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Council of State of Belgium

Magistrate Assessment

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1 Magistrate Assessment in the Czech Republic

In the Czech Republic, there is no legislation with regard to magistrate assessment. Thus, no assessment of magistrates/judges is proceeded either at the Supreme Administrative Court or at other judicial or administrative courts in our country.

In 2002 the Parliament agreed a Judiciary Act including a new system of assessment of judges proceeded by Ministry of Justice and by the presidents of courts. However, the Constitutional Court annulled all the provisions on the assessment of judges by its ruling of 18 June 2002 (see below) as being in conflict with the principle of the separation of powers and principle of independence of judiciary.

The Constitutional Court stated that any system of assessment of judges must be connected with establishment of judicial self-governing body. Only such a self-governing body may exercise assessment of judges. Since the Parliament and the government are not willing to enact the self-governing body of judiciary, the assessment of judges is not on the table. The judges are usually very sensitive to any reference on the assessment of magistrates.

Besides that, in the Czech Republic does exist a system of disciplinary liability of judges for breach of their obligations provided in the Act on Judiciary of 2002.

2 The case-law of the Constitutional Court on the assessment of magistrates

As mentioned, the Constitutional Court annulled by its ruling of 18 June 2002, No. Pl. US 7/02, the legislation on assessment of magistrates. The English version of the ruling is available on the website of the Constitutional Court (http://angl.concourt.cz/angl_verze/doc/p-7-02.php).

The contested provisions of Act on Judiciary were as follows. Ministry of Justice should be responsible for the professional qualifications of judges, who were required to submit to the statutorily specified manner of evaluation and assessment of the professional knowledge and awareness. For this purpose the ministry should direct the methods of evaluating professional qualifications of judges and the methods of inspecting their decision-making activity. It should also establish the appropriate Councils for evaluating the professional qualifications of judges (a Council for criminal law, a Council for civil law, and a Council for the administrative judiciary). The presidents of the Supreme Court, high, regional and district courts, as holders of offices in the state administration of courts, to which they were appointed (except the president and vice-president of the Supreme Court) by the Minister of Justice, who had the authority to remove them on the basis of the generally, quite vaguely formulated grounds "due failure to fulfill obligations", exercised the enumerated jurisdictions in relation to the assessment of the professional qualifications of judges. These presidents of courts should also evaluate these qualifications. The professional qualifications of a judge were to be evaluated on the basis of an evaluation prepared by the relevant court presidents and a on a report on the results of a judge's professional education prepared by the Judicial Academy, directed by a director appointed by the Ministry of Justice. Judge's decision-making activities were to be examined by a special panel of respective court composed by judges appointed by the relevant court president. In cases of a protest of a judge receiving an inadequate grade from a special panel, the evaluated judge was

entitled to submit a petition for the assessment by the above mentioned Council. Also president of the court could apply for assessment of a judge by the Council, if he did not agree with the assessment of the judge by the specialised panel of the court. The Council should be established by the Ministry. Some of its members were judges, others were appointed on the proposal of the relevant bodies by the Minister from state prosecutors, attorneys, notaries and experts in the fields of criminal, civil and administrative law. If any of these parties (the judge, the president of the court or minister) disagreed with the Council's decision, he might file a petition for assessment of the judge's professional qualifications with the Supreme Court.

The Constitutional Court held that *"[i]n the opinion of the Constitutional Court, the very enumeration of the individual powers of bodies of the executive branch (which are themselves in relationships of superiority and subordination) gives rise to a disproportionate opportunity for interference by the executive into the judicial power. The powers of representatives of the executive branch, conceived so widely and multilaterally, in relation to the evaluation of professional qualifications of judges who have already been appointed, in their cumulative effect do not observe the principle of separation of powers and in light of the above-mentioned constitutional values they cannot be accepted. Through them, the executive power, which, in relation to the judicial power, is supposed to only create material and organizational prerequisites for its proper functioning, acquires instruments which are capable, even if only indirectly, of influencing the independent decision-making of judges. The fact that the final decision on professional qualifications is in the hands of a panel of the Supreme Court cannot fundamentally change anything in this conclusion on the disproportionate opportunity for the executive power to interfere in the judicial power, likewise the fact that input to the evaluation of judges is also given by the judges' councils newly established by the Act, elected from among the judges at individual courts, as they have only advisory votes, which the representatives of the executive power are not required to accept. In this regard, it must also be emphasized that under the Act the judicial councils do not have an umbrella body which could be a true representative of the judicial power and a partner for the Ministry of Justice as a central body of state administration, or, as the case may be, itself bear responsibility for proceedings and the exercise of court administration, as well as responsibility for the quality of judicial personnel.*

(...) In our Constitution these guarantees [of independence of the courts] include, in addition to the principle of the incompatibility of offices, the absence of time limits on the office of a judge (Art. 93 par. 1 of the Constitution), non-transferability and non-removability, as enshrined in Art. 82 par. 2, par. 3 of the Constitution. Par. 2 of this provision provides that a judge cannot be removed or transferred to another court against his will; exceptions due to disciplinary responsibility are provided by statute. In this regard it must be said that a certain amount of room, which the framers of the Constitution provided in this provision by using the term "in particular", precisely because it is used in relation to an exception, must be interpreted in a strictly restrictive manner, in accordance with the usual legal principle on the relationship between a rule and an exception. Thus, we can fully agree with the petition that exceptions to the rule of non-removability of judges can apply only to conduct which is, in its intensity, comparable with the disciplinary violation expressly cited by the Constitution. An example of such conduct is another reason provided by the Act for the termination of a judge's office, conviction of an intentional crime or conviction with a prison sentence for a crime of negligence; however, an evaluation of a judge's professional qualifications as inadequate, influenced, moreover, as emphasized above, in substantial part by the executive power, cannot be of such character.

We must undoubtedly agree that a judge's professional qualifications, in addition to his moral integrity, are an undoubted prerequisite for the due performance of his office and therefore exceptional emphasis must be laid on

them. However, the emphasis must be attached primarily to preparation for this profession. The act appointing a judge to his office without limitation in time, must, however, be done in the conviction that the candidate will hold up in all areas – also fundamentally from the perspective of a substantial part of the aspects cited for evaluation of the professional qualifications of judges in § 136 par. 1 of the Act. Thus, it is precisely in the process preceding a judge's appointment to his office that all possible requirements imposed on a judge should be concentrated, and it is precisely here that the evaluation of professional qualifications must be subject to the strictest criteria, thus ruling out at the very beginning the possibility of appointing as a judge a person with insufficient professional qualifications or a person lacking guarantees of further self-education (even at the possible cost of exchanging the current practice for one which would permit the appointment only of a person whose moral, human and professional qualities had already been verified by the results of his previous profession). However, at the moment of appointment such a person becomes a judge, and thus an essential attribute of that office, appearing in the form of a judge's independence, is also activated. During the decision-making process the judge then not only must be independent and impartial, but should also be objectively perceived as such by the public. For this reason too the Constitutional Court considers the evaluated mechanism of subsequent and repeated evaluation of a judge's professional qualifications, which may lead as far as his removal, to stand in conflict with constitutional guarantees of judicial independence. It appears so because the judge who is exposed to such evaluation – the methods of which are, moreover, directed by a body of the executive power – is one whose qualifications, including professional ones, to perform this office have already received state approbation. In connection with the foregoing, one cannot overlook the possible effect of appeals on the grounds cited on legal certainty in general, in relation to those court decisions which have previously been issued by a judge thus removed due to lack of qualifications.

Although the aim pursued by a legal regulation seeking to achieve a qualitatively higher level of judicial personnel is legitimate, the chosen means aimed at it, as it is constructed in the contested provisions, must be evaluated as not observing fundamental constitutional principles. Moreover, it must be taken into consideration that the Act, in connection with the judges' responsibility for their professional qualifications in the performance of their offices declared in it (§ 82 par. 1), also expressly included, among the obligations it imposed on judges, the obligation to consistently educate themselves and deepen their professional knowledge for the proper exercise of their office (§ 82 par. 2), as well as the obligation to fulfil that obligation in accordance with the interest in the due exercise of the judiciary, and if the judge causes violation of his obligation this is a disciplinary violation (§ 87) for which the judge also bears disciplinary responsibility (§ 86), which may even lead to his removal [§ 88 par. 1 let. d)]. Thus, it can be said that to reach a situation where persons who ignore the obligation to take care of their professional level are excluded from the judicial personnel, the Act makes use of means which are – such as the exception from the principle of non-removability – expressly presumed by the Constitution."