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(LISBON NETWORK)

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The Quality of the training of Magistrates and common European standards for judicial training

THEME 2 : IDENTIFICATION OF THE CRITERIA FOR THE ADMISSION OF MAGISTRATES TO CONTINUOUS TRAINING ACTIVITIES

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Report by Mr Pasquale PROFITI

1. The perspective adopted: the <u>suitable</u> criteria, not the <u>possible</u> ones

Some preliminary considerations are necessary before going into the substance of my contribution.

The institutional framework of the legal education activity of judges and prosecutors varies according to the different regulations of any country. I am aware that in few cases training is mandatory while in other more numerous countries is optional; some countries contemplate the attendance in specific trainings as an indispensable requirement for getting access to some professional positions or as a parameter of the professional evaluation (so called conditional training: e.g. the participation in a 6-day training activity is demanded in Belgium to become "juge

d'instruction"; in Romania is demanded the attendance of specific courses as a requirement to access specialised Courts). Furthermore in certain countries the admission depends on a Chief judge or Chief Prosecutor's decision, in others the choice is adopted by the Ministry and as a third option, there are countries where the decision is taken by specific entities entrusted with the legal training (a school or a legal education institution or another body) which can be public or private and which have different degrees of independence from the executive power.

The conditions above exposed to some extent interfere with the **possible** criteria for the admission to in-service training. For example when Chief judges or Chief Prosecutors are entitled to interfere in the admission decision it is quite obvious that their perspective will be predominantly oriented towards the judicial office needs rather than the training needs of the aspirant or the success of the training event organised.

In my contribution I will refer to the **suitable** criteria, namely the criteria which I guess best ensure the success of the overall professional growth of the judiciary by means of optional training offered by a body which is also in charge of participants' selection.

2. Aims and substance of the training: fundamental parameters for a good selection

The criteria for selecting the participants in the continuous training programme should not be established in general and considered suitable for all kinds of training.
On the contrary their definition should depend on the type of goals the training programme in general and the specific sessions are intended to achieve.
In particular those criteria should consider two main factors:

- ⇨ the subject matter the training is meant to cover and the way the topic is conceived to be addressed;
- ⇨ the professional experience needed for the participants in order to have a fruitful learning outcome.

2.A. Different kind of trainings' goals and contents affecting the selection of the participants

People in charge of the organisation of any training event have always to take into account the two elements listed in point 2 when selecting the participants. The following considerations are specifications of those two indicators.

a) There are training programmes intended to face the scheduled topics with the explanation of elementary notions or which are conceived for trainees with no or few experience in the field.
On the contrary other trainings are planned with the intention to address specialized topics or specific issues within the chosen topic; years of experience in the field are needed for an appropriate comprehension of the legal matters to be discussed;

b) there are training programmes devoted to deal with legislative reforms recently come into force and with the aim to support trainees through the first systematic views and opinions on the legal innovations.

c) there are training activities whose topics affect the professional status and role of judges or prosecutors rather than their daily jurisdictional duties (for instance judicial ethics, rules governing judges and/or Prosecutors career);

d) there are trainings on subject matters that all judges and Prosecutors should be acquainted with (for example the role and interference of E.U. Law in the national law system) without any distinction according to their level of professionalism;

e) there are training initiatives that intend to cover the professional gaps of some judges and/or prosecutors variously detected (for instance after periodic professional evaluations);

f) there are trainings organized with the intention to support judges and/or prosecutors dealing with controversies of a particular nature and closely connected with the social context or the geographical positions of the jurisdictional area where they perform their duties (for instance smuggling of migrants or litigations connected with ethnic tensions);

g) there are training sessions requiring a certain knowledge of non-legal notions relevant for settling a judicial controversy (for instance medical or accounting notions);

h) there are training activities where the participants are asked of an active participation (for instance working out a mock trial under the supervision of a trainer);

i) there are trainings on topics which can be seen from different point of views and which affect different judicial areas (for instance the protection of the E.U. financial interests or issues connected with domestic violence).

The list above intends to highlight the importance of connecting the criteria of admission with the specificity of the training initiative.
In more than one case I have experienced a bad selection of part of the participants since they were unsuitable for the subjects and/or aims of the scheduled training. The consequence has inevitably had a negative impact a) on the attendance throughout the training activity, b) on the participants' confidence about the usefulness of the training and c) on the learning outcomes.

According to my experience it is not rare that organisers and trainers tend to focus on other aspects of the training regarded as more substantial and are apt to consider the participants' selection an easy and less important task for the success of the activity being worked out.

The following observations aim at reducing the risks of underestimating this step in the preparation of a training event.

3. A possible map of admission criteria

3.A. The "basic" training.

Whenever the main training's goal is to ensure that the attending judges and prosecutors have a basic and systematic knowledge of the scheduled topics the participants have to be selected among:

- ⇨ those who took office in recent time;
- ⇨ those who have recently changed or are about to change their position (for instance from the criminal to the civil field or vice versa, or from commercial litigations to juvenile justice and so on) and who have not previous experiences in the new field;
- ⇨ those who for various reasons have professional gaps. This is the case of trainees who have had a protracted leave from duty or were recruited in a period in which the tests and trainings before taking power were less stringent than in other periods, typically judges and/or Prosecutors engaged when there was not functioning a school of magistrates or immediately after social and/or political upheavals

There are legal education institutions that are in the habit to pay attention to this kind of participants, tailoring a structured programme for them; in my opinion this is recommendable and I am in favour of a structured training programme devoted to cover the specific training needs of this sort of potential trainees. It is indeed a serious flaw for any judiciary system to have judges or prosecutors with remarkable different professional skills; it means that citizens receive different answers from the justice system by chance, according to the fact that their controversy is under the care of one or another judge. That is why some countries have set the in-service training as mandatory only for some judges or prosecutors, like the newly appointed, or have specifically considered the training needs of those who are about to move or have recently moved to a different professional position requiring different knowledge.

On the other side it would be a serious mistake to admit also the participation of experienced and skilled trainees in training events which are planned to transmit basic notions and information; such

an error may lead to the complete disruption of the feeling of the class, which is an important component of a successful training initiative. Experienced participants often feel as an insult to be taught in that way and sometimes they openly point out such a feeling with obvious negative consequences on the other participants' perception of the usefulness of the course. It is strongly recommended to set the admission criteria in a way that the participants will be selected among the suitable categories.

3.B. The "specialised" training.

There are trainings that for the topics addressed or for the envisaged approach to the subject matter are conceived only for trainees who have been dealing with those issues for many years or have treated numerous cases affecting the topic. By attending the course they will confront their experiences with one another, already aware of the problems but at the same time willing to seek a different point of view or an additional analysis for a better solution. This may be the case of trainings on the civil implications of the commercial unfair competition or the infringement of the anti-trust rules or the investigative techniques on international terrorism.

In such a case admitting participants with no or few experience could result in an unfruitful interaction among participants and trainers, with a poor discussion and exchange of view.

It is obvious that in this case participants should only be admitted under the condition of giving proof of their previous experiences in the field.

The fact could be exposed by the applicant and certified by the Chairman of the Court or the Chief of the Prosecutorial service; in addition the most suitable criteria for the selection would be the quotation and production of the judicial acts rendered on the issues. Those acts are a probative way for showing the applicant's professionalism in the field and could be used as material of the course or to fuel the discussion in small-group work. Applicants producing pertinent and relevant material should be preferred to those who do not comply with the organisers' request.

3.C. The "multi-knowledge" training.

Probably the most delicate and difficult selection task refers to those trainings which affect different legal fields; in fact, there are important areas of the legal system which demands the application of different regulations. Bankruptcy is a typical example as well as family violence and abuse against minors; tax evasion or the protection of the E.U. financial interests are other two examples.

In this case the criteria of admission should strictly depend on the point of view under which the organisers intend to treat the topic.

The recurrent temptation is to "mix" the trainees, for instance assigning a quota to judges dealing with civil law, another quota to judges and/or Prosecutors dealing with criminal matters. The choice is not wrong in itself but it requires a well-pondered programme. It is wrong to divide the training programme into different sessions, for instance one specifically devoted to cover the civil aspects of the topic and another mainly devoted to criminal issues. In turn the participants will be induced to consider some parts of the programme useless for them and accordingly to pay less attention or worse not to attend the session. In both cases the class atmosphere is disrupted with a negative impact on the concentration of the remaining participants. Instead of planning separate sessions of a unique training event it would be far better to organise two separate trainings each devoted to treat the topic from one single point of view in order to have an homogenous audience.

However I am aware that trainings where legal topics are faced simultaneously from different point of views, if well conceived are among the most fruitful ones and I do not want to discourage such a kind of initiatives. I do also believe that the exchange of views among participants with different professional backgrounds is invaluable for enriching each other skills. My only wish is to emphasise the importance of working out a programme that wisely intertwine the relevant aspects of the subject in order to raise the attention of all the participants whatever professional profile they have.

If so I do believe that a real multidisciplinary training course should contemplate an **equal** participation of the different "categories" (in my examples civil and penal judge or prosecutors). I am opposite to selection criteria which provide for a prevalent participation, for instance, of penal judges and for a minority quota of other participants. It seems to me that such an indication is a sign that the training activity is mostly devoted to a category of trainees and the interest of the minority

participants is almost irrelevant The interest for a seminar cannot be measured with percentages, it sounds a little bit awkward to say that someone is 20% interested in a course.

The admission criteria in cases of "multi-knowledge" trainings should really require participants to prove that their knowledge cover the relevant concepts of both legal fields; again the most suitable manners to proof such attitude is to mention and possibly enclose the relevant judicial acts requested by the organisers as prevailing requirement for the admission. Additionally when dealing with multidisciplinary topics it is not rare that formal or informal protocols of cooperation among judicial authorities have been established (this is frequent for instance in cases of family abuses against minors where a coordination among criminal and family proceedings is really important); in cases like these applicants who purposely requested make reference to this protocols possibly enclosing the written document, should be given preference when selecting the participants.

3.D. The low attendance

One of the main objectives of the training institutions is to get in contact with all the country's judges and prosecutors, including the most geographically distant and the most reluctant to be involved in professional training. This goal can be achieved through a combination of training tools; of course their illustration is out of the domain of my contribution. In certain occasions the admission criteria can contribute to the satisfaction of that purpose.

Although it might sound a little bit strange I believe that a subsidiary admission criterion could be connected with the previous low attendance to training initiatives, namely admitting those applicants who have participated in fewer courses than others.

The importance of this criterion should never be primary.

In particular I believe that for those training sessions requiring a high competence and/or an active participation that criterion should play an ancillary role; only when the other criteria based on the competence and capability of actively attending the seminar lead to an equal appraisal, it might be the case to admit the ones whose participation in the past were less frequent.

For those training events which do not demand a high specialisation in a particular field the criterion of appreciating the previous low or no attendance could play a more important role. The

paradigmatic case is the training on new very important and large legislative reforms (for instance the adoption of a new family code or a new regulation of the evidence). In such cases it is obvious that the best thing to do for a training institution is to plan a series of training events and use a number of training tools in order to face the challenges the new regulation poses and cover the training needs of all judges and prosecutors. Sometimes this is not possible in a short time and the first initiatives have to deal with the task of selecting the suitable applicants who in these occasions are more numerous than usual. As to the admission criteria it might be said that there are no really experts in the newly introduced regulation. Generally speaking those judges and prosecutors who are in the habit to apply and join trainings are ready to study and discuss the reforms during their daily working practice. The same cannot be said for those disinclined to attend the trainings. New regulations call for urgent training also from people otherwise reluctant to spend time in training. Accordingly this is an extraordinary opportunity to get in contact with judges and prosecutors who probably do not attach importance to the training in general or for family problems or heavy workloads refrain from participating in training events. This is an important occasion to show them that training does not mean waste of time and that in medium – long term they will be able to recovery the time spent in training acting more professionally. That is why in this kind of training I would emphasize the criterion of the low attendance, provided that the applicants are among those that will be called to apply the new legislation at least not sporadically but as a relevant part of their professional duty.

The criterion of the low attendance, under the same condition and with the same goal, could profitably be used for the trainings on those legal areas for which there should be no specialised judges or prosecutors since all the country's in-service magistrates should be acquainted at the same level. This is the case, for instance, of training on the interference of E.U. law in the national legislation and the role of the Luxembourg Court of Justice or on the role of the European Convention for the protection of Human rights and fundamental freedom and the access to the Strasbourg Court of Human rights. Again anytime it is not possible to schedule trainings able to cover all the potential beneficiaries in a short time a suitable criteria of selection could be the previous low attendance with the aim to gain or regain the trust of a part of judges and prosecutors, stimulate their inclination to training, facilitate those who for family problems or heavy workloads have few chances of joining courses.

3.E. Seniority

I understand that some countries' legal education institutions give importance to seniority. As stated above my personal feeling is that the criterion is not a suitable one as such; as stated above seniority could be taken into consideration just as a way to detect the training needs of some categories of judges or prosecutors who are the suitable beneficiaries of trainings that intend to cover some professional gaps due to a recruitment without an adequate previous apprenticeship or that aim at supporting a young experience in the field. Apart from this I do not believe that seniority is a recommendable criteria.

3.F. The geographical provenance

There is another criterion suitable for some initiatives; it is an additional criterion to be used in combination with one of the other criteria above and below illustrated: the geographical provenance of the applicants.

The criterion can play a double opposite role as usual in accordance with the aims and substance of the training.

There are a number of trainings that for various reasons are unfit to be rescheduled so many times in order to accept all the applicants; at the same time the topic affects all the country jurisdictional areas. In a case like this the selection of the participants could take into account an equal territorial distribution, **provided that the competing applicants equally satisfies the requested professional profile**; in other words the organisers should select that applicant coming from a territorial jurisdiction with no other applicants rather than two or three applicants from the same jurisdictional area.

What is the reason behind this criteria?

A territorial distribution of the participants satisfies two important needs:

a) the participants by means of informal or informal debates or exchange of views will have the opportunity to get each other knowledge of the practices experienced in as many areas as possible, comparing advantages and disadvantages, reasons and consequences of the practice chosen;
b) the participants will have the possibility to transmit the achieved knowledge in all or most of the jurisdictional precincts of the country.
The latter advantage to some extent can be considered natural; judges and prosecutors tend to speak with colleagues of the ideas discussed during the trainings and compare them with the ones adopted locally. The fact can be regarded as a natural follow-up. The natural advantage can be possibly enhanced, at the discretion of the organisers, by formally demanding the participants to divulge to the local colleagues the point o f views expressed during the seminar by means of a written report.

On the contrary there are trainings dealing with issues mainly encountered by judicial authorities working in a particular area. Smuggling of migrants, litigations connected with ethnic tensions, investigative techniques connected with mafia-like organisations and so on. In this case the selection criteria should consider the fact and consequently establish a criterion which gives preference to applicants working in the primarily concerned jurisdictional areas.

3.G. Interactive trainings

When dealing with the criteria for selecting the suitable participants, the nature of the training activity and the methodology envisaged should play an important role. In particular a workshop or a seminar that includes small-group work or a mock trial organised by the trainees really demand an active presence and the participants' willingness to express their views and/or prepare conclusions and/or reporting back to the plenary sessions after the small-group work and/or contributing to the preparation of the mock trial.
The professionalism of the applicant is important but insufficient to guarantee the needed and profitable attendance. To my mind organisers should inform in advance the potential applicants of the envisaged methodology and that they are demanded to cooperate actively for the implementation of the training. Something more concrete can be done. A fruitful way of preparing a

workshop or another interactive training activity is to collect some relevant documents and send them out to potential participants; this task is easier in those countries where regional trainers are established. The documents should be accompanied with a questionnaire intended to collect opinions and/or practice on the topic before the training. This kind of preparation is really useful for the organisers, trainers, experts and participants. It can also be used as a manner of selecting participants; preference is given to applicants who have filled in the questionnaire and sent it back. It goes without saying that this criterion of selection should be explicitly mentioned when the questionnaires are distributed.

4. The clear illustration of the admission criteria and the reasons behind them

So far my main effort has been to highlight the importance of the organisational step consisting of defining adequate criteria of admission; the criteria for the admission of judges and prosecutors to the continuous training should be the consequence of an analysis of the aims and the substance of the training events. In other words the participants selection is something closely connected with the core of any training process; meditating on those criteria is also a useful means to get a better definition of the aims and the substance of the training and consequently should be included as an important step of the training organisation.

Any explanatory report of the training activity duly distributed before the event should make clear the reasoning underlying the detection of those criteria, in parallel with the aim and substance of the course. In such a way potential applicants will be acquainted of the professional background really needed for a fruitful participation and the precise training target. Those who do not satisfy the established requirements will be discouraged from the applications, while the others will be encouraged to propose their participation convinced that the class feeling will be really stimulating.

Furthermore a clear explanation of the criteria adopted for the selection and of the reasons behind them is an element of transparency and can give an additional evidence that the initiative has been well conceived by organisers who have a clear picture of the importance of the training initiative.