



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

PRESENTATION

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**Brussels
30 November 2009**

Assessment procedure: Different steps of the assessment procedure (discussion / making of the assessment file) and the frequency of the assessment

I. Introduction

There are two crucial points for a successful magistrate assessment. The first is the choice of criteria, as we have worked out in the 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, and consequently judges have confidence in clearly defined procedures. Actually, we love talking about procedures, and we believe that well designed procedures have the force to 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 assessment procedure is to ensure that magistrate assessment does not cross the borderline of judicial independence. To obtain correct and viable results without violating constitutional rights of the judiciary is not at all easy. Following German law and jurisdiction it is lawful to tell an individual judge that his or her professional quality is not excellent or even good, but only average or worse. It is lawful, too, and – in terms of the rule of law - even required to give the reasons for this career-killing verdict in detail. 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 held illegal because it aimed at the legal opinion that everybody has the right to express himself as extensively as he wishes. On the other hand, the sentence "Judge Z should prepare the court hearings in a less fragmentary way" has been accepted by the German Supreme Court, because there is no legal position allowing a judge to be badly prepared. But, at a close look, the difference between these two sentences is a very small one. Similarly, there is a lot of discussion about whether it is lawful to urge a judge to shorten the reasoning of his rulings by a negative comment on this point in the final decision of an assessment procedure.

II. Procedural steps concerning formal instruments of assessment

So how can the implementation of procedural rules help in this field of discussion? The following remarks are based on the practice in German administrative courts including first and second instance courts. I would like to underline 5 aspects:

- (1) Magistrate assessment has to be carried out on a **sufficient data basis**. So the first step of the assessment procedure aims at gathering all relevant information without violat-

ing judicial independence. I can see four main sources of information:

- First of all, the assessing authority needs to update general information about the judge undergoing assessment such as knowledge of foreign languages, successful further education, recently built up soft skills and so on. These information should be found in the personal file of the judge or can be delivered by the judge himself.
 - Second, current statistics are needed concerning the workload and working speed of the judge.
- (2) Third, a so called assessment contribution will be provided by the presiding judge of the magistrate's panel. He should know the judge undergoing assessment best, so that he will be able to give a well founded statement.
- (3) Fourth, the assessor – usually the president of the court – might attend a public hearing held by the magistrate being assessed. This is held to be lawful but is not practised very often.

You may have noticed that I've left out a source of information which seems to be the most valid one to gather information about the professional quality of a judge: The court decisions written by himself. In my opinion this source of information might be doubtful if not illegal. It might be equally doubtful to rely on any information coming from a higher instance magistrate who usually has to judge on appeals against the decisions of the judge undergoing assessment. We might discuss this aspect in detail. The reason for my reluctance to this source of information is not only the affection of judicial independence but is a very simple one: The assessor or the judge of the higher instance court could be wrong in their judgement on the decisions written by the judge being assessed.

Actually there is one exception to the rule that the decisions of the judge undergoing assessment are not to be evaluated: A candidate applying for a position at the Federal Administrative Court has to deliver 6 work samples to be evaluated by an advisory committee of the Federal Administrative Court (consisting of the president and vice-president as well as 3 elected judges of the court). The idea in this context is that the evaluation of the work samples is strictly limited to methodical skills; it is not lawful to look at the merits of a decision.

- (2) The second step of the assessment procedure is the elaboration of a **draft decision**. The point to discuss: Has the judge undergoing assessment the right to look at and comment on the draft decision? I think that there can't be any doubt about it: Of course he has. In all relevant guidelines on the level of first and second instance courts in Germany the right to examine the draft decision is established. The reason for my opinion on this point is simple once more: Fairness in assessment procedure requires

transparency. Without that the completeness and validity of the assessment – and with it the ability to achieve its goals – is at stake.

- (3) In a third step of the assessment procedure the **final decision** will be set up. It has to be presented to the judge being assessed. He 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 so that neither of the two can be taken notice of without the other.
- (4) The judge has the right to seek **judicial review** against the final decision of the assessment. If he takes the view that his **judicial independence** has been affected, he may invoke a specialised tribunal dealing exclusively with legal supervision of magistrates (*Richterdienstgericht*). If he claims other violations of law such as the **faultiness of the final decision**, he or she may take legal action which has to be dealt with by the administrative courts. The details are not important. What is essential is the possibility to present the final decision to a court of independent judges.
- (5) Let us have a short look at a few **details**:

- **Frequency:** In Germany the assessment takes 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 might discuss if the right to reject assessment beyond a certain age is appropriate or not.

- **Assessing authority:** It is decisive to know what authority carries out the assessment. In Germany it is the president of the court but acting as part of the administration. That means that the assessing judge is not acting in the shelter of judicial independence but can be submit to instructions. This should, in my opinion, limit the legal effects of the assessment strictly. It might be different if the assessment is carried out by a panel of independent judges as it is the case in Austria.

- **Professionalism:** Another aspect which might be worth discussing. One of the objectives of assessment is to be able to compare magistrates against each other. This requires, in my opinion, a certain degree of professional skills in the field of assessment. To begin with I think that we need a common standard of language used in final decisions of an assessment procedure because without that a comparison can't be drawn. Beyond that, psychological and communicative skills are needed to carry out assessment. In Germany further education and special training can be obtained, but are not compulsory.

III. Informal instruments of assessment

All in all, a well designed assessment procedure can help to carry out assessment without violating judicial independence. Nevertheless we should ask whether formal magistrate assessment is all that important. I'm sure that most of you know perfectly well whether any colleague of yours is excellent, sufficient or unsuitable – without ever seeing his or her assessment file. You simply know if somebody is a decent judge or not - Why so? Because the **informal instruments of assessment** are far more efficient than the formal ones:

Looking at the Federal Administrative Court: Judges have to fulfil reporting duties which aim at improving - if necessary - professional qualities such as the judges' effectiveness and speed. Let me give you 2 examples:

(1) After the concluding hearing of a case a draft reasoning should be submitted to the panel within 6 weeks, and the final version, signed by all members of the panel having heard the case, should be available within 2 months after the hearing. If 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 all panels of the court and may allow reasoning about their efficiency.

As a result of such reporting duties an informal ranking regarding the speed and efficiency of all judges of the court will be established. Judges will be aware of being under observation to a certain extent though 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 publicity. Doing so they have a massive impact on the assessment of magistrates. Thus, the informal approach seems to dominate personnel administration on the level of the Federal Administrative Court. Indeed: Who wants to find himself at the bottom of the informal ranking as a result of cafeteria gossip?

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