurate work and good concentration in spite of pressure; retention of good quality in spite of a high workload; personal initiative; readiness to assist others); **independent management and organisational abilities** (planning one's own work and time and setting priorities; even, unassisted and target-oriented work in line with personal limitations; transmission of work in accordance with duties; awareness of existing resources, the course of work and participants' obligations); **strength and readiness to make decisions** (provision of adequately rapid legal protection; rendering a timely decision; rapid and responsible decision-making; not yielding to inevitable conflicts); **readiness for innovation and flexibility** (openness for new techniques and methods of work and modernisation of the judiciary; readiness to abandon established ways; acceptance of new experiences and development of new ideas and solutions; flexible reaction to altered situations; openness for challenges and rapid involvement in work in new fields; readiness to participate in various structures of the court and organs of authority).

**Social abilities: team-working ability** (exchanges of information, experiences, knowledge and solutions; promotion of feelings of togetherness and mutual responsibility; respect for the interests of others; ability for communal resolution of problems; readiness to talk to others and to avoid isolation); **communication abilities** (accommodation of others; active listening and allowing speakers to complete their sentences; clear and comprehensible oratory; objective argumentation and expectation of objectivity; figurative explanation; posing clear and precise questions; presentation of the planned manner of action; transparent decision-making; emphasising problems and looking for solutions; encouragement of exchanges of experiences); **conflict-resolution and mediation abilities** (taking other peoples' arguments into considerations and readiness for compromise; fair and collegial conduct and expectation of the same from others; engagement in debate and constructive criticism; confronting conflicts; championing one's own rights and accepting one's obligations; facing necessary decisions; establishing reasons of conflicts; assuming clear positions; restraint and awareness of the role of mediator) **commitment to serve** (respecting the interests of participants and witnesses, also when scheduling hearings; courtesy and politeness; respecting agreement made with others; a good sense of time)

intellectual and professional capacities (a high intellectual level, ability to comprehend concrete legal situations, good quality of work) and organisational abilities and an ability to adapt to the function.

In **Spain** the criteria developed to assess the work of individual judges also serve for analysing the functioning of courts and the judiciary. In monitoring the work of judges the data collected do not cover just the number of verdicts rendered but also number of decisions by type of subject-matter. The results of the assessment may affect the careers of judges in that they may be used in disciplinary proceedings. Judges' quotas are set by measuring time used for each procedural action to be performed in a case; adding up these times results in the expected time needed to resolve a given case. This figure is compared and combined with the time needed by the most efficient courts to process cases, resulting in a target time a little less demanding than that in the best courts. Expenditure of time in assessing the work of judges is combined with data from judges' own remarks on the specific conditions in which they worked in the period under scrutiny (more complex cases, cases with an above-average number of parties, large amounts of evidence that had to be presented, cases where a high level of public interest required more care than is customary, and similar).

In **France** the work of judges is assessed in a descriptive manner, on the basis of a description of the judge's activities, generalised performance assessment, activities which correspond with the judge's professional sensibility, necessity of training and advancement. The following affect the assessment: overall professional capacities (decision-making ability and determination, ability to listen and communicate, ability to adapt to new situations), judicial abilities (ability to employ legal knowledge, ability to conduct proceedings and meetings – out of court, as well as an ability to comprehend cases and conduct proceedings), organisational abilities (ability to motivate and initiate certain activities, to define aims, to determine requisite human and other resources) and professional engagement (dedication, efficiency, professional advancement, a professional attitude towards other institutions).

In **Slovenia** the Judicial Council runs the system of assessing performance in the judiciary, for each judge and each court; no system is in place for measuring the duration of proceedings. The key indicators are the number and structure of completed cases, the number of cases where an appeal has been filed, the number of verdicts upheld, overturned or revised on appeal, as well as data on absences from work which influence the efficiency of a judge's work. Quantitative statistical data are gathered by the Judicial Council and the Ministry of Justice, each of which analyses them separately. Statistical data are important for the professional assessment of the work of judges, which also influences their careers directly (pay increases and promotion to senior judicial posts). However important, assessment of performance on the basis of statistical data (quantity of work) is only one of the criteria for assessing the performance of judges; numerous other well-developed criteria include professional knowledge (professional activity of the judge, specialist and post-graduate studies and reputation acquired in the legal profession); capacity for work (ratio between achieved and expected performance); ability to resolve legal issues (achieved level of correctness and lawfulness in making

decisions, established in particular in legal-remedies proceedings); maintenance of the good reputation of a judge and the court (based on the manner of conducting proceedings, communicating with parties and other authorities, maintenance of autonomy, impartiality, reliability and dignity, as well as general conduct in and away from service); verbal and written expression ability (as seen from files of processed cases, verdicts rendered and professional work of the judge); additional work performed in exercising the judicial function, in eliminating and preventing backlogs, mentorships, participation in legislative activities, in education and professional advancement; attitude towards co-workers in the exercise of the judicial function; ability to perform senior functions, where the judge has been appointed to one. The assessment of the judicial service must contain a grading for each of the aforementioned criteria. Standards have been defined in connection with some of those criteria: the number of cases a judge is expected to process annually, where there is differentiation as regards the types and complexity of cases<sup>4</sup>. Moreover, the parameters are not the same for judges performing identical jobs in equal-level courts, depending on which courts are involved and their respective workloads<sup>5</sup>. Furthermore, for certain cases that are obviously exceptional due to complexity by sheer size (e.g., criminal matters with several defendants) or legal complexity (e.g., patent matters), acting on a proposal of the presidents of the courts where such judges sit the council in

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<sup>4</sup> For example, judges in the Higher Courts in Slovenia are expected to process the following number of cases every year:

- criminal matters - 80 appeals against judgements cases, 160 cases of appeals against decisions (judicial admonitions, protective measures, investigations, complaints procedures, cases under the Law on Righting Wrongs and decisions on merits in criminal proceedings against juveniles), 240 cases of appeals against orders issued in criminal cases where a panel decides on the same,

- civil matters: 90 appeals against judgements cases, 180 cases of appeals against orders issued on merits: in noncontentious proceedings for regulation of personal and family status, for division of articles and joint property, in property line regulation proceedings, in easements rights proceedings, in probate proceedings, in return of confiscated property proceedings, in denationalisation proceedings, land registry proceedings, in issuance of provisional relief proceedings or disturbance of possession proceedings, as well as in non-suit cases when proceedings are thereby terminated, 270 cases of appeals against orders, and

- commercial disputes: 90 appeals against judgements cases, 180 cases of appeals against: orders to open bankruptcy or liquidation proceedings, orders on the division of bankruptcy estates or liquidation estates, orders on the completion of bankruptcy or liquidation proceedings, orders on initiating composition proceedings, orders on proposals to discontinue composition proceedings or on approving composition, orders on interim measures or in noncontentious proceedings according to alteration of the Law on Economic Companies and the Law on Assumptions or on non-suit cases when proceedings are thereby terminated, 270 cases of appeals against orders.

Where a professional assistant participated in processing the matter and submitted a report at a meeting of the judicial panel and prepared the draft of the decision, cases resolved in such manner are multiplied with a coefficient of 0.6 for appeals judgements and 0.4 for appeals orders.

<sup>5</sup> Smaller performance is expected of the following:

- departmental heads in the Supreme Court of the Republic of Slovenia, the Presidents of the Higher Labour and Social Courts in Ljubljana, the Higher Court in Ljubljana, the Higher Court in Maribor and the Administrative Court of the Republic of Slovenia – 20 % of the expected volume of work;

- the President of the District Court in Ljubljana, the Presidents of the Labour and Social Courts in Ljubljana and the President of the Municipal Court in Ljubljana – 25 % of the expected volume of work;

- the President of the Higher Court in Celje and the Higher Court in Koper – 40 % of the expected volume of work;

- the presidents of district courts and the presidents of municipal courts in Maribor and Celje – 50 % of the expected volume of work.

charge of assessing a judges' performance may determine a different manner of assessment for judges hearing such cases.

**Bosnia and Herzegovina** has also developed criteria and standards for assessing the work of judges. The total annual time spent at work is always taken into consideration (this figure includes time spent on annual vacations, sick leave, paid or unpaid absences from work, time spent on judicial panels in which the judge concerned is not the reporting judge, time spent on judicial panels in which the judge did not perform the duty of president of the panel, time spent in collegiate councils and meetings of court departments, time spent in training, time spent in sessions and working groups of the VSTS BiH, national and religious holiday leave, time spent visiting persons in detention), as are results achieved in respect of realising the minimal provisional norm (number of completed cases on all referrals on which the judge worked in the preceding year; achieved total norm) and the quality of the judge's work (upheld, altered and quashed decisions – all in terms of the total number and in points), promptness (work on old cases established according to the submittal date of the initial document, work on cases defined by law as urgent, promptness forwarding claims and indictments in legally-prescribed time-limits, service of submissions to parties, promptness in scheduling hearings in legally-prescribed time-limits, promptness in rendering and serving decisions within legally-prescribed time-limits)<sup>6</sup>. Other criteria taken into account and proficiency (evaluated in respect of knowledge of existing legislation and legislative developments; preparation of cases; ability to analyse cases; quality of rendering decisions; incorporation, citation and proper application of substantive law in decisions; competency in conducting trial hearings and panel meetings; observance and proper application of positive judicial practice and the instructions of higher-instance courts; utilisation of legal literature, status and clarity of records and other documentation, viability before the constitutional courts of decisions on regular and ancillary remedies and of appeals decisions, presentation of initiatives at meetings of collegiate councils and departments in debates on application of laws and elimination of their contradictory application, an active contribution to the work of court department meetings, proficiency and commitment in applying new legal institutions, participation in mandatory and other forms of educational activities), attitude to work (conscientiousness, industriousness, responsibility, motivation, orderliness, consistency; observance and utilisation of working hours; promptness in keeping records; attitude to parties, pressures, ombudsmen, monitoring activities, co-workers, the president of the court and presidents of court departments, attitude towards existing working norms, attitude to court property and resources, conduct at hearing, personal appearance and number and groundedness of complaints to the judge's work) and use of IT at work (unassisted work on computers in correspondence with parties, other courts, the court administration and co-workers, unassisted work in preparing cases, maintenance of documentation, use of documentation and data from the court's mainframe computer and from court practice CDs, drafting reports and decisions, use of the internet, electronic case management). Overall assessment of the said detailed criteria is made by means of numerical and descriptive

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<sup>6</sup> Where it is stressed that timeliness should not be interpreted just as taking action within the time-limits prescribed by law, but also as working on high-priority cases, working on old cases, well-grounded objections made by parties, the ombudsman etc.

grading (points), and an overall numerical and descriptive grade. Parameters for measuring the aforementioned criteria have also been worked out in detail<sup>7</sup>. The pilot-phase of a project for the quantitative assessment of the performance of judges – an aspect of the overall assessment which uses a combined system of time-limits and weighing - is about to be completed in Bosnia and Herzegovina and will be discussed herein later.

Given the extreme complexity of judges' work, the fluidity and sensitivity of assessing its qualitative component, and the relative nature of the criteria for that assessment and problems in objectivising them, comparative practice tends towards establishing an integrated, all-encompassing, fair and as reliable as possible system of assessing the performance of judges (assessment of the quantity of their work).

Several systems of (quantitatively) assessing the performance of judges are now in place:

- a system of guiding parameters/norms, which are not a reliable indicator of performance because in observing processed cases only their number is of importance and no distinction is made in respect of their complexity and time taken to resolve them; this system will be reviewed in detail hereunder as it is currently in use in Serbia;
- a percentage system of processing cases/time-limits by which is determined the time needed to conduct necessary activities and complete a certain segment or percentage of the total number of cases in a given period of time (although this system is more reliable for assessing the work of courts, its weakness is that it takes for granted that all judges work with an equal intensity, which is very unlikely and may also serve as a cover for unefficient action in cases);
- a system of weighted cases, which are a relatively good criterion for assessing the performance of individual judges and courts and the main quantitative factor in

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<sup>7</sup> **Performance in regard to the realisation of the minimal provisional norm** is assessed as follows: less than 40% of the judicial norm achieved – 0 index points; between 41% and 50% – 1 point; between 51% and 60% – 2 points; from 61% to 70% – 3 points; from 71% to 80% – 4 points; from 81% to 90% – 5 points, from 91% to 100% - 6 points, from 101% to 110% - 7 points, from 111% to 120% - 8 points, from 121 to 130% - 9 points, over 130% of the judicial norm achieved - 10 index points. **Performance in respect of the quality of work** is assessed by the number of confirmed decisions in the following manner : up to 20% upheld decisions – 0 index points; from 21% to 30% upheld decisions – 1 point, from 31% to 40% - 2 points; from 41% to 50% - 3 points; from 51% to 60% - 4 points, from 61% to 70% - 5 points, from 71% to 80% - 6 points, from 81% to 90% - 7 points, and over 90% upheld decisions - 8 points. Performance **in respect of timeliness, proficiency and attitude to work** is assessed with grades ranging from 1 to 3, including 1.5 or 2.5. **IT proficiency** is assessed as follows: beginner's or partial IT competency – 1 point, good IT proficiency –2 points. Finally, **the overall grade** for basic and municipal court judges and for district or cantonal court judges, for example, is awarded **on the basis of a sum of the grades awarded according to all the said criteria** and expressed as follows: a sum of 6 or less corresponds to an overall grade of 1; a sum of 7 to 9 – final grade 1.5; 10 to 12 – final grade 2; 13 to 15 – final grade 2.5; 16 to 18 – final grade 3, 19 to 21 - final grade 3.5, 22 to 24 – final grade 4, 25 to 27 – final grade 4.5, and over 27 index points give a final grade of 5.

determining the number of judges needed in each court (different weighing for different types of cases should be based on the results of a careful analysis of a group of experienced and impartial judges of the average length of time needed to process a certain type of case – the weighing given to each type of legal matter on the basis of an average processing time needed, the time at the disposal of the judge during a working day or month or year for work on cases, as well as the number of cases of each type a judge should process during the time available for work in a month or a year), and

- a system of time-limits whereby are determined the deadlines for resolving different types of legal matters and which has proved, especially in combination with a weighing system, as the most reliable system of (quantitative) measurement of the performance of judges.

## **2. 2. THE CONCEPT AND INSTRUMENTS OF EVALUATING JUDICIAL PERFORMANCE**

Valuation of the work of judges is an estimate of their professionalism (measurement of the quantity and assessment of the quality of their work) and conscientiousness in the exercise of the judicial function. The examples given above clearly lead to a conclusion that valuation of the work of judges is performed on the basis of criteria and parameters which may be differently defined in different legal systems, but which taken together reflect all aspects of performing the complex judicial function.

The criteria for assessing the work of judges are sets of demands a concrete society has for the properties judges must possess in their work.

The criteria for evaluating the performance of judges are the manner of grading, estimating the extent to which a judge satisfies those social demands, the properties contained in the criteria.

In their essence the criteria are legal standards. As all other standards, they also depend on certain social relations at a concrete point in time and in a concrete society, which means that criteria are by their very nature relative. When we speak of objectivisation of criteria we mean finding an appropriate argumentation by which a criterion is instituted in compliance with the demands of a society for a high-quality judiciary, with an aspiration to ensure the best possible quantifiableness of the argumentation and awareness that some criteria, or their elements, are very difficult to subject to such a procedure<sup>8</sup>. This then also requires objectivisation of the standards themselves in order to make possible public control of the correctness and consistency of application of the criteria by bodies in charge of electing judges and relieving them of duty, assessing their performance and pronouncing disciplinary measures, and to

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<sup>8</sup> The criterion of conscientiousness, or rendition capacity, or ability and readiness to make decisions, as standards for assessing the proficiency of judges, for example.

influence public attitudes about the functioning of the judiciary<sup>9</sup>. If legal standards such as proficiency and conscientiousness are not clearly defined and standards by which they are objectivised clearly formulated, worked out in detail, expressed and consistently applied, this opens the door wide to legal uncertainty and improper functioning of the judiciary and the state as a whole.

Standards depend on the type of work performed by the judges (investigative, criminal, civil, nonlitigious, first-instance, second-instance matters etc.) and should therefore not, and indeed cannot, be identical for all aspects of the judicial profession.

Valuation of the work of judges also depends on the body doing the assessment and the criteria and parameters it applies, level of impartiality and capacity for making a reliable and objective assessment, and opportunities to look into the work of all judges and compare them, which means that it is necessary to determine and be aware of the sources of data for the application of the criteria and standards. The bodies which look into the work of judges may also be composed of persons without knowledge of the judicial profession or the skills and knowledge needed to talk to candidates and examine their personalities. On the other hand, data may be statistical or descriptive (opinions of judges' sessions or a court or departmental president), incomplete (if activities also performed by the judge but not expressed by the criteria are not taken into consideration or if the judge's effective time at work in the period under scrutiny is not taken into account, or if they are not examined within the scope of the other results of the judges in the court concerned or similar courts) and similar<sup>10</sup>.

Criteria used to assess the performance of judges can be classified in two groups – professionalism and conscientiousness<sup>11</sup>.

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<sup>9</sup> The 1985 UN Basic Principles of Judicial Independence and the 1994 Recommendation No. R (94) of the Committee of Ministers of the Council of Europe to the member-countries on independence, efficiency and role of judges and the 1998 European Charter on the Status of Judges all insist that all decisions in connection with the professional career of judges – election, promotion, disciplinary sanctioning, impeachment, are based on objective criteria, to ensure that the election and careers of judges are based on abilities, taking into account qualifications, integrity, knowledge and efficiency.

<sup>10</sup> The Analysis of the Court Administration drafted by the Ministry of Justice of the Republic of Serbia in September 2004 contains a section entitled Supervision of the Overall Judicial Productivity which calls for identifying the existing statistical sources and shortcomings in the extant collection and processing of data, and defining a cheap and feasible mechanism of supervising judicial productivity that could function in the short and middle terms, as well as a more lasting solution which could be applied in municipal, district and commercial courts in the following two years.

<sup>11</sup> It has already been stressed that although there are a number of points of similarity between criteria and measuring standards for the election of judges and valuation of their work, they are not identical.

Besides criteria for assessing the performance of judges - proficiency (theoretical knowledge and practical competence – the ability to apply theoretical knowledge in practice) and conscientiousness (a judge's attitude to his or her judicial duties), another broader criterion is required for the election of a judge – fitness, a set of ethical properties society expects a person performing judicial duty to possess (honesty, conscientiousness, industriousness, fairness, dignity, perseverance, courage, a sense of social responsibility and the role of model) and conduct befitting those properties (preserving the reputation of a judge and the court in service and outside it – in the family and in society, exemplariness, preservation of independence – internal and external, impartiality, reliability and dignity in service and outside it, possession of personal civic courage, assuming responsibility for the internal organisation and a positive public image of the judiciary, taking participants and their intentions seriously, careful and conscientious performance of duty,

Professionalism, or proficiency, is the volume of theoretical and practical knowledge.

Theoretical knowledge is knowledge of the science of law and positive legislation as well as a comprehensive perception of social and legal reality, the aims to which society aspires, social changes, problems burdening society, possible ways to resolve them and the consequences various ways of resolving them cause<sup>12</sup>.

Criteria used to assess knowledge of theory include: length of law studies and success achieved, success achieved in the juridical examination and following the completion of training, academic titles, papers and articles published in the professional press, participation in professional advancement programmes, work in professional groups on drafting laws and other regulations.

Practical knowledge – qualification is a set of properties which make possible optimal and reasonably rapid application of theoretical knowledge to a concrete legal problem in the resolution of legal matters. Judges must be qualified for the following:

- analytical thinking, which makes possible reliable and timely comprehension, analysis and classification of complex problems and their interlinkage;
- discernment and decision-making, implying an ability and readiness to reach conclusions and make a timely choice for their own responsibility to reach a decision, weighing the facts, while using professional knowledge and with an understanding of social, economic and technical inter-linkages;
- verbal and written expression;
- persuasion – an ability and readiness to espouse their views with proper reasoning;
- engaging in discussion, listening and negotiation – an ability and readiness to prepare trials and meetings well, to conduct them patiently, considerately, correctly, equitably and in the direction of a goal, an/or to assist in the above;
- organisation and planning of work – an ability and readiness to act in a well-planned, economical and concentrated manner and to harmonise their commitments;

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a responsible attitude to excess workloads), and the standard for measuring that criterion is among other things the reputation the person enjoys in society.

Although fitness is therefore not taken as a criterion for valuing the work of judges, a judge is deemed to meet that criterion by his or her very election. If any doubts were ever to appear, they could be put to the test by a disciplinary procedure which would remove all judges unfit for service from judicial duty.

<sup>12</sup> Depending on the manner of resolving a problem, by a law or a judicial decision interpreting a law, the individual and broader consequences will be different. Under the latest alterations of the Law on Civil Litigation (*Official Gazette of the RS* No. 125/2004), effective from 23<sup>rd</sup> February 2005, an attempt to speed up excessively long civil litigation proceedings was made by a more strict application of the rules of conduct principle and prevention of repeated quashing of first-instance decisions. These problems open the door to other problems – unequal conditions for the realisation of rights for parties not versed in law or parties of low material status, as poor and uneducated parties will not be able to secure good-quality legal representation for themselves, the problem of securing the necessary funds for free and accessible legal aid, the **problem of licensing lawyers**, a possibility of formal rather than substantial resolution of conflicts, which can in turn lead to public dissatisfaction and even more distrust of the judiciary, etc.

- a heavy workload, perseverance - an ability and readiness for working with commitment and achieving results in respect of the quality and volume of work which comply with requirements even in the event of a considerable personal or external burden;
- teamwork and communication - an ability and readiness to co-operate with others and to openly respect and accept their contributions;
- controlling their behaviour in all situations, including critical ones;
- being aware of their own capacities and working on building them up.

Criteria for gauging practical knowledge and qualifications acquired differ depending on the type of work performed by the judge. They are primarily based on objective – statistical indicators such as the number, type, complexity of cases being processed, number of resolved cases – by merit and in other manner, number of cases completed with a legally-binding decision without appeal, number of appeals, upheld, revoked, altered cases by legal remedy, number of higher-instance court hearing opened, timeliness coefficients, effective hours of work etc. Also important, however, are opinions of the court department in which the candidate is employed and the higher-court department which decides in legal-remedy appeals against decisions issued by the candidate judge.

Even where the work of judges is expressed by the said statistical data<sup>13</sup>, opinions of other judges should be a corrective criterion which will point to circumstances which affected those data but are not visible for them (for example, the complexity of the cases processed by the candidate, type and volume of other business transacted by the candidate in and outside the court in connection with work, and which are not expressed by statistical data, changes in regulations or legal standards which affected the statistical data, and similar).

A specific criterion of practical knowledge and level of qualification is practical experience - years of service and type of work performed by the judge in the past. This should be used as a supplementary criterion, especially in cases where it is not possible to differentiate between judges on the basis of other elements or between candidates with similar qualification indicators.

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<sup>13</sup> Statistical data, however detailed and reliable, are only a partial reflection of the work of judges. Besides the numbers, a judge's performance includes factual and legal preparation for trial, examination of practice and regulations and their interpretation, participation in training and seminars and round-table gatherings devoted to important questions connected with the performance of judicial service, work with trainees and advisors, participation in grand juries, as well as a large quantity of administrative and technical work, as well as other business.

In Opinion No. 1 (2001), the Consultative Council of European Judges stresses that statistical data play an important social role in understanding and upgrading the work and efficiency of courts, but that these are not objective standards for valuation of any sort, calling for much caution in using statistical data as an aid in evaluating the work of judges.

Conscientiousness is a judge's conduct which reflects that judge's attitude towards professional commitments in accordance with the expectations of a given society.

Criteria for assessing conscientiousness are the sequence of taking up cases according to the sequence of their reception and urgency, observance of prescribed time limits for implementing procedural actions, timely scheduling of hearings and rendering of decisions, duration of proceedings, attitude towards participants in proceedings, and the fulfillment of other obligations proceeding from the exercise of the judicial function<sup>14</sup>.

### 2.3. PURPOSE OF EVALUATING JUDICIAL PERFORMANCE

Valuation of the work of judges is an important instrument used to:

- Manage the judiciary as a system, with the aim of:
  - creating a high-quality cadre of judges (by the election and promotion of judges in line with their performance)
  - improving the overall capacities of the cadre of judges, as well as the capacities of each individual judge by means of an appropriate programme of training, specialisation and diverse incentives (pay increases, additional vacation time, various remuneration, awards and commendations etc.)
  - optimally utilising the abilities of each judge in a court (by means of the annual plan of work and distribution of cases)
  - determining the requisite number of judges

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<sup>14</sup> In Opinion No. 1 (2001), the Consultative Council of European Judges states that systems of inspecting courts, where they exist, should not examine the merits or correctness of the decisions issued and should not lead judges to give primacy to productivity over proper performance of their role, which means arriving at a carefully considered decision in the best interest of those who seek justice.

In its Framework Programme dated 13<sup>th</sup> September 2005 – a New Target for Judicial Systems: Resolution of All Matters in Optimal and Foreseeable Time Limits, the European Commission for Efficiency of the Judiciary looked at new goal for judicial systems: processing all cases in an optimal and foreseeable period of time, stressing that a 'reasonable time' (as foreseen by Article 6 § 1 of the European Convention on Human Rights) was the 'threshold' exceeding which the Convention is deemed violated and should therefore not be seen as an appropriate result when achieved.

But in spite of a serious consideration of optimal time limits for processing cases, the Framework Programme emphasises as exceptionally important not giving in to the 'dictate of urgency' and summarily adopting measures whose effects might be the opposite of those expected. A state in which the members of a profession worked under temporal pressure without regard to the specific nature or circumstances of a case could only lead to long-term loss of motivation among judges as well as grave doubts about the benefits and quality of their decisions. Professional quality also depends on the trust and independence afforded to individuals in the performance of their duties. For that reason all proposals in connection with duration of judicial proceedings must be drafted with the active participation of interested parties and made so that they are not seen as an attempt to transform courts into 'judgement-issuing machines'. On the other hand, the specific nature of the judiciary cannot be an argument for allowing excessively lengthy proceedings. Judges, prosecutors, court staff and layers must remain masters of their own time, at the same time finding a way to differentiate between 'productive time' and 'wasted time'.

- monitoring the efficiency and ensuring a balanced workload for judges and courts;
- Determine the status of judges and their movement in service
  - vertically (election, promotion, dismissal)
  - horizontally (appointment to posts where judges can achieve the best possible results in accordance with their prior performance, capacities and specialisation, which needs to be established);
- Establish a system of personal accountability of judges for the exercise of judicial duties and at the same time protect the independence of judges in the procedure of assessing their personal responsibility (dismissal and disciplinary accountability owing to insufficiently successful – unprofessional and unconscientious performance of judicial service), because all forms of calling judges to accounts for their work in the exercise of judicial authority carries a risk of infringing on their independence.

Therefore, besides the fact that evaluation of the work of judges, in disciplinary and impeachment proceedings against judges in connection with insufficiently successful performance of judicial duties, must be in the service of personal accountability of judges for professional and conscientious performance of duty, and where the question of the accountability of judges is not being raised, must be in the service of upgrading the quality and efficiency of the entire judicial system. Its aim is primarily securing a high-quality cadre of judges (through the election and/or promotion of judges based on their performance), improving the capacities of each judge individually (with the help of training programmes) and the entire judiciary, ensuring full utilisation of the capacities of each judge in a court (through the annual plan of work) and motivating judges to achieve the best possible results in their work.

Here must also be noted that the system of evaluating the work of judges, especially where it is linked with the promotion or regulation of the status of judges, may not influence their independence or the exercise of their basic duty: adjudicating. Demands for the independence of the judiciary generate a need in the system of evaluating the work of judges for discretionary or decision-making powers to be inside the judiciary or a genuinely independent body in which the judiciary participates significantly.

## **3. EVALUATION OF JUDICIAL PERFORMANCE IN SERBIA**

### **3.1. GENERAL REMARKS**

The National Strategy for Judicial Reform adopted by the National Assembly of the Republic of Serbia in April 2006 declared the absence of instruments for a precise assessment of the productivity and performance of judges and the judiciary as one of the shortcomings of the existing judicial system; for this reason the establishment of a system which would make possible monitoring of the productivity of work in the entire judicial system and the results of the work of individual judges was defined as one of the Reform's objectives.

Realisation of this aim requires, besides using comparative experiences and international standards in this area, a detailed analysis of the existing system of assessing the work of judges to ensure that the new system does not repeat the mistakes made in the existing one.

In this task it is necessary to keep in mind that the effectiveness (quality and efficiency) of the judicial system is not the same thing as the effectiveness of judges, in their capacity as segments of that system.

It is possible for a judicial system to be efficient although the work of judges is not. For example, a judicial system is deemed efficient even when a majority of the verdicts issued by first-instance courts are quashed and returned for re-trial, if even then the proceedings are ended with a legally binding decision in a relatively short period of time – in this case the work of the judicial system is efficient while that of the first-instance judges is not. It is clear that in this case the effectiveness of the judicial system can be increased by improving the work of first-instance court judges. Conversely, judges may constantly improve their performance while that of the entire system may decrease. This is now the case in Serbia. Annual reports of the Supreme Court of Serbia indicate that in certain areas judges constantly complete more and more cases every year, which could be seen as an improvement of their efficiency (quantitative), but the effectiveness of the entire judicial system steadily declines, as in those areas courts have more and more such cases due to a large influx of new cases, which in turn leads to longer and longer processing times.

Due to erroneous identification of the performance (quality and efficiency) of the court system (and the judicial system as a whole) with the performance of judges in their capacity as segments of that system, no serious analyses have been made of the causes of the problems burdening the judiciary or systemic measures implemented to rectify those problems. This has led to a widespread conviction that the only way to improve the quality of the work of judges is to 'punish' those who do not achieve satisfactory results at work.

Valuation of the work of judges in Serbia is customarily seen as a numerical assessment of the results of their work rada (number of cases being processed, number of cases completed, number of uncompleted cases, number of upheld judgements, number of quashed judgments, number of cases in which the decision was rendered past a certain deadline etc.). Every court keeps monthly statistical records and drafts reports on the work of the court, its departments and individual judges, submitting them each quarter, half-year and year to the Ministry of Justice, the next higher court and the Supreme Court of Serbia, in accordance with Article 48 of the Law on the Organisation of Courts and Article 40 of the Court Rules of Procedure.

Even the measurement of the results (quantity) of work, as part of the process of evaluating the work of judges, is based on statistical data, unsystematic and inconsistent, and those statistical data are not accompanied with analyses, conclusions and assessment of the work of the judges, or a plan of measurements to rectify problems which have been found and for improving the operation of the judiciary or a concrete court or judge. No system has been set up in which it would be possible to compare the results of the work of judges and which would indicate the average performance of judges in a certain court or in Serbia as a whole.

When needed, measurements are done for individual judges for the purpose of election to a higher court<sup>15</sup> or initiation of a dismissal procedure. From the context of overall results and without a global analysis or one at the level of a given court are extracted certain data, courts or judges. This is a serious shortcoming, because it renders impossible the realisation of all aims which can and should be achieved by evaluating the work of judges.

The absence of continuous evaluation of performance of all judges precludes a systemic intervention which would be based on reliable analyses and contain realistic expectations of the effects desired.

In Slovenia, for example, if in a certain year a judge does not achieve an expected performance and had worked for at least six months, the reasons for that judge's shortfall are determined. The following are regarded as justifiable reasons: an above-average burden of cases, especially old ones; an excessively small number of cases given to the judge; simultaneous processing of cases belonging to different areas of law; poor working conditions (a shortage of courtrooms, ancillary staff etc.); changes of the scope of work etc.; the judge's participation in criminal proceedings lasting a long time. The causes of the sub-standard efficiency are determined by the president of the court (in co-operation with the judge and departmental head), who then informs thereof the Judicial Council during the regular annual submission of data on the performance of judges. In France, an

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<sup>15</sup> Serbia still has no system of promotion in service – this means that in order to be elected to a higher court (promoted), candidates who already hold judicial posts have to once again undergo the entire procedure of putting up a candidacy, nomination and finally election by the National Assembly, just as they did when they were first elected to serve as judges.

interview of the judge by the departmental head (in connection with business transacted by the judge in the period under evaluation) is one of the first stages in the assessment of the judge's work, and the assessment is descriptive. The interview itself provides an opportunity to point to possible difficulties, suggest ways of overcoming them and improving work by determining a way to eliminate difficulties (with the help of human resources, material and technical means, training and education etc.), and to propose the future scope of the work of the judge and the judge's future tasks.

In Serbia evaluation of the work of judges has no influence on the types, methods and programmes of their advancement (in-service training) or the type of work the judge will perform in the court, and neither does it motivate judges to perform better, and in particular to upgrade their expertise, except when they seek promotion.

Neither has the Law on Judges (which regulated that the types and methods of in-service training of judges were defined by the Supreme Court of Serbia sitting in full composition), nor the recently-adopted Law on the Training of Judges, Public Prosecutors, Deputy Public Prosecutors and Judges' and Prosecutors' Assistants<sup>16</sup> (under which permanent training programmes for judges are defined by the Judicial Training Centre) established a functional link between bodies which evaluate the work of judges and those which define training programmes, nor has it been ensured that the assessment of the work of judges affects them in any way. A system of this kind does not guarantee that the training programmes will be fully based on genuine needs for doing away with shortcomings and elevating the capacities of judges in toto, and each individual judge.

The absence of constant evaluation of the work of judges also precludes incentives for those judges who perform their duty successfully or particularly well, for example more rapid promotion, pay-grade advancements, better pay and diverse remuneration, awards etc.

## **3.2. LEGISLATION RELATING TO EVALUATION OF JUDICIAL PERFORMANCE**

The method of evaluation (assessment) of judicial performance has been prescribed by a number of laws and regulations.

### **3.2.1. LAWS**

There are several laws dealing with the evaluation of the performance of judges:

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<sup>16</sup> Published in the *Official Gazette of the RS* No. 46/06 dated 2 June 2006

- The Law on the High Council of the Judiciary (*Official Gazette of the RS*, Nos. 63/2001, 42/2002, 39/03 and 44/04 – Article 1 relates to the competence for the nomination of judges for appointment;

- The Law on Judges (*Official Gazette of the RS*, Nos. 63/2001, 42/2002, 25/03, 27/03, 5/04 and 44/04) - Articles 9 and 44 – 46 determine conditions for the appointment of judges; Articles 40a and 40b, respectively, concern the functioning of the supervisory board and the oversight of particular cases handled by a particular judge; Articles 51 – 55 relate to the termination of the judicial function and conditions for the relief of duty; Articles 42 – 46 deal with the procedure for the appointment of judges; Articles 57 – 61 relate to the procedure for the relief of duty; Articles 20 – 22 deal with the annual schedule of judges' assignments and the distribution of cases; Articles 23 and 26 pertain to the protection of the rights of judges;

- The Law on the Organization of Courts (*Official Gazette of the RS*, Nos. 63/2001, 42/2002, 27/2003, 29/2004, 101/2005 and 46/2006) – Article 7 provides for the right of complaint, Article 31 concerns the annual schedule of judges' assignments, Articles 48 - 52 relate to the discharge of affairs pertaining to judicial administration, in particular the drawing up of the annual schedule and its changes and the handling of complaints.

### **3.2.2. REGULATIONS**

There are several by-laws dealing with the assessment of judicial performance.

#### **A) Regulations brought by the Supreme Court**

The Supreme Court which, in accordance with Article 101 of the previous Constitution of RS (*Official Gazette of the RS*, No. 1/90 of 28 September 1990), establishes whether reasons exist for termination of a judge's tenure, has adopted:

- Standards for Assessing Minimum Efficiency in the Discharge of the Judicial Function, to be applied provisionally until the date of the commencement of the application of the provisions of Articles 21 - 28 of the Law on the Organization of Courts (*Official Gazette of the RS*, No. 80/2005);

- Standards for Assessing Minimum Efficiency in the Discharge of the Judicial Function (*Official Gazette of the RS*, Nos. 36/2002 and 41/2002).

The Grand Personnel Chamber, as the body of the Supreme Court defined by Articles 36 and 56 of the Law on Judges concerned with establishing whether conditions exist for the relief of duty of a judge, has adopted:

- Rules of Procedure of the Grand Personnel Chamber (*Official Gazette of the RS*, Nos. 41/2003 and 80/2005).

### **B) Regulations brought by the High Council of the Judiciary**

The High Council of the Judiciary, which nominates judges and presidents of courts for the appointment by the National Parliament of RS, has adopted:

- Rules of Procedure of the High Council of the Judiciary (*Official Gazette of the RS*, Nos. 13/2004 and 121/2004);

- Decision on Standards and Criteria for Nominating Candidates for Appointment as Judges and Presidents of Courts – Revised text, No. 111-00-4/2007-01 of 13 March 2007, which comprises Decisions on Standards and Criteria for Nominating Candidates for Appointment as Judges and Presidents of Courts, No. 111-00-1024/05-1 of 8 April 2005 and 15 July 2005, respectively, and the Decision Amending the Decision on Standards and Criteria for Nominating Candidates for Appointment as Judges and Presidents of Courts No. 111-00-1024/07-1 of 1 - 5 March 2007;

- Decision on the Procedure of Deliberations of the Grand Personnel Chamber in Nominating Candidates for Appointment as Judges and Presidents of Courts No. 021-02-2/2005-1 of 8 April 2005;

- Framework Criteria for Determining the Necessary Number of Judges in Courts of General Competence and Special Courts (*Official Gazette of the RS*, No. 61 of 18 July 2006).<sup>17</sup>

### **C) Regulations brought by the Minister of Justice**

In addition to the following regulations:

- Rulebook on Approximate Criteria for Determining the Necessary Number of Judges and Employees in Municipal and District Courts (*Official Gazette of the RS*, No. 47/1998; and

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<sup>17</sup> In the formal sense, these criteria serve, as also suggested by their name, for determining the necessary number of judges. In effect, although they have been introduced to serve a quite specific purpose – determination of the necessary number of judges and employees, these criteria also have an additional highly important function – i.e. the function of the so-called “judge’s caseload”. By the way, the overall number of cases completed was used as “caseload” also in the past when recording details for each judge regarding the degree of completion of the required number of cases. The required number of cases was previously determined by the Regulation on Approximate Criteria for Determining the Necessary Number of Judges and Employees in Municipal and District Courts (*Official Gazette of the RS*, No. 47/98) and by the Regulation on Approximate Criteria for Determining the Necessary Number of Judges and Other Employees in Commercial Courts (*Official Gazette of the RS*, No. 14/94). One should not lose sight of the fact that the “judge’s caseloads” are different in these and other laws and regulations and this is, consequently, another in a series of arguments speaking in favour of the conclusion on unreliability of the data on judicial performance. Different judges’ “caseloads” are presented in the table on page 50.).

- Rulebook on Approximate Criteria for Determining the Necessary Number of Judges and Other Employees in Commercial Courts (*Official Gazette of the RS*, No. 14/94)

applied until 1 January 2007 also for the purpose of assessing whether the required number of cases has been completed (“caseload”),<sup>18</sup> the Minister of Justice, with the approval of the President of the Supreme Court of Serbia, has also brought:

- Court Standing Rules (*Official Gazette of the RS*, No. 65/2003 of 27 June 2003) providing for the recording of data, drawing up reports on judicial performance (Articles 39-41), activities in the chamber or with an individual judge, as well as in the chamber in second-instance courts, the purpose of which is to assess the conscientiousness of judges in the discharge of their function (Articles 160-186).

Not a single one of the mentioned laws and regulations offers a definition of the standards and criteria for evaluating judicial performance. The standards and criteria for evaluating (assessing) the performance of judges prescribed by the said laws and regulations are mixed up, differing from one act to another, incoherent, unelaborated and inconsistent (for example, the kind and complexity of cases, conscientiousness, duration of the proceedings, treatment of the parties). Certain aspects of the judicial function have not been taken into account at all. All these aspects will be discussed further below.

### **3.3. BODIES WHICH EVALUTE JUDICIAL PERFORMANCE**

#### **3.3.1. GENERAL REMARKS**

Unlike the practice of the European states where evaluation of judicial performance is always under the authority of one body, evaluation of judicial performance in Serbia has been done and is still being done, pending harmonization of the laws pertaining to the judiciary with the new Constitution<sup>19</sup>, by different bodies which conduct their respective procedures separately in terms of their functions and consequences. Thus, different aspects of judicial performance are evaluated by the High Council of the Judiciary, the Supreme Court’s Grand Personnel Chamber, by the courts’ presidents and the Minister of Justice.

The new Constitution, Article 154 gives to the High Court Council the authority over all the issues concerning nomination of judges for first appointment, their appointments and relief of duty, nomination for appointment to the office of court president and participation in the procedure for their relief of duty. The High Court Council is the body of judicial self-government that became for the first time a constitutional category in Serbia under the 2006 Constitution. According to Article 153 of the Constitution of RS the High Court Council is an independent and autonomous body providing for and

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<sup>18</sup> The explanation given in footnote 17 is also applicable in this case.

<sup>19</sup> The 2006 Constitution was promulgated on 8 November 2006.

guaranteeing the independence and autonomy of courts and judges. It has 11 members including the president of the Supreme Court of Cassation, the minister responsible for justice and chairman of the competent committee of the National Parliament who are members based on the offices they hold. Of the 8 elective members 6 are judges with permanent judicial tenure including one from the territory of the autonomous provinces and two are respectable and well-known lawyers with at least 15 years of service in the profession (an attorney and a professor at a Law School). The High Court Council has not been appointed nor has it commenced its activities because not a single of the laws pertaining to the judiciary mentioned in Article 5, paragraph 2 of the Constitutional Law for the Implementation of the Constitution of RS has been passed. This is why the current laws on the judiciary are still being applied in accordance with Article 6, paragraph 1 of the mentioned Law.

### 3.3.2. HIGH COUNCIL OF THE JUDICIARY

The judicial legal changes effectuated during 2001 established for the first time a body of judicial self-government in Serbia's judiciary– the High Council of the Judiciary<sup>20</sup>. It proposes to the National Parliament to appoint the courts' presidents, judges, public prosecutors and deputy public prosecutors, appoints lay judges and performs other duties laid down by the law. Under Article 101, paragraph 4 of the previous Constitution of RS<sup>21</sup> a decision on whether reasons existed for termination of a judicial tenure, i.e. for a judge's relief of duty was to be taken by the Supreme Court in keeping with the law and the Supreme Court was to notify the National Parliament thereof. Consequently, there was no legal possibility to also place the determination of the conditions for judges' relief of duty under the authority of the High Council of the Judiciary.

Under the still valid regulations, the High Council of the Judiciary evaluates the performance of judges in the procedure of their nomination for appointment to a higher-instance court. Judges are appointed by the National Parliament on the proposal of the High Council of the Judiciary (Article 46, paragraphs 1 and 2 of the Law on Judges)<sup>22</sup> The High Council of the Judiciary, in nominating judges, takes into account only their competence and eligibility (Article 45, paragraph 1 of the Law on Judges).

It is noteworthy that the criteria for nominating candidates for appointment as judges by the High Council of the Judiciary and the criteria for appointment of judges by the Parliament of RS are not the same.

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<sup>20</sup> The High Council of the Judiciary was established under the Law on the High Council of the Judiciary (*Official Gazette of the RS*, Nos. 63 of 8 Nov 2001; 42/02; 39/03; 41/03; 44/04; 61/05).

<sup>21</sup> The previous Constitution of RS was published in the *Official Gazette of the RS*, No 1/90 on 28 Sept 1990.

<sup>22</sup> The new Constitution, Article 147 provides for an arrangement different from what has been in force until now. The Parliament of RS has the right to appoint judges who are appointed for the first time for a limited 3-year term in office. In other cases judges are appointed by the High Judicial Council pursuant to Article 153, in accordance with the law. As the (new) laws pertaining to the judiciary have not been passed yet, the current laws on the judiciary continue to be applied in keeping with Article 6 of the Constitutional Law for the Implementation of the Constitution of the Republic of Serbia (*Official Gazette of the RS*, No. 98 of 10 Nov 2006).

The High Council of the Judiciary takes into accounts the candidates' competence and eligibility while the National Parliament does not have the duty to consider the candidates' competence as well when making judicial appointments. The National Parliament is not legally bound either to make public the reasons why it has not accepted a proposal of the High Council of the Judiciary. The High Council's duties and powers in such a case have not been defined, i.e. it has not been prescribed whether it can nominate the same candidate again and how many times it can do so if its proposal is rejected for the second time.

One should not lose sight of the fact that the criteria for nominating and appointing judges and the criteria for evaluating their performance are not the same although they are similar and that this paper deals only with the criteria for evaluating their performance.

The manner of evaluating judicial performance introduced by the High Council of the Judiciary by the regulations it has adopted has unnecessarily turned this body into a judicial performance evaluation or assessment commission.

In the European states where there are bodies of judicial self-government similar to Serbia's High Council of the Judiciary or, the High Court Council (under the new Constitution), such bodies do not evaluate judicial performance.

In Italy the "judicial councils", i.e. the bodies composed of judges which can be found at every appeals court, give to the High Council of the Judiciary their opinion on the performance of judges. In Spain and Portugal judicial performance is evaluated by special commissions or services with the General (High) Council of the Magistrature. In Lithuania judicial performance is evaluated by a commission made up of a judge of a court of higher instance than that of the court whose judge's performance is being evaluated. In France judicial performance is evaluated in several stages by the relevant head of department, the court's president and the Promotion Commission. In Bosnia-Herzegovina judicial performance is evaluated by the court's president. In Slovenia the evaluation of judges' service is the responsibility of personnel chambers (at the district courts, higher-instance courts and the Supreme Court but the personnel chamber of the district court, with several members appointed from the ranks of judges of the relevant municipal court, executes its tasks also on behalf of the judges in the municipal courts in the area under the jurisdiction of the said district court). The personnel chamber, based on the office held, is made up of the court's president and a certain number of members whom the judges elect from among themselves for a 4-year term in the manner and under the procedure laid down by the Law on Appointments with the Judicial Chamber (the Slovenian counterpart to the High Council of the Judiciary) at the election which the Judicial Council calls at least 3 months prior to the expiry of the term in office of the current members of the personnel chamber.

The reason why the High Council of the Judiciary was set up by law and the reason why now it has also been established as the High Judicial Council under the Constitution, is

the need to have an independent and autonomous body preventing politics from influencing judges' appointment by ensuring objectivity in appointing judges and thus also their independence, by prescribing the criteria (competence and eligibility), by explaining the criteria in concrete terms, i.e. defining their substance in depth and by setting the standards to be used in determining to what extent each criterion has been fulfilled thereby enabling comparisons to be made between the thus obtained results (grades).

For these reasons the membership of this body has been determined by law. Under the law in force until now, the membership of the High Council of the Judiciary, when it decides issues relating to judges, includes the President of the Supreme Court of Serbia, the Republic Public Prosecutor, the Minister of Justice, one attorney appointed by the Bar Association of Serbia and a member appointed by the National Parliament from the ranks of its respectable lawyers. According to Article 153 of the Constitution of RS the membership of the High Court Council includes the President of the Supreme Court of Cassation, the minister responsible for justice and the chairman of the competent committee of the National Parliament as members who have that status based on the office they hold and 8 elective members appointed by the National Parliament in keeping with the law, of whom two are respectable lawyers (an attorney and a law professor) and six are judges. Thus, the actual membership of both of these bodies – the High Council of the Judiciary and the High Court Council - which includes persons who are not or need not be competent to evaluate judicial performance (the Minister of Justice, a representative of the National Parliament), as well as the method of appointing judges to the Council, do not guarantee competence in evaluating judicial performance in all fields of their service, which is why they make the Council unfit to evaluate (grade) judicial performance.

In addition, the High Council of the Judiciary has until now had neither the premises nor the equipment nor the logistics (it lacks its own supporting administrative service), nor enough time (all its members have their regular duties to perform in addition to serving on the High Council of the Judiciary and the number of the applicants is often several hundred people) to be able to engage in reliable evaluation (giving of grades) of the performance of each candidate or judge. Even if the High Court Council were, for its part, expected to evaluate judicial performance, it would, in fact, not have the possibility to deal with that for quite some time to go. The National Judicial Reform Strategy (*Official Gazette of the RS*, No 44/2006) envisages that the relevant laws setting up the Administrative Office to assist the High Court Council and formulating a structure and human resources plan will be adopted in 2006 and 2007, core services established at the Office in 2008 and 2009 and the Office be made fully operational only in 2010 and 2011.

### **3.3.3 GRAND PERSONNEL CHAMBER**

Proceeding from the awareness that European standards require that there is a body of judicial self-government ensuring independence of the judiciary which would, *inter alia*, handle issues of relevance to judges' professional careers on the one hand and proceeding from the provision of the previous Constitution according to which the Supreme Court

decides, in keeping with the law, whether there are grounds to terminate a judge's tenure, i.e. for his relief of duty and notifies the National Parliament thereof, on the other hand, a new body - the Grand Personnel Chamber - has been established within the Supreme Court of Serbia by virtue of Article 26 of the Law on Judges. The responsibility of the Grand Personnel Chamber is to set conditions for relief of duty of judges (Article 56, paragraph 1) and of courts' presidents (Article 70) and, under such procedures, to impose "warning measures" and the removal-from-court measure (Article 58, paragraph 1) which are, by their nature, disciplinary penalties.

The Chamber has adopted its Rules of Procedure and the Supreme Court of Serbia has adopted the Standards for Evaluating Minimum Effectiveness in the Discharge of Judicial Duties based on which the Grand Personnel Chamber evaluates whether a judge has performed his judicial duties so incompetently or unconscientiously that this can serve as grounds for his relief of duty.

The Grand Personnel Chamber is composed of 9 judges of the Supreme Court – 3 from the criminal, civil law and administrative department each. Members of the Chamber are appointed automatically. Namely, appointed for a 2-year term in office are the judges with the highest total number of years of judicial service, i.e. the oldest judges if they have the same number of years of judicial service. They may not be re-appointed until each judge, in that sequence, has completed his term in office with the Chamber.

Judging by the competence of its members, this body is surely well-qualified to evaluate judicial service, i.e. ascertain whether a judge has been performing his judicial duties so incompetently or unconscientiously that that can serve as grounds for his relief of duty. Automatism in appointing the members of the Grand Personnel Chamber, however, is not in accordance with the reason why the bodies of judicial self-government exist.

This body of judicial self-government, like any other such body, should itself be independent and autonomous to be able to ensure independence of judges and the courts. It is not essential for professional career decisions which are of crucial importance to be brought by the highest-instance judges but rather by the judges who enjoy the highest level of trust of their colleagues who are confident that they will pursue the duties entrusted to the competence of the body whose members they are becoming honestly, conscientiously, persistently, consistently and with courage. In this manner, difficult decisions on disciplinary measures and relief of duty (as well as appointment decisions, decisions on promotions and the like when dealt with by one body) are accepted by the actual judiciary as reliable, fair and taken in keeping with principles. Such decisions, when brought by a body that enjoys the judges' trust, also serve as guidelines for future conduct and, at the end of the day, exert a systematic influence on the judiciary to work better within its ranks.

### **3.3.4. PRESIDENT OF THE COURT**

According to the Law on the Organization of Courts, the court's president is responsible for the court's proper and timely activities and authorized to require legality, order and accuracy at the court and eliminate irregularities and delays.

Under the Court Rules of Procedure the court's president has the responsibility to supervise the activities of the court's departments and services by inspecting the book of entries and supporting books, diaries and hearing reports, keeping regular track of the protracted cases, getting reports and in other appropriate ways (Article 8 of the Court Rules of Procedure). If in examining the annual report, he establishes that the number of undecided cases at the court or at a court department is higher than the number of cases received over a 3-month period or that there has been an increase in the number of old cases, the court's president will issue a program for adjudicating such cases whereby measures will be introduced such as changes in the court's internal organization; introducing overtime; provisional redistribution of business hours; and other measures in line with the Rules of Procedure and the law and will make changes in the annual schedule of business (Article 9 of the Court Rules of Procedure). Article 11 of the Standards for Evaluating Minimum Effectiveness in Discharge of Judicial Duties also gives him authorization to halt the assignment of cases to particular chambers or judges if they need to be engaged more intensively in the activities associated with complex cases and upon receiving the opinion of the head of department to that effect. By the annual schedule of business at the court the court's president determines the type of work that each judge will do (Article 43 of the Court Rules of Procedure). This type of work may not be changed during the course of the year (Article 44 of the Court Rules of Procedure), except on account of appointment of a new judge, a judge's longer leave of absence or a judicial vacancy (Article 46 of the Court Rules of Procedure).

The affairs of the court administration entrusted to the court's president also include examination of applications and complaints. The court's president is required to examine each and every complaint and inform the complainant whether it is founded and whether any measures have been undertaken within 15 days as of the date of receipt of the complaint but will first of all request the relevant judge to make a statement on the matter. If the complaint has been filed through the Ministry of Justice or a higher-instance court, the Minister of Justice or the president of a higher-instance court have to be notified whether the complaint is warranted and whether any measures have been undertaken to remedy the situation.

Therefore, the president of the court at which a particular judge serves evaluates judicial performance as well both in the process of adoption of the annual schedule of business and of its changes (when issuing a program for deciding old cases) and in the applications and complaints review procedure when he may take away a case from the acting judge and assign it to another (the judge and the parties have the right to state an objection to such a decision to the president of the immediately higher court in the judicial hierarchy) and initiate the procedure for the relevant judge's relief of duty pursuant to Article 56 paragraph 2 of the Law on Judges which stipulates that the relief of duty procedure may

be initiated by the court's president, the president of the immediately higher court in the judicial hierarchy and the president of the Supreme Court.

Lack of regular evaluation of performance of all judges based on uniform and clear criteria and standards as well as lack of rules that would stipulate how the court's president should distribute the workload at the court on an annual basis, or determine the type of work to be done by a particular judge, i.e. the duty to take into account how effectively that judge has executed the tasks assigned to him and to change the annual schedule of business accordingly, make it impossible for the courts' presidents to distribute the workload at the courts optimally and introduce changes if necessary.

The status of the judges within the court does not depend on objective standards but primarily on the capacity of each court's president to recognize the aspects of work which a particular judge is more qualified to do (communication skills or organizational capacity, persuasion skills, affinity to particular legal fields) and assign the judge to tasks which he can perform to the maximum of his ability. This is why there are no guarantees for the optimum use of a judge's capacities within the court nor for the use of the evaluation of their performance also in order to determine their status horizontally (within the court) rather than only vertically (promotion, disciplinary liability, relief of duty).

The action on the part of the court's president upon receiving an application or complaint of a judge's performance also requires the court's president to evaluate how such a judge has been working but in this case he has only to evaluate his actions in the concrete case in point.

In practice, the complaints procedure, in the largest number of cases, boils down to familiarization of the court's president and the acting judges with the contents of the complaint for the judges to make a statement on the allegations set out therein. This happens for two reasons. Firstly, given his own field of specialization, the court's president may lack the required expertise to be able to evaluate a judge's performance in a specific case. Secondly, there are no well-elaborated provisions on judges' disciplinary accountability (currently judges may receive a warning measure or a removal-from-court measure for a period of one month – one year but only in response to a proposal for relief of duty in the relief-of-duty proceedings).

If the complaints about a judge's performance are well-founded, the court's president has only two options available. The first is to take away the case from the acting judge, if he establishes that the acting judge has been delaying the procedure, and to assign it to another judge (the judge and the parties have the right to file an objection to such a decision with the president of the immediately higher court in the judicial hierarchy). The second option is for the president to initiate the procedure for the relief of duty of the mentioned judge.

However, even though particular complaints about a judge's performance are well-founded, they may also be indicative of omissions of a nature not requiring initiation of relief-of-duty proceedings. In such cases virtually nothing is done. As a result, a grey

zone of omissions dismissed with impunity is left over which does not encourage the judiciary to improve its situation.

### **3.4. JUDICIAL PERFORMANCE EVALUATION METHOD**

#### **3.4.1. GENERAL REMARKS**

As already mentioned, the existing judicial performance evaluation system only covers the assessment of individual judges' performance in the procedure for their appointment (promotion), based on the application of a particular judge competing for appointment to a post at a higher-instance court, and in the procedure for the relief of duty, following the procedure for the relief of duty of a particular judge.

In contrast, it is customary for other European countries to evaluate the performance of all judges on a regular basis.

In Spain evaluation takes place every six months. In Bosnia and Herzegovina judicial performance is evaluated by the court's president on an annual basis while in France the performance of judges is evaluated every two years (exceptionally earlier, in cases determined by law on the proposal of duly authorized entities). In Portugal the performance of judges is assessed every four years. In Slovenia judicial performance is evaluated by the Personnel Chamber every two years during the first four years of judicial service and every six years thereafter (or, before the lapse of that period, at the request of the Judicial Chamber, the court's president, the president of the court of higher instance or of the respective judge himself). In Lithuania the performance of judges is evaluated twice during the first five years of service and every ten years thereafter; evaluation also takes place, however, in case of change of judicial function or of promotion. In Germany the performance of a judge with a permanent tenure is normally evaluated after a period of three years for the first time (and, exceptionally, also in situations where a particular judge has applied for a higher position<sup>23</sup>). His performance is evaluated once more after another period of three years, and every five years thereafter (twice). The performance of any judge aged over 50 is no longer evaluated. In Italy evaluation of judicial performance takes place upon completion of advanced professional training and thereafter at each stage of moving up the ladder – two years after joining judicial service; after eleven years of service at a first-instance court for appointment to a post at a second-instance court, i.e. the appeals court; and after seven years of service at a second-instance court for appointment at the third-instance court, i.e. the Court of Cassation. In all these countries evaluation is made bearing in mind practically every single criterion. Irrespective of whether done descriptively, by allocating points or by

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<sup>23</sup> There is no automatic promotion in Germany either but a judge is appointed to a higher post under the same procedure and in the same manner as in the case of his appointment as judge. In order for a judge to be appointed to a post at a higher-instance court it is necessary for him to have served at that court for a period of 6 months. His performance is then assessed by the presiding judge of the chamber to which he has been assigned and by the court's president. Only then will the judge in question be entitled to apply for the relevant higher post.

giving marks, evaluation is graded ranging from unsatisfactory, which requires intervention (in certain cases even relief of duty), through satisfactory and average up to successful and highly successful.

The absence of regular evaluation of judicial performance and lack of reliable and uniform criteria make it impossible to systematically intervene based on reliable examinations with realistic expectations of the desired effects (in terms of determining the necessary number of judges and courts, an even workload of judges and courts, etc.).

In addition to the absence of a law regulating disciplinary action, the lack of continual evaluation of judicial performance also makes it impossible to address, on a continued basis, objectively and reliably, the responsibility of the judges who perform their duty in an unsatisfactory manner. More precisely, the responsibility of such judges is subject to examination only when specific omissions are detected and even then only in the procedure for the relief of duty or where it is considered that this last and most rigorous measure is unnecessary.

On the other hand, due to absence of evaluation it is difficult to give incentives to the judges who have performed their duties successfully or highly successfully (possibly by granting faster promotion, higher salary grade, better pay, various forms of reward or acknowledgment, commendation, etc.).

In France, for instance, in the initial phase of evaluation, even a conversation between a judge and his head of department about the cases dealt with by the judge in the period under review makes it possible to perceive difficulties, propose how to overcome them and improve performance by providing a sufficient number of employees, material and technical means, the necessary training and advanced training as well as by proposing a future field of work and future tasks for the judge in question. In Slovenia, if a judge who has spent at least six months performing his duties fails to deliver the expected volume of work in a certain year, the underlying reasons are examined as well. The reasons that may be deemed justifiable include in particular: an above-average number of cases, especially those that are overdue; the unduly low number of cases assigned to such a judge; deciding or adjudicating simultaneously the cases from different fields of law; poorer material conditions of work at the court (lack of rooms for holding hearings, shortage of technical staff, etc.); change of field and the like; and participation of judges in long-drawn-out proceedings. The causes of low efficiency are established by the court's president, together with the judge and the head of department in question, and the findings are brought to the attention of the Judicial Council when submitting a regular annual report on judges' efficiency.

Finally, as judicial performance evaluation falls within the purview of bodies that do not decide on the training of judges (the High Council of the Judiciary and the Grand Personnel Chamber), it has no impact whatsoever on the training type, its method or

curriculum (advanced professional training) nor on the kind of duties to be discharged by a judge<sup>24</sup>.

However, in Slovenia and in Bosnia and Herzegovina, as well as in France and Germany and in other European countries, participation in obligatory and other forms of training is evaluated by applying the criterion of a judge's professional aptitude and has an impact on the overall assessment in making a regular evaluation of a judge's performance. Judges in whose performance deficiencies have been noticed in some areas are instructed to undergo training with a view to eliminating them.

### 3.4.2. STATISTICAL DATA

The Law on the organisation and uniform methodology of gathering, filing and processing of data<sup>25</sup> regulates the organisation, gathering, filing, processing, presentation, dissemination, exchange and protection of the data and information used for the exercise of functions and duties of the judicial authorities that are of interest to the country as a whole (hereinafter referred to as the Justice Information System). The Justice Information System (JIS) contains the data and information on laws and regulations, judicial practices, criminal procedure, societal relations and phenomena observed in the practice of the judicial authorities, judicial statistics and professional legal references, as well as other data and information used in the performance of the functions and duties of the justice administration authorities. Alignment, inter-connection and unification of the activities and meeting of the stakeholders' needs in the JIS are ensured by identifying the basic principles of methodology (definitions of processing units, features and modalities, their classification and selection of the processing methods), as well as organisational and methodological instruments (preparing instructions, forms, instructions for work, etc.). In order to ensure proper functioning of the JIS, both Yugoslav and international standards are applied, thus enabling its networking and cooperation with the information systems of other countries and international organizations. The basic principles of methodology, standards and methods for gathering, filing, processing, presentation, dissemination, exchange and protection of data and information within the JIS are all established by the official in charge of the authority responsible for justice administration affairs. This official defines more specifically the conditions and manner of utilizing the JIS data and information. Based on this law, the Minister of Justice has adopted the Rulebook on gathering, processing, presentation, unification, dissemination and exchange of data and information within the JIS<sup>26</sup>.

The parameters of the courts' activities, to be monitored either regularly or from time to time, are established by the Minister of Justice who also defines the forms and

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<sup>24</sup> The relevant laws only stipulate that a judge is entitled to advanced professional training at the expense of the Republic of Serbia whereas the types and methods thereof are prescribed by the Supreme Court of Serbia at the General Meeting (Article 8 of the Law on Judges and Articles 28 and 41 of the Law on the Organization of Courts).

<sup>25</sup> The Law was published in the "Official Gazette of the SFR of Yugoslavia", No. 44/89.

<sup>26</sup> The Rulebook was published in the *Official Gazette of the RS*, No. 114/2005.

methodology for such monitoring under Article 39, paragraph 1 of the Court Rules of Procedure. Under Article 41 thereof the court organizes statistical operations by following the instructions of the body responsible for statistical affairs.

Accordingly, each court keeps its own monthly statistics and prepares reports on the cases handled by it or by its departments or individual judges which are submitted quarterly, semi-annually and annually to the Ministry of Justice, to an immediately higher court in the judicial hierarchy and to the Supreme Court of Serbia, in accordance with Article 48 of the Law on the Organization of Courts and Article 40 of the Court Rules of Procedure.

The recording of the data serving the High Council of the Judiciary, the Grand Personnel Chamber and the courts' presidents in evaluating judicial performance, each within their respective field of competence, also takes place in keeping with the Binding Instruction on Tabular Periodic Reports on the Courts' and Judges' Workloads and on the Methods of Presenting Data in Such Tables, issued by the President of the Supreme Court of Serbia. All the same- instance courts are duty-bound to draw up identical tabular periodic reports (monthly, quarterly, semi-annual, annual and once in every three years) on the cases heard by them, their departments and judges.

The table contains the first name and surname of the judge, his position at the court concerned; the case reference code (case type corresponding to the references used in Articles 251, 252-255 and 258-288 of the Court Rules of Procedure); the number of undecided cases at the start of the reporting period; the number of assigned cases during the reporting period; the total number of cases being dealt with; the number of cases completed either by a judgment or otherwise; the total number of completed cases including the old ones; the number of cases that remained undecided; the proportion of the required minimum number of cases completed; the period of time spent preparing the decisions (less than 30 days, less than 60 days, over 60 days); number of workdays when the judge actually worked (effective work performance); absence from work; the number of reviewed judgments on appeal; the number and percentage of upheld judgments; the number and percentage of altered sentences; the number and percentage of quashed judgments; the efficiency ratio (quotient of the number of undecided cases in the period under review and the average monthly number of assigned cases in the same period), etc.

### **3.4.3. PROBLEMS CONCERNING THE USE OF STATISTICAL DATA**

There are deficiencies in the process of recording statistical data which make it impossible to pursue comparative and realistic monitoring of judicial performance at a court and of every individual judge and to establish whether judges and the courts have an equal workload.

Namely, monitoring of the type and complexity of cases completed by a judge in the reporting period is lacking (since cases are classified only according to subject-matter just as it is also provided for by the Court Rules of Procedure). As a result, it is impossible to

establish how much effort has truly been exerted in dealing with a case as well as whether judges have an equal caseload. A definition of cases completed in another manner and on the merits is lacking as well.

What is further lacking is monitoring of the number of unappealed judgments although adjudication of cases at the first instance, to the largest extent possible, is extremely useful socially. This is why the activities of the judges who have completed a large number of cases without any appeal having been lodged against them (e.g. 97 percent) but whose quality of reviewed decisions on appeal is poor need to be taken note of, recognized and appropriately evaluated. Such judges, subject to having achieved other satisfactory results, are useful in first-instance adjudication of cases. On the other hand, the quality of judicial performance established based on monitoring the destiny of a judge's decisions in appellate proceedings should have a considerable impact in terms of providing an opportunity for his appointment to a post at a higher-instance court.

Adjudication of particular types of cases (mediation in divorce proceedings, earlier settlement based on objections made in execution proceedings) and preparing the cases for trial has not been covered by the internal regulations at all. It follows that judicial performance has not been fully evaluated nor is it comparable as such. There is no monitoring of any activity pursued by the judge beyond his handling of cases such as the factual-legal preparation for a trial, study of jurisprudence and regulations and their interpretation, participation in training, at seminars and roundtables on major issues having to do with administration of justice, work with trainees and advisers, participation in the activities of the chambers to which they have not been permanently assigned, at the sessions of the departments and at general-type sessions and dealing with a heavy administrative-technical workload.

Additional duties discharged by the courts' presidents, their deputies, heads of departments and the judges keeping track of jurisprudence, have not been defined. Their factual evaluation has been done by reducing the required caseload by the Framework Standards for Fixing the Number of Judges at the Courts of General Competence and at Special Courts<sup>27</sup>. Article 5 stipulates that the tentative monthly number of cases completed by the presidents of the courts with fewer than 10 judges should be 50 percent, at the courts with 10 to 20 judges – 40 percent, at the courts with 20 to 50 judges – 10 percent while the Standards are not binding on the presidents of other courts. The relevant figure for the court's deputy president is 80 percent of the number set by the Standards and the same also applies to the heads of departments at municipal courts with 30 judges or more, department heads at all district courts, department heads outside the seat of the court and the judges who keep track of jurisprudence. Such a reduction in the number of required cases to be completed usually goes hand in hand with a proportionate reduction in the number of received new cases.

Unwritten practice has also done this at some second-instance courts with permanent presiding judges of the chambers whose required number of cases to be completed has been reduced along with their assignment, to different extents, to new cases depending on

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<sup>27</sup> See footnote 17.

the type of court where they serve. Although the data on the handling of the given caseloads have been gathered regularly and communicated to various entities that evaluate judicial performance in different situations, comparisons of judicial performance between different courts of the same type and instance have been difficult to make. The reasons include a higher reduction of the caseloads introduced for heads of departments at some courts, the newly-introduced practice of appointing permanent presiding judges of second-instance chambers and the reduction of the caseloads of the presiding judges of the chambers at some courts.<sup>28</sup>

The data on completion of the required number of cases by second-instance judges illustrate quite nicely the problem in using and comparing the results of their performance. Namely, at some second-instance courts there are permanent presiding judges of the chambers who are only authorized to check and certify with their signature every second-instance decision brought by such a chamber<sup>29</sup> Since the thus established scope of activity of the chamber's presiding judge includes additional duties as well which are not just the activities of usual adjudication of his own cases, certain courts with permanent presiding judges, being aware as they are of the need to evaluate this kind of activity as well, have set a lower requirement in terms of the number of cases to be completed by such presiding judges which, however, is not the same across the board for all the courts that have established it. In this manner, permanent presiding judges are placed at a disadvantage because they have more work to do than the judges from the courts where reporting judges are concurrently the presiding judges of the chambers with respect to their own cases. The permanent presiding judges of the chambers who do not have any lower requirement in terms of number of cases to complete are also at a disadvantage relative to the other judges and relative to the permanent presiding judges of the chambers at the courts which have set a lower requirement for them in terms of the number of cases they have to complete.

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<sup>28</sup> Of the courts that had permanent presiding judges at their chambers in the first half of 2006 (Belgrade, Valjevo, Kragujevac, in second-instance civil law field, Krusevac, Leskovac, Nis, Novi Pazar, Prokuplje, Smederevo, Sombor, Sremska Mitrovica, Subotica, Sabac and the Supreme Court of Serbia) a lower required number of cases to complete was assigned to the presiding judges of the chambers at the Supreme Court of Serbia, the District Courts in Belgrade (two thirds of the requirement set for a chamber member), Kragujevac (at the second-instance civil law department) and Novi Pazar (80 percent of the requirement set for a member of the chamber). Moreover, there was a special requirement set for the head of the case law department at the District Court in Belgrade and it was equal to one third of the caseload required of a member of a chamber.

<sup>29</sup> The office of permanent presiding judge of the chamber was established, based on insufficient arguments and support in terms of relevant law and without any written and published decisions thereon, in order to level out the practices at the courts and gradually usher in the newly appointed judges to the chamber. Essentially, however, it "covers up" and seeks to eliminate any possible errors made by less experienced or less competent judges who are members of the chamber. As for the accountability for performance that has been thus organized, everybody has an escape route: the presiding judge may say that not all the decisive facts have been presented to him and a member of the chamber that his opinion or arguments may differ but that what the presiding judge is insisting upon is of primary relevance. This working method makes up for the lack of an appropriate and consistent judicial performance evaluation mechanism and blurs the accountability of judges at the chamber whereas higher-instance judges (at district courts and now also at the Higher Commercial Court and the Supreme Court of Serbia) are placed in a paradoxical situation where, unlike their younger and by far less experienced colleagues from the municipal courts, they are not allowed to stand by their own decision and sign it.

Leaving aside the fact that where the caseloads for particular categories of judges have been reduced and the monthly number of cases they receive is not the same but is lower (in proportion to the fixed number of required cases to be completed); the problems posed as a result of burdening the presiding judge with inspection of the chamber members' decisions which he has to sign and the difficulty in evaluating this aspect of his activity; the consideration of how appropriate is the organization of work which contributes to judges' unbalanced workload and blurs their responsibility and accountability, these variations in work organization and in the requirements in terms of the number of cases to be completed make unreliable the data in use on the judicial workload and on the extent to which the required number of completed cases has been attained.

The situation is similar also with respect to the use and comparisons of the data on judges at the courts where there is no specialization (where judges deal with cases in all areas or in all areas of one single matter) with the judges from the courts that have separate research, criminal, civil law, non-contentious affairs and testamentary departments and even narrower specialization within such respective departments, e.g. for disputes in the areas of organized crime, war crimes, family relations or labour relations.

The efficiency ratio (the quotient of the number of undecided cases in the period under review and the average monthly number of received cases in the same period) which is a complex and at first sight reliable datum for evaluating the workload handled must also be taken cautiously and with a grain of salt. It should not be taken as a general standard in evaluating competence (i.e. the workload as an element of competence) or this should be done subject to additional examinations and explanations. The reason for this is that it is influenced by the circumstances that do not depend on the judge's work. For instance, the judges who complete an equal number of cases per month have different efficiency ratios depending on the number of received cases<sup>30</sup>. This standard is also unusable with the judges who, for particular reasons, no longer receive new cases (because they work in a number of different matters; or carry out duties that consume a considerable part of their working hours which is not reflected in the existing statistics; or no longer receive new cases to give them the opportunity to get engaged on complex cases within the meaning of Article 11 of the Standards or to bring their relevant chamber up-to-date). A problem may also arise with respect to the courts with a heavy caseload where the judges do not complete the prescribed i.e. expected number of cases per month for it is a generally known fact that that number cannot be attained by only dealing with old cases and that

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<sup>30</sup> Thus, of the judges who complete the same number of cases per month, e.g. 8, the judge who receives 20 cases per annum on average has an efficiency ratio of 7.6 whereas the one who receives 10 cases has the efficiency ratio of 3.2. The problem may arise also due to the "averaging" of the monthly number of cases completed by judges with longer leaves of absence (sick leaves, etc.) because they can deal with a much larger number of cases when they are in fact at work but when this number is "spread to get the average" on the annual level, their efficiency ratio is higher so that a wrong conclusion follows that they have poorer performance at work. For instance, a judge who receives 43 cases per month and completes 35 cases has an annual efficiency ratio of 3.01. However, if he has been absent for 3 months, his efficiency ratio should be expressed only as per the actual number of months worked, i.e. 9 (which is usually not done) in accordance with Article 40, paragraph 2 of the Court Rules of Procedure. In such a case, his efficiency ratio would be 2.1 – it would be better and would reflect more realistically how such a judge has worked.

around a third of cases that are completed are the newly received cases. Only in this case could the efficiency ratio be a more reliable standard for assessing their workload and this should be clearly prescribed for such a case. The fact that a judge decides to handle a lower number of cases than the number he should complete per month indicates that the number of judges at his court has not been fixed well (a larger number than necessary has been set or the judges within the court have not been properly assigned business under the annual caseload distribution scheme).

Deficiencies in dealing with the collected data were observed as well.

Notwithstanding the fact that detailed reports were communicated, neither the judges nor the courts have received any feedback on whether and how a particular judge has been evaluated i.e. how his performance has been graded so that the judges have had no possibility of participating in such a procedure, clarifying the relevant facts nor, what is more, expressing their disagreement with the possibly given evaluation or applying for any legal remedy.

Furthermore, examination of the data from the report is lacking. Since there has been no such examination, paradoxical phenomena have been observed. For instance, in 2005 the number of completed second-instance civil law cases at district courts increased by close to 40 percent. At the same time, the inefficiency ratio increased by 35 percent. No proper and relevant conclusion could follow from these two data unless the examination also includes the datum on the increase in the relevant caseload by 73 percent over the period under review.

Of these data, not a single can alone provide a realistic picture of a judge's performance. Not even a couple of data in combination can provide such a realistic picture. Strictly numerical criteria which the evaluation of judicial performance virtually amounts to may prompt judges, unless the notions of "complex" and "completed" cases have been defined, to complete as many cases as possible as fast as possible, mainly the easy and new ones rather than the old and complex cases, to cause delays and give preference to speed at the expense of quality and of substantive settlement of disputable relations. In addition, numerical criteria alone (the number of completed cases without taking into account the actual hours worked, the efficiency ratio regardless of a light or a heavy caseload, etc.) are neither generally applicable nor reliable. This will be addressed in more detail further below.

#### **3.4.4. DILEMMAS**

Bearing in mind, therefore, the fact that the activities of judges have been organized and internally regulated differently at the courts of the same type and instance, that they are evaluated irregularly and rarely by different actions on the part of several bodies which pursue a variety of procedures, separate in terms of their functions and consequences, which are insufficiently transparent and do not guarantee protection of the rights of judges whose performance is being evaluated as these procedures apply non-uniform,

incomplete and insufficiently accurate criteria and standards without defining beforehand the notions which are of exceptional importance in evaluating judicial performance (type and complexity of cases, duration of procedures, attitude to the parties, completion of the cases on the merits and in other ways) and without recognizing and evaluating many aspects of judicial performance (skillful conduct of the proceedings, persuasion, presentation of reasons, expression, communications with colleagues and trainees, engagement in professional work and training, etc.), it remains unclear how judicial performance is evaluated in Serbia.

- Is a better grade deserved by the judge who is more competent or the one who is more conscientious?

- Is the judge who has a lower number of cases that he is dealing with but whose work is of poor quality more competent and more conscientious or the other way round?

- Is a better grade deserved by the judge whose performance is of better quality or who has completed a larger number of cases?

- Is of better quality the judge with a larger number of appealed and even overruled judgments or the judge with a larger number of judgments which the parties have accepted and been satisfied with as they filed no appeal against them?

- Has the judge who has decided fewer serious cases worked better than the judge who has decided a large number of easy cases?

- If a judge decides a low number of cases and just a few of the appealed judgments are quashed, is he more competent than the judge whose over half of the appealed judgments have been overruled?

- What happens if the latter judge completes several times more cases and the number of overruled decisions is a mere 3 percent of the total number of the completed cases? If the purpose of administration of justice is to settle disputable legal situations, isn't 97 percent of completed cases a good score? Or is it a good achievement for somebody to remain a judge but not get promoted?

- Or, is the judge who completes just a couple of cases in a month incompetent compared to a judge whose number of completed cases is three or four times over that of the former? What if just one case had 30 or so defendants charged with several tens of serious crimes – murder, robbery, drug trafficking, abductions? All of this is one case. A case of pick-pocketing is one case as well. Or, why to waste time completing a case involving twenty or so members of a family which was joined upon marriage by a woman who came to a farm estate to live in a house of her husband's grandparents with her in-laws where they have all worked together for half a century (torn down old houses and constructed new ones, tilled their grandparents' land, raised and bred cattle, sold produce from their estate, spent and earned) and now their property has to be divided up among themselves? The time spent solving one such case is enough to settle 30 easy

cases! Is a judge incompetent if he completes just a few cases in a month instead of 21 if he has also completed one such case among them?

- Is a competently completed case only the case where a judgment has been delivered or also the case where the parties reached a settlement following a lengthy trial and presentation of numerous pieces of evidence, including by expert witnesses, based on which they came to realize that a settlement would, in fact, be most appropriate?

- What is key to making a reliable and comparable evaluation of a judge's performance?

### **3.4.5. STANDARDS AND CRITERIA FOR EVALUATING JUDGES' PERFORMANCE WHEN APPOINTING THEM TO HIGHER-INSTANCE COURTS**

Under the law, any applicant for appointment to a higher-instance court is required to obtain a prior collective opinion of the sitting judges of the court from which he comes (Article 44, paragraph 2 of the Law on Judges) and to submit a personal profile sheet. The Ministry of Justice, for its part, provides a form containing "information on the applicant's required number of cases completed and the efficiency and quality of the applicant's performance", describing the caseload handled by such a judge in the past three years, namely the number of pending cases; the number of decided cases; the number of undecided cases (efficiency ratio); the number of cases decided in another way; the number of decisions drawn up after a period of 30 days; the number of appeals filed; the number and percentage of upheld, altered and quashed decisions.

In the Decision on the standards and criteria for nominating candidates eligible for being appointed to the posts of judges and presidents of courts<sup>31</sup>, the High Council of the Judiciary has established both the benchmarks to evaluate professional aptitude and the criteria of worthiness of a candidate to be appointed to the post of such a judge.

Professional competency (Article 1) is evaluated on the basis of the quality of performance and the attained efficiency ratio<sup>32</sup> in the three-year period prior to the submission of the application in response to the advertised selection notice. Additional criteria, as laid down by the law, are: the length of judicial service, the acquired academic degrees and papers asked of legal professionals. The criterion for evaluating the quality of a judge's performance (Article 6) is the number of competently adjudicated cases belonging to core subject matters; the percentage of overruled, upheld and altered sentencing decisions compared to the number of reviewed authoritative decisions brought upon hearing ordinary and exceptional legal remedies; and the percentage of quashed as

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<sup>31</sup> The revised text of the Decision No. 111-00-4/2007-01 of 13 March 2007 comprises the Decisions on the standards and criteria for nominating candidates eligible for being appointed to the posts of judges and presidents of courts No. 111-00-1024/05-1 of 8 April 2005 and 15 July 2005 and the Decision amending the Decision on the standards and criteria for nominating candidates eligible to be appointed to the posts of judges and presidents of courts No. 111-00-1024/07-1 of 1-5 March 2007, respectively.

<sup>32</sup> It is unclear why, contrary to the provision of Article 1, Article 7 provides for the efficiency ratio as an additional criterion.

compared to the number of authoritative decisions brought. The criterion for measuring the rate of success is also the manner in which old cases have been handled (the number of assigned and the number of completed old cases), as well as the number of criminal cases subject to prescription as a consequence of an omission on the part of the candidate concerned.

Professional skills of candidates from among the judges are assessed also descriptively by the collectivity of the judges in their respective courts and by the immediately higher judicial body concerned (Article 12). Besides, candidates from the judiciary may also solicit the opinion of the bar association in the court's area of jurisdiction or of the prosecutor's office or of the public attorney's office which the candidate comes from (Article 10). However, the problem arises as no procedure has been provided under which such a descriptive assessment is to be made. Moreover, the candidate's role in making a descriptive has been left out. In practice, descriptive assessments are arbitrary and more often than not made without any explanation.

The opinion sought from sitting judges of the court which the candidate comes from (prescribed by the law) which is taken into account under Article 2, paragraph 2, of the Decision creates problems in practice because, as a rule, it amounts to a general support to all the candidates coming from the court concerned and is often given without discussion and without voting case by case<sup>33</sup>. There is no legal provision stipulating the obligation to obtain the opinion from the higher courts on candidate judges of lower courts although higher court judges may clearly have the best insight into the performance of the judges from lower courts in their area of jurisdiction<sup>34</sup>. Nevertheless, it is the practice of the High Council of the Judiciary to take into consideration the advice of the collectivity of a higher court (when given), in particular when the higher court concerned has clearly singled out certain candidates, either in the positive or negative context, whether simply by a show of hands or by secret balloting of its judges<sup>35</sup>.

The Decision on the rules of procedure of the High Council of the Judiciary in nominating candidates for being appointed as judges and presidents of courts, Article 6 provides that, in case several candidates apply for a post with the same court, the High Council of the Judiciary may shortlist the candidates pursuant to the Decision on the standards and criteria for nominating candidates eligible for being appointed as judges and presidents of courts and interview the short-listed candidates. This option, however,

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<sup>33</sup> A small number of cases are voted on by secret ballot. Sometimes the opinion comes from the court's president and is so vaguely worded that it is unclear whether it is the collective opinion of the sitting judges or solely the individual opinion of the court's president.

<sup>34</sup> Here, too, a uniform evaluation may appear to be lacking, in particular, of first-instance court judges in the jurisdiction area of larger second-instance courts as most judges of second-instance courts may have failed to gain insight into the decisions and performance of the relevant first-instance court judges, bearing in mind the number of appealed decisions.

<sup>35</sup> The basis for this is the provision of Article 12 of the Decision on Standards and Criteria setting forth that the professional skills of all the applicants from among the judges are evaluated descriptively in the reports made by the judges, deciding collectively, from their own courts and by their immediately superior judicial instance.

is regrettably seldom made use of because of the backlog at the High Council of the Judiciary and the need for urgent action.

The decision of the High Council of the Judiciary just to define the standards without determining their numerical values, even if it was not intended, has, in effect, made it possible to interlink them with the standards and criteria established by the Supreme Court of Serbia and to ensure unification of the judicial performance evaluation process.

In addition to incomplete personal profile sheets, i.e. incomplete and insufficient data (for which judges themselves cannot be held responsible), practical problems related to evaluation of performance for the purpose of judges' nomination for appointment to posts at higher courts include the unequal treatment of judges coming from different courts; difficulties in the use of the advice given by the judges collectively often being of a general nature and in support of all the candidates though they are, obviously, not equally qualified; and giving preference to a group of candidates according to one single criterion (for instance, length of judicial service), which may result in some excellent candidates being passed over for nomination. There are also difficulties in trying to gain insight into a judge's overall activities, because the data describing his performance are limited to basic judicial duties, as well as in presenting the quality of his performance based on the defined criteria as there is virtually no appeal in certain proceedings. Difficulties also arise in making comparisons between, and evaluation of, the judges hearing only a certain type of cases, on the one hand, and those dealing with a number of different procedures, on the other. They are further encountered in evaluating and in opting to give preference to the judges who, with the same number of completed cases, have a negligible number of appeals and excellent quality of performance over the judges with a large number of appeals against their decisions and not such a good quality of performance but in a situation where the serious nature of the completed and appealed cases, their character and complexity remain unknown.

For the above reasons it would be useful to have a direct insight into the cases handled by the judges whose performance is being evaluated under Article 3 of the Decision on the rules of procedure of the High Council of the Judiciary which specifies, *inter alia*, that direct checks are to be made by individual members of the High Council of the Judiciary if further information on a particular candidate is necessary. It may also prove useful to have, pursuant to Article 4 of the mentioned Decision, before final nominations are made, an interview on the candidate with the court's president or to interview the short-listed candidates, as provided for by Article 6 of the Decision on the rules of procedure of the High Council of the Judiciary.

The criterion of worthiness of a judge to be appointed to a higher-instance court and that of his competency are the main criteria in evaluating performance of the judiciary under the legislation currently in force. The former criterion, however, is still of secondary importance. According to Articles 14 and 15 of the Decision on the standards and criteria for a judicial post, the criterion for determining eligibility for performing a judicial function is the candidate's reputation in the community he comes from, his exhibited tolerance in professional discussions and readiness to respect others people's viewpoints

and arguments advanced in the process of collective decision-making. Eligibility of all the applicants from among the judges is also subject to a descriptive evaluation by the collectivity of sitting judges of their respective courts as well as of the immediately superior judicial instance. The “presumed eligibility” is the practical starting point for both candidate judges and assistant judges. Relevant information in writing or at least assertions (by the college of judges or by some collegial judges or by the relevant court’s president) that a candidate is unworthy of the post are exceptions and the practice of review, by the High Council of the Judiciary, of the complaints against some candidates is controversial<sup>36</sup>.

### **3.4.6. CRITERIA AND STANDARDS FOR ASSESSMENT OF JUDICIAL PERFORMANCE AND INITIATION OF A DISMISSAL PROCEDURE**

#### **A) Standards for Assessment of Minimum Performance in Discharging Judicial Duty**

The Standards for Assessment of Minimum Performance in Discharging Judicial Duty<sup>37</sup> were adopted for the first time after the enactment of the set of judicial laws of 2002. Article 2 prescribes that a failure to achieve the minimum work performance determined by these standards presents grounds for initiating the procedure according to Article 55 of the Law on Judges – dismissal procedure.

This enactment prescribes that the standards for assessing competence and diligence in discharging judicial duty are: the number of cases pending per judge, type and complexity of cases<sup>38</sup>, number of cases a judge should dispose of per month, number of revoked, confirmed and reversed decisions, period of decision drafting, timely and

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<sup>36</sup> In a small number of cases, based on information received from a variety of sources, it was concluded that a certain candidate was, all things considered, not worthy of being nominated for appointment as a judge or president of a higher court. The High Council of the Judiciary made no special decision in that respect, so that the candidate concerned, as a rule, was not aware of any doubts as to his worthiness and was, consequently, not in a position to dispel them. Such conclusions on unworthiness, while rare, were primarily attributable to private circumstances, such as the judge’s behaviour in the community where he lived, and less often to the actual discharge of his judicial function, his treatment of parties and handling of cases.

<sup>37</sup> The standards were adopted by the Supreme Court of Serbia ("Official Gazette of RS", nos. 36/2002 and 41/2002) whose competence in the determination of the grounds for dismissal of judges was stipulated by the previous Constitution.

<sup>38</sup> The type and complexity of cases are no longer considered, except in Article 16, where a longer time limit for decision drafting is allowed in complex criminal, civil, commercial and administrative cases (although the concept of complex case is not defined here, either). This standard is developed to a certain extent in commercial cases as well, by prescribing different "quotas" for different types of disputes before the commercial court.

prompt processing of cases as well as the treatment of parties in the proceedings – Article 1<sup>39</sup>. The period of performance assessment may not be shorter than 2 years (Article 2).

The standards for assessing the competence of judges<sup>40</sup>, which are contained in Article 3, are expressed in numbers - the number of disposed cases of the basic types in a month according to the promptness ratio<sup>41</sup>. According to the type and level of courts and the types of cases within them, a "quota" has been determined - the minimum number of cases a judge is expected to dispose of during a month (Articles 4 – 11)<sup>42</sup>. The standard of work quality (which Article 13 incorrectly refers to as a "criterion") in municipal and district courts as well as in the commercial court is the percentage of revoked, confirmed and reversed decisions relative to the number of decisions considered in a higher court or relative to the number of cases completed by a final and enforceable decision on the merits. Satisfactory quality is prescribed by Article 14<sup>43</sup>.

Standards for assessing diligence of judge's work (Articles 15 and 16) are proceedings duration, timely scheduling of hearings and processing of the case, treatment of the parties in the proceedings and the period of decision drafting. The period of decision drafting is a period prescribed by the law, except in complex criminal, civil, commercial and administrative cases, where this period may be prolonged up to not more than 30

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<sup>39</sup> The title of this document seems to point to a conclusion that it deals only with standards. However, from the contents of this article it is obvious that it is about both the criteria and the standards and that competence and diligence are stated as the criteria for the work of judges.

<sup>40</sup> This provision is incomplete because it only deals with the quantity of work, while it is seen from Article 12 that a judge's competence is also measured on the basis of the quality of his/her work. In measuring the quantity of a judge's work, the type and complexity of cases, which is determined in Article 1 as one of the standards for assessing the performance in discharging judicial duties and is not taken into account as a standard anywhere further in the text, is disregarded.

<sup>41</sup> The promptness ratio is obtained when the number of unsolved cases in the observed period is divided by the average monthly number of accepted cases in that period. The observations in connection with the application of this standard are presented on pages 36 and 37.

<sup>42</sup> In municipal courts (Article 4) disposal of a specific number of cases per month is expected - investigative cases (18), civil cases (21), labour disputes (25), executive, probate, nonlitigious and other (executive, nonlitigious, land-register cases, payment-order cases, as well as the "Kv", "Kri", "Kp", "Ik" cases) in the number corresponding to four-month inflow.

In district courts, there are fewer types of cases (Article 5), so the "quota" is prescribed for investigative (5), criminal (4) and civil (18) cases, and in appellate courts (Article 7) for criminal (15) and civil cases (20).

The type and complexity of cases is only elaborated to a certain extent in the first-instance commercial cases (Article 8), where differentiation is made according to the minimum number of cases a judge is expected to dispose of per month – commercial offences (30), offences with foreign element (16), bank disputes (16), construction disputes (16), disputes in the area of copyright and industrial property (20), forced settlement proceedings (5), bankruptcy (3) and liquidation (5), as well as nonlitigious proceedings in which a judge should dispose of all accepted cases during the month. Already in the Higher Commercial Court (Article 9) only the commercial offence cases and civil cases are differentiated. In administrative courts there is no differentiation between cases on the basis of type and complexity, while in the Supreme Court of Serbia the differentiation is based only on the type of case – criminal, civil and administrative (Article 11).

<sup>43</sup> A judge's performance is of satisfactory quality if the number of repealed decisions relative to the number of considered decisions does not exceed the following percentage: for municipal court in civil cases 25% and in criminal cases 15%; for district court in civil cases 20% and in criminal cases 15%; for commercial court 20%.

days. It is understandable and good that these standards are left flexible, because the processing may be diligent and, at the same time, vary from case to case<sup>44</sup>. However, once such provisions have been defined, it is necessary to determine the subjects and the procedure in which the compliance with the standards would be assessed.

Strictly numerical standards, here as well as elsewhere, cannot be a reliable indicator of judicial performance and may encourage judges to dispose of as many cases as possible as quickly as possible, mostly those that are easy to adjudicate, while disregarding more complex cases.

Since their entry into force is linked, by the provision of Article 17 paragraph 1, to the entry into force of the provisions of Articles 21 through 28 of the Law on Organisation of Courts and to the commencement of operation of the Administrative Court and appellate courts, which has not yet come into force either, the Standards for Assessment of Minimum Performance in Discharging Judicial Duty do not apply yet.

## **B) Regulation on Indicative Standards for Determining the Necessary Number of Judges and Employees in Municipal and District Courts**

In the meantime, from 2002 to practically 2007, the Regulation on Indicative Standards for Determining the Necessary Number of Judges and Employees in Municipal and District Courts<sup>45</sup> was applied in assessing the minimum performance of judges, in accordance with the provision of Article 17 paragraph 2 of the 2002 Standards<sup>46</sup>. Therefore, the standards set by the enactment of the Minister of Justice for a specific purpose – for determining the necessary number of judges and employees, were in fact used for years in assessing the performance of judges and determining the so-called "judge's quota". The indisputable correctness of the conclusion on this actual, but extremely important function of the standards from this Regulation stems from the circumstance that in its Article 4 the terms "on the merits" and "cases disposed of in another manner" are mentioned and the relation between them is established, instead of defining that matter by separate enactments by which the work of judges is assessed, as well as from the circumstance that the indicative number of disposed cases from these Standards was used in the courts in Serbia as the "quota" in calculating the quota fulfilment data, up until 1 January 2007.

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<sup>44</sup> In considering reasonable period in its Framework Programme of 13 September 2005, the European Commission for the Efficiency of Justice includes in particular the time dedicated to the drafting of decision in written form in order to determine whether a certain period is reasonable or not, taking into account various elements that have an impact on this: the complexity and significance of the case, the behaviour of the parties and relevant bodies and similar.

<sup>45</sup> The regulation was published in the "Official Gazette of RS" no. [47/98](#). The necessary number of judges was prescribed in the summer of 2006 by the new Indicative Standards for Determining the Necessary Number of Judges in Courts of General Jurisdiction and Special Courts ("Official Gazette of RS" no. 61 of 18/7/2006) adopted by the High Judicial Council, which, compared to the previous Regulation, prescribe predominantly higher "quotas" - expected numbers of disposed cases per judge.

<sup>46</sup> This paragraph was subsequently added to the Standards during 2002 ("Official Gazette of RS" no. [41/2002](#))

The 1998 Regulation stipulates the "quota" in another manner compared to the 2002 Standards for Assessment of Minimum Performance in Discharging Judicial Duty. It does not provide a range of the number of disposed cases which would enable grading in assessing the work of judges, but prescribes a precisely determined expected number of cases that a judge should dispose of per month for each of the separately mentioned case types. That is understandable because its basic purpose is to enable the determination of the necessary number of judges, not the assessment of the work of judges.

**C) Standards for Assessment of Minimum Performance in Discharging Judicial Duty that will be used temporarily until the day of commencement of the application of the provisions of Articles 21 through 28 of the Law on Organisation of Courts**

Since it is clear that not all the judges work or can work at the same pace and with the same quality, but that a majority of them is still necessary for the functioning of the judicial system, trying to regulate in a more appropriate manner the assessment of the performance of judges than it was possible on the basis of the 1998 Regulation, the Supreme Court of Serbia adopted the 2005 Standards for Assessment of Minimum Performance in Discharging Judicial Duty that will be used temporarily until the day of commencement of the application of the provisions of Articles 21 through 28 of the Law on Organisation of Courts ("Official Gazette of RS" no. 80 dated 20/9/2005). Article 18 paragraph 2 prescribes that, as of the day of entry into force (28/9/2005) of these "temporary" Standards for Assessing Minimum Performance, Article 17 paragraph 2 of the 2002 Standards for Assessment of Minimum Performance in Discharging Judicial Duty ("Official Gazette of RS" nos. 36/2002 and 41/2002), on the basis of which the mentioned 1998 Regulation was applied for assessing the fulfilment of judge's "quota", will cease to apply.

Thus the application of the 1998 Regulation for Determining the Necessary Number of Judges in assessing the performance of judges was formally terminated.

These so-called "temporary" 2005 Standards have had an unusual fate from the beginning. They were applied (Articles 3 through 14) in the assessment of the performance in discharging judicial duty and estimating the "quota" fulfilment from the entry into force until March 2006. From March 2006 the application of the "quota" from the void 1998 Regulation was resumed, with no written explanations. Then, in the period from September 2006 until the beginning of 2007, some courts applied the void 1998 Regulation for presenting the data on "quota" fulfilment, while some courts applied the Indicative Standards for Determining the Necessary Number of Judges from July 2006. The 1998 Regulation has finally not been applied any more as of the beginning of 2007. However, instead of applying the so-called "temporary" Standards for Assessment of Performance in Discharging Judicial Duty for the data on "quota" fulfilment from that moment, the Indicative Standards for Determining the Necessary Number of Judges in Courts of General Jurisdiction and Special Courts ("Official Gazette of RS" no. 61 dated 18/7/2006) have been applied.

The so-called "temporary" Standards prescribe the assessment of performance in discharging judicial duty in the similar manner as the 2002 Standards. They also stipulate, by the provision of Article 2 paragraph 2, that a failure to achieve the minimum performance determined by these Standards presents the grounds for initiating the procedure according to Article 55 of the Law on Judges (dismissal procedure).

In Article 1, a new standard among the standards for assessing the competence and diligence in discharging judicial duty (number of cases pending per judge, type and complexity of cases, number of cases a judge should dispose of per month, number of revoked, confirmed and reversed decisions, number of cases heard before a second-instance court in the appellate procedure against the decision of a first-instance court, period of decision drafting, timely and prompt handling of cases, as well as the treatment of the participants in the proceedings) is the number of cases heard before a second-instance court in the appellate procedure against the decision of a first-instance court, which is a consequence of the latest amendment to the Civil Procedure Code<sup>47</sup> as well as the Criminal Procedure Code, the application of which has been postponed until the end of 2008. However, the period of judicial performance assessment is reduced by Article 2 paragraph 1, from two years to a period not shorter than 1 year.

The standards for assessing the competence of judges that are contained in Article 3 are also expressed in numbers here - the number of disposed cases of the basic types in a month according to the promptness ratio. According to the type and level of courts and types of cases within them, a "quota" has been determined - the minimum number of cases a judge is expected to dispose of during a month (Articles 4 – 10).

The standard of work quality (which is in Article 13 of this enactment as well incorrectly referred to as a "criterion") in municipal and district courts as well as in the commercial court is the percentage of revoked, confirmed and reversed decisions relative to the number of considered decisions in a higher court or relative to the number of cases completed by a final and enforceable decision on the merits. Satisfactory quality is prescribed by Article 13<sup>48</sup> in the same proportions of considered and repealed decisions, except for commercial courts for which the threshold of repealed decisions (25%) that can be considered as satisfactory quality of work has been raised.

A novelty in work quality assessment, which arose as a consequence of amendment to the Civil Procedure Code and Criminal Procedure Code, is contained in other provisions of Articles 12 and 13. As an additional criterion for assessing the work quality of first-instance judges (in municipal and in district courts, as well as in commercial courts) they prescribe the percentage of cases heard before a second-instance court relative to the number of considered decisions in a higher court or relative to the

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<sup>47</sup> The Law was published in the "Official Gazette of RS" no. 125/ 04

<sup>48</sup> The performance of a judge is of satisfactory quality if the number of repealed decisions compared to the number of considered decisions does not exceed the following percentage: for municipal court in civil cases 25% and in criminal cases 15%; for district court in civil cases 20% and in criminal cases 15%; for commercial court 25%.

number of cases completed by a final and enforceable decision on the merits. In this case, the performance of a judge is of satisfactory quality if the number of cases heard for the purpose of presenting the evidence that was not presented in the first-instance proceedings due to a wrongful decision of the first-instance court relative to the number of considered decisions in a higher court, does not exceed 25%.

The standards for assessment of judge's diligence at work (Articles 15 and 16) are the same as in the 2002 Standards - duration of the proceedings, timely scheduling of hearings and processing of the case, treatment of the parties in the proceedings and the period of decision drafting, which is determined by the law and may be prolonged up to not more than 30 days in complex criminal, civil, commercial and administrative cases.

All of the remarks that were made on the 2002 Standards also relate to the "temporary" Standards. They also fail to provide a definition of the criteria and standards for judge performance assessment, they apply the terms "criterion" and "standard" inconsistently, they assign to different notions the same terms, which are mixed, unsystematic and lacking detail, while significant aspects of judicial work are not taken into account at all.

This enactment also relates to both the criteria and standards, although only the term "standards" is mentioned in the title, because Article 1<sup>49</sup> prescribes standards for assessing competence and diligence, which are obviously prescribed as criteria. Moreover, although the title points to a conclusion that the enactment itself deals only with the minimum performance in discharging judicial duty, the contents of Article 17 indicate that it is not just that, but that carrying out judicial duty in general is defined. Apart from the minimum performance, it also defines both successful and particularly successful performance in discharging judicial duty<sup>50</sup>.

The provision of Article 3, which prescribes the manner of assessing the competence of judges<sup>51</sup>, is incomplete because it speaks only about the quantity of work (Article 12 prescribes that the competence of a judge is measured also on the basis of the quality of his/her work) and disregards the type and complexity of the case, which are

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<sup>49</sup> "The standards for assessing competence and diligence in carrying out judicial duty shall be: the number of cases pending per judge, type and complexity of cases, number of cases a judge should dispose of per month, number of repealed, confirmed and reversed decisions, number of cases heard before a second-instance court in the appellate procedure against the decision of a first-instance court, period of decision drafting, timely and prompt processing of the case as well as the treatment of the parties in the proceedings".

<sup>50</sup> "The performance of judicial duty shall be deemed successful if the judge achieves a promptness ratio 1/3 lower, or if a judge disposes of 1/3 more cases than the minimum determined in Articles 3 through 14 of these Standards or treats in written reports the disputable legal issues of the judicial practice that are discussed at the meetings of judges and at professional conferences of judges.

The performance of judicial duty shall be deemed particularly successful if a judge achieves a promptness ratio 1/2 lower, or if he/she disposes of 1/2 more cases than the minimum determined in Articles 3 through 14 of these Standards".

<sup>51</sup> "Assessment of the competence of judges according to the criteria of Article 1 of these Standards shall be performed on the basis of the number of disposed cases in the month in the basic types of cases according to the promptness ratio".

determined in Article 1 as one of the standards for assessing the performance of judicial function.

In applying the standards relating to the quantity of work, effective working hours, or the fact that the results of each judge are taken in consideration in view of the time when he/she really worked during the reporting period (without sick leaves, absence and similar) is not taken into account in accordance with Article 40 paragraph 2 of the Court Rules of Procedure. If this were not the case, a judge who otherwise disposes of the expected number of cases per month and more, could get worse assessment grade due to the smaller total number of disposed cases during the year, although his/her absence was justified.

The type and complexity of cases, although of enormous significance for judicial performance assessment, are not defined anywhere, nor in this act.

It is also unclear on the basis of what the numerical values of some standards have been determined.

The provision of Article 13 prescribes, for example, that the quality of a judge's performance is satisfactory if the number of repealed decisions relative to the number of considered decisions does not exceed the following percentage: for municipal court in civil cases 25% and in criminal cases 15%; for district court in civil cases 20% and in criminal cases 15%; for commercial court 25%. Although until the beginning of the 1990s judicial performance regarding quality was similar to these percentages and even better than them, it is unclear why the quality standards (the determined percentages of repealed decisions) have been determined in this manner. For example, in more than the last ten years, within the jurisdiction of the District Court in Belgrade the percentage of repealed first-instance decisions in civil cases has varied around 40%, while in criminal cases it has been over 20%. The standards of minimum performance regarding quality, satisfactory quality, are so disproportionate to the actual situation that they are completely inapplicable, becoming only a desired projection. In order to make sense (in the assessment of judicial performance, in undertaking systemic measures) the standards should be adapted to the real situation and average performance, obviously increasing towards optimum values with the improvement of the situation.

It is also unclear how the quality of work in certain areas is assessed. In investigation, for example, the percentage of confirmed decisions does not reflect the quality of work of an investigative judge. The quality of work performed by the investigative judge cannot be assessed until during the main hearing, depending on whether it is necessary to present at it again the evidence presented earlier in the course of investigation or the evidence that should have been presented. In the appellate cases, the number of decisions against which a legal remedy was pursued is so low relative to the total number of disposed cases in the second instance that the percentage of repealed decisions upon legal remedy may only be applied as an additional criterion for assessing the performance of a second-instance judge. The main problem here is how to assess the quality of work in making the decisions that are not subject to the possibility of pursuing

a legal remedy, especially those by which a first-instance decision is repealed and remanded for a retrial with an order, and that is a large part of the second-instance work, considering the data that, say, the percentage of repealed decisions in civil area has been around 40% for a long time.

Article 3 of this enactment defines another competence standard - the promptness ratio, as the quotient of the number of cases pending in the observed period and the average number of accepted cases per month in the same period. This competence standard is stipulated as an alternative, along with the number of cases a judge should dispose of per month, by the provisions of Articles 4 - 10, with different values for municipal, district, commercial courts, the Higher Commercial Court and the Supreme Court of Serbia, in first-instance and second-instance cases. However, it is unclear on the basis of what the concrete ratios have been determined or the concrete expected numbers of cases to be disposed of have been prescribed, or why at some places the promptness ratio is prescribed as an alternative, along with the expected number of cases to be disposed of by a judge, and at some places it is the only option (Article 4 paragraph 2). Besides, all other remarks on (un)reliability of the promptness ratio, because of which it should not be unreservedly relied upon as a general standard for competence assessment, set forth on pages 36 and 37, fully apply in this case as well, so there is no need for their repetition.

From the fact that the judges record a high promptness ratio despite the fact that they complete not only the "quota" – the expected number of cases, but even more than that<sup>52</sup>, it would be wrong to conclude, as is usually done, that these judges are unsuccessful in the performance of their duties. That, as well as the fact that the judges do not fulfil the "quota" - the expected number of cases - due to small monthly inflow of new cases, indicate that the number of judges is above or below the necessary level in a specific court or in specific departments of all courts or that the judges are not properly assigned by the annual work schedule, i.e. that there is an inadequate number of judges in the entire system, or that they face an uneven case load across courts.

Instead of a rash conclusion that the performance of judicial duty is unsuccessful and that there is a need for "punishment" or replacement of judges, which is standard practice in Serbia, the European Commission for the Efficiency of Justice, in its Framework Programme dated 13 September 2005 – A New Objective for Judicial Systems: the Processing of Each Case Within Optimum and Foreseeable Timeframe, makes emphasises, inter alia, that the proceedings duration in an overburdened court will be extended and points to different measures that may have a positive impact on resolving case backlog in overburdened courts, such as: court specialisation, better assignment of cases among the courts of different levels, change in the territorial jurisdiction of courts or use of alternative methods of dispute settlement.

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<sup>52</sup> In district courts in Serbia, in second-instance civil cases, for example, in 2005 the promptness ratio increased by 35% despite the increase in the number of disposed cases by almost 40% due to, among other things, a 73% increase in the inflow of cases. A similar trend, with a simultaneous increase in the number of disposed cases on the one side and a lack of promptness on the other, due to an increased inflow, was exhibited in 2006 as well, and has lasted for several years.

## "JUDGE'S QUOTA" IN BY-LAWS

TYPE OF CASE	Standards for Assessment of Minimum Performance in Discharging Judicial Duty "Official Gazette of RS" 36/2002 and 41/2002	Regulation on Indicative Standards for Determining the Necessary Number of Judges and Employees in Municipal and District Courts "Official Gazette of RS" 47/98	Indicative Standards for Determining the Necessary Number of Judges in Courts of General Jurisdiction and Special Courts "Official Gazette of RS" 61/06	Standards for Assessment of Minimum Performance in Discharging Judicial Duty that will be used temporarily – Art. 17 "Official Gazette of RS" no. 80/2005		
				Minimum performance Articles 3 through 14	Successful performance +1/3 Art. 17 para. 1	Particularly successful performance +1/2 Art. 17 para. 2
investigative "Ki" (municipal)	18	20	27	18	24	27
criminal "K" (municipal)	14	16	21	14	19	21
civil "P" (municipal)	21	23	25	20	20	27
labour disputes "P1" (municipal)	25	30	30	20	20	27
investigations "Ki" (district)	5	7	7	5	6.6	7.5
criminal "K" (district)	4	4	5	4	5.3	6
civil "P" (district)	18	23	20	15	20	22.5
2nd instance criminal "Kž" (district)	—	30	30	15	20	22.5
2nd instance civil "Gž" (district)	—	35	30	20	27	30
administrative		30	50	20	27	30
civil "P" (appellate)	20	35	25	20	20	27
criminal "Kž" (appellate)	15	30	10	15	15	20

### **3.4.7. PROCEDURE FOR JUDICIAL PERFORMANCE ASSESSMENT AND PROTECTION OF THE RIGHTS OF JUDGES IN THAT PROCEDURE**

In the procedure of judicial performance assessment, neither their participation nor their legal protection are essentially ensured. The generalised provision of Article 26 of the Law on Judges on the right of judges to appeal to the Grand Personnel Chamber if a certain right is violated for which no special protection procedure is prescribed by this law, is practically not applied<sup>53</sup>.

The procedures before the High Council of the Judiciary and the Grand Personnel Chamber are always closed to the public, their decisions are not public, except those decisions of the High Council for which the Council President and the President of the Supreme Court agree that they be published in the media for particularly important reasons. No legal remedy is allowed against their decisions.

The new Constitution, however, by the provision of Article 170, prescribes the possibility of filing an appeal before the Constitutional Court against individual enactments or actions of government bodies or organisations entrusted with public authority, by which human or minority rights and freedoms guaranteed by the Constitution are violated or denied, if the other legal remedies for their protection have been exhausted or are not stipulated. The conclusion that, in the absence of another legal remedy, judges will be able to use this legal remedy as well seems rational.

In contrast, in France, Germany, Bosnia and Herzegovina, Slovenia, for example, a judge is informed in a timely manner of the planned procedure for assessing his/her performance and is actively involved in it. All the results of his work are available to him/her, as well as different legal remedies if he/she believes that his/her performance has been evaluated incorrectly or that a certain right of his/hers is violated or unfoundedly endangered.

In France, the presidents of departments must ensure that the judges whose performance will be assessed receive a particular form - annex on time. In the annex, the judge should summarise his/her activities and state the training and advanced training he/she received in the period covered by the assessment. Thus, the judge has an opportunity to explain his/her activities and the manners and methods of carrying them out. Their description should be clear and well laid out, it may contain numerical presentation of the judge's performance, as well as a description of the actual activities (the types of cases he/she worked on, nature of the subject-matter of dispute, number of decisions rendered, number of cases pending, additional activities, work in councils etc.). A judge is not required to assess his/her work therein, or to enclose the documents that will justify and confirm his report. A judge also participates in an interview on the basis of which the president of the department will give an opinion about the judge's performance to the president of the court. The president of the court prepares an assessment of the judge's performance and sends

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<sup>53</sup> The High Personnel Council is obliged to decide on the complaint within eight days and informs immediately the court president, the president of the immediately higher court and the president of the Supreme Court of Serbia of its decision.

the documents on the basis of which he/she prepared it to the judge, who is allowed a period of 8 days to make any objections. Special attention is paid to stating the date of the assessment dossier (file) delivery because of the estimation of the timeliness of the judge's appeal. If there are no objections, the assessment becomes final and the whole file is delivered to the Judicial Directorate (the Sub-Directorate for Judges, before the deadline specified in advance). In case there are objections to the assessment and after any amendments, the judge will be informed that the assessment has become final and the file will be sent to the Directorate. The judge who disputes the final assessment documents about his/her performance may also turn to the Advancement Committee within 15 days from the day of receiving the notification that the assessment has become final. Upon receiving the opinions and objections from the interested person and the person who has carried out the assessment, the Committee encloses its opinion with explanation in the judge's file.

In Bosnia and Herzegovina, the assessment procedure is carried out in several phases. A preliminary assessment is followed by presentation of a preliminary assessment to the judge who is being assessed with a notification that he/she may lodge a written objection within 3 days from the date of receiving the preliminary assessment. The objection is decided on by the president of the court, who may accept it and deliver a new assessment to the judge or deliver a written reply to the statements from the objection to the judge within 3 days from the objection receipt. Regarding the reply to his/her objection, the judge may submit a reasoned objection again within 3 days from the reply receipt. If the president of the court does not accept the reasoned objection, he/she will deliver his/her assessment, the judge's objection and the reply to the objection with any other documents to the Council, which will give the final opinion on the objection.

The Slovenian Law on Judicial Service authorises a judge to deliver reasoned remarks on the opinions of the Personnel Council and of the ministry in charge of the judiciary regarding the eligibility of the candidate for election within eight days from the opinion receipt day, as well as to file an appeal against the decision of the Judicial Council on transfer or appointment to the position of judge, or the position of adviser, and against the decision in connection with classification in the wage category of judges, within eight days from the decision receipt day, which is decided on by a 2/3 majority of all Judicial Council members. The assessed judge may file an appeal to the Personnel Council of the Supreme Court of the Republic of Slovenia, within eight days, against the assessment of his/her performance delivered to him by the Personnel Council, in written form and confidentially. The assessment of the judge's performance is made on the basis of the data from the judge's personal record and other data on fulfilment of the criteria referred to in Article 29 of this law, in which all the data of significance for the preparation of assessment of judge's performance are entered, and the contents of each entry are immediately communicated to the judge the record refers to, who has the right of insight into his/her personal record.

### **3.4.8. SHORTCOMINGS OF THE JUDICIAL PERFORMANCE ASSESSMENT SYSTEM IN SERBIA**

The judge performance assessment system in Serbia:

- does not serve the purpose of successful management of the judicial system (by increasing the overall capabilities of judges through a training system and optimum use of judges within the court, by means of annual work schedule); instead, it is used solely in deciding on the status of judges (election and dismissal);
- is not permanent or applied to all judges but exists only when proposals are made for election to a higher court or when establishing the existence of grounds for dismissal, but only of those judges who have applied for election to a higher court (advancement) or of those against whom a dismissal procedure has been initiated;
- is defined by uncoordinated and frequently contradictory standards contained in several laws and by-laws adopted by different bodies (Supreme Court, High Council of the Judiciary, Grand Personnel Chamber);
- contains criteria and standards for judicial performance assessment which are undefined, incomplete, unclear, imprecise, inconsistent, unreliable and uncoordinated and which do not take into account all circumstances of significance for judicial performance assessment and do not guarantee their equal application in all cases;
- is implemented by the entities that do not decide on judges' training (High Judicial Council, Grand Personnel Chamber, president of court) so the assessment has no impact on the types, manners and programmes of training (advanced training) or the type of work the judges will perform in the court;
- is implemented in the proceedings that are not transparent (open, public, clear) and do not provide protection of rights of the judges whose work is the subject of assessment;
- does not enable an estimate of procedure duration because the data on the actual workload of judges and courts are often insufficiently reliable and comparable;
- deprives the citizens of the possibility of assessing and choosing whether to engage in judicial proceedings or to solve the dispute in a different legal manner;
- causes a decrease in the citizens' confidence in the work of courts, which hinders establishment of the rule of law.

The mentioned shortcomings point to a conclusion that it is not possible to improve the existing system of judicial performance assessment and that it is necessary to establish a completely new system in which they will be eliminated.

When eliminating the existing shortcomings and establishing a new system of judicial performance assessment, in addition to comparative experiences, the international standards and recommendations should also be taken into account, which themselves arise from the long, comprehensive and comparative dealing with the issue of judicial performance assessment and from the generally accepted goals to which all democratic states aspire in the establishment and preservation of the rule of law.

## **4. P R O P O S A L**

### **4.1. PRELIMINARY CONCLUSIONS**

The complexity of judicial work and the fluidity and sensitivity of assessment of its qualitative component, as well as the relativity of the criteria for its assessment and the problems in their objectification, on the one hand, and the need for the responsibility of judges in their independent and impartial performance of judicial duty, with the need for constant improvement of conditions for exercising the right of citizens to a fair trial, on the other hand, make judicial performance assessment an extremely difficult task.

Assessment of judicial performance, due to its complexity, must take into account all its aspects. In addition to the number of disposed cases, the work of a judge also consists of keeping abreast of complicated transitional developments, getting informed of the contents of numerous amended laws, systemic interpretation of laws for the purpose of their correct and fair application, preparing for trials in terms of facts and laws, undertaking procedural activities for the purpose of providing the conditions for holding hearings, getting informed of the practice and regulations, skills of conducting the trial itself and ability and readiness to make decisions, writing the judgment with clear and convincing explanation based on correct application and interpretation of the law, participation in training (both as a student and as an instructor) and in the work of expert bodies, in the work with trainees and advisers, participation in the work at the meetings of panels of judges, departments, criminal and other panels in which the judge is not the president of the panel, as well as in a large amount of administrative-technical work, *inter alia*.

It is obvious that in judicial performance assessment, it is necessary to review, recognise and assess all of these aspects by an appropriate combination of several elements contained in the criteria and standards, with all of them being assessed in an appropriate manner.

Evaluation of judicial performance, as a result of the process of assessment of his/her work, should be made by assessing each of the criteria, or each of the elements each criterion consists of, on the basis of several relevant standards - indicators for each of the criteria, with the judge's participation in the assessment procedure for the purpose

of clarifying the circumstances that cannot be observed from the collected data and with the judge's entitlement to pursue a legal remedy against the work assessment.

The conclusion on a judge's performance should be given only after all the results of his/her work are compared with the average results in the specific court and/or in the Republic. Also, the decisions on the measures that will be proposed or applied in relation to a specific judge as well as in relation to the court or the whole system should be made by comparing these individual data with the average in the specific court and/or in the Republic.

Differentiation between the quantity and the quality of judges' work and establishment of a uniform, comprehensive, fair and as reliable as possible a system of measuring their performance (quantity measurement) facilitates assessment of the performance of judges.

This further enables a functional connection of judicial performance assessment with the implementation of systemic measures in the judiciary (determining the necessary number of judges, monitoring the efficiency and equal workload of judges and courts, determining and conducting appropriate training), with determination of the status of judges and their professional movement (vertical – through election to higher instances or through dismissal and horizontal – through assignment of judges within the court in accordance with their performance, affinities and narrower specialisation) and with establishment of the system of personal responsibility of judges for performance of judicial duties and protection of their independence in this procedure.

Similar conclusions were used as the starting point in the neighbouring Bosnia and Herzegovina as well, a state with similar, until recently the same, legal system and a tradition similar to ours. Focus was placed on timely movement of cases from one phase to the next, and not on counting of, and predominantly focusing on the number of disposed cases. The pilot measurement and assessment of judicial performance through time standards and case weights, designed during 2005, was performed for several months, until mid-2007, and showed a number of advantages over the previously existing system of measuring the performance of judges by means of indicative standards/"quotas".

## **4.2. A POSSIBLE APPROACH**

### **4.2.1. DETERMINATION OF TIME LIMITS AND DEVELOPMENT OF THE SYSTEM OF WEIGHTS**

It is of the greatest importance for this system to define, determine **the time limits for solving different types of cases through different phases of their processing and to develop a system of weights**, complexity designations for different types of cases, to calculate the time the judges have available for processing specific cases and, **on the basis of weights and the available time for work on the cases, to determine the quotas for the total number of cases**, which would be used as the basic quantitative factor in estimating the number of necessary judicial positions, on the one hand, **and to develop a comprehensive system for assessing quantitative performance of courts and judges based on time limits for different phases of specific types of cases, total time needed for case disposal, average duration of proceedings, proportion of disposed cases (the quotient of the number of disposed and the number of accepted cases in the observed period).**

### **4.2.2. DETERMINATION OF TIME LIMITS FOR CASE PROCESSING**

Steps in the process:

- identifying various types of cases from specific matter - identifying the types of acts in each type of case;
- calculating the duration, number and frequency of each of the identified acts;
- adding up the amounts of time needed for undertaking each of the acts in specific type of case, and
- calculating the time needed for completion of one type of case.

This could be performed by working groups (the Delphi method) composed of experienced judges from different courts and, if needed, with participation of experienced prosecutors, lawyers and court employees (registrars) for different areas (criminal, civil, first-instance, second-instance and similar). The results of these working groups could be verified by concrete measurement of actual cases disposed of in specific representative (pilot) courts by the judges who would keep a journal every day during a period of 3 months or longer and record in them the time that passed between two acts in case processing, the time spent for each act in each type of case (e.g. for reviewing the documents, for the hearing, for preparation for the trial, for consulting the regulations, for opinion drafting). After expiry of the verification period, the working groups should study the collected and arranged information and comments from the journal and possibly adjust their time estimates.

### **4.2.3. DETERMINATION OF THE SYSTEM OF WEIGHTS**

The system of weighted cases is based on the answers to the following questions:

- How much time is it necessary on average for completion of each type of case (reception, processing, trial, rendering a decision with its delivery)?
- How much time does a typical judge have available for the work on cases?

Time is used as the reference for estimation of work quota. The aim is to determine how much time is sufficient and how much time should be sufficient for disposing of each case, and then to calculate how much time is necessary for disposing of each case.

By multiplying the average time per case by the number of cases, the total time necessary for disposing of all cases is obtained, while by dividing the obtained time by the available time of judges, the relation of the work quota with the number of judges is obtained.

The initial steps in this process are similar to the steps for determination of time limits, as explained previously. The working groups estimate the average time for an act in a case, and then determine the average frequency of occurrence of each act for each type of case. The next step is to multiply the average duration of a certain act by its frequency in order to get the "weight per task" for each type of case. Then the "weights per task" are added together for each individual type of case and thus the case weight is obtained.

Finally, by dividing the case weight (the total time needed) for a specific type of case by the available time of judges, the number of cases of that type that a judge can solve in a one-year period is obtained.

For the purpose of determining the number of judges that are needed in a court in order to dispose of the total number of cases within a reasonable time limit (under the assumption that in one year the inflow of cases is equal to the number of disposed cases) the product of the number of all types of accepted cases and the corresponding weights (the total time that will be spent on solving the accepted cases) is divided by the available time of the judges<sup>54</sup>.

### **4.2.4. AVAILABLE TIME OF A JUDGE**

Available time of a judge reflects the number of days that each judge has available per year for hearings and for work in connection with the case. The "average" or "standard" year of a judge should precisely reflect various factors that reduce the

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<sup>54</sup> It should be noted that the estimates of time intervals and the total time are given for an average case of each type. Extremely long and extremely short duration of cases are absorbed into the average duration of cases (duration of the majority of cases) in a longer period.

number of days a judge has available for hearings in the case, such as weekends and holidays, sick leave, vacation, education of judges, official absence and similar. Judge's year may be measured in minutes, hours or days; however, whichever measure is used, it constitutes the key reference in determining how many cases can be processed within one year<sup>55</sup>.

Judge's day may be divided into two parts: the time dedicated to the matters related to cases, and the time dedicated to the matters unrelated to cases. The time a judge spends at work on cases will vary on the daily basis, but a typical day will include the number of hours in a working day less the elements such as lunch break, administrative work, correspondence, phone conversations, waiting time or "idle" time, meetings of judges, time of travel for court business purposes, activities in connection with citizens and education of citizens<sup>56</sup>.

Judge's year is the product of the number of available days of a judge and the number of hours in a day for work on cases<sup>57</sup>.

The final step for determining the necessary number of judges for processing the total number of cases in a court is dividing the total time for processing of the expected number of accepted cases (or the cases the judges are to be put in charge of) by available time of a judge<sup>58</sup>.

If all types of cases are assigned weights/points of judge's work quota on the basis of judge's time necessary for disposing of them, the total number of cases assigned to each judge to work on and his/her performance could be measured in weights/points of

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<sup>55</sup> For example, judge's year may be obtained in the following way: weekends – 104 days; holidays – 3 days; annual vacation – 22 days; sick leave – 8 days; training of judges – 6 days; the total number of days spent – 143, judge's year – 222 days (considering the total number of days in a year – 365)

<sup>56</sup> One of the approaches to determining how much time for work on the matters related to cases is available each day is to determine the number of hours in a working day (e.g. 8 hours) and to create standard values for deducting the time for the activities unrelated to cases, expressed in minutes or percentage. An example of standard values for deduction expressed in minutes: break – 30 minutes; administrative work – 30 minutes; meetings of judges – 30 minutes, everything else – 30 minutes; the total time for the activities unrelated to cases – 120 minutes or 2 hours. The total time available for work on cases – 6 hours. An example for standard allowed time for work on the activities unrelated to cases expressed in percentages: meetings of judges – 9%; break – 7%; everything else – 6%; the total standard allowed time – 30%. The total time available for work on cases – 70% (or 5.6 hours of the total of 8 hours in a working day).

<sup>57</sup> Following the mentioned examples, 222 available days of a judge per year x 6 hours per day available for work on cases = 1,332 judge's hours available per year for the activities related to cases.

<sup>58</sup> For example, if the working groups determine that 6 working hours of a judge are necessary on average to dispose of a burglary case, and that a judge's year has 1,332 hours, then one judge should be able to dispose of 220 burglary cases in one year or 18 burglary cases per month. If 4.4 hours of judge's time are necessary on average to dispose of a case relating to contracts, then one judge should be able to dispose of 300 cases relating to contracts in one year or 25 of such cases per month.

(Note: The duration of leaves has already been deducted earlier in order to obtain the time of work on cases that is available to a judge in a one-year period, so we divide by 12 months here, and not by 11.)

judge's work quota and could be compared with other judges, regardless of the combination of different types of cases assigned to each individual judge to work on.

#### **4.2.5. RECOGNITION OF COURT AND JUDGE'S TIME FOR SPECIFIC ACTIVITIES**

The working groups should consider the manner of measuring the specific time of courts or judge's time that has not been measured previously nor recognised to the courts or judges according to the existing indicative standards/quotas, such as e.g. the time spent at work in the panel to which the judge is not regularly assigned; time needed to forward appeals, duration of processing in the first-instance court after the decision upon the appeal has been rendered.

#### **4.2.6. SEPARATION OF DUTIES AMONG JUDGES AND AUXILIARY COURT STAFF**

The working groups should define criteria for separating the duties of judges from the duties of auxiliary staff of different levels for the purpose of estimating judge's time. The work on chronological arrangement of documents, service of documents, service of summons, combining the evidence, verifying the procedural preconditions for holding hearings, preparation of less difficult decisions (on lack of jurisdiction, on ordering that the appeal be put in order, on exemption from costs of the proceedings or on obligating the party to pay them and similar) may be performed by trained court staff. Although such work should not be included in the estimation of time for case weighting because in that manner the level of judge's professional efforts is reflected more truly and the estimate of the needs for judges is determined more precisely, the experience so far warns us that changes are particularly likely in this respect and that the judges will continue to perform these jobs by themselves for a considerable period, so it would be realistic to count them among the jobs performed by a judge in that period as well.

#### **4.2.7. TEST SYSTEM OF WEIGHTED CASES**

After the working groups have determined the time needed for performing the tasks, the time limits and weights for different types of cases, the available time of a judge and the number of cases of each type that a judge should dispose of in one year or in one month, these results should be tested for their validity in selected courts, simultaneously with testing the time limits for different acts in specific types of cases<sup>59</sup>.

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<sup>59</sup> One of the techniques that may help prevent exaggeration regarding the time spent at work on tasks is to request the judges to record their time as percentage of their daily/weekly/monthly jobs, but that the total percentage may not exceed 100%.

Upon obtaining the data, information and comments, the working groups should forward their adjusted estimates to all judges and courts in Serbia in order to obtain their comments and, after receiving the feedback, the working groups should consider and adjust their estimates once again where it is justified. Their final recommendations should then be forwarded to the High Council of the Judiciary and to the Supreme Court of Serbia, and to the relevant commission of the High Council for court administration issues.

### **4.3. REMARKS**

It should never be disregarded that the time measures, case weights and statistical data on performance are not scientifically exact. They should only be used as indicators of satisfactory or unsatisfactory performance of courts and judges, of existence of systemic problems and justifiability of further research and undertaking of necessary measures in order to encourage and improve performance of judges and courts, improve timely processing of cases or in order to consider initiation of disciplinary procedure as the last resort. It also should not be disregarded that quantitative performance is merely one of the factors of overall judicial performance assessment.

Judicial performance assessment and establishment of objectified criteria and reliable, comparable and regularly applicable standards for them, which would ensure that skilled, trained and worthy judges work in the judiciary of Serbia is undoubtedly one of the most important measures of the judicial reform, whose indispensability is also emphasised by the Feasibility Study for Signing a Stabilisation and Association Agreement with the EU.

Informed of and agreeing with the guidelines of the Judicial Reform Commission, which has proposed, through its working group, the criteria and standards for election of judges and permanent assessment of their work, the Judges' Association of Serbia focused on the establishment of standards for assessing the performance of judges. Almost two years of work led to a conclusion that it would be possible in Serbia as well to apply time standards of judicial performance through determining the available work time of judges, the average time necessary for case completion (by determining the type and number of acts in each case and the average time for each act) and by relating the available time of judges to the total number of cases and the average and actually spent time necessary for disposing of them. In this way cases could be also defined according to complexity ("weights"), the necessary number of judges and other employees could be estimated more correctly, and the "quotas" for judges could be determined as well, as long as they are necessary in the transitional period of the reform. Creation of such a model of measuring judicial performance and its test application require engagement of experts (lawyers, statisticians, IT experts, court staff) and judges in courts throughout Serbia.

The system for judicial performance measurement, as a part of the judicial performance assessment system, is very important for the High Council of the Judiciary

and Grand Personnel Chamber of the Supreme Court of Serbia, as well as for the High Court Council, once it has been constituted, since it is related to their function of election to higher instances and dismissal of judges, conducting disciplinary procedures against judges, monitoring the efficiency and even workload of courts and determining the necessary number of judges for each court. Similarly, the measurement system is very important for the presidents of courts in supervising and managing the work of court and judges working in it, preparing the annual judge assignment list, processing appeals and initiating dismissal procedures. The measurement system is also very important to the Ministry of Justice, which shares the competence and responsibility regarding determination of the data on court work that will be monitored regularly or periodically, prescribing the forms and methodology in collection of statistical data on the performance of judges and supervising the operations of courts and coordinating these activities with the High Council of the Judiciary and the Judicial Reform Commission. Finally, in making decisions on financing that have an impact on courts, the government bodies in charge of financing rely to a significant extent on the data on the total number of cases and performance delivered by the courts, the High Council of the Judiciary and the Supreme Court of Serbia.

Therefore, it is essential for the system of judicial performance assessment, especially the system for measuring their performance, to reflect the work of judges and courts precisely, correctly and completely. The need for establishment of the judicial performance assessment system as well as the need for bringing the whole judicial system into compliance with the new Constitution point to a conclusion that further successful work in the judicial reform requires joint coordinated involvement of all – those who will design, concretise and implement further measures in the judicial reform, as well as of to whom these measures will relate.