

Individual Evaluation of Judges in Germany

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Abstract

In Germany, with the exception of the five federal supreme courts, court organization is a responsibility of the Länder (federal states). In some of the Länder, so-called employee profiles (“Anforderungsprofile”) have been established for judicial office. These lists attempt to describe criteria for certain judicial positions. They are applied in the process of promotion but also serve as an indicator for initial appointment.

The European picture with respect to individual evaluation of judges is extremely diverse. In preparation for this paper, the author attempted to ascertain the situation in the Council of Europe member states. The results of this survey (to which 23 members of the CCJE have replied) are listed in Appendix I.

The general difficulty of professional evaluation of judges lies in the limits that have to be observed for constitutional reasons. In Germany, the overall rule of every evaluation is that there has to be a reliable factual basis. The evaluator is under a duty not to omit relevant aspects, to consider all the facts that make part of the picture, not to select arbitrarily but to try to paint a true and full picture of the person who is being evaluated. In the case of judges, it is unacceptable to comment on the core of judicial decision-making. Evaluations may be challenged in the administrative court on grounds of fact as well as on grounds of law.

Key words

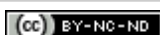
Judges; recruitment; evaluation; promotion; Europe

Resumen

En Alemania, con la excepción de las cinco cortes supremas federales, la organización judicial es responsabilidad de los Länder (estados federales). En algunos de estos Länder, se han establecido los denominados perfiles de empleados

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(“Anforderungsprofile”) para la oficina judicial. Estas listas pretenden describir los criterios para determinados cargos judiciales. Se aplican en los procesos de promoción, pero también sirven como un indicador para el nombramiento inicial.

El panorama europeo respecto a la evaluación individual de los jueces es muy diverso. Preparando este trabajo, el autor intentó determinar la situación de los Estados miembros del Consejo de Europa. Los resultados de esta encuesta (a la que respondieron 23 miembros del CCJE) se enumeran en el Apéndice I.

La dificultad general de la evaluación profesional de los jueces estriba en los límites que se deben respetar por razones constitucionales. En Alemania, la regla general de cada evaluación es que tiene que haber una base factual fiable. El evaluador tiene la obligación de no omitir aspectos relevantes, debe considerar todos los hechos que forman parte de la imagen general, sin seleccionar arbitrariamente, sino tratando de reflejar una imagen verdadera y completa de la persona que está siendo evaluada. En el caso de los jueces, es inaceptable comentar la base de la toma de decisiones judiciales. Las evaluaciones pueden ser impugnadas en el tribunal administrativo por razones de hecho y no sólo por razones de derecho.

Palabras clave

Jueces; recrutamiento; evaluación; promoción; Europa

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1. Introduction

This article is a practice report on individual evaluation of judges in Germany. It aims to give an overview of the criteria and practice of such evaluation and its role in the career of judges in Germany. In the German federal system most judges are employed by the federal states (Länder) and only the highest judges of the federal supreme courts are employed by the federation. Therefore, slight differences in regulations and practice occur. For the purpose of this paper, they can be ignored. The personal view of the author, who can look back to more than 30 years of being involved in the process of evaluating judges, is also included. Cross-reference to basic conditions of evaluation of judges in other European countries is given in Appendix I. A (fictitious) example of an individual evaluation in Germany may be found in Appendix II. This paper is not covering recruitment and first appointment of judges in Germany, for which the federal states (Länder) have established a variety of procedures and criteria aiming at ascertaining the quality of applicants.¹

2. Evaluation and the Principle of Judicial Independence

Individual evaluation of judges is a tool of staff management. Such tools are known in all organizations where a substantial number of personnel have to be managed. They are used in a selection process, both at the level of (first) recruitment and in career decisions. Their aim is to single out who is the best choice for a given position, again at the level of first appointment as well as in decisions on promotions. The underlying intention is to provide a desired quality of the staff and thus to guarantee and improve the quality of the organization.

With respect to the judiciary, certain differences to other organizations are obvious: The judiciary is the third power in the state. It is independent from the executive and the legislature. Its members enjoy individual independence, not as a personal privilege but as a necessary pre-requisite for an independent judicial (third) power. They are part of the judicial hierarchy but they are not subject to orders as to how to perform their tasks. They reach their decisions independently as their own individual responsibility, decisions which are not subject to review by any superior but which can be challenged, reviewed and altered only in the legal procedural appeals process by other independent judges.

It is this unique role of the judiciary which causes unique difficulties in evaluating individual judges. The difficulty is how to find the right balance between the aim of every organization to have and promote the best qualified staff members and the special aim of the judicial organization to provide, maintain and encourage individual judicial independence. The additional difficulty lies in the problem to characterize individual judges as "good", "medium" and "bad," although in principle and in view of judicial independence, it should be inadmissible to assess the correctness of judgments and decision-making as the core of their work and although it should be avoided to induce a certain way of handling their judicial business and maybe even of decision-making.

3. Professional evaluation

3.1. Europe

The European picture with respect to individual evaluation of judges is extremely diverse. A brief and quite thorough summary can be found in the report of the European Network of Councils for the Judiciary (ENCJ) (2005).² In preparation for

¹ For further details see Riedel (2013); for various recruitment and appointment proceedings in Europe cf. the report of the European Network of Councils for the Judiciary (2012). See also European Council for the Efficiency of Justice, 2014, chapter 11.1

² See also the report on performance management of judges, 2006/2007 (European Network of Councils for the Judiciary (ENCJ), 2007). A quick overview for the member states of the Council of Europe can be found in The European Commission for the Efficiency of Justice (2014, table 11.39). A report on Austria

this article, the author has attempted to ascertain the situation in the Council of Europe member states. The results of this survey to which 23 members of the CCJE³ have fortunately replied are listed in Appendix I. They underline the extreme diversity in this area. Meanwhile, the CCJE has issued an opinion on the evaluation of judges' work, based on extensive materials collected in these states.⁴

It is quite clear both from the findings of the ENCJ as well as from the recent surveys that judicial systems where promotions are rare see little necessity to introduce individual evaluation of judges. The best example is England where practitioners of high standing are called to the bench and where promotions are rare.⁵ At the other end of the scale is a large group of jurisdictions with rather elaborate evaluation systems, fairly strict procedures and, above all, very detailed catalogues of evaluation criteria.⁶ These catalogues are sometimes enacted by law or legal instruments or introduced by the relevant High Council or Ministry of Justice. It is remarkable that sometimes even point systems with point values assigned to certain criteria are being used. It is equally remarkable that productivity figures (the number of cases solved by the judge compared with an average workload of all judges) are considered as relevant and that the outcome of cases appealed from the judge are taken into account.

3.2. *Criteria of evaluation in Germany*

In Germany, with the exception of the five federal supreme courts, court organization is a responsibility of the Länder (federal states). Most of the Länder have established catalogues of criteria for individual evaluations of judges. A representative example is the federal state of North-Rhine-Westphalia, where so-called employee profiles ("Anforderungsprofile") have been introduced for judicial office some 10 to 15 years ago. These lists attempt to describe criteria for certain judicial positions (judge at first instance, appeal court judge, presiding judge etc.). They are applied in the process of promotion but also serve as an indicator for initial appointment.

The list of North-Rhine-Westphalia contains, inter alia, the following elements many of which can also be found in the profiles of the other Länder:⁷

I. Professional competence

Professional qualification

Wide knowledge of the law

Ability to apply the law in practice

Ability to acquaint oneself with new legal fields

Good judgement

Ability to apply information technology

Understanding of judicial office

Impartiality

Prepared to actively uphold the values of the constitution

Prepared to defend against undue influence

Prepared to take responsibility for judicial decisions

(by *Georg Stawa*), France (by *Roger Errera*), Germany (by the author), Italy (by *Giuseppe Di Federico*), The Netherlands (by *Philip Langbroek*) and Spain (by *Marta Poblet* and *Pompeu Casanovas*) can be found in Di Federico (2005) (although the author is in no position to say whether the data reported there are still valid). ENCJ has recently issued a report on Independence and Accountability, cf. ENCJ 2014.

³ The author is the German member of the Conseil Consultatif de Juges Européens.

⁴ cf. CCJE Opinion17 (2014)

⁵ Although it may be asked on what basis the few decisions on promotion are reached ("informal views"?).

⁶ Cf., e.g. Belgium, Bulgaria, Croatia, France, Italy, Netherlands.

⁷ The classification of professional competence, personal competence, social competence and competence to lead has found widespread acceptance following an expert meeting on judicial independence organized by OSCE in Kyiv, Ukraine, in 2010. The "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia", para. 27 to 31 have incorporated these elements (Organization for Security and Co-Operation in Europe 2010).

- Awareness of the influence of private conduct on judicial office
- Ability to present arguments and to convince
 - Precise phrasing
 - Ability to define issues in complex cases
 - Giving reasons thoroughly, with respect to the individual case
 - Openness
- Ability to conduct hearings and interrogations
 - Being thoroughly prepared
 - Knowledge of the court files and documents
 - Planning and structuring of trials
 - Respect for the interests of the parties
 - Understanding, sensitiveness and patience with parties
 - Clear view of chances for settlements
- Competence in teaching
 - Prepared to instruct students in preparatory service
 - Diligent correction of students' papers
- II. Personal competence
 - General elements of personality
 - Broad interests
 - Natural authority
 - Prepared to accept difficult duties
 - Awareness of one's strengths and weaknesses
 - Control of one's emotions
 - Sense of duty and responsibility
 - Awareness of social responsibility
 - Prepared to accept responsibility for the judicial administration
 - Able to assess consequences of decisions
 - Responsible handling of a large workload
 - Openness towards lay judges and court staff
 - Ability to cope with the workload
 - Physical and psychological fitness
 - Prepared to accept additional duties
 - Able to work fast under pressure and with concentration
 - Maintaining standards even with a high work load
 - Ability to manage and to organize work
 - Set priorities
 - Optimize work flow
 - Able to motivate oneself and others
 - Delegate work reasonably
 - Take available resources into account
 - Ability to decide
 - Decide swiftly and responsibly
 - Prepared to face necessary disputes
 - Flexibility and preparedness for innovations
 - Openness towards new technologies
 - Openness towards modernization of courts
 - Prepared to work in different court structures
 - Ability to develop new solutions
- III. Social competence
 - Ability to work in a team
 - Ability to communicate
 - Ability to deal with conflicts and to mediate
 - Prepared for compromises
 - Fairness, positive approach in dealing with colleagues
 - Constructive criticism
 - Ability to mediate
 - Being accepted as an authority

- Awareness of service aspects
 - Respect for interests and concerns of parties and witnesses
 - Politeness
 - Keeping to schedules
 - Taking the necessary amount of time
- IV. Competence to lead
 - Clear instructions
 - Trust in staff and colleagues
 - Openness for concerns of staff

3.3. Occasions and form of evaluation in Germany

In Germany⁸, professional evaluation of judges and prosecutors throughout their career is the responsibility of the Länder judicial administrations. All the Länder employ systems of evaluation designed to provide a certain ranking of the judicial staff as a basis for decisions on promotion. Their basic structure is as follows:

The occasion of evaluation is either general or specific. Most of the Länder have regulations providing for evaluation of judges (and prosecutors) at regular intervals, usually every four or five years. This does not mean that the individual judge will be evaluated every four or five years, calculated from the date of his or her appointment; instead, a fixed date for evaluation of all judges is set and the evaluation periods run from then on, the idea being to assess and evaluate the full judicial staff at one fixed date and to create a certain ranking of all judges. Usually, judges over 50 or 55 years of age are or may be excluded from evaluation.

In addition to this general evaluation there may occur specific reasons for evaluation which will lie in the person of the judge who is to be evaluated. These reasons can be manifold, for instance when he or she applies for an open position in another court, especially for a promotion, when he or she is (with their consent) transferred for a limited period of time to another court without giving up the position for life in the original court, when he or she is taking leave of absence (e.g. for family reasons or in order to take over work in the government administration) et cetera.

The person who evaluates is invariably the president of the regional court or (in case of judges of the higher regional court) the president of the higher regional court. These are by law the "superiors" of all judges in their respective court districts. Evaluation is the personal responsibility of the court president which means that it cannot be delegated to anyone else (except the vice-president). Considering the number of judges which may well amount to 200 or more in one regional court district periodic evaluation at a given date is an enormous task. In addition, evaluations for special occasions, which tend to be quite numerous, make up a great part of the work load of court presidents. It is, however, accepted that although the decision on evaluation is their personal responsibility, they are entitled to rely on the help of assistants (judges who - with part of their work force - work in the administrative department of the courts). This is essential as in the course of preparing the evaluation it is necessary to look into court files, to read judgments handed down by the judge, to go through statistics (e.g. the number and percentage of cases decided by judgment, of cases settled, etc.) and to gather other information (e.g. from lawyers, from other judges - especially those presiding over the panel of which the respective judge is a member, from appeal court judges). It is also quite common that in preparation of an evaluation the president or the vice-president will sit in as spectators in a trial conducted by the judge.

⁸ The following is an extract from the chapter on Germany in "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe" (Riedel 2005, p. 69, 95); as far as the author is aware, no major changes to the evaluation systems have occurred subsequently.

The form of evaluation varies among the Länder. In some administrations, an evaluation sheet in the form of a check list has been introduced. All the elements considered relevant are listed and boxes showing the grade of performance of the respective element have to be ticked. In summing up, a general result of the evaluation has to be expressed. In other Länder, evaluations are set out in a textual report describing various elements and the respective performance; here again, a final assessment, a mark, has to be expressed at the end of the report.⁹ This is essential for the purpose of creating a certain ranking of the staff.

It follows from this that certain general categories of evaluation have to be observed. Again these vary a little among the Länder but generally the following categories are used:

- below average
- average or satisfactory
- above average or fully satisfactory
- high above average or good
- excellent or very good

It is quite common to distinguish within each of these categories between lower, medium and upper level so that, for instance, an overall result could be "above average (lower level)" or "good (upper level)". The system is similar to the system of law exams with its scale from 0 to 18 points, where for individual results, points 4 to 6 are associated with the mark "sufficient", 7 to 9 with "satisfactory", 10 to 12 with "fully satisfactory", 13 to 15 with "good" and 16 to 18 with "very good" (points 0 to 3, which indicate failed exams, do not apply here). General statistics as to the spread of these final results of evaluations have been published only by some ministries.¹⁰ For North-Rhine/Westphalia, the author of this paper estimates that the spread may be

- | | |
|----------------------|-----------|
| - below average | 0 % |
| - average | 2 - 3 % |
| - above average | 40 - 50 % |
| - high above average | 45 - 55 % |
| - excellent | 5 - 10 % |

Junior judges usually start with an "average" and then like judges recently appointed for life, work their way up through an "above average (lower level)" and so on until, with continuing professional experience, an "above average (upper level)" or higher result may be reached. It is also not uncommon that judges who have recently been promoted will get a lower final mark than before the promotion because their performance has to be seen against higher demands and less professional experience in higher judicial office.

At times evaluations do not only end with a final result describing the performance of the judge but also with a prognosis. This is the case when evaluation takes place on the occasion of the judge seeking another position, especially a promotion. Then

⁹ A (fictitious) example is shown in Appendix II.

¹⁰ The Ministry of Justice of North-Rhine/Westphalia has published statistics of evaluations concerning junior judges and judges appointed for life (excluding those that have been appointed to higher posts), (Ministry of Justice of North-Rhine/Westphalia 2003). According to this, in the three districts of (ordinary) higher regional courts junior judges have been assessed between 26 and 38 percent as average, between 62 and 73 percent as above average and only less than 2 percent as high above average. Among the judges appointed for life but not yet promoted only up to 3 percent have been assessed as average, between 44 and 51 percent as above average, between 47 and 55 percent as high above average and none as excellent. The estimate given in the text includes judges in higher ranks who tend to be assessed with higher marks and should still be accurate for regular evaluations in 2008 (Deutscher Richterbund 2008). Evaluations for January 1, 2013, have produced a similar spread of results.

not only the performance in the actual position has to be evaluated but the court president also has to express an opinion as to the performance that can be expected from the applicant in the position applied for. In general, the final result concerning the performance and this "aptitude prognosis" will show the same level, for instance, if a judge's performance at the regional court is considered "high above average" her or his aptitude to fill a position in the higher regional court will in general also be considered "high above average". In some cases, however, different results may be expressed, e.g. very thorough and considerate judges with a "high above average" performance at first instance may - for lack of experience in administrative matters - not be given the "high above average" aptitude prognosis if they apply for the post of vice-president of a regional court.

3.4. Procedure, criteria and independence

The general difficulty of professional evaluation of judges lies in the limits that have to be observed for constitutional reasons. It is quite clear that judicial independence as guaranteed by the constitution forbids any kind of evaluation which weighs, marks and values the correctness and quality of judicial decisions. Section 26 of the Judges Act¹¹ states that "judges are subject to service inspections only insofar as their independence remains unaffected". This means that the president of the court may, for instance, criticize judges for their personal or professional conduct but never for the way he or she applied the law in their decisions. Evaluations, therefore, have to be limited to more general observations (e.g. the broadness of the knowledge of the law, the speediness and / or thoroughness of deciding cases, the amount of work dealt with) or - as the literal translation of the German technical term says - the "outer order of judicial business"; they may not touch the core of judicial work, the correctness of the application of the law, the intrinsic value of the decision. Transgressions of these limitations may be challenged in court in the light of judicial independence.

It is with this background that criteria for evaluation have been laid down in rather general terms in regulations which can be found in all judicial administrations of the Länder. They vary in detail but in general they follow the "employee profiles" (Anforderungsprofile) as explained above, i.e. the lists that have been developed for the purpose of initial appointment or for appointment to higher judicial office in some of the Länder. Professional competence (e.g. knowledge of substantive and procedural law, ability to conduct trials etc.), personal competence (e.g. ability to cope with the work load, ability to decide, openness for new technologies and developments etc.), social competence (e.g. ability to mediate, respect for concerns of parties, ability to lead constructive discussions etc.) and - especially in cases where higher appointments are in question - competence to lead (administrative experience, ability to lead and instruct teams etc.) are the main headings under which diverse and detailed criteria can be found in these regulations.

In addition, the overall rule of every evaluation of a civil servant in Germany is that evaluators have to have a reliable factual basis for their evaluation. They are under a duty not to omit relevant aspects, to consider all the facts that make part of the picture, not to select arbitrarily but to try to paint a true and full picture of the person who is being evaluated. With judges, as has been pointed out above, it is unacceptable to comment on the core of judicial decision-making. Before this background it would be inadmissible to make negative comments on the number of successful appeals against the judge's decisions.¹² Likewise, it is prevailing opinion

¹¹ Deutsches Richtergesetz (DRiG); see Heyde (1994, p. 79); for further reference to all the legal problems of drawing the line between judicial independence on one side and the powers of the administration (court presidents, Ministry of Justice) on the other side see the commentary by Schmidt-Rantsch (2009, especially on s. 26 DRiG). For comments from the point of view of the judges' association see Deutscher Richterbund 2008).

¹² The simple test is, if there were a super court of cassation, a certain percentage of the decisions of the federal supreme court would be overturned; would this allow the conclusion that the judges at this court

that it is at best treacherous to try to compare numbers of cases delivered.¹³ It is accepted that an objective report of statistical facts is admissible.

The author of this paper can look back to many years of involvement in the process of evaluating judges, first as a judge assisting the president of a regional court, then assisting the president of the higher regional court (court of appeal), later as vice-president of a regional court, as a head of department in the Ministry of Justice (where judges assigned to administrative functions in the ministry had to be evaluated) and for the last nine years as president of a court of appeal.

When an evaluation concerning a junior judge who has just begun the career (i.e. after about six to nine months) is prepared, it is quite common to get a written or oral report from the presiding judge of the panel where the judge sits, a report which should comment on all or most of the aspects listed above. In addition, the assistant of the president would look through between 10 and 20 files with judgments written by this judge. One would look at the way the cases were handled (efficiency, preparation of trials, timeliness) and at the judgments not with a view whether the cases were decided correctly but noting the technical aspects (structure, wording, referring to leading cases, technic of weighing the evidence etc.). The president would normally also sit in when the judge sits as a single judge and would see how the trial is conducted, how the judge communicates with lawyers, with witnesses, with litigants, how he or she explains legal and factual aspects of the case and, a very important aspect in Germany, what kind of approach they would take seeking a settlement of the (civil) case.

The draft evaluation is then communicated to the judge with an opportunity to raise objections or to suggest changes. Once the evaluation is final, there is still a possibility to ask for a review at the administrative level or even to have a formal judicial review before the administrative court.

Further evaluations throughout the judge's career will normally be based on the former evaluation with additional information, aspects and observations added.¹⁴ Over the years, the evaluations show a detailed picture of the way the judge has worked himself through the ranks and through different fields of judicial work. It is the result, the richness and quite often the details of these evaluations which are decisive when it comes to promotions.

4. Evaluation and Promotion in Germany

As has already been indicated, professional evaluation of judges plays a major role in their career because decisions on higher judicial appointments are largely based on the results of evaluations in regular intervals as well as of evaluations made on the occasion of applicants seeking promotion.

The process of promotion is quite formalized. It resembles the process of initial recruitment and selection. Invariably, positions for higher judicial office in the Länder are publicly offered by job advertisement in the official gazette. Judges who apply are evaluated by their respective president on the occasion of their application. The president will then report to the president of the higher regional court who in turn will add their own evaluation and then report to the Ministry of

are bad judges? Or, what if long standing decisions of the final court of appeal are suddenly being changed? Are the judges who have followed these rulings good judges or are those who have decided against them good judges?

¹³ For a recent controversy cf. Wittreck (2013), commenting a court decision which has upheld a reprimand by the court president who had admonished a judge because the number of cases dealt with by this judge had been significantly below average. The matter is still pending on appeal. Indeed, is the judge who decides for himself that he needs more time than his colleagues for any given case in order to arrive at a just decision the better judge? Or is the judge who economizes his resources by allocating only so much time for every case that he can get all his work done in a 40 hour week the better judge? See also Wittreck (2012)

¹⁴ A (fictitious) example of such an evaluation can be found in Appendix II.

Justice. The ministry will make up its mind as to who is best qualified for the position. It will then communicate its view to the relevant presidential council, a professional body of judges elected by their peers. The presidential council in most of the Länder has merely an advisory function, but justice ministers are reluctant to overrule their opinion. Where judicial electoral committees participate in appointments and promotions, it is up to the committee to decide who has to be elected and who will consequently be appointed to higher judicial office. When no such committees are involved the decision on promotion is either taken by the Minister of Justice or by the cabinet of the Land. Unsuccessful candidates have to be informed of the intended appointment in order to give them an opportunity to apply to the administrative court to review the decision prior to the appointment.

As regards the criteria of promotion, it is quite clear that final marks reached in the evaluations play a decisive role in the decision, and generally the ministry is not in a position to promote a person with a lower final result over an applicant who has reached a better result in the evaluation. That is, an applicant with the result of "high above average (medium level)" could, as a rule, not be promoted if another applicant is ranked "high above average (upper level)." This rule appears to be well established by a long series of decisions of the federal administrative court, where the court has pointed out that selection among applicants for higher posts has to follow, above all, the results of professional evaluations including evaluations that may date back some time; other criteria which are not related to professional performance (age, rank, time spent in office) can only be taken into account if, in view of their professional performance, applicants can be regarded as "by and large" of equal standing.¹⁵ Exceptions to this rule would have to be well founded in order to be upheld on judicial review; they may be possible, for example, where applicants have been evaluated by different bodies (different court presidents, a government ministry, another Land judicial administration) and if there is evidence that the practice of evaluation in one case may have been more lenient than with other applicants. In the event that several applicants hold the same result after evaluation, additional criteria may be brought in. These may be the period of time for which the relevant evaluation result has been achieved by the applicants, the time served in the judiciary, their age, or laws asking for preferential treatment of female applicants.

It is worth mentioning that the Länder have a long tradition of using an additional formal requirement at least for the first level of promotion. By way of self-binding regulations, they have stated that in order to qualify as a candidate for higher judicial office in the regional or higher regional courts (i.e. for promotion to presiding judge in the regional court or judge in the higher regional court – court of appeal -) a judge has to serve for a certain period of time (usually between 8 and 12 months) in the higher regional court. During this "trial period" (Erprobung) judges work at their full judicial capacity as a member of a panel in the higher regional court. The evaluation that the president of the higher regional court gives with respect to their work at the end of this "trial period" is of high persuasive authority for future evaluations on the occasion of applications for promotion. The idea of this "trial period", of course, is that the aptitude for higher judicial office may best be tested in a higher court; in addition, evaluation of prospective candidates by the president of the higher regional court may level differences in the evaluation practice of court presidents in the courts below. Most Länder accept that, aside from these "trial periods" in higher regional courts (which among judicial colleagues are termed „third state exam“), longer periods of work in a Ministry of Justice or as an assistant in one of the highest courts of the Federation or in the Federal Constitutional Court may also suffice to qualify as a candidate for

¹⁵ cf. Bundesverwaltungsgericht, judgments of December 19, 2002 – BVerwG 2 C 31/01 – and of February 27, 2003 – BVerwG 2 C 16/02 -. Oberverwaltungsgericht Lüneburg, Decision of June 5, 2003, - 2 ME 123/03 -; Oberverwaltungsgericht Berlin, Decision of January 15, 2004, - 4 S 77.03 -.

promotion. Judges who have not passed these “third state exams” do not qualify for promotion in the regional court or to the court of appeal.

Evaluations may be challenged in the administrative court on grounds of fact as well as on grounds of law. It is well established that any negative aspect of an evaluation has to be supported by a substantial factual basis. If the evaluation is challenged for lack of factual basis, the administration will have to support the opinion of the court president with relevant facts, e.g. statistics, reports of misconduct, etc. In addition, the evaluation has to be consistent, meaning that the text or the individual elements of the evaluation have to be conclusive with respect to the final result. If, for instance, the text contains only positive remarks, a final result “average” will not be deemed to be conclusive. On the other hand, it is accepted that the process of evaluating staff involves elements of personal judgement that cannot be subject to judicial review in the strict sense because a full review would result in the court substituting its own evaluation for the evaluation of the court president. As a result, therefore, it is quite difficult to successfully challenge an evaluation unless the factual basis is deficient or a substantial procedural error (e.g. bias of the superior) can be established.¹⁶

Judicial control of decisions on promotion is very tight. Although, in theory, it is accepted that both in evaluations as well as in decisions on promotions there must be certain discretion for the relevant authorities, administrative courts demand that reliable facts be shown for every aspect which may not be considered favorable. Especially in decisions on promotions it is vital that all possible aspects are considered, thoroughly weighed and that an acceptable, balanced and well-considered decision can be shown. It is not possible in this article to show in detail the extent of the line of leading cases on this issue. It should suffice to mention the outcome of just one dispute. Quite recently, the federal administrative court had to decide on the application of a contender for the post of president of the court of appeal in Koblenz. The federal administrative court held that the appointment of the president by the government of Rhineland-Palatinate was unconstitutional and hence that the person appointed had to leave his post. In the end the contender was appointed and the president who was in fact ousted by court decision got another appointment in a ministry.¹⁷

5. Conclusion

This paper is meant as a practice report. For this reason and also because of the intensive involvement of the author in the process of evaluation of judges in Germany, the author is reluctant to offer a judgment on the merits of this system. Readers are invited to draw their own conclusions. In the opinion of the author, the system strikes a reliable balance between the aim of substantial evaluation of professional judicial staff and individual judicial independence. It is also worth noting that the responsibility of evaluation lies with a member of the judiciary who enjoys judicial independence. It is arguable whether evaluations by assessment committees or councils should be preferable to the individual responsibility of an individual evaluator, despite the fact that the individual evaluator may and does seek advice. Committee decisions may provide a broader picture and produce additional aspects. On the other hand, a decisive quality element of the German system appears to be the right to extensive judicial review, and it would appear that such a review can be more substantial in the case of a reasoned decision of an individual actor than in case of perhaps less precisely reasoned decisions of a committee. In

¹⁶ Cf. Bundesverwaltungsgericht, judgments of December 19, 2002 - [BVerwG 2 C 31.01](#) -, of February 27, 2003 - [BVerwG 2 C 16.02](#) -, of October 28, 2004 - [BVerwG 2 C 23.03](#) -. Statistics as to the rate of success of challenges of evaluations in court are not available.

¹⁷ Cf. Bundesverwaltungsgericht, judgment of November 4, 2010 – [BVerwG 2 C 16/09](#) -, where all the principles are laid out. See further Bundesverwaltungsgericht, decision of December 16, 2008 – [BVerwG 1 WB 59/08](#) -.

conclusion, it is suggested that this system stands comparison with well-established systems of judicial evaluation in other countries.

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Appendix I – Individual Professional Evaluation of Judges

Country	Individual Evaluation	Rules	Rules issued by	Evaluator	Criteria			Relevance for Promotion	Judicial Review
Albania	yes	yes	High Council	High Council	workload done, speed of trial, quality (appeals), deadlines met, eval. ChiefJustice, self-eval.			not always	right to oppose inspect. draft
				(Inspectorate)					
Belgium	yes	Arrêté Royal	Arrêté Royal	president + 2 elected judges	functioning, intellectual, professional, organization capacities; not content of decisions;			confidential	right to observations
Bulgaria	yes	yes, Art. 198	High Council	Commission of High Council	Art. 198, 199; grades; knowledge, skills, expediency, appeals, inspection, workload, compliance and skills in hearing			yes	objection to High Council
Croatia	yes	yes	Law/High Council	elected body	points; workload, quality (appeals results), other activities			yes (only)	judges' panel
Cyprus	no	no	no	no	none			no	no
Czech Republic	no	no	no	no	none			no	no
Denmark	only for new appointment	no	no	president	are debated			yes	no
England	no	no	no	no	none			informal views	no
Finland	no	no	no	no	vague				
France	yes (2-years)	fiche d'évaluation	Ministry of Justice	president				yes	commission d'avancement (judges)

Italy	yes	yes	High Council	High Council, local Council's draft etc.	parametri Capo IV-V, VIII, marks Capo XI;			yes (only)	yes (administrative court)
Lithuania	yes	yes		evaluation commission	workload, managing proceedings, clarity, delays, settlements etc.			yes	
Luxemburg	no	no	no	no	none			no	no
Macedonia			Law	High Council	Art. 41, 98 ss., 102 ss.; quantity, quality, very refined point system; view of presidents and court				only reassessment
Monaco	yes	yes		president				yes (reduction des durées d'ancienneté)	
Netherlands	yes	no (competence profiles)	(High Council)	president	productivity, quality, permanent education, standing etc.			yes	no
Norway	no	no	no	no	none			no	no
Poland	yes	new law 2013	?	?	?			?	?
Portugal	yes	yes	High Council	High Council (inspections) judges	List according to Article 13			yes	yes
Slovakia	yes	yes	Law	president	Review proceedings, appellate court, president, etcetera			yes	Council
Slovenia	yes	Law	Law	president	Quantity (minimum), Article 29			yes	
Switzerland	no	no	no	no	none			no	no
Ukraine	no	no	no	no	none			High Council	

Appendix II – German Evaluation Sheet

Name:	Michael Everybody
Position:	judge, court of appeal, Cologne
Date and Place of Birth:	April 4, 1958, Boomtown
Address:	Castlestreet 12, Cologne
Civil state:	married, 3 children
Exams:	first state exam 1984: "sufficient" second state exam 1988: "fully satisfactory"
Appointments:	1985: Article Clerk 1988: (junior) Judge 1992: Judge (appointed for life), Regional Court Cologne 2003: Judge, Court of Appeal, Cologne
Assignments:	1992-1993: local court, Cologne 1999-2000: court of appeal, Cologne

Judge at the Court of Appeal Michael Everybody in his time in the regional court Cologne was a member of various panels for first and second instance civil cases and for first instance criminal cases. From 1993 to 1996 he was deputy presiding judge of a panel for homicide cases. After this he was a member of the panel for crimes against the state and from 1998 until his assignment to the court of appeal he sat in a panel for appeals in probate cases. After his assignment to the court of appeal he was a member and deputy presiding judge of two panels for first instance civil cases who had to deal mainly with construction cases. At the court of appeal, Judge Everybody sat from 2003 to 2005 in a panel on appeals in construction cases; in addition to this, for some months with half his working force he was assigned to a panel dealing with appeals on costs and another panel hearing company law cases. Between 2005 and 2007 he belonged first to a panel hearing appeals in international sale cases and again construction cases. Since 2008 Judge Everybody is a member and deputy presiding judge of the panel dealing with bank cases.

Judge Everybody has published books and articles on construction law and is teaching in seminars for lawyers. He is also sitting as an examiner in law exams.

Professional Competence

Judge of the court of appeal Everybody is a judge with complete experience in civil and criminal cases. He commands excellent, widespread and deeply founded knowledge of the law. He knows how to apply this knowledge of the law to the individual case with an ability for deep scientific research – where this is necessary -, but also with excellent practical skills, with a down-to earth and clear view of essential issues and with distinct social competence. He shows critical, independent thinking and judgment and a balanced, infallible intuition. His understanding of the role of a judge is exemplary. He meets litigants, advocates and witnesses with competence and at all times guarantees impartial conduct of hearings and of decision-making.

Due to his high professional and intellectual abilities judge Everybody is able to appraise exactly even very voluminous, complex and manifold cases, to analyze them clearly, to structure the issues and to write an easily understandable, structured report of the facts of a case with exact emphasis on important issues. Thanks to his laudable engagement and stamina he is able to acquaint himself shortly and thoroughly with legal fields so far not familiar to him. Hereby, at the court of appeal, in a very short period of time he has acquired profound knowledge in the fields of construction law, costs, company law, probate and the law of banking and stocks. He commands a remarkably wide judicial expertise and knowledge in these fields. Especially in the law of banking he is an expert with excellent, very profound knowledge. With his high engagement and great sense of

duty he prepares even the most complex cases deeply and thoroughly and leads them to a very balanced and convincing outcome. His opinions are well structured and show complete and exact reception of the facts. They are phrased in easily understandable language. Relevant legal issues are reported thoroughly with reference to leading cases, textbooks and learned opinions. His draft judgments are in clear, transparent and consequential order; they show convincing reports of the deliberations of the court and are precise in their wording. The judge's oral reports in the deliberations are well prepared, instructive and easy to follow. He stands to his opinion with thoughtful arguments but is always open to hear and discuss the views of his colleagues. In cases where he is not charged with the task of rapporteur he still intervenes in with thoughtful and knowledgeable ideas.

As deputy presiding judge of the panel judge Everybody regularly presides over one tenth of the cases of the panel. In these cases but also in times of absence of the presiding judge he conducts the business of the panel with great competence. He conducts hearings excellently prepared in a quiet, professional way and a very constructive, benevolent atmosphere. He is very successful in explaining the preliminary opinions of the panel in a convincing way to parties and advocates and hereby often reaches conciliatory settlements.

Personal Competence

Judge Everybody is a very learned, open-minded person with multiple interests. He works with great enthusiasm, industriously, with great concentration and swiftness but at the same time thoroughly and is absolutely reliable. His sense of duty and responsibility, his flexibility and personal preparedness as well as his social competence are exemplary. He is able to shoulder even long-lasting high workloads with no sign of fatigue and without shortcomings in the quality of his work. Repeated simultaneous assignments in two panels with different special fields were easily mastered by him. He is open for new working techniques and makes use of modern information technology.

Social Competence

With his collegiality and assistance judge Everybody helps creating and maintaining a good working climate in his panel. In court he is open, polite, competent and well-balanced towards all persons present. He explains preliminary views and opinions of the panel in an emphatic, open, easily understandable way which can be understood well even by lay litigants. Judge Everybody who shows a friendly, quiet, polite and (in a positive way) self-assured standing, is highly respected among his colleagues and the support staff.

Competence to Lead

With his own high commitment judge Everybody works towards efficient and rational organization of the work in the panel. This applies especially in those cases where he acts as presiding judge. By his own conduct he sets an example for other members of the panel, integrating them and motivating them. His co-operation with the support team is constructive and efficient. He knows how to incorporate interests and views of the support team in the conduct of the work of the panel for which he is responsible.

The overall view of the performance of judge Everybody shows excellent professional competence, a very distinct sense of duty and responsibility, great flexibility and preparedness to take over diverse fields and assignments of judicial work.

Knowledge, abilities and performance of this very industrious and engaged judge are at the date of this report (January 1, 2013)

High above average (upper level)

It is likely that even higher performance will be assessed in the future.

Cologne, February 2013

The president of the Court of Appeal