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This publication has been realized with the financial support of the European Union.

The Newsletter is published on the website of the Association of the Councils of State Supreme administrative jurisdictions of the European Union. (www.juradmin.eu).

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FROM THE SECRETARY-GENERAL'S DESK

The concept of high-quality justice raises the issue of magistrate assessment, i.e. assessing the efficiency and speed of magistrates in handing down rulings. We felt it was essential to examine the design and performance of systems for assessing magistrates within the Councils of State and Supreme Administrative Jurisdictions, in order to capitalise on the experiences acquired in this area by each of ACA-Europe's member jurisdictions.

The seminar held in Brussels on 30 November 2009 under the aegis of ACA-Europe, with the technical support of the Belgian Council of State, proved an excellent opportunity to discuss – based on an overview of the situation in ACA-Europe's member jurisdictions – a matter that is currently of concern to all jurisdictions, namely improving the management of justice with a view to enhancing public confidence in courts and facilitating access to them.

To this end, a questionnaire was drawn up aimed at identifying, based on 14 topics, the goals and criteria of assessment, the procedure followed and the resulting outcomes, for each of ACA-Europe's member jurisdictions. Virtually all member jurisdictions supplied answers. The Auditor General of the Belgian Council of State, Mr Philippe BOUVIER, used these to compile a very enlightening general report, which he presented at the start of the seminar. This was followed by three talks, each introducing a very stimulating discussion chaired by Mr Robert Andersen, First President of the Belgian Council of State, on the three core topics of the seminar:

- The first talk by Mr André SCHILTE, President of the Administrative Court of Appeal of Douai (France), dealt with assessment goals and criteria.
- The second, given by Dr Ulrich MAIDOWSKI, a judge at the Federal Administrative Court of Germany, examined the steps involved in the assessment procedure and the frequency of assessment.
- The third, by Mr ROSENDO JOSE DIAS, Vice-President of the Supreme Administrative Court of Portugal, was about the decision procedure and follow-up.

Based on this discussion, Mr Philippe BOUVIER presented a series of conclusions to the seminar participants at the end of the day.

Mr Georges RAVARANI, President of the Administrative Court of Luxembourg and President of ACA-Europe, brought the seminar to a close by laying the foundations of a future-oriented discussion about the importance of assessment in terms of the transparency and efficiency, both quantitative and qualitative, of administrative justice.

All of the talks given at the seminar are reproduced in this newsletter. The questionnaire, together with the answers provided by member jurisdictions, can be viewed on the ACA-Europe website: www.juradmin.eu (under Colloquia/Seminars).

Yves Kreins
Secretary-General

GENERAL REPORT

By Philippe BOUVIER, Auditor General at the Belgian Council of State

INTRODUCTION

Reading the highly instructive replies that each member of ACA-Europe gave to the questionnaire on magistrate assessment, I could not help thinking of La Fontaine's words in his fable "The Animals Sick Of The Plague": *Ils n'en mouraient pas tous, mais tous étaient frappés* [Not all died, but all were struck down]. Not that magistrate assessment is in any way comparable to the plague – or virus A/ H1 N1, as one might say today! But it is impossible not to be struck – if I can use that word again – by how very contagious assessment seems to have become, to the extent that even magistrates are now affected by the rampant contamination. If previous generations of magistrates were to rise from their graves, they might well have something of a shock. But is this trend for assessment merely a fashion, a sign of the times, or something more lasting?

The phenomenon is still a recent one, so gauging its impact on the operation of the justice system is a risky business. As to whether importing this HR management tool into the heart of the judicial system is advisable, the answers received show that opinions vary widely. No doubt today's proceedings will help to settle the question one way or the other...

There are some countries where magistrate assessment is not practised and which are seemingly no worse off as a result. Others do not have such a system but would favour its introduction. Many countries appear to have survived the implant without the least hint of rejection!

The situation in the Czech Republic is in some ways symptomatic, making it a good place to start our overview and possibly to keep in mind during our subsequent discussions. Our Czech colleagues have experienced a system of magistrate assessment, but only on paper. A law on the subject was passed in 2002, but it was immediately annulled by the Constitutional Court because the assessment of the professional aptitude of judges which it introduced was, at least in part, controlled by the Ministry of Justice. The Czech Constitutional Court ruled that this was incompatible with the principle of the separation of powers and with the independence of the judiciary. And since neither the Czech Parliament nor the government seemed willing to establish a self-governing judicial body, the assessment of judges in the Czech Republic is no longer on the table.

Our tour of member countries will have 14 stages, corresponding to the 14 sets of questions which members were kind enough to answer. Before I start, I'd just like to issue a word of caution: I hope and trust that I have correctly interpreted your responses, but if I do misrepresent you on the odd occasion, you will, of course, have an opportunity to correct me later on.

I. THE EXISTENCE OF A SYSTEM OF MAGISTRATE ASSESSMENT AND ITS SCOPE

1.1. As I have just said, some countries do not have a system for assessing their magistrates. However, these countries are in the minority. They are, if I am not mistaken, Cyprus, the Czech Republic, Denmark, Finland, Ireland, Luxembourg, Malta, Poland and Spain, i.e. nine

countries out of the 28 that replied to the questionnaire. I am leaving aside Belgium for the moment, but will come back to it in my conclusion.

This does not mean that there is no critical scrutiny of magistrates' actions in the nine aforementioned countries, merely that none of these countries has a statutory system of assessment. However, Cyprus has statistics that enable the work of judges to be assessed and approved; Spain and Finland evaluate the professional abilities of candidates for promotion; Malta has a consultative commission for monitoring the proper functioning of courts; Luxembourg is calling for a proper system of assessment to be established under the aegis of a council of justice that is independent of the legislature and executive in order to ensure objectivity in appointments and promotions, while the Dutch Council of State would like to see an assessment system that allows magistrates to get feedback on the job they are doing. The situation in Poland is slightly unusual, in that there is no common system of assessment for all magistrates, although mechanisms for scrutinising the functioning of courts do exist.

1.2. Whilst systems of magistrate assessment do exist in the remaining 19 countries, these systems vary widely. This diversity partly reflects the way in which the judicial function is organised in the different countries. Some have a unified assessment system for all magistrates (Bulgaria, Croatia, Hungary, Latvia, Lithuania, Slovakia and Turkey, with the exception of senior magistrates in Turkey). In other countries there are two separate systems, owing to the coexistence in these countries of “judicial” magistrates and administrative magistrates (Greece, with the exception of members of the Council of State, Portugal). There are other cases where magistrates within the judiciary are subject to assessment but not administrative judges: this is the situation in Italy, because the number of administrative magistrates is small and this helps to guarantee their independence (promotions on the basis of seniority, *salvo demerito*).

The members of the French and Dutch Councils of State are not assessed. In France, however, there is a common assessment system for all magistrates of administrative courts of appeal and administrative courts; this system, which is similar to that for magistrates within the judiciary, does not cover the presidents of administrative courts, who are members of the Council of State. In Austria, there is an assessment system for judges of the first and second instance in normal courts, but this does not apply to Supreme Court judges or to members of the Administrative Court. In Slovenia, the system for assessing judges is different from the one used for public prosecutors. In Germany, the federal structure of the judicial system has a bearing on assessment methods, with different systems in place in the various federal states. These formal assessment procedures – there are also “informal” ones – are either regular or occasional. I will come back to this later on. Finally, sometimes assessment only applies to magistrates at the start of their careers: this is the case in Estonia, where magistrates are assessed in the first three years of their careers and are then declared either permanently suitable or unsuitable.

2. Is there “variable geometry” in the assessment methods used? By that I mean: are there differences depending on whether the magistrates exercise exclusively judicial functions or managerial and organisational ones? Here too, the picture is varied.

There are three types of scenario: 1) the heads of courts report on their ability to exercise managerial functions (Bulgaria, France, Hungary, Lithuania, Poland); 2) they are not subject to any assessment (this is true of the president of the Federal Administrative Court of Germany, the president and vice-president of the Austrian Administrative Court, the vice-

president of the French Council of State and the presidents of the administrative courts of appeal in France); 3) their scope of assessment is no different to that of their colleagues (Croatia, Greece, Latvia, Portugal, Slovakia).

The situation in Croatia and Slovenia is distinguished by the fact that the number of cases to be handled by heads of courts takes into account the other duties they have to perform.

II. THE NATURE OF THE RULES ESTABLISHING AND GOVERNING MAGISTRATE ASSESSMENT

In the great majority of countries, the principle of magistrate assessment is enshrined in law. The implementing procedures are governed by rules usually adopted by an independent collective body, representative of the courts themselves.

In Greece, the very principle of magistrate assessment is formally enshrined in the Constitution, although the main thrust of the provision seems to be to entrust this task to “more senior magistrates”. In Turkey, the Constitution expressly states that all matters relating to their status shall be regulated by law “*in accordance with the principles of the independence of the courts and the security of tenure of judges*”. In Germany, the Federal Magistrates Act states that supervision of magistrates must not affect their independence. In Poland, there are guidelines establishing and governing the assessment of magistrates, although there is not, as such, any assessment system common to all magistrates.

III. THE GOALS OF THE MAGISTRATE ASSESSMENT SYSTEM

When it comes to the objectives of assessment systems, the countries can be divided into three categories. The first group sees assessment as a way of helping to improve the organisation and functioning of courts (Cyprus, Lithuania, Malta, Poland). Others use the assessment mechanism more as a tool for developing the careers of individual magistrates, in which case assessment is generally linked to promotion (Austria, Latvia, Sweden). The third, and largest, category comprises countries that use magistrate assessment as a way of both enhancing the performance of the court as a whole and testing the abilities of individual magistrates, mainly with a view to future promotions (Bulgaria, Croatia, France, Greece, Hungary, Poland, Portugal, Slovakia, Slovenia, Turkey).

The situation in Germany is somewhat unusual, as it has two assessment systems, one formal and the other informal. The former is regular or occasional. As its name suggests, assessment on occasion occurs during promotion procedures, whereas regular assessment is focused on the individual aptitude of magistrates. The informal assessment instruments, which primarily include the requirements to report on the business of the court and the annual negotiations on the courts’ steering committees, are generally intended to improve the overall functioning of courts.

At this point, the question arises as to whether magistrate assessment can drive improvements in the functioning of the justice system while at the same time boosting the individual progress of each magistrate. In any case, this appears to be what most countries are banking on. Moreover, it may well be argued that progress by each member of a court ultimately results in better functioning of the court as a whole. However, where assessment is seen by magistrates solely in terms of developing their careers, which they naturally wish to be successful, might this not tend to mask very real shortcomings to the detriment of effective administration of justice? One might say that it all depends on the way in which the

assessment is conducted, as well as on the assessor and assessee. No doubt this issue merits discussion.

IV. CRITERIA OF MAGISTRATE ASSESSMENT AND HOW THEY ARE WEIGHTED

Although the weighting of criteria (Bulgaria, Lithuania, Portugal, Slovenia) and the existence of assessment tables (France, Hungary, Lithuania, Portugal, where an assessment chart is being developed) are the exception rather than the rule, there is widespread similarity in the criteria and other behavioural indicators used for assessments. They relate, in no particular order, to legal knowledge, decision-making mindset, organisational skills, productivity and ability to meet deadlines, professional ethics, openness to change, continuing training, interaction with colleagues, relations with litigants and level of involvement in the life of the court. Management skills are also assessed in chefs de corps undergoing assessment.

However, the above observation does not apply to “quality of work”. Some countries consider quality of work in their assessment of judges (Bulgaria, Croatia, Greece, Hungary, Latvia, Portugal, Slovakia, Slovenia, Turkey). Others expressly leave it out, on the grounds of magistrate independence, most notably in Germany, France, Estonia, Lithuania and Sweden. Indeed, in some countries the ability to display independence and impartiality as a judge is itself a criterion in magistrate assessment.

But the big question remains: is it possible to assess the quality of legal decisions without at the same time compromising the independence of those that issued them? I would like, at this point, to quote Article 74/7, section 2, paragraph 1, of the coordinated laws on the Belgian Council of State, which states that the assessment of magistrates is aimed, among other things, at determining the quality of their performance, “without thereby compromising their independence and impartiality”. With all due respect to our legislators, that phrase seems to me to embody the difficulty of an undertaking that seeks to mingle fire and water. Isn’t the main limitation of any assessment system the need to respect the intellectual independence of magistrates? Something for us all to think about.

V. GUARANTEES DESIGNED TO SAFEGUARD THE INDEPENDENCE AND IMPARTIALITY OF MAGISTRATES

Firstly, it should be noted that protecting the independence and impartiality of magistrates is a concern widely shared within the various countries. Everyone agrees that the assessment systems implemented should not compromise this independence and impartiality.

In Germany, the situation is quite clear: the law states that the independence of magistrates must not be affected by any form of assessment, whether formal or informal, and magistrates can seek a judicial review of assessment measures from a specialised tribunal. Likewise, in Greece, auditors and counsels, the only Council of State magistrates subject to assessment, enjoy functional and personal independence under the Constitution. And, like in Germany, any judge in Slovenia who feels that his/her independence has been prejudiced in any way can appeal to the Judicial Council, which has the power to annul the violation.

In most countries, it is the assessment system itself, as it is organised, which protects the independence and impartiality of magistrates. This guarantee lies mainly in the quality of the authorities involved in the assessment process. The assessors are usually magistrates themselves, and the final decisions are generally taken with the involvement of the chef de

corps (France, Slovakia), assessment boards set up within the court itself (Greece, Slovenia), a board of judges (Latvia) or special collective bodies whose makeup and operation ensure autonomy from the legislature and executive or from the judiciary itself: examples of these are the Supreme Judicial Council of Bulgaria, the Permanent Commission for the Assessment of Judges' Activities in Lithuania, the High Council of Administrative and Fiscal Courts in Portugal and the Supreme Council of Judges and Public Prosecutors in Turkey.

The situation in Bulgaria deserves special mention: although the final decision is taken by the Supreme Judicial Council, the assessments are conducted under the aegis of a commission set up within the Council, called the Commission on Proposals and Performance Appraisal. The latter works with support performance appraisal commissions whose members, all magistrates, are chosen by random designation, with the assessor always of a higher rank than the assessee.

VI. FREQUENCY OF ASSESSMENT AND STEPS INVOLVED IN THE ASSESSMENT PROCEDURE

Assessment procedures vary widely from country to country, but there are three main scenarios.

Sometimes, assessments are only performed under specific circumstances, such as when a job is opened up to competition, when the magistrate requests it, or when a disciplinary procedure is under way. In Spain, for example, which does not have a statutory system of evaluation, appointments and promotions are usually made based on merit and ability, which requires an assessment of sorts. Cyprus, Finland, Italy, Luxembourg and Poland operate a similar system. Sweden also belongs in this category, but it is thinking of introducing a regular assessment system as a basis for individualised salaries for judges. In Slovakia, an assessment procedure is undertaken at the request of the judge concerned, in the event of promotion, and also at the request of any person authorised to take disciplinary action.

The second scenario involves regular assessments. In France, for example, administrative magistrates are assessed each year; assessed magistrates participate actively in their own assessments through interviews with their chamber president and the head of court. In Portugal, regular assessments are only held for magistrates in administrative courts of first instance and there are interviews between the assessor and assessee at the start and end of the assessment. In Greece, auditors and counsels are assessed internally every two years; the system aims to provide objective and reliable information to the High Judicial Council, which takes decisions regarding the promotion of counsels and auditors. The situation in Estonia is unusual, in that the assessment of magistrates is confined to the first three years of their careers.

The third scenario features a combination of the first two. With its regular and occasional evaluation methods, Germany is one of the countries in this category. Although the frequency varies from one federal state to another, assessments generally take place every four years and are compulsory only up to the age of 50. Assessment on occasion, which is the only type used at the Federal Administrative Court, is used during promotion procedures and is mainly based on a discussion between the assessee and assessor. Bulgaria, Hungary and Lithuania also have this dual system of regular and special assessment; here too, there is scope for substantial dialogue between the magistrate being assessed and the assessor or assessment committee. Unless I am mistaken, Croatia, Latvia, Slovenia and Turkey can also be included in this third category, although in these countries the assessment processes are more unilateral in

character.

VII. INFORMATION GATHERING AHEAD OF MAGISTRATE ASSESSMENT

It will come as no surprise that all assessors have to have some basis on which to begin assessing a magistrate. No country stands out in this regard. Information of all kinds is generally gathered within the court where the assessed magistrate works and the nature of the information selected is linked closely to the aims of the assessment, the criteria used and, where appropriate, the objectives assigned to the magistrate being assessed.

Equally unsurprising is the fact that statistics (handling times, cases under way) make up the bulk, though not the entirety, of the information gathered. Often, other more senior magistrates or magistrates from the court of appeal are questioned. The substance of the assessee's work may also be scrutinised. By means of "samples" (Germany), sometimes chosen at random (Italy), the quality of decisions may be taken into account in promotion procedures.

VIII. OBJECTIVES TO BE ATTAINED BY ASSESSED MAGISTRATES

As regards the objectives to be attained by magistrates, the contrast is striking, at least at first sight: these do exist in some countries, but apparently not in others, although perhaps it might be fairer to say that such objectives were not explicitly stated in the responses.

Where objectives were mentioned, they included the following:

- first and foremost, productivity standards, including clearing of the oldest cases;
- quality standards;
- vocational training;
- publication of notable decisions;
- effective supervision of law clerks.

This being said, the absence of predefined objectives should not be confused with a lack of any objectives at all. As the Bulgarian representative judiciously pointed out, quantitative assessment and the evaluation of work quality allow the assessor to make recommendations to the assessee during the general appraisal; it is then up to the latter to take these on board for the next assessment. The Lithuanian representative made a similar point when he noted that the goals may be drawn from the criteria against which the judge is assessed, such as qualitative and quantitative performance indicators.

Lastly, I would note that in Turkey the assessment results in ratings: the higher the score achieved, the greater the chances of promotion.

IX. THE AUTHORITY RESPONSIBLE FOR CARRYING OUT THE ASSESSMENT AND FOR TRAINING ASSESSORS

1. Who decides on the assessment outcome? This subject has already been addressed in section V, on the guarantees designed to safeguard the independence and impartiality of magistrates. Accordingly, the decision is taken either within the court or outside it. From there on in, there are plenty of variations.

When the decision is taken within the court, it is taken by the head of the court (Administrative Court in Germany, administrative courts in France, Slovak courts, Hungary) or by a collective body within the court (Austria, Greek Council of State, Slovenia).

In other countries, the assessment decision is taken by an independent collective body, usually made up exclusively of magistrates, but also sometimes of representatives from the legislature, bars, universities, or even the president of the Republic or the Minister of Justice. Such a system operates in Bulgaria, Croatia, Estonia, Latvia, Portugal, Sweden and Turkey, with makeup of the collective body varying from country to country.

2. In the majority of countries, there is no special training for assessors. Germany is therefore unusual in having a Judges' Academy, which provides training in assessment techniques. In France, there is a training module for appraisal interviews developed by the Council of State training centre.

X. THE DECISION RESULTING FROM THE ASSESSMENT, ITS BASIS AND CONSEQUENCES

1. In many countries, the assessment is formalised by awarding a grade. These range from inadequate or mediocre, via adequate or satisfactory, to exceptional or excellent.

In Bulgaria, the overall evaluation is positive or negative depending on the points awarded for each criterion. In Latvia, the decision takes the form of a positive or negative resolution, but no grounds are mentioned in the resolution.

In France, the system of grades has been abandoned in favour of a detailed written assessment based on assessment items. Similarly, in Hungary the assessment takes the form of supported findings, in Lithuania of reasoned conclusions and in Slovakia of a detailed, written assessment.

2. The data on which the assessment is based are usually compiled in very similar formats. Four examples will serve to illustrate this observation:

- in Bulgaria, support performance appraisal commissions fill out a form containing all of the information needed to produce the assessment;
- in Greece, assessment reports written by members of the Council of State about the activities of auditors and counsels with whom they work form an essential component of the assessment process;
- in Portugal, assessors – magistrates more senior than the assessee and appointed by the High Council of Administrative and Fiscal Courts – are tasked with drafting a fully comprehensive report for the Council, containing all relevant information about the merits of the assessee and a proposed evaluation rating;
- in Turkey, judicial inspectors, chosen by experienced judges, inspect every court and record their observations in magistrate appraisal files, which are then used as the basis for the evaluation decision.

3. In most countries, the only effect of a negative assessment will be to slow down or halt the magistrate's career progress. In some cases, a positive assessment will have positive financial consequences (Bulgaria, France, Latvia, Portugal, Slovenia) and a negative rating will trigger disciplinary action (Lithuania, Portugal, Hungary, Slovakia) or a declaration of unsuitability for office (Estonia, Hungary, Slovenia).

It is interesting to note that in Germany the concept of performance-related pay is deemed to be unconstitutional by most scholars. In Sweden, a new system, which has not yet been tested and is already being disputed, would mean that magistrates' salaries are determined individually based on the outcome of their assessment; however, the assessment must not include judges' judicial activities but rather focus on other factors such as their support for new colleagues or willingness to cover for a sick colleague.

XI. THE CONTRIBUTION MADE BY THE ASSESSED MAGISTRATE TO THE ASSESSMENT PROCESS AND APPEAL OPTIONS

Firstly, a distinction must be drawn between the existence of interviews between assessor and assessee ahead of the actual assessment and the situation where assessees have the option of reacting to the assessor's initial evaluation before the assessment is set in stone. The first of these has already been touched on in section VI on the frequency of and steps involved in magistrate assessment. It strikes me that the earlier the assessee is involved in the assessment process the more important the element of self-assessment will be in the overall evaluation. However, this element is still present when the assessee is allowed to have his/her say at the outset of the process, before the final decision is taken. Such an option is provided in Bulgaria, Estonia, Greece, Hungary, Latvia, Lithuania, Portugal and Turkey.

The question of whether the magistrate undergoing assessment has the right to appeal against the findings of the assessment yielded mixed answers. In some countries there is no right of appeal, namely Bulgaria, Latvia and Estonia. A judicial appeal is available in Germany, Croatia, France, Hungary, Greece, Portugal and Lithuania. Appeals are also available in Austria, Slovakia, Slovenia and Turkey.

That being said, it should be emphasised that no country offers neither *ex ante* nor *ex post* appeals. Less common, but present nonetheless, are systems that allow assessees to react ahead of the assessment decision and also to appeal against the decision after it has been made: Greece, Hungary, Lithuania, Portugal and Turkey (review) offer their magistrates this double guarantee.

XII. RETENTION, CONSULTATION AND CONFIDENTIALITY OF THE ASSESSMENT FILE

When it comes to retention of the assessment file, there is a particularly wide range of situations: in some cases, no file is held (Estonia), in others only the final decision and the observations of the assessee are kept in the file (Germany, Lithuania), while in the majority of countries all preparatory documents and the decision itself are kept (Croatia, Greece, Hungary, Latvia, Portugal, Slovakia, Slovenia). Turkey also belongs in the latter category, but it includes magistrates' declarations of assets in the file, as well as documents relating to the assessment. In France, as in Bulgaria, the assessment files are kept in electronic form, backed up by a security system.

There is a similar lack of uniformity regarding where files are kept. Most often, the file is kept by the authority that has the power to rule on the assessment. Accordingly, it is held either at the court to which the assessee belongs, or elsewhere. There may also be multiple files for each magistrate, each held in a different place (authority responsible for the final decision, president of the assessed magistrate's court, Minister of Justice).

These files are kept confidential in all countries, and confidentiality is usually guaranteed by law. Generally, they are accessible to the principal stakeholders, members of the department where they are held and/or those who have an interest in them such as the authorities responsible for appointments to posts in the event of a promotion. In such circumstances, it is primarily the conclusions of the assessment that are communicated: this is the situation in Lithuania, for example. On a similar note, attention should be drawn to the decision taken by an administrative court in Slovenia, according to which the decision of the Judicial Council confirming the negative assessment of judicial service for a judge was exempt from the rule of confidentiality, but not the assessment itself nor the personal data that it contained.

XIII. COMPLIANCE OF THE ASSESSMENT SYSTEM WITH NATIONAL AND INTERNATIONAL LAW

In most countries, the courts have never been called on to rule on the compliance of magistrate assessment systems with national and international law.

As we have seen, one notable exception is the Czech Republic, where the magistrate assessment system introduced by a 2002 law was annulled by the Constitutional Court on the grounds that it violated the principle of the separation of powers by giving a dominant role to the executive. Moreover, according to the Court any system for assessing magistrates would require the establishment of a self-governing judicial body, to safeguard the independence of the judiciary.

In Spain, the Supreme Court annulled, on the grounds of non-compliance with the law, a regulation introducing financial, pay-related penalties for judges who issue fewer decisions than a specified output.

Both the German Federal Court of Justice and the German Federal Constitutional Court have validated the formal and informal magistrate assessment methods for magistrates in the light of the Constitution and the law. However, the Federal Court ruled that any assessment resulting directly or indirectly in instructions about how to handle cases would be illegal. It also held that the evaluation of the professional skills of magistrates would be incomplete if based only on quantitative aspects such as speed or number of cases settled within the relevant period of time.

Similarly, in France, a Council of State ruling of 25 January 2006 held that the rating and assessment of magistrates did not undermine their independence.

XIV. OBSERVATIONS AND REFLECTIONS

Even where not officially assessed, the quality of justice dispensed is nonetheless a major preoccupation. For example, in some of Germany's federal states, autonomous groups of magistrates have come together voluntarily to develop proposals for improving the quality of judicial work. Magistrates in Portugal, meanwhile, would like to see their assessment system expanded, with improved flow of information to assessees (except for strictly personal information) and objectives set jointly by the assessor and assessee.

Other mechanisms could also be encouraged aimed at promoting high-quality justice dispensed in a reasonable timeframe. We have seen that active participation by assessed magistrates in the process leading up to their evaluation makes them partners in the

assessment, to the extent that assessment and self-assessment operate side by side. There is another mechanism that would no doubt help to improve the quality of justice, namely “intervision” (i.e. peer supervision), which is recommended by the French National School for the Judiciary. Intervision is seen as a benign way of observing and reviewing the working practices of magistrates. It consists of mutual supervision between two magistrates, who exchange ideas about their working practices in a spirit of complete trust and confidentiality, with magistrates free to choose their partner. Intervision takes us away from assessment, since the latter cannot make use of the former. However, both of these processes are liable to contribute to effective administration of justice.

CONCLUSION: BELGIUM - AT THE CROSSROADS

1. Belgium is in a sense at the crossroads when it comes to magistrate assessment. Magistrates within the judiciary are subject to an assessment system enshrined in Article 151(6) of the Constitution, instituted by a law of 22 December 1998 and implemented by a royal decree of 20 July 2000. This system, which has already undergone some alterations and will certainly undergo more, has been up and running for some years. At the other end of the spectrum, as it were, are the members of the Constitutional Court, whom neither the Constitution nor the law requires to be assessed. In between the two, there are the magistrates of the Council of State and the members of the *Conseil du contentieux des étrangers* (Aliens Litigation Council), which is a first instance administrative jurisdiction. In the absence of any stipulation in the Constitution, a law of 15 September 2006 established and organised assessment mechanisms for these magistrates. A royal decree setting out assessment methods and criteria for members of the Council of State is currently being prepared. The first assessments are expected to take place from 1 June 2010.

2. The assessment system for magistrates of the Belgian Council of State is based on the one for judicial courts, which has been in place for a number of years.

It comprises a general and a specific regime. The latter, which is similar to the general regime and is enforced for a period of nine years, only applies to holders of managerial offices, namely chamber presidents, first auditors heads of division and first rapporteurs heads of division.

The chefs de corps, i.e. the first president, president, auditor general and assistant auditor general, are not subject to the assessment system. However, the offices they hold are limited in time (five-year period, renewable once only).

The main features of the general assessment regime are as follows:

1°) it is wholly internal: magistrates are assessed by other magistrates occupying managerial roles, namely the four chefs de corps, the chamber presidents, the first auditors heads of division and the first rapporteurs heads of division ;

2°) it takes place at regular intervals: the first assessment occurs one year after the individual is sworn in, and once every three years thereafter ;

3°) the assessment procedure is divided into six steps: an initial ‘planning’ interview, performance interviews throughout the assessment cycles, compilation of a draft assessment, an ‘appraisal’ interview, a provisional assessment decision then a final

assessment decision ;

4°) a negative assessment is rated “inadequate”, while a positive assessment is not rated at all ;

5°) the law provides for the right of appeal against any final assessment decision; the appeal board is wholly internal to the Council of State and always takes the form of a collective body ;

6°) an “inadequate” rating results in the magistrate having his/her pay cut for six months and being prevented from performing any additional work that he/she would otherwise have been allowed to undertake, such as a teaching job, also for six months. Such a rating may also be a barrier to promotion. Where no negative rating is issued, a pay rise is awarded to magistrates who do not exercise a managerial role, subject to a seniority-in-grade condition and the approval of their chef de corps ;

7°) assessments are confidential and can be consulted by their subjects. They are kept at the Council of State, and forwarded to the authority empowered to make appointments in the event of promotion.

Under the specific regime – which only applies to chamber presidents, first auditors heads of division and first rapporteurs heads of division who have not yet been definitively appointed to these posts – assessee rated “good” remain in their managerial role while those rated “inadequate” lose their managerial position. After nine years under this system, and provided they have performed satisfactorily, they are subject to general regular assessment.

3. Referring to the assessment system established by the law of 15 September 2006, Michel Leroy has written that the law contains an “absurd amount of detail”, that “an objective and uniform mechanism for assessing skills is unnecessary in a small institution where everybody knows everybody else” and that if these rules “were properly enforced... some magistrates would have to spend their time assessing their colleagues and discussing the assessments instead of handling cases” (*Contentieux administratif*, Brussels, Bruylant, 2008, 4th edition, pp. 149-150).

This is an interesting – if hard-hitting – analysis. In fact, it echoes a point made by our Italian colleagues, namely that a small number of administrative judges is not compatible with a real assessment system. In any case, the standpoint adopted by Michel LEROY, chamber president at the Council of State and lecturer at the Université libre de Bruxelles, will undoubtedly give us food for thought in our discussions today.

4. Another opinion up for discussion is that voiced by the Belgian High Council of Justice only a few days ago, on the 25th of this month to be precise.

An autonomous, constitutional body, the High Council’s powers only extend to the judiciary, and exclude other jurisdictions such as the Constitutional Court or the Council of State. It too has recently criticised the bureaucratic dimension of the assessment procedure for members of jurisdictions within the judiciary and the substantial workload it generates. Moreover, it attacks the financial sanctions and the weighting system on the grounds that they demotivate magistrates and encourage complacency. It also calls for a clear separation between magistrate assessment and discipline; in its view, discipline should never be the ultimate aim of

assessment. In addition, it believes steps should be taken to encourage quantitative and qualitative assessment in which planning and performance interviews play a central role. The Council is particularly in favour of the performance interviews since – no surprise here – they enable meaningful dialogue between the assessor and the magistrate undergoing assessment. Which brings us neatly back to peer supervision: if assessment nudges ever closer to self-assessment, intervision may not be so far off after all...

The High Council of Justice went on to say:

“The priority must be to optimise the magistrate’s personal performance and that of the jurisdiction or corps as a whole”.

But is this enough to convince the sceptics? Is it even realistic? Is it not just a purely theoretical view? And, in any case, isn’t making a value judgment about a judge’s work equivalent to judging the judge? Quite apart from any “collateral damage”, where does this leave the independence, or at any rate the intellectual independence, of judges – an independence which the High Council of Justice is expressly required to respect, under Article 151(2) of the Constitution?

Would training for assessors, whoever they may be, protect the justice system from all of these perils? As something of a “layman” on this issue, I shall refrain from commenting.

5. Of course, only time will tell what the outcome of all this will be. In any case, I will leave you with the words of Jean-Paul Sudre, who in 2005 wrote a final report on the assessment of judges for the European Network of Councils for the Judiciary. In it, he said that while no system could any longer escape public scrutiny of the quality of justice, judges and the decisions they hand down, the effectiveness of assessment mechanisms remains a key issue for discussion within our various judicial systems.

That seems to me a suitable transition between the general report and the rest of the day’s proceedings!

ASSESSMENT GOALS AND CRITERIA

By André SCHILTE, President of the Administrative Court of Appeal of Douai, France

I. Goals and criteria in the assessment of administrative magistrates: the French system

The French system of assessment for administrative magistrates has remained remarkably stable for members of the Council of State whilst undergoing significant changes for magistrates at administrative courts and administrative courts of appeal.

It has been remarkably stable for members of the Council of State since traditionally members of that body are neither rated nor assessed; promotion to a higher grade (auditor, counsel (*maître des requêtes*), councillor) is based strictly on seniority, which has always been considered an absolute guarantee of independence. Because grades and jobs are kept separate, appointments to functional posts (president of a bench) are made following consultation with the chief officers of the litigation division.

However, arrangements governing a small group of magistrates (the Council of State has fewer than 250 members) working in the same place are not appropriate for a much larger body managed at national level (the over 1,000 magistrates of the administrative courts and administrative courts of appeal). Assessment of these magistrates has evolved significantly over recent years, reflecting in many ways the changing goals of assessment and, at least as importantly, its changing criteria.

II. Goals:

The previous system was rather crude and, at the risk of exaggerating, I would say it only had one real objective which was to compare and rank magistrates based on a mark: in theory 0 to 20, but in reality usually somewhere between 16 and close on 20.

There was firm guidance for this rating system in the form of a circular, which specified, for example, that novice magistrates of high calibre should start at 16 and work their way up by no more than a quarter of a point each year.

In addition to this rating system, there was an assessment of magistrates' qualities based on a chart rating their legal abilities, their involvement in the life of the court and their working capacity. This assessment, which was by definition subjective, featured ratings from "inadequate" to "exceptional" for each of the criteria. The rating ended with an overall assessment of the magistrates' qualities. The magistrates then had a small space in which to write their own observations before signing the document.

The aim was clearly to select which councillors were suitable to move up to the next grade, then subsequently to become chamber president and finally, for those that demonstrated leadership qualities, head of court.

The system was initially amended to include an assessment sheet containing objectives for the year ahead, an evaluation of success in meeting the previous year's objectives, the magistrate's training needs and career development goals. However, this second sheet, which was separate from the actual rating, was not used to assess the magistrate's progress.

The new system introduced in 2009 goes further than just combining the two rating and assessment documents; although this is not made explicit, it also dovetails with a new requirement for each court to develop a court plan (*projet de juridiction*).

The main innovations are as follows:

- the numerical mark has been scrapped;
- magistrates can record their own assessment at various points in the document, in relation to meeting objectives, difficulties encountered with the objectives, their own training needs and the quality of the interview;
- the criteria used to assess magistrates' qualities have been strengthened and diversified. Descriptive ratings ("inadequate" to "exceptional") have been abandoned, and instead qualities are assessed against an ideal benchmark for the post occupied;
- different documents are used depending on whether the magistrate is a councillor, chamber president or head of court.

These innovations mark a radical change in assessment goals. The new goals are as follows:

- work towards a shared analysis of magistrates' situations;
- make magistrates more aware of their qualities and areas where they need to improve;
- identify different career profiles, distinguishing between magistrates who are managers and those who have more of a lawyer profile, whether specialist or otherwise;
- allow qualities to be recognised very early on, without getting trapped in a linear progression;
- improve the service provided to litigants;
- translate court objectives to the level of the individual.

In summary, we have essentially moved from a simple ranking system to three main goals:

- seeking to match magistrates' qualities with the post occupied;
- creating a career profile for the magistrate (lawyer/manager);
- interpreting the court plan in relation to the magistrate and thereby improving the service provided to litigants.

III. Assessment criteria

These vary according to the magistrate's grade and job title. Three separate documents have been created, instead of one as was the case before.

In the case of councillors and first councillors, the criteria are split into three categories, each containing a number of items:

- aptitude for exercising judicial functions, including a large section on actual legal abilities (accuracy of knowledge, understanding of how the law is applied, participation in deliberations, quality of expression, etc.);

- general professional aptitude: working capacity, ability to deal with change;
- service: availability, sense of public service.

For chamber presidents, the criteria are focused on their ability to support, organise and lead as well as to exercise authority, their involvement in the life of the court, and their ability to anticipate and propose new ideas.

Last but not least, the criteria for heads of court include the management-related criteria mentioned above plus the ability to manage public relations, their attention to coherence between magistrates and registrars within the court and their attention to the training needs of magistrates and registrars.

I would point out that the new system of assessment still needs to be assessed itself. It was only applied for the first time in 2009, so it is still too early for any such assessment to be made.

STEPS INVOLVED IN THE ASSESSMENT PROCEDURE AND FREQUENCY OF ASSESSMENT(DISCUSSION/COMPILING OF THE ASSESSMENT FILE)

By Dr Ulrich MAIDOWSKI, Judge at the Federal Administrative Court of Germany

Introduction

There are two crucial points for a successful magistrate assessment. The first is the choice of criteria, as established this morning. The second is the design of the assessment procedure.

The importance of procedures in general for the realization of fundamental rights is almost commonplace. Consequently judges have confidence in clearly defined procedures. Actually, we like talking about procedures, and we believe that well designed procedures can change the world. However, in the context of magistrate assessment, reasonable doubt might be justified as to whether this confidence is appropriate.

The main objective of the assessment procedure is to ensure that magistrate assessment does not cross the borderline of judicial independence. Obtaining correct, viable achievable results without violating the constitutional rights of the judiciary is not at all easy. Under German law and jurisdiction it is lawful to tell an individual judge that their professional quality is not excellent or even good, but merely average, or worse. It is also lawful and – in terms of the rule of law - necessary to give detailed reasons for such a career-killing verdict. But it is not lawful to influence the judge’s decision-making process if the assessment could be understood as aiming at specific cases or legal opinions. To give an example, the sentence “the conduct of court hearings by Judge X should be less hesitant” was deemed illegal because it aimed at the legal opinion that everybody has the right to express themselves as extensively as they wish. On the other hand, the sentence “Judge Z should prepare the court hearings in a less fragmentary way” was accepted by the German Supreme Court, because there is no legal position allowing a judge to be badly prepared. But on close inspection the difference between these two sentences is very small. Similarly, there is a lot of discussion about whether it is lawful to urge a judge to shorten the reasoning behind his rulings by making a negative comment on this point in the final decision of an assessment procedure.

I. Procedural steps concerning formal instruments of assessment

So how can the implementation of procedural rules help in the context of this discussion? The following remarks are based on practices in German administrative courts, including first and second instance courts. I would like to underline 4 aspects:

- (1) Magistrate assessment has to be carried out on a **sufficient data basis**. So the first step of the assessment procedure entails gathering all the relevant information without violating judicial independence. As I see it, there are four main sources of information:
 - First of all, the assessing authority needs to update general information about the assessed judge, such as their knowledge of foreign languages, successful further education and so on. This information should be included in the judge’s file or may be submitted to the judge himself.
 - Secondly, up-to-date statistics on the workload and working speed of the judge are required.

- Thirdly, a so called assessment contribution will be provided by the judge presiding the magistrate's panel, who should be best acquainted with the judge undergoing assessment and thus able to give a well founded statement.
- Fourthly, the assessor – usually the president of the court – might attend a public hearing held by the magistrate being assessed. This is deemed lawful, but does not happen very often.

As you may have noticed, I've left out one source of information which, on the face of it, seems to be the most obvious one for gathering information about the professional quality of a judge, namely the court decisions they have written. In my opinion this source of information might be doubtful, if not illegal. It may be equally doubtful to rely on information coming from a higher instance magistrate who usually has to rule on appeals against the decisions of the judge undergoing assessment. This aspect merits detailed discussion in its own right. The reason for my reluctance to accept this source of information is not only because it could affect the judicial independence, but very simply that the judgement by the assessor or the judge of the higher instance court on the decisions written by the assessed judge could be wrong.

Actually there is one exception to the rule that the decisions of the judge undergoing assessment should not be evaluated: A candidate applying for a position at the Federal Administrative Court has to submit 6 work samples for evaluation by an advisory committee of the Federal Administrative Court (consisting of the court's president, vice-president and 3 elected judges. The evaluation of these samples should be strictly limited to the judge's methodological skills: it is not lawful to consider the merits of a decision.

- (2) The second step of the assessment procedure entails drawing up a **draft decision**. The point to discuss here is this: Does the judge undergoing assessment have the right to look at and comment on the draft decision? I think there can be no doubt that he does. All relevant guidelines on the level of first and second instance courts in Germany establish the right to examine the draft decision. Once again, the reason for my opinion on this point is simple: a fair assessment procedure requires transparency. Without it the completeness and validity of the assessment – and the possibility to achieve its goals – is at stake.
- (3) The third step of the assessment procedure involves the making of the **final decision**. This has to be presented to the judge being assessed who has the right to add remarks, comments or complaints. Both the final decision and the statement of the judge will be added to his personal file in such a way that neither can be taken into account without the other.
- (4) Assessed judges have the right to seek a **judicial review** against the final decision of their assessment. If they take the view that their **judicial independence** has been affected, they may refer the matter to a specialised tribunal that deals exclusively with the legal supervision of magistrates (*Richterdienstgericht*). If they claim any other violations of the law, such as the **faultiness of the final decision**, they may take legal action, which is then a matter for the administrative courts. The details are not important. The important thing to highlight here is the possibility to submit the final decision to a court of independent judges.

(5) Let us take a short look at a few **details**:

- **Frequency:** In Germany such assessments take place every 4 years up to the age of 50 or 55; during the first 3 years a judge will be assessed more frequently (after 6, 18 and 36 months). Beyond the age of 50, every judge has the right to undergo assessment, but is not obliged to do so. We could discuss whether the right to reject assessment beyond a certain age is appropriate or not.
- **Assessing authority:** It is crucial to know which authority carries out the assessment. In Germany it is the president of the court, albeit acting as part of the administration. So the assessing judge is not acting in the shelter of judicial independence, but can be subjected to instructions. This should, in my opinion, limit the legal effects of the assessment strictly. Things may be different if the assessment is carried out by a panel of independent judges, as is the case in Austria.
- **Professionalism:** This is another aspect that may be worth discussing. One of the objectives of assessments is to enable comparisons between magistrates. In my opinion a prerequisite for this is a certain degree of professional skill in the field of assessment. To begin with I think we need a common type of standardised language for use in final decisions of assessment procedures because without it no comparisons can be drawn. Beyond that, psychological and communicative skills are needed to carry out assessments. In Germany further education and special training can be obtained, but are not compulsory.

II. Informal instruments of assessment

All in all, having a well designed procedure can ensure that assessments are carried out without violating judicial independence. Nevertheless perhaps we should ask whether formal magistrate assessment is at all important anyway. I'm sure that most of you will already know perfectly well whether any colleague of yours is excellent, adequate or unsuitable, without ever seeing their assessment file. You simply *know* whether or not somebody is a decent judge. How? Because **informal instruments of assessment** are far more efficient than formal ones.

Looking at the Federal Administrative Court, judges have to fulfil reporting requirements aimed at improving (if necessary) professional qualities such as their effectiveness and speed. Let me give you 2 examples:

(1) After the concluding hearing of a case, a draft reasoning has to be submitted to a panel within 6 weeks, and the final version, signed by all members of the panel who heard the case, must be produced within 2 months of the end of the hearing. If one of these requirements is not met, this fact has to be reported to the court's administration. Although these reports are not passed on to other members of the court, the mere existence of this reporting requirement means that the aforementioned time limits are very rarely exceeded.

(2) Every 6 months, each panel of judges has to report how many of its cases have already been pending for more than 6 months (complaints procedure) and 1 year (revision procedure) respectively. The results of these reports are summarised in a statistical statement

communicated to all the members of the court, thereby ensuring the dissemination of up-to-date knowledge about the workload and speed of all the court's panels, enabling discussion of their efficiency.

Such reporting requirements establish an informal ranking regarding the speed and efficiency of all the court's judges. Judges will thus be aware of being under observation to a certain extent, though no written evaluation of any individual magistrate is produced by these instruments, which instead aim to influence the manner in which magistrates discharge their responsibilities by a certain form of publicity. In so doing they have a massive impact on the assessment of magistrates. Thus, the informal approach seems to dominate personnel administration at the Federal Administrative Court. After all, who wants to find themselves at the bottom of the informal rankings as a result of cafeteria gossip?

DECISION PROCEDURE AND FOLLOW-UP

By ROSENDO JOSE DIAS, Vice-President of the Supreme Administrative Court of Portugal

Introduction

It may be said that magistrate assessment in Portugal is an age-old tradition and that such quality control on the exercise of judicial power has its roots in the so-called “correction” that kings ordered to be performed by crown judges, who were sent out to courts in the name of the monarch to verify and report on any corrections that needed to be made in the administration of justice¹.

This “correction”, which initially symbolised the concentration of powers in the person of the king, paved the way for inspections, which are now under the control of the High Council of Administrative and Fiscal Courts, a collective body chaired by a peer-elected judge – the President of the Supreme Administrative Court – and comprising the following members: two appointed by the President of the Republic, four elected by Parliament and four judges elected by their peers on the basis of proportional representation.

The many criticisms and complaints of poor functioning and results voiced over recent decades led to successive adaptations and reforms. However, for all its faults, this model is such an underpinning feature of the legal culture that it is difficult to see any better solution and therefore difficult to imagine it being completely done away with. It is more likely to be retained and further adapted.

For a number of years, the assessment of administrative judges has been performed by inspectors who are judges at the Supreme Administrative Court. However, the rules also state that they may be appeal court judges or first instance judges with over 15 years’ seniority, whom the High Council of Administrative and Fiscal Courts recognises as possessing impartiality, common sense, good education, technical qualifications, and the people and people-management skills needed to carry out assessment tasks. The inspectors are appointed by the plenary Council with their prior consent, or upon request.

I. Assessment objectives

The essential or ultimate objective of assessing court magistrates is the smooth running of the judicial system, in terms of efficiency and speed.

In practice, the aim of the inspection is to assess the merit of magistrates based on the quality or value of their work, i.e. the qualities applied over time to the various components of the judge’s job and their ability to adapt in order to improve results, since these results ultimately have a bearing on the effective administration of justice.

Assessment also aims to detect anomalies and cases where magistrates’ performance falls below an acceptable level, in which case the assessor issues a “poor” rating, leading to the magistrate’s suspension from duty and the launch of an inquiry to determine whether the individual is unfit for such duties.

¹ *Ordenações Afonsinas – Afonso V – meados do século XV, livro 2, 63, 2.*

Ordinary assessments take place every four years.

Knowing the merit of each magistrate is also important from a personal viewpoint. A positive assessment may mean that magistrates work hard to maintain their high rating, acquire recognition from colleagues and the management body and are better placed to advance in their careers, since promotion at the appeal court (Central Administrative Courts) and Supreme Court is currently based on competitions.

One reason why assessment is so important is that it results in a rating, which determines whether or not an individual is admitted to the competition for central court (administrative appeal court) judges. To be eligible, candidates must be rated either “good with distinction” or “very good”. Furthermore, the law stipulates that the assessment mark is one of the foremost criteria taken into account when assessing files. This assessment is performed by a five-man jury, chaired by the President of the Supreme Administrative Court (who may be replaced by one of the vice-presidents or by a member of the High Council of Administrative and Fiscal Courts having at least the status of a counsellor at the court of appeal). The other members are a Council magistrate with at least the status of a counsellor at the court of appeal, two non-magistrate members of the Council and a university professor in law having at least the status of a senior lecturer.

For the entrance competition for the Supreme Administrative Court, previous ratings are also the number one assessment factor, although legal experts who are not career magistrates may also be recruited (one in six) and the entry conditions are different.

For a long time, the practice was to assess the merit of candidates and to rank them based largely on the ratings they had obtained. This practice is now less rigidly adhered to.

II. How are ratings awarded?

The relevant services draw up a programme of inspections to be carried out each year and the Council divides this work up among the inspectors. The inspectors visit the court, where a secretary helps them to find all the files they want in relation to the cases handled by the magistrate being assessed, normally making a distinction between completed and pending cases.

The inspector gathers and records all the necessary information – lists of cases assigned to the magistrate, lists of completed cases, case handling times, list of unhandled cases, list of cases handled but completed late.

For each case, the inspector checks and records whether the judges’ actions were performed within the relevant timeframe or whether there were delays, whether these were systematic or occasional, whether the magistrate organised his/her work efficiently and whether there was a link between the delays and the volume of work to be done. The inspector also analyses the technical quality of the decisions, whether they are well structured, whether they are clearly written, whether they are reasoned and whether the reasons may be deemed of good quality, irrespective of the nature of the decision.

Magistrates being assessed can select and put forward up to 10 pieces of work that are representative of the quality of their work. They can also tell the inspector about measures

they have taken to improve the organisation and functioning of services.

The information gathered by the inspector forms the basis for a report, which must take account of the assessment criteria stipulated in Article 13 of the Regulation.

As regards personal ability to exercise the profession, Article 13(2) of the RIJ specifies a general assessment that inspectors must perform and which must take account of the following factors among others:

- a) Civic virtue.
- b) Independence, impartiality and dignity of conduct.
- c) Relations with litigants, other magistrates, lawyers, other legal professionals, judicial officers and the general public.
- d) Professional and personal standing.
- e) Ability to keep calm and display reserve while performing duties.
- f) Ability to understand the specific cases presided over and sense of justice, taking into account the socio-cultural environment in which the magistrate operates.
- g) Aptitude for and involvement in magistrate training.

“Suitability for the job” is assessed based on the factors set out in Article 13(3) of the RIJ:

- a) Common sense.
- b) Assiduity, enthusiasm and commitment.
- c) Productivity.
- d) Method.
- e) Speed of decision-making.
- f) Ability to simplify proceedings.
- g) Management of the court, hearings and other actions, particular as regards compliance with deadlines and timetables.

For the “technical preparation” criterion, Article 13(4) of the RIJ stipulates that the overall assessment must take account of the following factors, among others:

- a) Intellectual quality.
- b) Ability to understand specific legal situations.
- c) Ability to convince others, based on the quality of arguments used to justify decisions, especially the original decision.
- d) Legal quality of the work examined, assessed primarily in terms of the ability to summarise information in the statement and settling of questions, the clarity and simplicity of the summary and argumentation, sense of practicality and legal understanding, as well as the level-headedness and knowledge revealed in the decisions.

The inspector takes account of previous assessments and has an interview with the magistrate at the start and end of the assessment. The report specifies the facts on which the assessment is based and in particular gives reasons for negative assessments, pursuant to Article 14(1) of the RIJ.

The inspection report ends with a proposed rating and is forwarded to the assessed judge, who can give his/her opinion on the report, make observations, provide information and request that any actions be taken that he/she deems useful to correct the facts or the rating.

The inspector may take additional action and respond to the observations, and then either correct or leave unchanged the disputed aspects.

All the information mentioned above goes into a file which is sent to the Council. The Council forwards it to one of its members, who analyses it and proposes a rating. This may or may not be the same as the rating proposed by the inspector, but where it is not the decision must be properly reasoned.

The Council does not use a rating chart but, in November 2008 it adopted a resolution stipulating that inspection reports must indicate, for all magistrates assessed, the cases assigned, completed and pending, and within the latter category those on which no progress has been made in the past six months or which have been awaiting a verdict for more than three months. At meetings in September and October 2008, the inspectors produced an important document containing guidelines on assessment practice².

The assessment results in one of the five quality grades specified in Article 16 of the RII, although, as we have seen, it contains a detailed prior assessment of the magistrate's performance of duties, at least as regards the aspects stipulated in the regulation.

III. Options for reviewing the rating decision

Assessed magistrates who do not agree with the rating they have been awarded can appeal to the Council to request that any errors be corrected and the rating amended.

There have been some cases of complaints, but these have largely dried up in recent years.

The assessment can also be contested judicially, in the event of procedural defects, errors in the organisation of the file that affected the final outcome or errors in the assessment of facts.

Some of these actions for procedural defects have been upheld. As regards assessment errors, the Supreme Court stated in one such case:

In assessing magistrates, the High Council of Administrative and Fiscal Courts has a certain amount of discretionary power, provided the outcome is always to award the judge a fair rating.

Decisions taken at this level thus belong in an area in which the scope for disputing decisions is confined to the binding elements of the action and checking the existence of an obvious error or the adoption of clearly unsuitable criteria.

In any case, no known judicial procedure has resulted in the annulling or correction of ratings on the grounds of an error of evaluation or assessment.

IV. Main problems with the assessment system

- The system described above is very much rooted in tradition and in a legal culture where the interpretation of law through conceptual jurisprudence still plays an important role. As a result, assessments of magistrates' work place great emphasis on extensive and numerous quotations from doctrine and case law, conceptology and deductive reasoning,

² This document relates to assessment based on the quality of work, quantity of work and the conditions in which duties are performed. It gives specific examples of a number of situations and contains an experimental numerical rating chart based on the number and complexity of decisions handed down each year by each administrative court judge.

but do not sufficiently value assessment of the specific features of a case, the effort to rule appropriately on the facts of the case and effective and sensible management of the disclosure of evidence and of the trial proceedings.

- These aspects are actually the hardest to prove, monitor and evaluate, but this does not mean that we should give up trying to find ways of giving them the prominence they are due.
- Although judges have not taken action to dispute assessment decisions in recent years, they continue to criticise the assessment system and to demand:
 - more objective and transparent criteria, based on a pre-defined complexity scale for cases according to the type of procedure or procedural plea, claims, volume of work and time involved;
 - precise and exhaustive guidelines on the information to be gathered by inspectors, in order to prevent discrepancies in the aspects they present to the decision-making body;
 - that the general confidentiality which Article 20 of the Regulation imposes for the whole inspection file be lifted for statistical and other data relating to aspects that are not obviously linked to the personal relationship with the assessee, so that these can be consulted by other judges or at least those who were assessed at the same period;
 - assessment of hearings, the quality of decisions on the facts of the case and of oral acts in general;
 - assessment based on actual work rather than work as viewed through statistics;
 - definition and negotiation of objectives and an assessment based on quality and on the objectives met.

However, we must remember that objectives can only help to measure competencies when associated with quantifications, and the latter are subject to the same problems as inspections.

The criticisms and expectations of judges raise a number of issues that may provide food for thought and discussion during our seminar.

I would like to take the opportunity to present a further two proposals for discussion:

- The quality of service provided by the judiciary can be measured and quantified more easily if the magistrate works in a group with a management structure and quantified targets.
- It would be good if, based on the outcome of this seminar, ACA-Europe could issue recommendations of good practice for magistrate assessment.

Thank you for your attention and I wish you every success with this initiative.

GENERAL CONCLUSIONS

By Philippe BOUVIER, Auditor General at the Belgian Council of State.

1. In the light of our productive discussions, let us come back to the idea expressed by Jean-Paul Sudre: while no system can any longer escape public scrutiny of the quality of justice, judges and the decisions they hand down, the effectiveness of assessment mechanisms remains a key issue for discussion within our various judicial systems.

Today's proceedings have confirmed the accuracy of that observation. The legitimacy of the goal – namely, high-quality justice delivered in a reasonable timeframe – is beyond question. However, the question is in what form and by what methods assessment can contribute to this goal.

2. The criteria used to assess the judicial function usually relate to the quantity or quality of work performed.

An assessment of quantity presupposes the establishment of productivity standards. Although the degree of difficulty encountered varies from case to case, it seems to be generally possible to identify average values expected in future based on statistics from past years. Such an exercise is likely to have a beneficial effect in terms of encouraging magistrates to emulate good performance.

As regards assessing the quality of work, there are multiple aspects to consider. There is widespread consensus that judgements about actual judicial decisions pose a serious problem with regard to the principle of the intellectual independence of magistrates. Nonetheless, this independence cannot be allowed to be a universal get-out clause. There seems to be scope for some degree of scrutiny of the work performed by magistrates, taking into account pre-established objectives or the court plan. Moreover, can we state categorically that an evaluation of closed cases or of compliance with the requirement for predictability will necessarily impinge on the principle of independence? Procedural guarantees in favour of the magistrate are one way of preventing such infringements.

3. The importance of participation by assessed magistrates in the process leading up to their assessment is generally acknowledged. Involving assessees in setting objectives helps to ensure greater acceptance of decisions at the end of the process and increases the likelihood of positive knock-on effects.

Despite this, the cost-benefit ratio of the assessment mechanism cannot be ignored. In general, the time spent on assessment should not be disproportionate to the results obtained in terms of the quality of justice and the time taken to deliver it; what is needed is a flexible, streamlined procedure geared towards consensus.

4. The assessment decision would fail to achieve its objective if it were to result in assessed magistrates becoming demotivated or complacent.

In response to this concern, some people recommend doing away with any sort of grading (which inevitably has something school-like about it) in favour of a detailed written assessment. In the same line of thinking, the question arises as to whether the assessment

should be completely dissociated from any form of sanctions, even non-disciplinary ones, and/or from promotion procedures.

Even conceived in these terms, assessment would still appear to have its limitations: it could be seen as an impossible task, an attempt to “raise the game” of magistrates whose shortcomings apparently arise from their unsuitability for the judicial function.

5. As regards the authority responsible for carrying out assessments, there is a strong current of belief that the systems of “outside inspection” and “expert scrutiny” are both equally important.

Many believe that any assessment benefits in overall terms from being based on multiple perspectives, i.e. those of court insiders *and* outsiders. Could this be part of the solution to the lack of assessor training observed in most countries?

6. As has already been mentioned, the Belgian High Council of Justice very recently insisted on the urgent need to prioritise optimisation of the magistrate’s personal performance and that of the jurisdiction or corps as a whole.

How, though, can we avoid the pitfalls of demotivation and complacency? How can we ‘raise the game’ of assessed magistrates without compromising their intellectual independence? Is it just a question of coaches being tactful and diplomatic? What if they are incapable of this?...

In any case, the remedy (i.e. the assessment) must not be worse than the evil it is intended to combat (i.e. poor-quality justice delivered in an unreasonable timeframe).

Could assessment training be the magic formula that steers us away from these pitfalls? There is no escaping the fact that, with the notable exceptions of Germany and France, there is something of a void in this area.

As a “layman”, the author of these lines has expressly chosen not to comment on this issue. However, if being a judge is a job, isn’t the same true of being an assessor? Can one play it by ear as an assessor? Assessment, self-assessment, intervision and supervision are tools that cannot, surely, be handed out at random. The assessment of magistrates is a topic for discussion; isn’t the training of those who assess them a necessary add-on to that discussion? In any case, it is something that none of us can afford to ignore.

FINAL CONCLUSIONS

By Georges RAVARANI, President of the Administrative Court of Luxembourg, President of ACA-Europe

Following such an excellent and exhaustive summary by our colleague Philippe Bouvier, there is no need for me to draw yet *more* conclusions from those he has already identified.

However, I would like, if I may, to say a few words.

I think that today's seminar has shown us two things:

- Firstly, that magistrate assessment is vital. Rare indeed are the professions in which individuals take up a job and are then left to their own devices for the next 40 years, enjoying automatic promotions irrespective of their merits.

Such a situation is obviously bad for the quality of justice. – It is also detrimental to magistrates themselves who, immune from ever being held to account in any way for their actions, risk becoming irresponsible people and behaving accordingly. Everything then depends on their sense of personal ethics. But ethics without accountability is a risky gamble...

There may be some who argue for a system based on seniority alone. Such a system has many benefits in that magistrates are not exposed to any pressure, whether from inside or outside, which means that their independence is extremely well protected. However, everyone agrees that there should be a safety clause: automatic promotion "*salvo demerito*", as our Italian colleague expressed it. But who is to judge whether the individual has been deficient and then take the necessary decisions?

Paradoxically, the best way of safeguarding the independence of magistrates is to have an open system of assessment. Make no mistake about it: there is *always* assessment, even in systems that do not officially have it. The question is whether or not the assessment is transparent. Without independent and objective assessment, there is a very real danger that the process becomes politicised, that politicians take over and apply disreputable criteria for promoting judges, to the detriment, of course, of their independence.

We can go further, and say that when magistrates' superiors or colleagues take decisions about promotions which are not based on well defined assessment procedures – e.g. based on official or unofficial votes or opinions, without pre-established criteria, without prior discussion and without consulting the magistrates concerned – there is the risk of 'behind-the-scenes' assessment, in which the magistrates concerned are not given an opportunity to prove their merits and defend themselves against gossip, superficial judgements with no objective foundation, or simply personal animosity.

It would seem, therefore, that magistrate assessment based on transparent procedures is vital. The question is no longer whether to assess but rather *how* to assess.

- Secondly, today's seminar has furnished ample proof that magistrate assessment is

difficult and delicate.

How can we assess the quality of magistrates' performance without in any way compromising their independence? To quote the general rapporteur, it is like trying to mingle fire and water. But as the First President of the Belgian Court of Cassation pointed out, independence must not be allowed to become a universal get-out clause that allows magistrates to do whatever they like and be exempt from any sort of demands as regards quality and the assessment of quality. Let me say, by the way, that however fundamental it is to the role of the magistrate, independence is not an end in itself; it is only a means – an indispensable one, admittedly – for ensuring another, even more fundamental, requirement for magistrates, namely impartiality.

If we move beyond purely quantitative assessment criteria (number of decisions drafted, time taken to clear cases, case management, etc.), which are relatively easy to apply, and try to assess other essential skills for judges which cannot be quantified (reasoning power, clarity of decision-making, sensitivity in dealing with parties and lawyers, etc.), how can we avoid, in seeking to dodge the difficulties inherent to such an approach, moving towards a system where every magistrate is rated excellent, or even beyond excellent (remember the example quoted by our French colleague, where magistrates ended up scoring 21, 22, even 23 out of 20, and never less than 19, or what our Bulgarian colleague said: *“Everyone knows who the good and bad judges are, but everyone is rated excellent”*), and the real assessment takes place off the record, away from any official and transparent procedure. How can we avoid creating a code language where people say one thing and mean the opposite (e.g. “takes great pains” = “isn't up to the job”)?

But what is the alternative? Remember, the human factor cannot be underestimated, as has been highlighted during the seminar. How can magistrates continue to work together on good terms if one of them has been told by their boss or a committee of judges, during an assessment, that he doesn't know his subject, that he's lazy, that he lacks reasoning ability, and so on? After all, life goes on after the assessment ...

It may be an obvious question, but is there really a great difference in quality between the justice of countries that have an assessment system and those that don't?

How, ultimately, can we measure subjective qualities objectively?

When all's said and done, how can we assess assessment systems? Are they really capable of interpreting anything more than legal knowledge or mere productivity – human qualities such as good will, commitment, common sense, selflessness?

Questions upon questions and, as our Portuguese colleague noted, more questions than answers. But at least these questions have been raised during this seminar: we may not have come up with definitive solutions, but asking the right questions is undoubtedly a first step towards developing outline solutions to the problem.

At any rate, the high-quality contributions of our various speakers and the extremely important work done by the general rapporteur have enabled us to learn more about and to compare the different assessment systems and practices in Europe, thereby clarifying our ideas on a subject that is vitally important for ensuring justice that is both acceptable and

accepted.

All that remains for me to do is, on behalf of ACA-Europe, to thank the members of the Belgian Council of State for initiating this seminar and for being such wonderful hosts, the speakers for the quality of their interventions and the participants for their interest and their contributions to the discussion. I think I can speak for everyone here when I say that this day of discussions on a highly sensitive topic has been an unmitigated success.
