



Council of State of Belgium

Magistrate Assessment

Seminar organized by the Association of the Councils of State and the Supreme Administrative Jurisdictions of the EU

With the collaboration of the Council of State of Belgium

With the support of the European Commission

GERMANY

**Brussels
30 November 2009**

I. Basic information

a) Due to the federal structure of the German judiciary there is no uniform nationwide assessment system covering all the magistrates. Nevertheless, on the level of the federal states, specific systems are established in all branches of the judiciary including the administrative courts. Regardless of many variations due to federal state regulations and different branches of the judiciary, formal and informal assessment procedures are to be distinguished.

There are two formal instruments of assessing magistrates: Regular assessment and assessment on occasion; the latter is used particularly in cases of applications for promotion. Regular assessments take place every 4 years and are compulsory only up to the age of 50. However, a few federal states do not make use of this instrument at all, whereas others apply it to young professionals every 2 years. All formal magistrates' assessments result in a written final decision containing a considerably detailed evaluation.

The two most important informal instruments with an impact on the assessment of magistrates are reporting duties of various kinds and the annual negotiations of the courts' steering committees (consisting of a number of judges limited by statute) concerning the assignment of business within the court (details see below). No written evaluation of any individual magistrate is produced by these instruments; instead, they aim at influencing the magistrates' way of handling their responsibilities by a certain form of partial publicity.

b, c) On the level of the Federal Administrative Court no regular magistrate assessment is carried out. However, if a federal magistrate wishes to apply for the position of presiding judge or for any position outside the court he will communicate this to the presidency of the court ("*Interessebekundungsverfahren*"), initiating an assessment on occasion. The presiding judge of the applicant's panel will formulate a written assessment contribution without adding a grade to it. On this basis the president of the court will carry out the assessment.

The president of the court herself resp. himself is not subject to magistrate assessments.

Whereas formal means of assessment play an important role in state courts, it is the informal approach to assessing magistrates that dominates personnel

administration on the level of the Federal Administrative Court. Fairly elaborate reporting duties aim at improving - if necessary - the awareness of professional qualities such as the judges' effectiveness and speed:

(1) Magistrates should submit to their panel a draft reasoning within 6 weeks after the concluding hearing of a case. The final version, signed by all members of the panel having heard the case, should be available in written form within 2 months after the hearing. In case one of these requirements is not met, this has to be reported to the court's administration. Although these reports are not being communicated to other members of the court, the mere existence of this reporting duty results in the fact that the above mentioned time limits are very rarely exceeded.

(2) Every 6 months each panel of judges has to report how many cases in its responsibility are already pending for more than 6 months (complaints procedure) and 1 year (revision procedure) respectively. The results of these reports will be summarised in a statistical statement communicated to all members of the court. The so achieved court-wide publicity leads to a current knowledge about the workload and speed of the panels of the court and may allow reasoning about their efficiency.

(3) At least annually - if required, more often - the court's steering committee has to decide on the assignment of business within the court. If it is necessary to assure that pending cases are dealt with speedily the range of competence of the panels can be altered, or the allocation of judges modified. To this end, the speed and efficiency of panels or even individual magistrates might be discussed fairly intensively within the committee. As a result of such discussions an informal ranking regarding the speed and efficiency may be compiled. Also, judges will be aware of being under observation to a certain extent.

II. Legal basis

The admissibility of magistrate assessment is founded on art. 26 para. 1 of the Federal Magistrates' Act stating in a very general way that magistrates are subject to legal supervision insofar as their independence is not affected. Additionally, art. 33 para. 2 of the Basic Law, granting the equal access to public office according to the aptitude, qualifications and professional achievements of the candidate, implies the admissibility of an assessment. Apart from these clauses no legal framework exists on the federal level - as far as the Federal Administrative Court is concerned - to establish magistrate assessment. On

the level of the federal states, assessment criteria and procedures are governed by detailed regulations containing job requirements' profiles (professional and social competence, soft skills such as capacity for teamwork and communication skills, ability to deal with conflicts, service-orientation etc.) and an elaborate grading scale.

On the other hand magistrate assessment of any kind has to respect the limits emerging from constitutional law. The independence of magistrates (art. 97 para. 1 of the Basic Law) must not be affected by any form of assessment. Thus it excludes particularly that magistrate assessment may be based on or related to the contents of judicial decisions.

III. Goals of magistrate assessment

Assessment on occasion of an application for promotion aims at establishing a prognosis on whether the applicant has the qualification for the position he is applying for. This is held to be the only possibility to ensure that the personnel administration will meet the requirements of art. 33 para. 2 of the Basic Law above mentioned (cf. II).

The informal instruments of magistrate assessment are not supposed to allow identification of strengths or weaknesses of individual magistrates or a comparison against each other. Instead, they aim at improving the overall functioning of the Court as required by art. 19 para. 4 of the Basic Law (guarantee of effective judicial review). The Federal Administrative Court as a whole is being held responsible by the Ministry of Justice and, in consequence, by Parliament for the quality and efficiency of the legal protection in its competence. Its position within the judiciary - e.g. when discussing the assignment of additional competence - depends on the extent to which the Court meets these requirements of speed and quality.

IV. Assessment Criteria

The choice of criteria relevant for the formal assessment on occasion depends on the position the applicant is applying for, including professional and social competence as well as soft skills. Productivity, organisational skills, capacity for teamwork, involvement in the court's administration and communication skills may be looked at particularly; the criteria are not weighted. They have to allow, in any case, to evaluate the aptitude, the qualifications and the professional achievements of the magistrate undergoing assessment (cf. art. 33 para. 2 Basic Law). The quality of work, however - in terms of the contents of

decisions and reasoning -, is not part of the assessment criteria. Taking it into consideration is illegitimate because it would affect judicial independence.

Informal instruments of assessment are mainly based on the criteria speed and efficiency. Individual skills - professional as well as social - of magistrates can play a role, too, in case the steering committee discusses the allocation of human resources within the court.

V. Guarantees safeguarding the independence of magistrates

Whereas art. 33 para. 2 as well as art. 19 para. 4 of the Basic Law require magistrate assessment in order to ensure that only the most qualified candidates be appointed, art. 97 of the Basic Law sets a limit to the extent and legitimate consequences of magistrate assessment. Any violation of judicial independence has to be avoided; this includes all indirect forms of exerting influence on the handling of cases. Whenever magistrates undergoing assessment take the view that their judicial independence might be affected by any formal or informal means of assessment, they may invoke a specialised tribunal – a court dealing exclusively with legal supervision of magistrates (*Richterdienstgericht*) - and seek judicial review regarding the measures in question. Apart from that the restrained nature of the informal instruments of assessment in practice at the Federal Administrative Court and their limitation to a guarded form of (partially) public reasoning confined to the court ensures that, as a rule, the independence of magistrates will not be violated.

In comparison, magistrate assessment is not likely to affect the impartiality of magistrates.

VI. Procedural details

At the Federal Administrative Court no regular assessment is being carried out. The assessment on occasion will be initiated by the magistrate applying for promotion. Although no written procedural rules exist, there will be communication between the applicant and the presiding judge of his panel, before the latter passes his written assessment contribution to the president of the court. The president may of course discuss the matter with the applicant but is not obliged to do so. The purpose of such a discussion will be to clarify the facts if necessary. If the assessment is carried out in the context of measures of personnel selection there will be, apart from the final decision of the assessment procedure concerning an individual magistrate, a statement comparing all candidates for a position containing a recommendation as to who is consid-

ered most qualified ("*Besetzungsbericht*"). Addressee of this statement is the Minister of Justice who has to prepare the decisions of the Federal Government on all nominations of magistrates for federal courts.

The informal instruments of assessment follow plain directives without various procedural steps to be taken. If the court's steering committee wishes to alter the assignment of business or the allocation of human resources, hearings are to be held.

VII. Data basis

As pointed out above, magistrate assessment on occasion is based on an assessment contribution provided by the presiding judge of the magistrate's panel. Additionally, statistical information as to the speed of handling pending cases will be gathered by the court's administration. By no means will the assessor base the assessment on an evaluation of court rulings written by the magistrate in order not to affect his or her independence. This only happens in the course of an application for promotion to the position of a federal judge; candidates then have to bring forward 6 work samples to be evaluated by an advisory committee of the Federal Administrative Court (consisting of the president and vicepresident as well as 3 elected judges of the court) in order to address a recommendation to the magistrates' electoral college (a parliamentary committee).

VIII. Objectives to be attained by the magistrate undergoing assessment

Judicial independence limits the admissibility of strict quality standards to be met by magistrates undergoing assessment. Almost the same goes for the admissibility of quantitative minimum standards concerning the workload to be managed by a magistrate, which however has been discussed intensely. Apart from this concern based on constitutional law, the magistrates at the Federal Administrative Court, having passed multiple former assessments, do not need to meet any objectives to be able to apply for positions requiring assessment.

IX. Authority carrying out the assessment

Magistrate assessment at the Federal Administrative Court is carried out by the president of the court. The skills needed to conduct professional assessments are taught in advanced education and training courses offered by the Judges' Academy.

X. Final decision: Form and consequences

The assessment on occasion results in a formal decision containing an evaluation of the professional quality of the magistrate being assessed, and including a prognosis as to his or her aptitude for the applied position. There is no financial or disciplinary impact resulting from an assessment not leading to promotion, although the concept of a performance-related payment of judges has been discussed widely in Germany during the past few years – but was held to be unconstitutional by most scholars.

None of the informal instruments of assessment contains a final verdict concerning the professional quality of an individual magistrate. Aiming at the effects that an in-court public discussion of speed and efficiency will create, the impact of these instruments derives from the reluctance of any magistrate to be object of such a discussion.

XI. Procedural rights and judicial review

The magistrate undergoing assessment has not the right to examine the draft assessment, but may comment on the final decision. This statement will be added to the personal file in context to the final decision. For the possibility of judicial review if the magistrate complains of violation of judicial independence cf. V. If a magistrate claims other violations of law such as breach of procedural rules or incorrectness of the final decision, he or she may take legal action which has to be dealt with by the administrative courts. Errors of law occurring while informal assessment instruments are being practised, may also be subject to judicial review on the ground that legal supervision of the magistrate has exceeded the limits drawn by constitutional or statutory law.

XII. Assessment file

All final decisions concluding an assessment are part of the magistrate's personal file; the same goes for any comment of the magistrate undergoing assessment in the course of the assessment procedure. However, there is no separate assessment file. So, the personal file will contain neither the assessment contribution given by the relevant presiding judge of the panel nor statistical activity reports or other contributions to the assessment. The concluding statement comparing all candidates for a position to be filled (cf. VI.) will not be part of the personal file either. The file is confidential.

Magistrates may consult their own personal file at any time. The access to the file is strictly limited; e.g. members of the relevant staff council are not entitled

to consult the file without consent. The file may be consulted, however, in the case of a disciplinary procedure / action or by members of the administration carrying out legal supervision. The details are controversial.

XIII. Case law

a) The Federal Court of Justice (BGH, in its special function of dealing with legal supervision of magistrates) as well as the Federal Constitutional Court (BVerfG) have stated that the current assessment system – both formal and informal instruments – is legitimate as to constitutional and statutory law (*BGH, decision of 10 August 2001 – RiZ (R) 5/00 -, NJW 2002, 359; BVerfG, decision of 14 June 1975 – 2 BvR 370/75 -, DRiZ 1975, 284*). The emphasis of court rulings on this subject, however, lies on specifying the legal limits for magistrate assessment.

Concerning formal instruments of assessment the courts have underlined, that although it is admissible to evaluate the quality of magistrates' work, it would be illegal to carry out an assessment in a way allowing to deduce direct or indirect instructions as how to handle cases in general or, even more so, to decide on specific cases (*BGH, decisions of 14 April 1997 – RiZ (R) 3/96 -, DRiZ 1998, 20, and of 22 September 1998 – RiZ (R) 2/07 -, NJW-RR 1999, 426*). Decisions on the procedural aspects of formal assessment are more numerous, particularly stressing the right of the magistrate undergoing assessment to comment on the final decision (*BGH, decision of 25 September 2002 – RiZ (R) 4/01 -, NJW-RR 2003, 492*).

In the context of informal assessment instruments the jurisdiction has emphasised the admissibility of reporting duties in general and of gathering statistical data particularly. However, the evaluation of the professional skills of a magistrate would be incomplete if based only on quantitative aspects as speed or number of cases settled within the relevant period of time (*BGH, decisions of 3 October 1977 – RiZ (R) 1/77 -, BGHZ 69, 309; and of 14 September 1990 – RiZ (R) 1/90 -, BGHZ 112, 189; Administrative Court Ansbach, decision of 14 December 2004 – AN 1 K 03.02679 -, published in the data base "juris"*). Apart from these decisions, the Federal Constitutional Court states that the negotiations of the court's steering committee on the assignment of business may be based on an evaluation of the professional skills of the magistrates concerned, but have to respect constitutional limits (*decision of 25 February 1964 – 2 BvR 411/61 -, BVerfGE 17, 252*).

b) As far as can be seen there is no case law available regarding the compliance of the assessment system with international treaty law because the guarantees offered specifically by the European Convention on the Protection of Human Rights and Fundamental Freedoms are equally and fully covered by the national constitutional law.

XIV. Additional information

The concern has been expressed that magistrate assessment carried out by the president of a court might not suffice to strengthen the awareness of judicial ethics and to build up the conviction that the privilege of being a magistrate should lead to the utmost efforts to contribute to a high-quality justice system. Therefore, on the level of federal states (e.g. in the administrative courts of North Rhine-Westfalia), autonomous groups of magistrates have set up a quality management system excluding the influence of the presidency of courts as well as of the ministerial administration. Discussion on topics related to the quality of judicial work in those groups is not limited by the constitutional guarantee of judicial independence because taking part in it is entirely voluntary, and the memoranda edited by autonomous groups cannot create a binding effect whatsoever. Therefore the discussion may lead to proposals concerning quality standards of judicial work which would be illegal if formulated by the Ministry of Justice or the president of a court. It can be observed, however, that especially those parts of quality management discussion which are strictly limited to problems of the every-day-work of magistrates, exert a certain pressure to justify a handling different from the proposed standards as well as a point of view as to judicial ethics falling short of the concept agreed upon by the discussion group.

2009-10-06

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